INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D18/98

Salaries tax – employment – source of income – whether liable to salaries tax – sections 8(1) and 8(1A)(b) of the Inland Revenue Ordinance.

Panel: Ronny Wong Fook Hum SC (chairman), Andrew Chan Weng Yew and Larry Kwok Lam Kwong.

Date of hearing: 29 December 1997.
Date of decision: 28 April 1998.

The taxpayer was an employee of a Hong Kong company (Company A) and had been assigned a full time job in Company A's factory in China. The taxpayer's salary was paid by Company A into his account with a bank in Hong Kong. In the tax year concerned the taxpayer spent a total of 216 days in Hong Kong. The taxpayer maintained that he had been working in the factory in China and was not required to render any service in Hong Kong.

Held:

1. The expression 'income arising in or derived from Hong Kong' in section 8(1) is referable to the locality of the source of income. What is important therefore is not the place where the duties of the employee are performed but the place where payment for the employment is made.

2. The taxpayer's income in question was derived from Hong Kong from a source of employment. Company A is a Hong Kong company and maintained an office in Hong Kong. Its general manager in Hong Kong supervised the work of the taxpayer. Some services were rendered by the taxpayer in Hong Kong. His salary was paid by Company A into an account in Hong Kong. Accordingly the taxpayer is within the tax ambit as prescribed by section 8 of the IRO.

Appeal dismissed.

Cases referred to:

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

Chan Wai Mi for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Background of this case

1. On 14 July 1971, an electronics manufacturing company by the name of Company X was registered in Hong Kong with its principal place of business in District Y.

2. Company X has a factory in Shenzhen ('the Shenzhen Factory'). The Taxpayer maintains that he had been working in the Shenzhen Factory since 1987 and was not required to render any service in Hong Kong.

3. On 19 May 1994, Company X issued a certificate in these terms:

> 'This is to certify that [the Taxpayer] is an employee of [Company X] and had been assigned a full time job in our China factory during the period of 1 April 1993 to 31 March 1994. Mr Z (the Taxpayer) only returned to Hong Kong during week end for off duty purpose. We would also confirm that Mr Z did not render any service to Company X while staying in Hong Kong.'

4. Company X further informed the Revenue that

   a. there is no formal contract of employment between Company X and the Taxpayer.

   b. the Taxpayer is responsible for the overall production in the Shenzhen Factory. His responsibilities include production planning and monitoring shipment.

   c. the Taxpayer is under the supervision of its general manager who is based in Hong Kong.

   d. instructions were given to the Taxpayer by fax; by internal memos and by phone calls from Company X's Hong Kong office.

   e. during the year ended 31 March 1994, the Taxpayer was on leave from 5 February 1994 to 21 February 1994. Company X however maintains no record in relation to the Taxpayer's leave.

5. In his correspondence with the Revenue, the Taxpayer informed the Revenue that his normal working hours in the Shenzhen Factory was between 8 am and 6 pm. He

was regularly asked to work overtime without pay. As notional compensation for such overtime, he was afforded a certain degree of flexibility for his attendance at the Shenzhen Factory.

6. The Taxpayer submitted to us a tax receipt issued by Shenzhen's taxing authority dated 5 July 1997 for RMB $4,950 in respect of tax for the period commencing 1 June 1997.

7. The Revenue produced before us an analysis of the arrival/departure record showing the Taxpayer's time of arrival in and departure from Hong Kong during the year ended 31 March 1994 and a calendar for that year depicting the number of days that the Taxpayer was inside/outside Hong Kong. These are annexed to this decision as Schedule I & Schedule II. There is no challenge from the Taxpayer on the accuracy of these compilations. According to Schedule I, he spent a total of 216 days in Hong Kong in the year of assessment 1993/94.

Evidence of the Taxpayer

8. Since 1989, he applied for tax exemption from the Revenue which was granted until the year of assessment 1993/94.

9. He travelled regularly back to Hong Kong in 1993 as his father of 83 was then indisposed with liver cancer.

10. Company X commenced its Shenzhen Factory in 1987. He looked after the production of radios, recorders and CD clocks in that factory. He was assisted by 10 odd subordinates to take charge of about 1,500 workers in 1993. There was no written contract of employment between him and Company X.

11. Whilst the Shenzhen Factory operated on the basis of a 5 days' week, he had to put in regular overtime work.

12. Between April 1993 to March 1994, he spent a total of 16 full days which were normal working days in Hong Kong. He explained that his stay in November 1993 was probably attributable to the illness of his father. His father passed away on 19 November 1993 and the funeral took place on 29 November 1993.

13. There were also 9 occasions between April 1993 and March 1994 when he left Hong Kong after 5 pm on a normal working day to return to Shenzhen.

14. He maintained constant contact with Company X's Hong Kong office by phone and fax. He accepted that in the year of assessment 1993/94, there probably were working sessions in Hong Kong but those instances were rare. There were also several occasions when he attended Company X's Hong Kong office to pick up items for use in the Shenzhen Factory.

15. Company X paid his salary into his account with a bank in Hong Kong.

The applicable legal principles

16. CIR v Goepfert 2 HKTC 210 makes it clear that the first question is whether the income falls within the basic charge to tax under section 8(1) of the Inland Revenue Ordinance ('the IRO'). What has to be decided is whether the income arose in or derived from Hong Kong from a source of employment or not. For this purpose what has to be considered is from which place the income really comes to the employee. The expression 'income arising in or derived from Hong Kong' in section 8(1) is referable to the locality of the source of income. What is important therefore is not the place where the duties of the employee are performed but the place where payment for the employment is made.

17. The judgement of Mortimer J (as he then was) in CIR v So Chak Kwong Jack 2 HTKC 174 makes it clear that in order to take the benefit of the exemption conferred by section 8(1A)(b) of the IRO, 'a taxpayer must not render services during visits which exceed a total of 60 days in the relevant period.'

Our Decision

18. We are of the view that the Taxpayer's income in question derived from Hong Kong from a source of employment. Company X is a Hong Kong company. At the material times, they maintained an office in Hong Kong. Its general manager in Hong Kong supervised the work of the Taxpayer. The Taxpayer accepted that there were occasions (albeit rare) when he attended the Hong Kong office of Company X in discharge of his duties. We refer to his evidence summarised in paragraph 14 above. It is clear from his evidence that some services were rendered in Hong Kong. His salary was paid by Company X into an account in Hong Kong.

19. There is no evidence that the Taxpayer paid any tax to the Tax Authority in Shenzhen in respect of his income for the period in question. The receipt that he rendered to the Revenue is in respect of income for a subsequent period.

20. For these reasons we are of the view that the Taxpayer is within the tax ambit as prescribed by section 8 of the IRO.

21. We therefore confirm the assessment and dismiss the Taxpayer's appeal.