Case No. D20/97

Salaries tax – source of employment income – taxpayer employed by Hong Kong representative office of offshore company – contract of employment negotiated and concluded in Hong Kong – remuneration paid and received in Hong Kong – whether Hong Kong or non-Hong Kong employment – Inland Revenue Ordinance sections 8(1) and 8(1A).

Panel: Andrew Halkyard (chairman), Albert Ho Chun Yan and Brian Hamilton Renwick.

Date of hearing: 13 February 1997.
Date of decision: 14 May 1997.

Prior to the year of assessment commencing 1 April 1993, the taxpayer was Regional Marketing Manager for an offshore company, Company A. During that time, the assessor considered that the taxpayer had a non-Hong Kong employment and was therefore entitled to time basis assessment. In February 1993 Company A merged with a company associated with Company C. The new entity became known as Company D. All of these companies therefore became associated.

During the period 1 April 1993 to 30 October 1993 the taxpayer worked for Company C in Hong Kong. He accepted that this was a Hong Kong employment and that he was therefore not entitled to time basis assessment.

With effect from 1 November 1993 he was transferred by Company C to Company D. Company D was incorporated outside Hong Kong. It had a representative office in Hong Kong to which the taxpayer was attached. The taxpayer was based in Hong Kong. His post with Company D was Regional Sales Manager. The terms and conditions of the taxpayer's employment with Company D were essentially the same as those he had with Company A and were similar to those he had with Company C. The contract of employment with Company D was negotiated and concluded in Hong Kong. The formal written agreement was, however, signed by the taxpayer outside Hong Kong. This took place two months after he commenced duty.

The taxpayer's salary from Company D was received in Hong Kong and paid by Company C in Hong Kong. Company C was reimbursed by Company D for the expenditure.

Whilst employed by Company D, the taxpayer participated in Company D's pension plan. This plan was taken out with, and managed by, an independent Hong Kong insurance company.

With effect from 1 November 1993, the taxpayer claimed that he had a non-Hong Kong employment with Company D and that he should be assessed on a time apportionment basis calculated by reference to the number of days spent in Hong Kong for the years of assessment 1993/94 and 1994/95.

Both the taxpayer and the Commissioner accepted the decision in CIR v Goepfert (1987) 2 HKTC 210 as binding authority. Both parties also accepted that whether the taxpayer had a Hong Kong employment should be determined on the basis of the criteria set out in Departmental and Interpretation Notes No 10 (revised, 1 December 1987), paragraph 3.

Held:

(1) Applying Departmental and Interpretation Notes No 10. The taxpayer had a Hong Kong employment because, although his employer was not resident in Hong Kong, his contract of employment was negotiated (to a very great degree) and concluded in Hong Kong, enforceable in Hong Kong and the place of payment of his remuneration was also Hong Kong.

(2) In the great majority of cases the location of an employment can be determined on the basis of the specific factors set out in Departmental and Interpretation Notes No 10. In appropriate cases, however, it is necessary to look beyond those factors, particularly where a locally-engaged employee has entered into a contract of employment with an offshore employer.

(3) Applying a broader test than that set out in Departmental and Interpretation Notes No 10. When examined from a practical and substantive perspective, the taxpayer's employment was located in Hong Kong. While based and working in Hong Kong he was offered and accepted a new employment on essentially the same terms as his existing Hong Kong employment. He was a member of a Hong Kong pension plan with a Hong Kong insurer. Apart from the place where the taxpayer carried out his employment duties, which can not be taken into account in determining source of employment income by virtue of Goepfert's case, the only non-Hong Kong elements present were the residence of Company D outside Hong Kong and the fact that Company D was ultimately liable for paying the taxpayer's remuneration. In substance, the taxpayer's employment was located in Hong Kong.

Appeal dismissed.

