Case No. D1/96

Salaries tax – section 8(1) – employment by Hong Kong company – income arising in or derived from Hong Kong; and section 8(1A)(1B) – employment by overseas company – apportionment of time in and out of Hong Kong – calculation of part days and non-working days.

Panel: Audrey Eu Yuet Mee QC (chairman), Felix Chow Fu Kee and Charles Hui Chun Ping.

Date of hearing: 15 March 1996.
Date of decision: 9 April 1996.

Appeal dismissed.

Cases referred to:

D20/96, IRBRD, vol 1, 3
CIR v George Andrew Goepfert [1987] 2 HKTC 210
D12/94, IRBRD, vol 9, 131
CIR v So Chak Kwong 2 HKTC 175
D29/89, IRBRD, vol 4, 340

K A Lancaster for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by the Taxpayer against the determination of the Commissioner dated 6 November 1995 in respect of the Taxpayer's salaries tax assessment for the years end 31 March 1993 and 31 March 1994.

AGREED FACTS

2. The following facts in the determination are agreed to by the Taxpayer.

3. Employer's returns of remuneration and pensions for the years ended 31 March 1993 and 31 March 1994 filed in respect of the Taxpayer show the following particulars:

Year ended 31-3-1993

Employer		:	Company A	Company B
Capacity in which employed		:	Head of Corporate Finance	Director, Corporate Finance
Period of employment		:	1-4-1992 to 31-12-1992	1-1-1993 to 31-3-1993
Income	- Salary	:	HK$598,860	US$31,250
	Bonus		HK$ 66,540	-
	Allowance		-	US$13,749
Total		:	HK$665,400	US$44,999

Year ended 31-3-1994

Employer		:	Company B
Capacity in which employed		:	Director, Corporate Finance
Period of employment		:	1-4-1993 to 31-3-1994
Income	- Salary	:	HK$1,409,028
	Bonus		HK$ 386,035
Total			HK$1,795,063

4. The Taxpayer declared the following income in his salaries tax returns for the years of assessment 1992/93 and 1993/94:

Year of assessment 1992/93

1-1-1993 to 31-3-1993 US$44,999

Year of assessment 1993/94

'Total @ US$180,000 p.a. inclusive of all allowances etc.'

5. On divers dates, the assessor raised on the Taxpayer the following salaries tax assessments for the years of assessment 1992/93 and 1993/94:

Year of assessment 1992/93

Total Assessable Income	$1,013,004
($665,540 + 44,999 @7.7216)	
Tax thereon	$ 151,950

Year of assessment 1993/94

Total Assessable Income	$1,795,063
Tax thereon	$ 269,259

6. The Taxpayer objected against the 1992/93 assessment in the following terms:

> 'The grounds for such objection include the fact that the assessment is estimated and/or erroneous and/or excessive …
>
> I am of the opinion that the source of my employment during the relevant period (1 March 1993 to 31 March 1993) is outside Hong Kong.'

7. For the period between 1 January 1993 to 31 March 1993, the Taxpayer was in Hong Kong for 61 days.

8. For the period between 1 April 1993 to 31 March 1994, the Taxpayer was in Hong Kong for 232 days.

9. On appeal to the Commissioner, the salaries tax assessment was reduced by apportioning the Taxpayer's income from Company B on the days in and out of Hong Kong. The revised assessment is as follows:

> 'The assessor now proposes to revise the salaries tax assessments for the years of assessment 1992/93 and 1993/94 as follows:
>
> **Year of assessment 1992/93**
>
> | | |
> |---|---|
> | Income from Company A | $665,400 |
> | Income from Company B (US$44,999 x 7.7214 x 61/90) | $235,497 |

Total Assessable Income	$900,897
	=======
Tax thereon	$135,134

Year of assessment 1993/94

Tax Assessable Income ($1,795,063 x 232/365)	$1,140,971
Tax thereon	$171,145'

FURTHER FACTS FOUND

10. The first employer Company A related to the period from 1 April 1992 to 31 December 1992. The Revenue produced a copy of the employment contract dated 16 October 1990 between Company A and the Taxpayer. According to clause 4, the Taxpayer's remuneration was calculated annually, payable in 13 equal instalments each payable in arrear at the end of each month and the 13th instalment to be paid together with the 12th at the end of every calendar year. Clause 5 provides that he would also be paid a bonus at the discretion of the Board, normally in December.

11. The Revenue also produced a letter from Company A dated 11 March 1993 which says:

> 'The contract of employment was negotiated and concluded in Hong Kong and is enforceable in Hong Kong.
>
> The Taxpayer was not assigned from an overseas associated concern. He is a Country C resident who seeks employment in Hong Kong. Before joining our company, he was working in Hong Kong with another company.
>
> We paid remuneration to the Taxpayer by cheques drawn from our HK$ Current Account with Bank D.
>
> Our company is incorporated in Hong Kong and the meetings of the Board of Directors are held in Hong Kong.
>
> All allowances were paid as part of the Taxpayer's remuneration during the year ended 31 March 1992.'

12. The second employer Company B related to the period from 1 January 1993 to 31 March 1993 as well as the next year from 1 April 1993 to 31 March 1994.

