

**Case No. D21/13**

**Salaries tax** – director’s fee income – source – sections 8(1)(a) and 68(4) of the Inland Revenue Ordinance.

Panel: Albert T da Rosa, Jr (chairman), Lo Pui Yin and Shum Sze Man Erik.

Date of hearing: 28 May 2013.

Date of decision: 12 November 2013.

The Taxpayer held his office as an independent non-executive director in the Company and received a director’s fee of HK\$120,000 for each of the years of assessment 2005/06 and 2006/07.

The Company was incorporated as an exempted company in Place C and was registered as an overseas company in Hong Kong under Part XI of the Companies Ordinance. Its shares were listed on The Stock Exchange of Hong Kong Limited.

The Company stated that its principal place of business was Address D in Hong Kong and its head office was Address E in Mainland China.

The Taxpayer contended that the place of management and control of the Company is in Mainland China. The director’s fee he received from the Company was sourced outside Hong Kong and should not be subject to salaries tax.

**Held:**

1. The only issue in dispute is whether such director’s fee income was arising in or derived from Hong Kong.
2. The test lies not in where the Taxpayer exercises his office but in where lies that office. The office of a director is located in the place where the company is located.
3. The test for a company residence is not where it is registered but where its real business is carried on.
4. The place of the board meeting of the Company is in itself irrelevant but a factor to consider. In this particular case, the factor of the ‘place of board meeting’ is not so dominating for one to come to the conclusion that the place

of management and control of the Company is in Mainland China.

5. Irrespective of whether it is also resident elsewhere, the Company was resident in Hong Kong:
  - 5.1 The main activities of the Company is to maintain its status as a company whose securities are listed on the Stock Exchange of Hong Kong and to leverage on the Hong Kong banking and financial infrastructure to obtain corporate finance.
  - 5.2 The Company maintained its principal place of business, Branch Share Registrar and the Transfer Office in Hong Kong.
  - 5.3 The Company carried on a business of investment holding in an address in Hong Kong
  - 5.4 The Company's shares were listed in Hong Kong. The appointment of the Taxpayer as an independent non-executive director of the Company was to comply with and was governed by the Listing Rules.
  - 5.5 The annual general meetings of the Company were held in Hong Kong.
  - 5.6 The Company filed returns with the Companies Registry, employer's returns and Profits Tax returns with the Revenue.
  - 5.7 The Company employed staff, maintained bank accounts, has its accounts audited in Hong Kong.

**Appeal dismissed.**

Cases referred to:

CIR v Goepfert [1987] 2 HKTC 210  
McMillan v Guest [1942] 24 TC 190  
D123/02, IRBRD, vol 18, 150  
Todd v The Egyptian Delta Land and Investment Co Ltd [1982] 14 TC 119  
The Swedish Central Railway Co Ltd v Thompson [1924] 9 TC 342  
Charter View Holdings (BVI) Ltd v Corona Investment Ltd & Another [1998] 1 HKLRD 469  
De Beers Consolidated Mines Limited v Howe [1906] 5 TC 198  
Union Corporation Ltd v CIR 34 TC 207  
D59/03, IRBRD, vol 18, 626

Taxpayer in person.

Yau Yuen Chun and Chan Siu Ying Shirley for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. Mr A ('the Taxpayer') has objected to the Personal Assessments for the years of assessment 2005/06 and 2006/07 raised on him. The Taxpayer claims that the director's fee he received from Company B ('the Company' the shares of which are listed on the Stock Exchange of Hong Kong Limited at the relevant time) should not form part of his total income.

2. By the determination ('the Determination') dated 10 December 2012, the Deputy Commissioner of Inland Revenue ('the CIR') upheld the relevant Personal Assessments for the years of assessment 2005/06 and 2006/07 that is to say:

2.1. Personal Assessment for the year of assessment 2005/06 under Charge Number X-XXXXXXX-XX-X, dated 28 April 2009, showing Reduced Total Income of \$954,666 (the Taxpayer's share being \$515,058) with tax payable thereon of \$114,133 (the Taxpayer's share being \$61,577); and

2.2. Personal Assessment for the year of assessment 2006/07 under Charge Number X-XXXXXXX-XX-X, dated 28 April 2009, showing Reduced Total Income of \$1,011,230 (the Taxpayer's share being \$542,190) with tax payable thereon of \$103,933 (the Taxpayer's share being \$55,726).