Cases referred to:

CIR v Geopfert (1987) 2 HKTC 210
Bray v Colenbrander (1953) 34 TC 138
Nathan v FCT (1918) 25 CLR 183

Liquidator, Rhodesia Metals, Ltd v CT [1940] AC 744

J R Smith for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The Taxpayer has appealed against the determination of the Commissioner in relation to salaries tax assessments raised on him for the years of assessment 1993/94 and 1994/95. The Taxpayer claims that he has a non-Hong Kong employment and therefore his income referable to the time spent working outside Hong Kong should not be assessed to salaries tax.

The facts

The facts of this appeal are set out below. We state at the outset that the evidence surrounding the employment history of the Taxpayer was complex. The facts were only established through numerous exchanges of correspondence between the Inland Revenue Department and the Taxpayer and his employers, as well as from the oral and documentary evidence adduced before us by the Taxpayer.

1. For several years up to 1991, the Taxpayer was employed by Company A, a company organised under the laws of Country B as Regional Marketing Manager for South East Asia. During this period, at least for the year of assessment 1990/91, the Taxpayer was granted time basis assessment. In other words, he was considered by the assessor to have a non-Hong Kong employment and his income from that employment was apportioned on the basis of days-in/days-out of Hong Kong. Only his income referable to days-in Hong Kong was subjected to salaries tax.

2. In February 1993, Company A merged with a company associated with Company C. In accordance with the terms of the merger, Company A then became known as Company D. It remained a Country B corporation.

3. Company C is incorporated in Country E. At all relevant times, Company C carried on business in Hong Kong through a representative office in Hong Kong.

4. From 1 April 1993 to 31 October 1993, the Taxpayer was employed by Company C as Senior Marketing Manager based in Hong Kong. The Taxpayer's contract with Company C was negotiated and concluded in Hong Kong. The contract, which was dated 29 March 1993, provided that:

(a) Company C would employ the Taxpayer 'in the capacity of Senior Marketing Manager for the areas PRC, Hong Kong and Macau …' (clause 1)

(b) Company C would 'have the right to transfer the [Taxpayer] to another post within the Company C organization with the terms and conditions hereof.' (clause 3)

(c) The Taxpayer would 'perform such duties and exercise such powers in relation to the business of Company C and its subsidiaries or associate companies as from time to time assigned or vested in him by the Company C Area Representative in Hong Kong, Company C officers and/or managers from Company C head office, its subsidiaries or associate companies and as may be consistent with his office.' (clause 4(a))

(d) In addition to his normal monthly salary, the Taxpayer would receive a 13th month salary payable on the last day of December each year. (clause 6(b))

(e) The contract of employment was governed by the laws of Hong Kong and the courts of Hong Kong would have exclusive jurisdiction in respect of any legal action or proceedings. (clause 14)

5. With effect from 1 November 1993 the Taxpayer was transferred from Company C to take up employment with Company D as Regional Sales Manager. At all relevant times Company D only employed two staff in Hong Kong, the Regional Sales Manager and his secretary. Administrative and office support for Company D in Hong Kong was provided by its affiliated company, Company C Hong Kong Co Ltd, a company incorporated in Hong Kong. All the expenses of Company D's office in Hong Kong were met by Company C Hong Kong Co Ltd, which is then reimbursed by Company D's head office in Country B.

6. The background to the Taxpayer's change of employment is as follows. In August 1993 he was approached by the Vice President of Sales and Marketing in Company D to join Company D as its Regional Sales Manager. Around early October 1993 Company C requested the Taxpayer to relocate to Country F for a period of two years. He was unwilling to work outside Hong Kong and did not want to be relocated. When approached again by the Vice President of Company D just prior to 10 October 1993, the Taxpayer accepted the post of Regional Sales Manager. In order to maintain continuity (his predecessor at Company D having left his post on 31 October 1993), the Taxpayer commenced working for Company D on and with effect from 1 November 1993. At around this time, he submitted a letter of resignation to Company C with an effective date of 31 October 1993. Apart from 4 to 6 October 1993, when he was in Country F, the Taxpayer was in Hong Kong throughout the months of August and October 1993.