13. The Revenue obtained the following information from Company B:

> '(a) Company B was an overseas corporation resident in Country E. Its central management and control was in Country E.
>
> (b) The Taxpayer was employed by Company B as Director – Corporate Finance.
>
> (c) The terms and conditions of the Taxpayer's employment were negotiated and concluded in Country F.
>
> (d) The Taxpayer was assigned to work in Hong Kong for Company G. Company G was s subsidiary of Company B. His duties was focused on developing relationships with other corporate finance teams to carry out Company B's business activities in the Asia/pacific region including Hong Kong.
>
> (e) Company B had jurisdiction and control over the Taxpayer's employment during the period of assignment.
>
> (f) The Taxpayer's remuneration was paid in U.S. dollars and was credited to his bank account maintained in Country H.'

14. The Taxpayer did not challenge any of the above save that he said sub-paragraph 13(e) was inconsistent with 13(a). We see no inconsistency in those two sub-paragraphs. As to paragraph 13(d), the Taxpayer explained he was working for Company B but using the offices of Company G. The Revenue accepts that the Taxpayer was employed by Company B, an overseas corporation, and not Company G, a Hong Kong company. The facts are not in dispute and we have no hesitation in accepting the further facts as stated above.

THE TAXPAYER'S CASE

15. The Taxpayer is a Country C national. He spents a lot of time in Country C and other countries outside Hong Kong. He has a residential address in Hong Kong and he spents about half or more than half of the time here.

16. The nature of his work for both employers was more or less the same. He was in the debt business, that is, he helped to bring about loans, often to companies in Hong Kong. To a smaller extent, his work also involved equity, shares or securities.

17. He accepted that some tax should be payable but he could not say how much. To date, his salary has not been taxed elsewhere. His reasons for challenging the determination were as follows:

(a) The vast bulk of the deals were concluded with counterparts outside Hong Kong.

(b) The deals were almost invariably concluded outside Hong Kong, thus the income was no sourced in Hong Kong.

(c) The deals were almost invariably governed by foreign and not Hong Kong law.

(d) A lot of the work done in Hong Kong related to preparatory or clerical work which was mostly wasted or turned out to be futile because very few deals were eventually concluded.

(e) The time apportionment basis adopted by the Commissioner was inequitable and illogical.

18. The Taxpayer had to pay the tax initially assessed pending the appeal. He complained that even after the tax was reduced upon the determination by the Commissioner, the difference between the tax paid and the reduced amount was still not refunded to him. Since the Revenue accepts that the tax should be reduced to the amount as per the determination, despite this pending appeal, we see no reason why the difference was not refunded to the Taxpayer and we hope this will be done for similar cases in future.

THE REVENUE'S CASE

19. In respect of the income from Company A, the Revenue relies on section 8(1) of the Inland Revenue Ordinance Chapter 112 ('the Ordinance'). This reads:

> *'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 pension.'*

20. Mr Lancaster, for the Revenue, cites D20/69, IRBRD, vol 1, 3 which explains section 8(1) as follows:

> *'On our reading of the section, we are unable to conclude that only where services are rendered in Hong Kong is income from employment taxable. As the word "income" is defined, one can, for practical purposes, substitute the word "salary", "wages" or "remuneration" in its place, so that if the remuneration arises in or derives from Hong Kong it is taxable. The expression "income arising in or derived from Hong Kong" is referable to the locality of the source of income: in other words not the place where the duties of the employee are performed but the place where the payment for the*

> *employment is made. The section does not say: "income arising in or derived* ***from services rendered*** *in Hong Kong". … "Income arising in or derived from" means the source of income. Locality of the source of income at least prima facie is the place where the employee gets his "income" from the place from where it is paid. In our view, therefore, a person employed by a Hong Kong company and who is paid by the Hong Kong company from money originating in Hong Kong to perform services elsewhere, is liable to salaries tax because his income arises in or is derived from Hong Kong.'*

This was approved by Macdougall J in CIR v George Andrew Geopfert [1987] 2 HKTC 210 where he said at page 236:

> *'It follows that the place where the services are rendered is not relevant to the enquiry under section 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be completely ignored.'*
>
> *'If during a year of assessment a person's income falls within the basic charge to salaries tax under section 8(1), his entire salary is subject to salaries tax wherever his services may have been rendered, subject only to the so called "60 days rule" that operates when the taxpayer can claim relief by way of exemption under section 8(1A)(b) as read with section 8(1B). Thus, once income is caught by section 8(1) there is no provision for apportionment.'*

21. Company A is a Hong Kong company. The contract of employment was negotiated and concluded in Hong Kong. The Taxpayer was controlled by the employer from Hong Kong. All remuneration and allowances were paid to the Taxpayer in Hong Kong. On those facts, there can be no doubt that the income from Company A arose in or was derived from Hong Kong, irrespective of where the services were carried out. It was caught by and was taxable under section 8(1) of the Ordinance.