3. In his Grounds of Appeal, the Taxpayer states:

'The Commissioner incorrectly concluded that the location of the central management and resident of the Company from which I received director's fee was located in Hong Kong and accordingly, the Commissioner incorrectly concluded that the director's fee was sourced in Hong Kong and subject to Hong Kong Salaries tax.'

4. The director's fee in question was HK\$120,000 for each of the years of assessment 2005/06 and 2006/07 respectively.

5. At the hearing the parties agreed to the facts as stated in paragraphs 1(1) to 1(15)(d) of the Determination ('the Agreed Facts' set out in paragraph 7 herein).

6. The Taxpayer gave evidence on affirmation.

### **The Agreed Facts**

7. The Agreed Facts are as follows:

7.1. Mr A ('the Taxpayer') have objected to the Personal Assessments for the years of assessment 2005/06 and 2006/07 raised on him. The Taxpayer claims that the director's fee he received from Company B ('the Company') should not form part of his total income.

7.2. The Company was incorporated as an exempted company with limited liability in Place C on XX July 2000 and was registered as an overseas company in Hong Kong under Part XI of the Companies Ordinance on XX November 2000. Its shares were listed on The Stock Exchange of Hong Kong Limited on XX May 2001.

(a) The Company, in the annual reports, stated that its principal place of business was Address D ('the Hong Kong Address') and its head office was Address E ('the Mainland Address'). It maintained its Branch Share Registrar and Transfer Office in Hong Kong.

(b) The directors of the Company at the relevant times were as follows:

Executive directors  
(8 names concealed)

Non-executive directors  
(2 names concealed)

Independent non-executive directors  
(2 names concealed)

(c) The Company in the Directors' Reports for the years ended 31 December 2005 and 2006 described its principal activities as investment holdings.

(d) The Company's financial statements for the years ended 31 December 2005 and 2006 were audited by Company F, certified public accountants, in Hong Kong.

(e) The Company filed employer's returns in respect of its employees and directors to the Inland Revenue Department.

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7.3. By a letter dated 31 March 2005, the Company appointed the Taxpayer as an independent non-executive director for a term of 3 years commenced on 31 March 2005 and expired on 30 March 2008 under the following terms:

- (a) the appointment would be governed by the Rules Governing the Listing of Securities on the Stock Exchange.
- (b) the Company would pay the Taxpayer director's fee of \$120,000 per annum during the term of office.

7.4. The company filed employer's returns in respect of the Taxpayer for the years of assessment 2005/06 and 2006/07 and reported the following particulars:

	<u>2005/06</u>	<u>2006/07</u>
(a) Period of employment:	1-4-2005 – 31-3-2006	1-4-2006 – 31-3-2007
(b) Capacity in which employed	Non-executive director	
(c) Income accrued for the year Director's fee	<u>\$120,000</u>	<u>\$120,000</u>

7.5. Company G filed an employer's return in respect of the Taxpayer and reported that total income accrued to the Taxpayer for the period from 1 April 2005 to 31 March 2006 was \$1,000.

7.6. The Taxpayer submitted Tax Return-Individuals for the years of assessment 2005/06 and 2006/07 in which he:

- (a) declared the following income and profits:

	<u>2005/06</u>	<u>2006/07</u>
<u>Salaries Tax</u>		
Name of Employer	The Company	
Income accrued for the year	Independent non-executive director	
Director's fee		
Period	1-4-2005 – 31-3-2006	1-4-2006 – 31-3-2007
Income (Total)	<u>\$120,000</u>	<u>\$120,000</u>
<u>Profits Tax</u>		
Name of business	Company H	
Assessable Profits	<u>\$394,058</u>	<u>\$422,190</u>

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- (b) made a remark ‘offshore income’ against the employment income.
- (c) elected for Personal Assessment.
- (d) claimed deduction for interest payments to produce rental income of \$3,526 for the year of assessment 2005/06.

7.7. The Taxpayer claimed that the director’s fee of \$120,000 received from the Company in each of the years of assessment 2005/06 and 2006/07 (‘the Fee’) was sourced outside Hong Kong and thus should not be subject to salaries tax. His reasons were as follows:

‘Notwithstanding that [the Company] has a place of office in Hong Kong, its registered office is situated at [Address J] in [Place C].

Besides, its head office is situated at [the Mainland Address], which is the place where [the Company] conducted its business and majority of its directors located...

You would agree that in a decided case, it has been decided that the source of director’s fee is the location where the directors located to manage the company which is the registered office of the company.