7. On 12 October 1993 the Vice President of Company D sent a facsimile addressed to the Taxpayer in Hong Kong which stated:

> 'This will confirm our phone regarding your employment transfer from Company C Hong Kong to Company D Hong Kong. We are very pleased to offer you the position of Regional Sales Manager effective 1 November (or

> sooner if available). We will directly transfer you over to Company D at the same salary and benefit package, plus the Company D Sales Bonus program with which you are familiar.'

8. On 12 October 1993 the Taxpayer received a letter signed by both the Area Representative of Company C and the Vice President of Company D which stated:

> '… we are pleased to confirm you [were] employed by this company [Company C] as the Senior Marketing Manager on the terms and conditions stipulated in the Employment Agreement dated 29 March 1993[1] from even date to 31 October 1993 inclusive.
>
> With effect from 1 November 1993, you have been transferred to [Company D] as the Regional Sales Manager of South East Asia on the same terms and conditions mentioned above. You are responsible for marketing the precision materials components of [Company D] and reporting directly to [the Vice President, Sales and Marketing, Company D].
>
> During your employment with [Company D], this company is responsible for paying all your salaries and expenses incurred in connection with the discharge of your duties.'

9. The Taxpayer's contract with Company D had essentially the same terms and conditions as those applying to the Taxpayer when he was employed by Company A, except that his annual salary was the same as that which he received from Company C. The contract, which was dated 9 January 1994, provided that:

(a) Company D would employ the Taxpayer 'in the capacity of Regional Sales Manager for the areas South East Asia (PRC, Hong Kong, Taiwan, Singapore, Malaysia, Indonesia, Thailand and Philippines) … commencing on the 1st day of November 1993.' (clause 1)

(b) The Taxpayer would 'perform such duties and exercise such powers in relation to the business of Company D and its subsidiaries or associate companies as from time to time assigned or vested in him by Vice President from Company D head office, its subsidiaries or associate companies and as may be consistent with his office.' (clause 2(a))

(c) In addition to his normal monthly salary, the Taxpayer would receive a 13th month salary payable on the last day of December each year. (clause 4(b))

(d) The contract of employment was governed by the laws of Country B. (clause 12)

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[1] Fact 1 refers.

10. Notwithstanding that the remuneration clause in the Taxpayer's contract with Company D only referred to a monthly and an additional 13th month salary (fact 9(c) refers), the Taxpayer was also entitled to a sales bonus from Company D.[2] As indicated at fact 9, the terms of employment, including the sales bonus, were essentially the same as those applying to the Taxpayer when he worked previously for Company A. Moreover, apart from the entitlement to the sales bonus and participation in a pension plan, the terms of the Taxpayer's employment with Company D were essentially the same as those applying to the Taxpayer when he worked for Company C.

11. The Taxpayer signed the agreement with Company D on 9 January 1994 when he attended Company D sales meeting in Country B. At that time he had already been working for Company D for slightly over two months. The Taxpayer agreed that the general terms and conditions of his employment were settled by October 1993 except for his sales bonus and pension entitlements. The Taxpayer's explanation in relation to these matters are as follows:

(a) The sales bonus programme for Company D for the fiscal year November 1993 to October 1994 was discussed by Company D in Country B with its country managers, including the Taxpayer, in January 1994. It was signed by the Taxpayer on 26 January 1994. The programme operates for one year 'and this process was repeated in 1995'.

(b) 'After I signed the agreement in January 1994, the only difference between the terms and conditions [of my employment with Company D during the period] November 1993 to January 1994 concerned the pension plan. The pension plan is non-contributory and has been taken out with Company G, a company of investment managers in Hong Kong.'[3]

12. While employed by Company D, the Taxpayer's salary was paid in Hong Kong. The Taxpayer's explanation of this matter and our findings are as follows:

(a) For administrative purposes, the Taxpayer remained on the payroll of Company C after 1 November 1993. He was concurrently on Company D's payroll; and

(b) With effect from 1 November 1993 Company C continued to pay the Taxpayer's salary on behalf of Company D and then debited Company D for the same amount via internal transfer. Specifically, the Taxpayer's monthly salary was paid by cheque by Company C through its bank account in Hong Kong and Company C was later reimbursed for this expenditure by Company D.

