Case No. D16/89

Salaries tax – application of sections 8(1) and 8(1A) of the Inland Revenue Ordinance – double taxation – claim for apportionment of income – CIR v Goepfert considered.

Panel: T J Gregory (chairman), Dr Philip Fu Yuen Ko and Albert Ho Chun Yan.

Date of hearing: 28 February 1989.
Date of decision: 2 June 1989.

The taxpayer was employed by a company incorporated in Hong Kong and his employment was subsequently transferred to another company also incorporated in Hong Kong. Both of the two employer companies were members of the same group. The taxpayer was employed to perform services in China. He spent more than 60 days in Hong Kong in each of the years of assessment in dispute. The taxpayer argued that his employment was a 'non Hong Kong employment' and that he should be subject to tax only in respect of the services which he performed in Hong Kong. He argued that under the principle of CIR v Goepfert, he should not be considered as having employment in Hong Kong.

Held:

It is common practice for employers in Hong Kong to employ persons in Hong Kong to perform services in other territories in the region outside of Hong Kong. In such circumstances, the income of the individual is not subject to salaries tax in Hong Kong provided that the employee spends not more than 60 days in Hong Kong. Where an employee is employed in Hong Kong and spends more than 60 days in Hong Kong during which he performs services, his entire income will be taxable in Hong Kong and is not subject to apportionment on a 'day in – days out' basis.

Appeal dismissed.

Cases referred to:

BR 20/69, IRBRD, vol 1, 3
CIR v Goepfert 1 HKTC 210
CIR v So Chak Kwong, Jack 2 HKTC 174

Wong Yui Keung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. NATURE OF THE APPEAL

The Taxpayer's appeal was against assessments to salaries tax for the years of assessment 1984/85 and 1985/86.

2. THE FACTS

The facts, which were not in dispute, are as follows:

2.1 From 1 May 1979 the Taxpayer was employed as a computer marketing representative by a Hong Kong incorporated company, X Limited, which is ultimately owned by an overseas corporation.

2.2 From 1 June 1980 the Taxpayer transferred to X Limited's China trade division as data processing sales representative.

2.3 At a date subsequently, either 1 January 1983, according to the Taxpayer, or 1 July 1984, according to the Revenue, the Taxpayer was appointed the chief representative at the Beijing Office of Y Limited, a company incorporated in Hong Kong and ultimately owned by the same overseas corporation as X Limited.

2.4 From the beginning of December 1985 there was a 'reorganisation' of the Taxpayer's employment. By letter dated 23 December 1985 from Y Limited he was redesigned assistant general manager for the Beijing representative office of Y Limited, with his services for Y Limited to be performed wholly within the People's Republic of China ('PRC'), and by letter dated 23 December 1985 from X Limited he was appointed an assistant general manager of X Limited with his services for Y Limited to be performed in Hong Kong and by which he was required to spend 155 days per annum in Hong Kong.

2.5 Attached to the Taxpayer's 1984/85 salaries tax return was a list of his visits to Hong Kong showing that between 1 April 1984 and 30 March 1985 he was in Hong Kong for 166 days of which 14 days were vacation.

2.6 Attached to the Taxpayer's 1985/86 salaries tax return was a list of his visits to Hong Kong showing that between 1 April 1985 and 30 April 1986 he was in Hong Kong for 111 days.

3. THE MATTERS IN ISSUE ON THE APPEAL

The Taxpayer and the Revenue were agreed that the points in dispute were:

3.1 the date the Taxpayer was employed by Y Limited: was it 1 January 1983 or 1 July 1984; and

3.2 whether the Taxpayer was assessable to salaries tax under section 8(1) or 8(1A) of the Ordinance.

4. DOCUMENTATION

The Board had before it copies of the following documents:

4.1 X Limited's certificate of incorporation dated May 1971.

4.2 The Taxpayer's letter of appointment dated 1 May 1979, refer paragraph 2.1 above.

4.3 Y Limited's certificate of incorporated dated June 1982.

4.4 The Taxpayer's letter of appointment dated 20 December 1982, refer paragraph 2.3 above.

4.5 Employment's return for 1982/83 dated 31 May 1983 submitted by X Limited with respect to the Taxpayer.

4.6 The Taxpayer's salaries tax return for 1982/83 dated 13 June 1983.

4.7 Registration certificates of the Beijing representative office of Y Limited dated July 1983.

4.8 Registration certificate and resident's permit of Y Limited and the Taxpayer, the former being undated and the latter being dated 29 September 1983.