22. In respect of the income from Company B, the Revenue relies on section 8(1A) of the Ordinance. This reads:

> *'(1A) 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.*
>
> *(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.'*

23. It is common ground that the Taxpayer's employment with Company B was located outside Hong Kong. Hence his income was only chargeable to salaries tax under section 8(1A) in respect of **services rendered** in Hong Kong.

24. Mr Lancaster again refers to CIR v George Andrew Goepfert for an explanation of the distinction between section 8(1) and section 8(1A) of the Ordinance. MacDougall J referred to the Commissioner's departmental practice:

> 'If the income from employment does not come within the basic charge, because it does not 'arise in' or 'derive from' a source in Hong Kong, then consideration will need to be given as to whether liability arises under the extension to the basic charge by the provisions of section 8(1A). Sub-section (a) of section 8(1A) does not in any way limit the charge in section 8(1); it extends the charge by specifically including as income arising in or derived from Hong Kong, all income derived from services rendered in Hong Kong including leave pay attributable to such services. It should be noted that this sub-section relates only to employments; it does not apply to offices of profit.'

Having summarized the position on section 8(1) as cited in paragraph 20 above, MacDougall J went on to explain section 8(1A) as follows:

> *'… if a person, whose income does not fall within the basic charge to salaries tax under section 8(1), derives income from employment in respect of which he rendered services in Hong Kong, only that income derived from the services he actually rendered in Hong Kong is chargeable to salaries tax. Again, this is subject to the "60 days rule"'.*
>
> *Thus the respondent, who in the light of the Board's findings does not fall within the basic charge imposed under section 8(1), is only liable to pay salaries tax on the whole of the income derived from the services he actually rendered in Hong Kong. Since he rendered services outside Hong Kong for 41 days he is not liable to salaries tax in respect of the income attributable to those services. In other words his income for salaries tax purposes is apportioned on a "time in time out" basis.*
>
> *Had the respondent merely earned income from services rendered in Hong Kong during visits not exceeding a total of 60 days in the year of assessment, then by virtue of section 8(1A)(b)(ii) read with section 8(1B) ("the 60 days rule"), that income would be exempt from liability to salaries tax.'*

25. It is also relevant to understand how days will be concluded for the purpose of salaries tax. In D12/94, it was held that part days should be included in the calculation of days spent in Hong Kong for salaries tax purposes. Likewise 'non-working days' should be included once it has been ascertained that the Taxpayer has performed services during visits to Hong Kong. The Taxpayer's visits in that case exceeded 60 days in aggregate and he did render services during some if not all of those visits, as the 60 days in section 8(1B)

qualified 'visits' and not 'services rendered', it was held that the benefit of section 8(1B) was not available to him. Mr Lancaster also refers to CIR v So Chak Kwong 2 HKTC 175 and D29/89 to the same effect.

26. If every part day is counted as one day, one could end up with more than 365 days in a year. What the Revenue has done in this case is to count the day of arrival as one day but to exclude the day of departure as a day outside Hong Kong. It follows that where a taxpayer arrives and leaves Hong Kong on the same day, it is considered a day in Hong Kong. It is on this basis that the 61 days from 1 January 1993 to 31 March 1993 and the 232 days from 1 April 1993 to 31 March 1994 are arrived at.

27. For the period from 1 January 1993 to 31 March 1993, the Taxpayer was in Hong Kong for 61 days. It is noted that this is just one day more than the 60 days in section 8(1B). The Taxpayer urges us to take that into consideration to mitigate the rigours of the law. He said if he had known of this earlier, he would have arranged his affairs accordingly. The 60 days rule in section 8(1B) is a statutory exemption which does not involve any element of discretion. Once the Taxpayer exceeds the 60 days, section 8(1B) does not apply.

REASONS FOR DECISION

28. In respect of the income from Company A, a Hong Kong company, it is clear and we agree with the Revenue that such income was chargeable to salaries tax under section 8(1) as income arising in or derived from employment in Hong Kong irrespective of where the services was rendered. The matters relied on by the Taxpayer, that is, the counterpart was outside Hong Kong, the deal was concluded outside Hong Kong or was subject to foreign law are entirely irrelevant.

29. In respect of the income from Company B, an overseas company, it is necessary to see under section 8(1A) whether any service was rendered in Hong Kong. The Taxpayer admits that some work was done in Hong Kong, he worked in the Hong Kong office of Company G, he had to see clients and carry out the preparatory or clerical work in Hong Kong. While many of the negotiations or preparatory work might be wasted, he was nonetheless earning an income for such futile work. In the absence of evidence to the contrary, his salary would accrue evenly from day to day. Time apportionment is thus one basis for salaries tax assessment.

30. Time apportionment is not the only basis for finding out how a taxpayer's income should be apportioned between services rendered in or services rendered outside Hong Kong. However, the burden is on the Taxpayer to prove that the assessment appealed against is excessive or incorrect (section 68(4) of the Ordinance). The Taxpayer was asked, but failed, to suggest any alternative or better basis for apportioning the income for the purposes of salaries tax assessment. In the circumstances, we have no option but to dismiss the appeal. The assessment is therefore as per the reduced assessment in the determination and set out in paragraph 9 above.

INLAND REVENUE BOARD OF REVIEW DECISIONS