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2 Compare fact 7.

3 In the contract of employment set out at fact 9 there is no mention of participation in any pension plan.

13. In its employer's return for the year of assessment 1993/94 in respect of the Taxpayer, Company C disclosed that the Taxpayer was employed by it for the whole year as Regional Sales Manager and that he received remuneration from that employment of $509,500. The return stated that the Taxpayer was not paid wholly or partly by an overseas concern.

14. In his salaries tax return for the year of assessment 1993/94 the Taxpayer disclosed that his employer for the whole year was Company D. He also attached a schedule to the return showing that he was absent from Hong Kong during the year for a total of 60 days.[4]

15. The assessor raised a salaries tax assessment on the Taxpayer for the year of assessment 1993/94 on the basis of the income disclosed at fact 13. The assessment noted:

> 'Assessable income: $509,500 × 322/365 = $449,476*
> *Time basis allowed subject to review and receipt of further information'

16. The Taxpayer objected to the assessment on the grounds that:

> 'The actual count of my absence from Hong Kong while on business was 60 days instead of 43 days …'

17. By letter dated 9 October 1995 the assessor advised the Taxpayer that he was of the opinion that the location of his employment was in Hong Kong and that assessment of his income on a time apportionment basis (fact 15 refers) was inappropriate.

18. The Taxpayer responded by stating that Company D was formerly known as Company A, and that he was employed by Company A since 1989 in exactly the same capacity of Regional Sales Manager as he is now employed by Company D. From 1989 to 1991 the Taxpayer stated that he was granted time apportionment assessment and thus enjoyed tax exemption for the income referable to the period of his business related absences from Hong Kong. The Taxpayer admitted that his employment with Company C was concluded in Hong Kong, and accepted he was not entitled to time apportioned assessment for his income from that employment, but that this was 'forfeited' since his transfer to Company D on 1 November 1993.

19. In its employer's return for the year of assessment 1994/95 in respect of the Taxpayer, Company C disclosed that the Taxpayer was employed by it for the whole year as Regional Sales Manager and that he received remuneration from that employment of $790,520. The return stated that the Taxpayer was not paid wholly or partly by an overseas concern.

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[4] Inclusive of day of departure and day of return to Hong Kong. Calculated exclusive of the day of return, total absences amounted to 43 days.

20. In his salaries tax return for the year of assessment 1994/95 the Taxpayer disclosed that he was employed for the whole year by Company C. He also attached a schedule showing that he was absent from Hong Kong during the year for a total of 114 days.[5]

21. The assessor raised a salaries tax assessment on the Taxpayer for the year of assessment 1994/95 on the income disclosed at fact 19. Time apportionment was not allowed by the assessor.

22. The Taxpayer objected to the assessment on the grounds that it was incorrect and that time apportioned assessment should be allowed because his present employment was the same as that in previous years in respect of Company A where 'the claim for time-apportionment [had] been approved' and that he 'should therefore be assessed on the same basis as' he had been for those years.

23. On 25 May 1996 the Commissioner rejected the Taxpayer's objection to his salaries tax assessments for the years of assessment 1993/94 and 1994/95. She confirmed the assessor's view that the Taxpayer had a Hong Kong employment, that time apportioned assessment was not appropriate and determined that all the income disclosed at facts 13 ($509,500) and 19 ($790,520) was subject to salaries tax.

24. The Taxpayer lodged a valid appeal to the Board of Review against the Commissioner's determination. Although he accepted that his employment with Company C was a Hong Kong employment, he claimed that his employment with Company D was an offshore employment and that he should be entitled to time apportioned assessment by reference to his absences from Hong Kong while employed by Company D.