4.9 The Taxpayer's salaries tax return for 1983/84 dated 31 May 1984.

4.10 Working report of Y Limited Beijing representative office (undated) for the period 30 September 1984 to 30 September 1985.

4.11 Employer's return for 1984/85 dated 16 May 1985 submitted by X Limited with respect to the Taxpayer.

4.12 Employer's return for 1984/85 dated 16 May 1985 submitted by Y Limited with respect to the Taxpayer.

4.13 The Taxpayer's salaries tax return for 1984/85 dated 17 July 1985 and accompanying letter dated 17 July 1985.

4.14 Letter dated 23 December 1985 from Y Limited to the Taxpayer, refer paragraph 2.4 above.

4.15 Letter dated 23 December 1985 from X Limited to the Taxpayer, refer paragraph 2.4 above.

4.16 Assessor's letter dated 17 February 1986 to Y Limited with respect to the Taxpayer.

4.17 Employer's return for 1985/86 dated 15 May 1986 submitted by Y Limited with respect to the Taxpayer.

4.18 Employer's return for 1985/86 dated 17 May 1986 submitted by X Limited with respect to the Taxpayer.

4.19 The Taxpayer's salaries tax return for 1985/86 dated 7 June 1986 and accompanying letter dated 7 June 1986.

4.20 Letter dated 3 July 1986 from Y Limited to the Revenue with respect to the Taxpayer.

4.21 A series of individual monthly income tax returns filed by the Taxpayer with the Ministry of Finance, General Taxation Bureau, of the People's Republic dated as follows:

6 August 1984 for the first eight months of 1984
31 October 1984 for the ninth and tenth months of 1984
21 January 1985 for the eleventh and twelfth months of 1984
2 February 1985 for the first month of 1985
20 March 1985 for the second and third months of 1985
8 May 1985 for the fourth and fifth months of 1985
14 June 1985 for the sixth and seventh months of 1985
2 August 1985 for the eighth and ninth months of 1985
5 October 1985 for the tenth and eleventh months of 1985
6 December 1985 for the twelfth month of 1985
30 January 1986 for the first month of 1986
5 March 1986 for the second month of 1986
21 March 1986 for the third month of 1986.

4.22 Letter dated 21 March 1988 from Y Limited to the Revenue with respect to the Taxpayer.

5. THE CASE FOR THE TAXPAYER

5.1 In view of the facts which were agreed between the Revenue and the Taxpayer, after being duly sworn, the Taxpayer, who appeared in person, was invited to give such evidence as he considered relevant to the dispute and to address the Board as to why his salaries tax assessments were incorrect.

5.2 The Taxpayer pointed out that:

5.2.1 the documents confirmed that when Y Limited set up its representative office in Beijing he was appointed its chief representative;

5.2.2 from January 1983 he was stationed in the representative office in Beijing and resided in China with benefit of a resident's certificate;

5.2.3 he paid tax to the Chinese authorities, refer the documentation listed in 4.21 above;

5.2.4 to fulfill his employment duties he had to return to Hong Kong to compile reports, to report to his supervisors, submit expense reports and hold meetings with other group personnel involved;

5.2.5 all of his actual services were rendered in China;

5.2.6 the services he rendered in Hong Kong were incidental to his work in China;

5.2.7 the income generated from Hong Kong should be apportioned by reference to the number of days he spent in China.

5.3.1 Under cross-examination the Taxpayer:

5.3.1.1 agreed that the employer's return for 1984/85 submitted by X Limited, document 4.11, was correct and that he received the stated income, $69,120, and it was paid by autopay to an account with Hongkong Bank;

5.3.1.2 agreed that the employer's return for 1984/85 submitted by Y Limited, document 4.12, was correct and that the emoluments of $341,725.18 were also received by autopay into a bank account in Hong Kong;

5.3.1.3 agreed that the employer's return for 1985/86 submitted by Y Limited, document 4.17, was correct, subject to the period stated in paragraph 11 of the return reading 'from 01/04/85 to 30/11/85' (as opposed to '30/11/86' as stated on the form), that statement 13 stated that payments were not paid by an overseas concern either in Hong Kong or overseas, but that he did not know why this return stated that $217,408.83 was paid by Y Limited as he was not

responsible for the information contained in the form and all that he was concerned with was that he was employed by Y Limited as chief representative in its Beijing office;

5.3.1.4 agreed the content of the letter dated 21 March 1988, document 4.22, in principle and stated that the interpretation depended on how one read the letter; that the $317,200, stated to be emoluments paid in Hong Kong for services performed for Y Limited in China, arose as Y Limited was not doing business in Hong Kong and only conducted business through its Beijing representative office;

5.3.1.5 agreed the content of the employer's return for 1985/86, submitted by X Limited, document 4.18, and that the money was paid in Hong Kong.

