INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D129/98

Salaries Tax – employment – place of service – source of income – 60 days limit – whether liable to salaries tax – section 8 of the Inland Revenue Ordinance.

Panel: Kenneth Kwok Hing Wai SC (chairman), Vincent Lo Wing Sang and Benny Wong Man Ying.

Date of hearing: 10 February 1998.
Date of decision: 9 December 1998.

The taxpayer, who was employed by a Hong Kong company as the factory manager of a factory in China, appealed against the assessment concerned on the ground that he rendered all his service in China. During the relevant year of assessment, the taxpayer's wages were paid in Hong Kong dollars into a bank account of a bank in Hong Kong.

Held:

1. As payments for the taxpayer's employment were made in Hong Kong dollars to a bank account in Hong Kong and as the employer was a Hong Kong company, the location of the taxpayer's employment was in Hong Kong. His entire income from the employment was caught by the charge under section 8(1) Chapter 112 of the Inland Revenue Ordinance, and there was no provision for apportionment: see CIR v Goepfert 2 HKTC 21 at page 238.

2. In CIR v So Chak Kwong, Jack 2 HTKC 174, it was held that the words 'not exceeding a total of 60 days' qualify the word 'visits' and not the words 'services rendered'.

3. His employer throughout has confirmed the taxpayer's case that the rendered outside Hong Kong all the services in connection with his employment.

4. Although the representative of the Inland Revenue Department relied on the bringing of documents and clothes samples referred to by the employer, in the view of the Board, the statements of the employer must be read in the context of the relevant letters, the clearest being the letter dated 22 April 1997 in which the employer made it plain that these acts were purely gratuitous.

5. The factory in China started production at the end of May 1995 and right at the beginning of June 1995, the employer employed a specific person to do the job of bringing documents and samples. The occasions when the taxpayer did bring cheques or clothes samples are in the Board's decision few and far in between. The Board accepted what the taxpayer and his employer unanimously said that those acts were purely gratuitous. The taxpayer was doing another person or persons a favour and not rendering any service 'in connection with his employment'. The taxpayer was the factory manager, not a courier.

6. The Board was firmly of the view that the taxpayer has proved that he rendered all the services in connection with his employment in China.

Appeal allowed.

Cases referred to:

CIR v Goepfert 2 HKTC 210
CIR v So Chak Kwong, Jack 2 HKTC 174

Fung Ka Leung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the determination dated 15 August 1997 by the Commissioner of Inland Revenue, rejecting the Taxpayer's objection against the salaries tax assessment for the year of assessment 1995/96 ('the Relevant Year of Assessment') dated 3 January 1997 showing net chargeable income of $324,315 with tax payable thereon of $41,263, but reducing the net chargeable income to $186,773, with tax payable thereon of $29,554.

2. The Taxpayer appealed on the ground that he rendered all his services in China.

The facts

3. On the statement of facts in the determination, the documents produced at the hearing of the appeal, and the oral evidence given by the Taxpayer, we make the following findings of facts.

4. The Taxpayer was employed by a Hong Kong company. The contract of employment was agreed in about January 1995 while the Taxpayer was working in China for another factory. The Taxpayer was employed by his employer as the factory manager of

a factory in China and he was in charge of all the affairs of the factory. During the Relevant Year of Assessment, the Taxpayer's wages were paid in Hong Kong dollars into a bank account of a bank in Hong Kong.

5. The employer's return filed by the Taxpayer's employer ('the Employer') stated that the Taxpayer was employed as factory manager during the Relevant Year of Assessment and that his salary/wages amounted to $324,315. In his tax return, the Taxpayer declared that the total income from his employer was $324,315.

6. By letter dated 1 April 1996, the Employer certified that the Taxpayer:

> 'is employed by our company as factory manager from 1 March 1995 up to now. During his employment period, he's working and staying in our China factory. He's back to Hong Kong on holiday only for rest not involve (sic) business'.

7. In response to queries raised by the assessor, the Employer stated that (a) the Taxpayer's date of commencement of employment was 1 March 1995; (b) in the Relevant Year of Assessment, the Taxpayer was the manager of the employer's factory in China, responsible for the production management of the factory; and (c) the leave taken by the Taxpayer during the year was 65 days as shown in Appendix A to the determination.

8. By letter dated 26 November 1996, the Taxpayer's employer replied to the assessor stating that in the Relevant Year of Assessment, the Taxpayer had not been to the Hong Kong office for work; and that even if the Taxpayer had been to the Hong Kong office, this was only because while he was on his way to Hong Kong for holidays he brought back documents or clothes samples; and that he would not stay in the office for the whole working day.

9. On 3 January 1997, the assessor raised on the Taxpayer the following salaries tax assessment – an income of $324,315 less allowance of $79,000 with net chargeable income of $245,315 and tax payable thereon of $41,263.