The contentions for the Taxpayer

The regimen of the Taxpayer's argument before us was that because his employment with Company A was confirmed by the Inland Revenue Department as an overseas employment, and he was thus granted time basis assessment (fact 1 refers), similar treatment should be granted for his employment with Company D because (1) Company D is the successor to Company A (fact 2 refers), (2) his duties with Company D are exactly the same as they were when he was employed by Company A, (3) he enjoyed the same terms of employment, including benefits and sales bonus, when employed by both Company A and Company D and (4) the employment with Company D was offered, negotiated, concluded and enforceable in Country B.

In order to determine the location of his employment with Company D, the Taxpayer contended that it is only his employment contract with Company D that is relevant and not his employment contract with Company C. In this regard, he reiterated that his terms of employment with Company D, including benefit package and sales bonus, were

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[5] Inclusive of day of departure and day of return to Hong Kong. Calculated exclusive of the day of return, total absences amounted to 95 days.

not available to him when he was employed by Company C but were available to him when he was employed by Company A and this latter employment was confirmed by the assessor as a non-Hong Kong employment.

The Taxpayer claimed that the employer's returns filed in relation to him by Company C (facts 13 and 19 refer) were incorrect because he started a new employment with Company D on 1 November 1993. Similarly, the Taxpayer claimed that his own salaries tax returns (facts 14 and 20 refer) were incorrect because they did not disclose that he ceased employment with Company C on 31 October 1993 and started a new employment with Company D on 1 November 1993.

Although the Taxpayer acknowledged that the general terms and conditions of his employment with Company D were settled by October 1993 (facts 6, 7, 8 and 10 refer), he maintained that his contract of employment was negotiated and signed two months after the effective date of the employment (1 November 1993) because the former Regional Sales Manager of Company D resigned in October 1993 and he had to take up the post urgently in order to maintain continuity.

Finally, the Taxpayer argued that, based upon the Commissioner's practice, his employment with Company D should be taken as a non-Hong Kong employment and that time basis assessment was appropriate in his case. We deal with this matter under the heading 'Analysis' below.

The issue before us

Both parties agree that the issue before us can be simply stated: was the Taxpayer's income from Company D derived from a Hong Kong employment (in which case it must be fully subject to salaries tax under section 8(1)) or a non-Hong Kong employment (in which case it is subject to salaries tax under section 8(1A) only in respect of income derived from services rendered in Hong Kong).

The statutory provision and the interpretation of that provision

Section 8 of the Inland Revenue Ordinance provides:

> *'(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 …*
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> *(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;'*

These provisions were considered in CIR v Goepfert (1987) 2 HKTC 210, which was accepted as binding authority by both parties, Macdougall J stated at 236 – 237:

> *'… 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.* [our emphasis]
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> *That being so, what is the correct approach to the enquiry? … Specifically, it is necessary to look for the place where the income really comes to the employee, that is to say, where the source of income, the employment, is located. As Sir Wilfred Greene said, regard must first be had to the contract of employment.'*

Proceeding from this basis, both parties accepted that whether the Taxpayer's employment with Company D was located in Hong Kong or overseas should be determined by applying the following paragraph in Inland Revenue Departmental Interpretation and Practice Notes No 10: 'The Charge to Salaries Tax' (revised, 1 December 1987), paragraph 3 of which states:

> *'As a consequence of the Goepfert decision and the observations contained in the judgment the Department will in future accept, subject to the qualification at paragraph 6, that an employment is located outside Hong Kong, in other words that a 'non-Hong Kong' employment exists, where the following three factors are present, namely:*
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> *(a) the contract of employment was negotiated and entered into, and is enforceable outside Hong Kong;*
> *(b) the employer is resident outside Hong Kong; and*
> *(c) the employee's remuneration is paid to him outside Hong Kong.'*

Paragraph 6 states:

> *'It is expected that in the great majority of cases the question of Hong Kong or non-Hong Kong employment will be resolved by considering only the three factors mentioned above. However, the Department must reserve the right, in appropriate case, to look beyond those factors. As was pointed out in the Goepfert decision:*
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> > *"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 locus of the source of income, the employment."*

The situations in which further factors will have to be examined cannot be laid down with precision. However, cases where a person changes his employment from an employer resident in Hong Kong to one resident outside Hong Kong with little apparent change in the nature of duties performed will be given careful scrutiny. Similar attention will be given to cases where locally-engaged employees enter into offshore contracts of employment.'