5.3.2 The witness was then questioned with respect to the Revenue's letter of 17 February 1986, document 4.16, and agreed that the answers to the eight questions posed in that letter as given in the reply dated 3 July 1986 from Y Limited were correct.

5.3.3 The Taxpayer was then questioned as to what he did when he was in Hong Kong and he explained that he wrote reports which related to his business activities in China, held conferences with colleagues at which he requested support as there was not the manpower in the Beijing representative office and complied his expense report. He stated that technical updates were sent directly to Beijing and that if he underwent product training it was mainly in the United States. His duties in Hong Kong were reporting.

5.3.4 There was then questioning as to the names used in the documents issued by the PRC authorities, document 4.4 above: the witness was insistent that the application was by Y Limited and issued to Y Limited notwithstanding any similarity between X Limited and Y Limited in the name in Chinese characters written in the documentation.

5.3.5 The witness was questioned as to the working report, document 4.10.

5.3.6 The witness confirmed that personnel requirements were seen to in Hong Kong.

5.3.7 The witness was then questioned about:

5.3.7.1 the letter from Y Limited dated 20 December 1982, document 4.4, and the offer of the position as chief representative of the Y Limited representative office in Hong Kong as of January 1983;

5.3.7.2 as to the composition of the Board of Y Limited and the status of Mr A, the person who signed the letter;

5.3.7.3 the employers' return for the year ended 31 March 1983, document 4.5, and agreed the contents and stated that he had not been concerned with the fact that the form was returned by X Limited when he was employed by Y Limited.

5.3.8 The witness confirmed that he identified his employer as X Limited in his return for 1982/83, document 4.6, and that in his return for the year of assessment 1983/84, document 4.9, he also stated that X Limited was his employer. He agreed that his return for the year of assessment 1984/85, document 4.13, stated that Y Limited were his employer and that the taxable income of $173,268 was explained by his letter of 17 July 1985 namely that this represented 152/365ths of $416,077. The witness also agreed that in his return for 1985/86, document 4.16, the declared salary of $96,463 represented 111/365ths of $317,200 and was also explained by the letter and schedule accompanying his return.

5.3.9 The witness was then asked whether there was any significant change in his duties from before 1 December 1985 and afterwards. The witness stated that for the whole period he was the chief representative at the representative office of Y Limited in Beijing but from 1 December 1985 there was some internal job reassignments. Prior to that date he was in charge of all direct business in the PRC. From 1 December 1985 he was to take care of the joint ventures of his employers with the PRC and that the work pattern was the same as previously that he came to Hong Kong to report.

5.3.10 The witness was then questioned on attachment 8 to his grounds of appeal, the first of which from Y Limited stated that as a result of a reorganisation his employment was to be changed and that from 1 December 1985 he would be assistant general manager of Y Limited's Beijing representative office and that his services were to be performed wholly within the PRC, and the second, a letter dated 23 December 1985 from X Limited, stated that as from 1 December 1985 he will be employed by X Limited as assistant general manager with his services only being carried out when he was in Hong Kong and that he would require to spend 155 days per annum in Hong Kong. The witness agreed that although his services for Y Limited were to be wholly within the PRC he had to return to Hong Kong to report.

5.3.11 When questioned about the content of the employer's return for 1985/86. The witness stated that he did not know by whom the form had been completed and he copied for his own salaries tax returns what the employer had returned.

5.4 In response to a question from the Board the Taxpayer stated that he did not wish to refer to any specific provision of the Ordinance.

6. THE REVENUE'S SUBMISSION

The representative of the Revenue handed in a written submission.

6.1 This submission, having summarised the Taxpayer's case, stated that the Board was required to consider section 8(1), 8(1A) and 8(1B).

6.2 The Revenue stated that section 8(1) is the basic charging section whereby income which arises in or is derived from Hong Kong is assessed to salaries tax. In determining whether income is assessable under this section regard is to be had to where the source of income the employment is located. The Revenue referred the Board to BR20/69, IRBRD, vol 1, 3 which considered the meaning of 'income arising or derived from' as used in section 8(1).

