Case No. D15/02

Salaries tax – employment – source of income – whether liable to salaries tax – section 8(1), 8(1A) and 8(1B) of the Inland Revenue Ordinance ('IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Paul Chan Mo Po and Peter Sit Kien Ping.

Date of hearing: 7 February 2002.
Date of decision: 23 May 2002.

By an agreement the appellant was employed by Company A as manager of the despatch department and supervisor of the production department on a monthly basis. The agreement designated Company A-Shenzhen as the appellant's place of work. She was entitled to the Hong Kong statutory holidays but her off days were to be taken at the direction of Company A-Shenzhen.

During the year of assessment in question, the appellant resided in Hong Kong and she travelled to work in Shenzhen. She was in Hong Kong for a total of 328 days. She attended a computer training course in Hong Kong in order to equip herself for Company A-Shenzhen's change of computers. The appellant could not produce any document indicating payment of tax to the Shenzhen fiscal authority in respect of her earnings.

Held:

The appellant was a sincere and down-to-earth witness. She informed the Board that she worked in Company A-Shenzhen during the day but had to return to Hong Kong to look after her children. Her husband and her father-in-law were both residing in Hong Kong. She attended training courses in Hong Kong on her own volition in order to equip herself to handle the anticipated change of Company A-Shenzhen's computer system. She did not attend these courses pursuant to directions of Company A. She had to make use of her own leave entitlements for such attendance. The Board was of the view that she did not render any service in favour of Company A in Hong Kong.

Appeal allowed.

Chow Chi Leung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Background

1. By an agreement dated 29 March 1997 ('the Agreement') between the Appellant and Company A, the Appellant was employed by Company A as manager of the despatch department and as supervisor of the production department on a monthly basis commencing from 1 April 1997. The Agreement designated Company A-Shenzhen as the Appellant's place of work. She had to work a five-and-a-half-day week with salary at $27,000 per month. She was entitled to the Hong Kong statutory holidays but her off days were to be taken at the direction of Company A-Shenzhen.

2. The issue before us relates to the Appellant's liability for salaries tax in respect of her earnings for the year of assessment 1997/98. During that year:

(a) The Appellant resided in Hong Kong and she travelled to work in Shenzhen.

(b) The Appellant was in Hong Kong for a total of 328 days.

(c) She attended a computer training course in Hong Kong on 31 October 1997 in order to equip herself for Company A-Shenzhen's change of computers in the year 2000.

3. In response to queries from the Revenue in relation to the nature of the Appellant's employment for various years since 1 April 1997, Company A stated that:

(a) The Appellant was 'stationed in our [Company A-Shenzhen] in PRC, and supervised all activities about production'.

(b) The Appellant 'did not need to render any service or reporting to our company in Hong Kong'.

(c) The Appellant's salary was credited into her account with Bank C by auto-transfer.

(d) The Appellant attended training courses in Hong Kong on 28 and 29 May 1998; 11 June 1998 and 31 October 1998. The four days were counted as leave taken by the Appellant.

4. In the course of her correspondence with the Revenue:

(a) The Appellant was asked whether she considers herself rendering services to her employer when she returned to Hong Kong on her employer's instructions for training between 1 April 1998 and 31 March 1999. The Appellant responded by stating that she did not consider herself rendering any service when she returned to Hong Kong for training.

(b) She could not produce any document indicating payment of tax to the Shenzhen fiscal authority in respect of her earnings.

The law

5. Section 8(1) of the IRO provides that:

> *' 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 [any employment of profit].'*

6. Section 8(1A)(b) of the IRO provides that income arising in or derived from Hong Kong from any employment excludes income derived from services rendered by a person who '*renders outside Hong Kong all the services in connection with his employment*'.

7. Section 8(1B) of the IRO provides that:

> *' 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.'*

The hearing before us

8. The Appellant gave sworn testimony before us. She informed us that:

(a) She worked in Company A-Shenzhen during the day but had to return to Hong Kong to look after her children. Her husband and her father-in-law were both residing in Hong Kong.

(b) She attended training courses in Hong Kong on her own volition in order to equip herself to handle the anticipated change of Company A-Shenzhen's computer system in 2000. She did not attend these courses pursuant to directions of

Company A. She had to make use of her own leave entitlements for such attendance.

(c) The entire production department of Company A was in Company A-Shenzhen. She did not render any service in Hong Kong.

9. The Appellant is a sincere and down-to-earth witness. We accept her testimony.

Our decision

10. There is little doubt that the Appellant was in Hong Kong for more than the 60 days' limit as prescribed under section 8(1B) of the IRO. Had she rendered services in Hong Kong in favour of Company A, she would not be able to take advantage of the provisions in section 8(1B) in determining whether she rendered outside Hong Kong all the services in connection with her employment for the purpose of section 8(1A)(b)(ii).

11. We are of the view that the Appellant did not render any service in favour of Company A in Hong Kong. She did not attend the computer training courses pursuant to the terms of her employment. She attended those courses on her own volition in an attempt to equip herself for changes. Her job was tied to the production department in Shenzhen. We accept the evidence of the Appellant and Company A that her job did not call for any services being rendered in Hong Kong.

12. For these reasons, we allow the appeal and discharge the assessment.