Analysis

As both parties argued this appeal purely upon the application of the Inland Revenue Departmental Interpretation and Practice Note No 10 quoted above, we have decided that, at least initially, we should examine the three factors set out therein in order to determine the location of the Taxpayer's employment.

(a) *Where was the contract of employment negotiated and entered into, and enforceable?* We reject the Taxpayer's contention that his contract was negotiated, concluded and enforceable outside Hong Kong. Granted that the written contract was signed in Country B on 9 January 1994. But by January 1994 the Taxpayer had already commenced work in Hong Kong for Company D for over two months, the terms of the employment were essentially the same as those applying to his employment with Company C (which was negotiated and concluded in Hong Kong) and the negotiations and conclusion of the Taxpayer's transfer from Company C to Company D all took place in August and October 1993 when, apart from the period 4 to 6 October 1993, the Taxpayer was at all times in Hong Kong.

We accept that finalisation of the sales bonus programme for Company D for the fiscal year November 1993 to October 1994 took place in Country B in January 1994. But the facts before us indicate that settlement of this programme by Company D with its country managers was an annual process (fact 11(a) refers). It was also just one part of the Taxpayer's overall remuneration package and was known by him, and accepted in principle by him, in October 1993 (fact 7 refers).

The Taxpayer also acknowledged (fact 11(b) refers) that, after signing the contract on 9 January 1994, the only difference between the terms and conditions of his employment with Company D prior to that date related to Company D's pension plan. The Taxpayer claimed that this plan is enforceable in Country B. That may be: but we simply have no evidence before us to evaluate this claim. However, what we have found as a fact is that the pension plan was taken out with Company G, a Hong Kong based insurer. This would clearly have been a Hong Kong based, Hong Kong funded and Hong Kong regulated retirement scheme. As indicated by the Taxpayer in his evidence, he was not eligible for inclusion in Company D's scheme established in Country B, being neither a Country B national nor employed in Country B.

On the basis of the facts we have found, we have no hesitation in deciding that the Taxpayer's employment was, to a very great degree, negotiated and concluded in Hong

Kong. Moreover, the Taxpayer is resident in Hong Kong and Company D has a place in Hong Kong at which legal process can be served. The employment agreement is undoubtedly enforceable in Hong Kong.

(b) *Where was the employer resident?* Company D is a Country B corporation. The Commissioner did not challenge the Taxpayer's claim that it was resident outside Hong Kong.

(c) *Where was the employee's remuneration paid to him?* The Taxpayer acknowledged that his salary was paid in Hong Kong by Company C but argued that this was simply for ease of administration. The Commissioner disputed the argument that the Taxpayer's remuneration was paid to him outside Hong Kong on both narrow and expansive grounds.

The narrow ground was that, on the facts before us, the Taxpayer was paid from Hong Kong and received by the Taxpayer in Hong Kong in his Hong Kong bank account. It therefore followed that, in strict geographic terms, the Taxpayer's remuneration for working for Company D was paid to him in Hong Kong.

The expansive ground, for which no authority was cited apart from Goepfert's case, focused on factors other than simply the geographic place of payment and receipt. It rested on the fact that the Taxpayer admitted he was on Company C's payroll (fact 12 refers) and that the Taxpayer's remuneration was paid from the business generated from Hong Kong.