6.3 Section 8(1A) was enacted subsequent to the decision in BR20/69 and provides that if the source of employment is outside Hong Kong a person is liable to Hong Kong salaries tax in respect of his services rendered in Hong Kong, section 8(1A)(a) whereby section 8(1A) is to be regarded as an extension to the basic charge under section 8(1).

6.4 If a taxpayer falls within the basic charge, that is section 8(1), his entire salary in the year of assessment is subject to tax although he might have rendered some of his services outside Hong Kong during the year. However, the section permits the taxpayer to claim relief under section 8(1A)(b)(ii) as read with section 8(1B). Thus, a taxpayer is not assessed to salaries tax if he renders all of his services outside of Hong Kong in a year. Furthermore, no account is to be taken of services rendered by him during visits to Hong Kong not exceeding a total of 60 days during the year of assessment. This view is supported by the determination in CIR v Goepfert 1 HKTC 210. The court, in this case, after reviewing a number of decisions of the Board of Review, concluded that the test of source of employment income could be drawn from a series of English cases and can be summarised by the question posed at page 237 of the report:

'Where does the income really come to the employee?'

Putting it in another way where is the source, the employment, located. Although, to answer the question, it is necessary to look at a number of factors, the court in Goepfert was firmly of the view that the place where the services are rendered by the employee is not a factor which can properly be taken into account. It follows from the judgment in Goepfert that other factors, such as the nature of the employee's duties, and whether his remuneration forms part of the expense of a Hong Kong company or establishment, will not often have relevance to the question of the place of employment.

6.5 The Revenue submitted that as a consequence of the Goepfert decision and the observations contained in the judgment that the Revenue now accepted that an employment is located outside Hong Kong where the following three factors are present, namely:

6.5.1.1 The contract of employment was negotiated and entered into and is enforceable outside Hong Kong;

6.5.1.2 The employer is resident outside of Hong Kong; and

6.5.1.3 The employee's remuneration is paid to him outside Hong Kong.

6.5.2 Nevertheless, the Revenue reserves the right to look beyond these three factors in appropriate cases, as pointed out in Goepfert at page 237:

'There can be no doubt therefore that in deciding the crucial issue, the Commissioner may need to look further than the external or superficial features of the employment. Appearances may be deceptive. He may need to examine other factors that point to the real focus of the source of income, the employment.'

6.6 In the appeal the Taxpayer based his claim on holding a non-Hong Kong employment. The Revenue requested the Board to endorse the right of the Revenue to look beyond the three factors set out in the Goepfert case.

6.7 The Revenue submission was that the following facts were relevant:

6.7.1 That the Taxpayer's employment commenced with X Limited on 1 May 1979. He was transferred to the China trade division on 1 June 1980 and transferred to Y Limited on 1 July 1984. These facts were supported by documents 4.2 and 4.4. Y Limited confirmed that the employment contract was negotiated and written in Hong Kong, refer paragraph 2 of document 4.19.

6.7.2 X Limited, the Taxpayer's original employer, is a Hong Kong incorporated company conducting business in Hong Kong and prior to 1 July 1984 it maintained a China trade division to conduct all China trade operations of the Group of which X Limited was a member. On 1 July 1984 the China trade division was taken over by another Group wholly owned subsidiary incorporated in Hong Kong, Y Limited.

6.7.3 Y Limited's principle activities were the sale and servicing of group products in the PRC. The registration certificates, document 4.3, establishes that both X Limited and Y Limited had a representative office in Beijing which engaged in the routine activities of computer business liaison and technical services.

6.7.4 On 20 December 1982 the Taxpayer was offered the position of chief of the representative office at Y Limited in Beijing as from January 1983, document 4.4, but up to 30 June 1984 the Taxpayer's salary was paid by X Limited and reported to the Revenue in the employer's tax returns file by X Limited documents 4.6 and 4.7.

6.7.5 The Taxpayer's remuneration for the period from 1 July 1984 to 30 November 1985 is reported to the Revenue by Y Limited, documents 4.17 and 4.18.