10. By letter dated 7 January 1996 (sic), the Taxpayer objected to the assessment on the ground that it was excessive. He claimed that during the year, he rendered services in China. Income tax had been paid in China in respect of his income for the period from July 1995 to June 1996. He stayed in Hong Kong for 66 days for rest and because he was ill.

11. On divers dates, the Employer advised that (a) the Employer did not keep record on the dates the Taxpayer returned to the Hong Kong office; (b) the Taxpayer brought documents and samples to the Hong Kong office on a voluntary basis; (c) the normal office hours of the factory in China were Monday to Saturday from 8:30 a.m. to 6:00 p.m.; and (d) the normal office hours of the Hong Kong office were Monday to Friday from 9:30 a.m. to 6:30 p.m. and Saturday from 9:30 a.m. to 1:00 p.m.

12. According to the records of the Immigration Department, the Taxpayer had been in Hong Kong for 92 days in the Relevant Year of assessment (part of a day being counted as a day).

13. In support of his objection the Taxpayer supplied copies of his income tax return to the China Tax Authority showing that tax in respect of the following income. By letter dated 23 January 1997, the assessor proposed to revise the assessment by excluding the part of income on which income tax had been paid in China, that is, by deducting an income of RMB63,000 or HK$58,542, thereby reducing net chargeable income to $186,773 and tax payable thereon to $29,554.

14. The Taxpayer did not accept the assessor's proposal.

15. By letter dated 22 April 1997, the Taxpayer's Employer replied to the assessor stating that there was no designated person to receive documents or clothes samples brought back to the office; that it depended on which colleague happened to be there and the Taxpayer would then leave, the reason being that this was purely gratuitous because he brought them while on his way to return to Hong Kong for rest.

16. The Commissioner rejected the Taxpayer's objection but reduced the net chargeable income to $186,773, with tax payable thereon of $29,554 after excluding the part of income (RMB63,000 to HK$58,542) on which income tax had been paid in China.

17. By notice of appeal dated 22 August 1997, the Taxpayer appealed.

Our decision

18. As payments for the Taxpayer's employment were made in Hong Kong dollars to a bank account of bank in Hong Kong and as the Employer was a Hong Kong company, the location of the Taxpayer's employment was in Hong Kong. His entire income from the employment is caught by the charge under section 8(1) of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance'), and there is no provision for apportionment, *CIR v Goepfert* 2 HKTC 21 at page 238.

19. Section 8(1), (1A) and (1B) provide that:

> *'(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources … (a) any office or employment of profit …'*
>
> *'(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment … (b) excludes income derived from services rendered by a person who … (ii) renders outside Hong Kong all the services in connection with his employment …'*

> *'(1B) In determining whether or not all services are rendered outside Hong Kong for the purposes of subsection (1A) no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment'.*

20. In *CIR v So Chak Kwong, Jack*, 2 HKTC 174, it was held that the words 'not exceeding a total of 60 days' qualify the word 'visits' and not the words 'services rendered'.

21. Thus, assuming without deciding that part of a day is counted as one day for the purpose of the 60-day rule, section 8(1B) would not avail the Taxpayer, assuming that the trips to and from Hong Kong were 'visits'.

22. But the case of the Taxpayer is that the rendered outside Hong Kong all the services in connection with his employment.

23. The Taxpayer's case has been confirmed by his employer throughout. By way of example, by the letter dated 1 April 1996, the Employer certified that the Taxpayer worker and stayed in their China factory and that he returned to Hong Kong on holidays only for rest not involving business. By way of another example, by the letter dated 26 November 1996, the Employer confirmed that the Taxpayer had not been to the Hong Kong office for work.

24. The Respondent (the CIR) relied on the bringing of documents and clothes samples referred to by the Employer. In our view, the statements of the Employer must be read in the context of the relevant letters, the clearest being the letter dated 22 April 1997 in which the Employer made it plain that these acts were purely gratuitous – '純是義務性質的'.

25. The factory in China started production at the end of May 1995 and right at the beginning of June 1995, the Employer employed a specific person to do the job of bringing documents and samples. The occasions when the Taxpayer did bring cheques or clothes samples are in our decision few and far in between. We accept what the Taxpayer and his employer unanimously said, that those acts were purely gratuitous. The Taxpayer was doing another person or persons a favour and not rendering any service 'in connection with his employment'. The Taxpayer was the factory manager, not a courier.

26. We have carefully considered everything which has been said on behalf of the Respondent, but we are firmly of the view that Taxpayer has proved that he rendered all the services in connection with his employment in China.

27. For the reasons given above, we allow the appeal and annul the assessment appealed against. In other words, we annul the salaries tax assessment for the Relevant Year of Assessment dated 3 January 1997 showing net chargeable income of $324,315 with tax payable thereon $41,263, as reduced by the Commissioner by his determination to net chargeable income of $186,773 with tax payable thereon of $29,554.