Without the benefit of hearing full argument upon the interpretation of Goepfert's case, we could only evaluate the competing arguments on this matter by undertaking independent research. The difficulty we discovered is that the English cases on which Macdougall J relied in Goepfert's case are themselves not entirely clear us to how the location of an employment is to be determined. However, the one common theme running through these cases is: from where does the employee receive the salary?[6]

Having found as fact that the Taxpayer remained on Company C's payroll in Hong Kong and that he was paid his salary through an inter-bank transfer in Hong Kong, there is a basis on which to support the Commissioner's narrow argument in this case. To argue otherwise, the Taxpayer would need to have been paid directly by Company D into (ideally) a foreign bank account.[7]

We note that an inter-company agreement exists between Company D and Company C for Company D to reimburse Company C for the Taxpayer's remuneration. But this agreement was not introduced in evidence before us. It may be that in paying the Taxpayer's remuneration Company C was simply acting as Company D's agent, being

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[6] See, for example, the speech of Lord Normand in Bray v Colenbrander [1953] 34 TC 138, 156 which states that the issue in dispute in that case was whether employment income was taxable because the place of payment of remuneration was outside the United Kingdom.

[7] As in Goepfert's case: see [1987] 2 HKTC 210, 216.

directly reimbursed for each and every payment incurred; alternatively, Company C's representative office in Hong Kong may have been reimbursed for a wide variety of costs, only one of which related to the remuneration paid to the Taxpayer. Company C may have been reimbursed on a cost recovery basis; alternatively, Company C may have been reimbursed on a cost plus basis. And in this regard what was the role, if any, of Company C Hong Kong Co Ltd (fact 5 refers)? On all these matters, the evidence was sketchy and we are not prepared to speculate. We can only conclude on the facts found by us that, strictly speaking, the place of payment of the Taxpayer's remuneration was in Hong Kong.

But whether we are right or wrong in the foregoing analysis, it would seem to be absurdly simple and inappropriate in this age of electronic banking to reach our decision on the basis that the place of payment determined the source of employment income in this case. Surely source of employment income, which should be determined as a 'hard practical matter of fact',[8] should not depend in the final analysis upon the place from where an employee is actually paid. Accordingly, we decided to look more broadly, from a practical perspective, at where the Taxpayer's employment was located.

Taking this approach, we have no hesitation in concluding that the Taxpayer's contract of employment was located in Hong Kong. The bare facts are that the Taxpayer, while based and working in Hong Kong, was offered and accepted a new employment on essentially the same terms and conditions as those applying to his existing employment. Within three weeks and without leaving Hong Kong, he commenced work for his new employer. He became a member of a pension plan which was taken out in Hong Kong, which was based in Hong Kong and which was with a Hong Kong insurer. The only major non-Hong Kong element on the facts before us is that the Taxpayer's employer, Company D, was resident outside Hong Kong and as employer was ultimately liable for paying his remuneration. In all the circumstances, we conclude that the substance of the matter shows that the Taxpayer's employment was located in Hong Kong.

We wish to make clear that we should not be taken as disputing the Commissioner's statement in Departmental Interpretation and Practice Note No 10 that in the great majority of cases the location of an employment will be resolved by considering only the three factors mentioned above. However, as the Commissioner recognises, in appropriate cases it is necessary to look beyond those factors. Although there is absolutely no suggestion in the Taxpayer's case that the change in his employment contract was motivated by tax considerations, this is nonetheless a case where a locally-engaged employee has entered into a contract of employment with an offshore employer. It is not inappropriate, therefore, to consider other factors to show in substance where the employment is located.

We also record that we fully understand the Taxpayer's grievance in this case. Virtually all his arguments were based upon the analogy to his previous employment with Company A and the fact that he was granted time basis assessment on his income from that

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[8] See Nathan v FCT [1918] 25 CLR 183, 189 and Liquidator, Rhodesia Metals, Ltd v CT [1940] AC 744, 789.

employment. Whether he was properly granted time basis assessment in those earlier years, we cannot say. There are simply insufficient facts before us to decide. In the result, we can only look to the facts regarding the Taxpayer's employment with Company D, which is the issue in dispute in this appeal. And, in this regard, whether one simply considers the factors set out in Departmental Interpretation and Practice Note 10 or takes a broader approach as indicated above, we conclude that the Taxpayer's employment was located in Hong Kong. Time basis assessment is not, therefore, available to the Taxpayer for the years of assessment under appeal.

For the above reasons the appeal is dismissed.