6.7.6 The Taxpayer's remuneration was paid to him at all times in Hong Kong.

6.8 The Revenue invited the Board to accept:

6.8.1 that the Taxpayer's employment's status remained unchanged from 1 May 1979 to 30 June 1984 but that from 1 July 1984 he commenced employment with Y Limited. The Revenue accepted that the date of transfer is not so relevant once it was established that he was with either X Limited or Y Limited;

6.8.2 although the Taxpayer was responsible for all aspects of the Group's business in the PRC he had to return to Hong Kong to perform duties and that having regard to the frequency and number of days he spent in Hong Kong his duties in Hong Kong were not insignificant;

6.8.3 as the contracts of employment were entered into in Hong Kong with Hong Kong incorporated companies and as the Taxpayer's salary was paid in Hong Kong the Taxpayer's source of income the employment was Hong Kong;

6.8.4 despite the documents dated 23 December 1985 there was no change of the Taxpayer's employment with Y Limited from 1 December 1985: his duties and terms of employment might have changed but the employment itself was continuous whereby the whole of the Taxpayer's income was assessable to tax unless he could claim to be qualified for the exemption required by section 1(1A)(b)(ii) as read with section 8(1B).

6.9 The Revenue submitted that the question for the Board to consider was whether in both the years of assessment 1984/85 and 1985/86 the Taxpayer rendered all services in connection with his employment outside of Hong Kong. The Revenue submitted that the evidence was that although the Taxpayer was assigned by his employment to work in the PRC he had also worked in Hong Kong and that it is clear that in these two years the Taxpayer did not render all services outside Hong Kong whereby section 8(1A)(b)(ii) is of no assistance to the Taxpayer.

6.10 Since the Taxpayer had rendered services in Hong Kong in both years of assessment it was submitted that the next question for the Board to consider is

whether the Taxpayer is entitled to the relief provided for in section 8(1B) whereby no account was to be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basic period for the year of assessment. The Revenue referred to the Taxpayer's schedules submitted with his salaries tax returns for the years of assessment 1984/85 and 1985/86 and stated that 166 days and 111 days, respectively, evidenced the fact that the Taxpayer was not a 'visitor' in the true sense of the word. In both years his 'visits' exceeded 60 days and he did render services during these periods whereby section 8(1B) has no application. With respect to this submission the Revenue referred the Board to CIR v So Chak Kwong, Jack 2 HKTC 174 in which the High Court decided that in order to take the benefit of section 8(1B) a taxpayer must not render services during visits which exceed a total of 60 days in the relevant period.

6.11 The Revenue also advised the Board that notwithstanding the fact that the Taxpayer had asserted that he had paid salaries tax to the Beijing Tax Bureau during the two years of assessment it was not relevant to the consideration of the present appeal. The relevant amendment to the Ordinance, section 8(1A)(c), took effect from 1 April 1987, a date subsequent to that period with which the Board was concerned.

7. THE RELEVANT PROVISIONS OF THE INLAND REVENUE ORDINANCE

The provisions of the Ordinance, relevant to this appeal, are accepted by the Board as being section 8(1), 8(1A) and 8(1B).

7.7 Section 8(1) provides as follows:

'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; and

(b) any person.'

7.2 Section 8(1A) reads:

'For the purposes of this Part, income arising in or derived from Hong Kong from any employment –

(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services; and

(b) excludes income derived from services rendered by a person who –

(i) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft; and

(ii) renders outside Hong Kong all the services in connexion with his employment.'

7.3 Section 8(1B) reads:

'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.'

8. THE ISSUE

In simple terms the issue between the Taxpayer and the Revenue is whether any of the provisions of the relevant provisions of the Ordinance entitle the Taxpayer to be exempted from tax on that proportion of his emoluments which relate to or are equivalent to the period of time spent by him working for his employer in the PRC.

9. REASONS FOR THE DECISION

9.1 There is no dispute between the parties that from his first engagement with effect from 1 May 1979, refer document 1, the Taxpayer was employed by X Limited.

9.2 One question the Board has to determine is whether the Taxpayer ceased to be employed by X Limited with effect from 31 December 1982, pursuant to the letter dated 20 December 1982, or whether he changed employment on 1 July 1984. Having read the letter of 20 December 1982 the Board is satisfied that the Taxpayer's employment changed with effect from 1 January 1983. The Board does not accept that employer's returns can change that contractual position: it is not for the Board to speculate why the employer's returns showed X Limited as the employer to 30 June 1984 and Y Limited from 1 July 1984, as opposed to 31 December 1982 and 1 January 1983, respectively. The letter of 20 December 1982 is not ambiguous in any way and the Board is satisfied that had the Taxpayer's employment being terminated between 1 January 1983 and, at least, 23 December 1985, in circumstances which would have entitled him to claim damages for wrongful dismissal, the correct defendant would have been Y Limited.

9.3 Another question the Board has to determine is the effect of the letters dated 23 December 1985, documents 4.14 and 4.15. The letter from Y Limited, document 4.14, does not state that there is any minimum or maximum time the Taxpayer would be required to spend within the PRC performing his duties for Y Limited whereas the letter from X Limited, document 4.15, requires the Taxpayer to spend at least 155 days in each year with X Limited. The Board finds these two letters somewhat difficult to rationalise: the letter from Y Limited does not refer to the Taxpayer having the right to exempt himself from his services to Y Limited for 155 days per annum to serve X Limited and the letter from X Limited does not state that the salary to be paid to the Taxpayer would be at the rate specified per month, and pro rata for a broken month, to be paid when he was providing services to X Limited. The effect of these two letters was not canvassed during the appeal but the Board is bound to question whether it is possible for an individual to have two employers and by virture of a contract with one employer take advantage of section 8(1A)(b)(ii) with respect to his salary from the employer who requires him to work overseas but be subject to salaries tax under section 8(1) with respect to the income received from the employer who requires the employee to fulfill his duties in Hong Kong. A Board could, perhaps, be persuaded that this was the case if the employment was with two totally disassociated employers and were written in such a way as to require the employee to fulfill the overseas appointment for, say, 45 consecutive days out of every 60 days and the Hong Kong base employer for 15 consecutive days within each period of 60 days. It may be that the letters of 23 December 1985 were prompted by the appreciation of the difficulties the Taxpayer was facing, namely being taxed within the PRC and being taxed in Hong Kong and that these letters were an attempt to create the opportunity for an argument of the foregoing nature to be raised. However, the point was not canvassed at the appeal and there have to be lingering suspicions in the mind of the Board that it is the type of agreement which is intended to be caught by section 61.

9.4 It is clear to the Board that the wording of section 8(1), when read in conjunction with the wording of section 8(1A) and 8(1B) do not permit the interpretation which the Revenue submit ought to be afforded based on the decision in CIR v Goepfert. This decision is based on entirely different premises and, fundamentally, is applicable to cases where Hong Kong is used as a convenient place at which an employee may reasonably live when he is to perform services throughout the region, such as the south-east Asian region, covering, perhaps, destinations as far as apart as Japan in the north and Singapore or Indonesia in the south, China or India to the west and Philippines to the east. This is not an uncommon arrangement for major corporations.

9.5 The Board's view of the applicability of Goepfert is supported by the decision in CIR v So Chak Kwong 2 HKTC 174 that a Hong Kong company may employ a person in Hong Kong and assign him overseas to perform his duties

and it is only in cases in which the individual returns to Hong Kong during a year of assessment and spends more than 60 days in Hong Kong, and whether at one visit or cumulatively, and it is only if during some part of the total period he discharges the duties of his employment, as opposed to being a mere vacationer in his native country, that a liability to tax arises.

9.6 The interpretation placed on Goepfert by the Revenue cannot be as comprehensive as was submitted to the Board. The Board is satisfied that the individual employed in Hong Kong by a Hong Kong company to perform duties in Hong Kong can be reassigned by his employer to work overseas and, subject to complying with the provisions of section 8(1B) in each year of assessment in which the employee was abroad fulfilling his duties, his salary would not be liable to tax in Hong Kong and that can be achieved without rewriting his employment contract.

9.7 Applying the facts in this present appeal to the law the Board is satisfied that from 1 January 1983 the Taxpayer's employer ceased to be X Limited and became Y Limited and that from 1 January 1983 his duties were to be those of chief representative at the Beijing representative office of Y Limited. It is unfortunate for the Taxpayer that for him to be able to fulfill those duties properly he had to make regular visits to Hong Kong and that in each of the relevant tax years in question his visits exceeded sixty days whereby he cannot claim benefit of section 8(1A)(b)(ii) whereby his appeal must fail.

9.8 In reaching its decision the Board has considered carefully the letters of 23 December 1985 and is unable to attach any significance to them.

9.9 The Board expresses sympathy for the Taxpayer in that the effect of this decision is that he will have been taxed both in Hong Kong on the whole of his emoluments and in the PRC on some part of those emoluments but it is the duty of this Board to apply the law as it stands at the relevant time.

10. DECISION

For the reasons given the appeal fails.