Accordingly, the source of [the Fee] in my case should be in [Place C] or in [Mainland China].’

7.8. In response to the Assessor’s enquires, the Company provided the following information:

- (a) The appointment of the Taxpayer as independent non-executive director was approved by the shareholders in the annual meeting held on 23 May 2005.
- (b) Schedules of board meetings attended by the Taxpayer were as follows:

- (i) 1 April 2005 to 31 March 2006

<u>Date</u>	<u>Type of meeting</u>	<u>Issue to be considered</u>	<u>Place of meeting</u>
19-04-2005	Audit Committee	2004 annual results	Hong Kong Address

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<u>Date</u>	<u>Type of meeting</u>	<u>Issue to be considered</u>	<u>Place of meeting</u>
20-04-2005	Board	2004 annual results	Hong Kong Address
10-06-2005	Board	Related party transaction	Hong Kong Address via telephone
10-06-2005	Board	Exercise of share options	Hong Kong Address via telephone
22-06-2005	Board	Exercise of share options	Hong Kong Address via telephone
21-07-2005	Board	Bond issue	Hong Kong Address via telephone
02-08-2005	Board	Conversion of convertible bonds and convertible bond committee	Hong Kong Address via telephone
31-08-2005	Board	proposed establishment of a Mainland China equity joint venture in City K	Hong Kong Address via telephone
20-09-2005	Audit Committee	2005 interim results	Hong Kong Address
21-09-2005	Board	2005 interim results	Hong Kong Address
05-10-2005	Board	Increased in registered share capital of City L's Company M	Hong Kong Address via telephone
09-11-2005	Board	Tendering of Project N in City P	Hong Kong Address via telephone
20-12-2005	Board	Related party transaction	Hong Kong Address via telephone
20-12-2005	Board	Internal control review	Hong Kong Address via telephone
30-12-2005	Board	Year-end review	Hong Kong Address via telephone
15-02-2006	Board	Proposed establishment of a new project in City K	Hong Kong Address via telephone

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<u>Date</u>	<u>Type of meeting</u>	<u>Issue to be considered</u>	<u>Place of meeting</u>
15-02-2006	Board	Circular in relation to the proposed establishment in a new project in City K	Hong Kong Address via telephone
03-03-2006	Board	Placement of existing shares	Hong Kong Address
15-03-2006	Remuneration Committee	Granting share option	Hong Kong Address via telephone
15-03-2006	Board	Granting share option	Hong Kong Address via telephone

(ii) 1 April 2006 to 31 March 2007

<u>Date</u>	<u>Type of meeting</u>	<u>Issue to be considered</u>	<u>Place of meeting</u>
06-04-2006	Board	Related party transactions	Hong Kong Address via telephone
20-04-2006	Audit Committee	2005 annual results	Hong Kong Address
20-04-2006	Board	2005 annual results	Hong Kong Address
24-07-2006	Board	2006 interim review	Hong Kong Address via telephone
19-09-2006	Audit Committee	2006 annual results	Hong Kong Address
20-09-2006	Board	2006 annual results	Hong Kong Address via telephone
03-11-2006	Board	Connected Transactions (1) Disposal of DME Business (2) Acquisition of 20% equity interest in City Q's Company R	Hong Kong Address via telephone
19-12-2006	Board	Year-end review	Hong Kong Address via telephone
28-02-2007	Board	NED appointment and terms	Hong Kong Address via telephone



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<u>Date</u>	<u>Type of meeting</u>	<u>Issue to be considered</u>	<u>Place of meeting</u>
22-03-2007	Board	AC terms (regular board meeting)	Hong Kong Address via telephone

- (c) All the board meetings for the years of assessment 2005/06 and 2006/07 were held in the Hong Kong Address. Majority of directors stayed in Mainland Address. They joined the meetings via telephone.
- (d) The duties and responsibilities of the Taxpayer as an independent non-executive director included:
- (i) review the performance of the Company and formulate business strategy of the group;
  - (ii) review and approve the annual and interim results of the Company;
  - (iii) review the effectiveness of the system of internal control and risk management;
  - (iv) review connected transactions of the Company;
  - (v) act as member of the Remuneration Committee of the Company;
  - (vi) act as member of the Audit Committee of the Company;
  - (vii) perform other duties as required under the Companies Ordinance and the Listing Rules.
  - (viii) review and approve transactions which public announcements were required.
- (e) The Taxpayer performed the duties in Fact 7.8(d) in Hong Kong.
- 7.9. The Assessor considered that the Fee should be chargeable to tax. He raised on the Taxpayer the following Personal Assessments for the years of assessment 2005/06 and 2006/07:

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Year of assessment	2005/06		2006/07	
	Total \$	The Taxpayer's share \$	Total \$	The Taxpayer's share \$
Income from The Company		120,000		120,000
Company G		<u>1,000</u>		<u>-</u>
Employment	641,054	121,000	659,149	120,000
Businesses (sole proprietorship)	394,058	394,058	422,190	422,190
Properties (partly owned)	<u>2,830</u>	<u>2,830</u>	<u>-</u>	<u>-</u>
Total Income	1,037,942	517,888	1,081,339	542,190
<u>Less:</u> Deductions				
Interest payable on properties let	2,830	2,830	-	-
Charitable donations	200	-	100	-
Home loan interest	68,246	-	58,009	-
Retirement scheme contributions	<u>12,000</u>	<u>-</u>	<u>12,000</u>	<u>-</u>
Reduced total income	954,666	<u>515,058</u>	1,011,230	<u>542,190</u>
<u>Less : Allowance</u>	<u>330,000</u>		<u>330,000</u>	
Net Chargeable Income	<u>624,666</u>		<u>681,230</u>	
Tax Payable thereon (After tax reduction)	<u>114,113</u>	<u>61,577</u>	<u>103,933</u>	<u>55,726</u>

7.10. The Taxpayer objected to the assessments in Fact 7.9 on the ground that the Fee was offshore income. He put forth the following contentions:

- (a) 'I disagree with the reply from [the Company] confirming that all the board meetings were held in Hong Kong. It is a fact that some of the board meetings were held in Hong Kong and some of the board meetings were held in [Mainland China]. But, your attention is also drawn to the fact that majority of the directors, including the Chairman and the Chief Executive Officers, are [Mainland China] residents who were working at the Company's [Mainland China] head office as the Company's business is operated and managed in [Mainland China]. Beside, the board meetings were usually conducted in the mode of tele-conference since those directors who located in [Mainland China] would not physically presented in Hong Kong for those meetings that held in Hong Kong and those directors who located in Hong Kong would not physically presented in [Mainland China] for those meetings that held in [Mainland China]. In this circumstance, it is hard to define where the board meetings were held and meaningless to say where the board meetings were held.'

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- (b) ‘I have requested the Company’s secretary to send you a letter directly to make further clarification on where and how the meetings were conducted...’
- (c) ‘As the Company’s registered office is not situated in Hong Kong, the Company’s business is not in Hong Kong, majority of the directors, including the Chairman and the Chief Executive Officer, are non-Hong Kong residents and majority of the board meetings were conducted outside Hong Kong, you would agree that the central management of the Company is located outside Hong Kong and accordingly, [the Fee] is not subject to Hong Kong salaries tax.’

7.11. The Assessor received a letter from the Company in which it stated that:

‘ We would like to clarify that not all the board meetings held in the years of [assessment] 2005/06 and 2006/07 were held at [the Company’s Hong Kong Address]. Some of the board meetings were held at our head office in [Mainland China]. Besides, a majority of the board meetings were conducted in the mode of tele-conference as not all the directors were located at the place where the board meetings were held. Usually, most of the directors were located in [Mainland China] and a small proportion of directors were located in Hong Kong during the meetings since our business was in [Mainland China] and a majority of our directors are [Mainland China] residents.’

7.12. In reply to the Assessor’s further enquires, the Company provided the following information:

- (a) The Company employed the following number of staff during the years of assessment 2005/06 and 2006/07:

<u>Year of assessment</u>	<u>In Hong Kong</u>	<u>Outside Hong Kong</u>
2005/06	7	10,324
2006/07	8	13,347

- (b) The Company maintained the following bank accounts in Hong Kong during the years of assessment 2005/06 and 2006/07:

<u>Name of Bank</u>	<u>Account number</u>
Bank S	XXX-XXX-XXXXXXXXX, XXX-XXX-XXXXXXXXX
Bank T	XXX-XXXXXXXXXX, XXX-XXXXXXXXXX

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7.13. The Company provided minutes of directors' meetings held during the years of assessment 2005/06 and 2006/07 which showed that the Taxpayer attended in Hong Kong the following directors' meetings:

(a) Year of assessment 2005/06

<u>Date</u>	<u>Place meeting held</u>	<u>The mode in which the Taxpayer participated in the meeting</u>
20-04-2005	Hong Kong Address	Present at the place of meeting
10-06-2005	Hong Kong Address	In Hong Kong via telephone
10-06-2005	The Mainland Address	In Hong Kong via telephone
22-06-2005	The Mainland Address	In Hong Kong via telephone
21-07-2005	Hong Kong Address	In Hong Kong via telephone
02-08-2005	Hong Kong Address	In Hong Kong via telephone
31-08-2005	The Mainland Address	In Hong Kong via telephone
21-09-2005	Hong Kong Address	Present at the place of meeting
05-10-2005	The Mainland Address	In Hong Kong via telephone
09-11-2005	The Mainland Address	In Hong Kong via telephone
20-12-2005	The Mainland Address	In Hong Kong via telephone
20-12-2005	The Mainland Address	In Hong Kong via telephone
30-12-2005	Hong Kong Address	In Hong Kong via telephone
15-02-2006	Hong Kong Address	In Hong Kong via telephone
03-03-2006	The Mainland Address	In Hong Kong via telephone
15-03-2006	The Mainland Address	In Hong Kong via telephone

(b) Year of assessment 2006/07

<u>Date</u>	<u>Place meeting held</u>	<u>The mode in which the Taxpayer participated in the meeting</u>
06-04-2006	The Mainland Address	In Hong Kong via telephone
20-04-2006	Hong Kong Address	Present at the place of meeting
05-06-2006	The Mainland Address	In Hong Kong via telephone
24-07-2006	The Mainland Address	In Hong Kong via telephone
20-09-2006	Hong Kong Address	In Hong Kong via telephone
03-11-2006	Hong Kong Address	In Hong Kong via telephone
08-12-2006	Hong Kong Address	In Hong Kong via telephone
19-12-2006	Hong Kong Address	In Hong Kong via telephone
28-02-2007	Hong Kong Address	In Hong Kong via telephone
22-03-2007	The Mainland Address	In Hong Kong via telephone

7.14. The Assessor maintained the view that the Fee was taxable. He invited the Taxpayer to withdraw the objections.

7.15. The Taxpayer declined to withdraw the objections and put forth the following contentions:

- (a) '[The Company]'s subsidiaries are operated in China with no business in Hong Kong. For listing purpose, [the Company], a [Place C]'s company, was formed to act as an investment [vehicle] of all these subsidiaries. The Hong Kong [Address] was then established to act a window to communicate with bankers and investors.'
- (b) 'Majority of the board of directors, including the chairman who are also the major shareholder and managing director, are [Mainland China] residents ordinary residing in [Mainland China].'
- (c) 'In [the Company]'s listing documents, its annual report and letter-head paper, you will find that its head office is in [Mainland China] but not the Hong Kong [Address].'
- (d) '[The Company] in the letter in Fact 7.11 explained clearly that some of the board meetings were held in [Mainland China] head office. Even some of the meetings were mentioned as held in Hong Kong, these meetings were conducted in the mode of tele-conference with majority of directors staying in [Mainland China].'

8. We also find that the Company did not have business registration certificate '營業執照' and tax registration certificate '稅務登記証' in Mainland China. The operation and management of (words omitted here) and the sale and distribution of Product U in Mainland China were carried out by the Mainland Subsidiaries, not the Company.

### **The relevant IRO provision**

9. The relevant sections of the Inland Revenue Ordinance ('IRO' and references to section numbers herein are to section numbers in the IRO) (Chapter 112) are set out below:

9.1. Section 8(1)(a) provides that Salaries Tax shall be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from any office or employment of profit. The section reads:

*'8(1) Salaries tax shall, ... 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) ...'.*

- 9.2. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

**Substantive issue**

10. The questions under section 8(1)(a) are therefore whether,
- 10.1. the Taxpayer held an office;
  - 10.2. such office was a source the Taxpayer's income; and
  - 10.3. such income was income arising in or derived from Hong Kong.
11. There is no dispute that the Taxpayer held his office as an independent non-executive director in the Company and received in income in question from that office in the relevant years of assessment.
12. The only issue in dispute is whether such income was arising in or derived from Hong Kong.
13. In this connection, there is no distinction between the words 'arising in' and the words 'derived from' in section 8(1). See Macdougall J in CIR v Goepfert [1987] 2 HKTC 210 at page 225.
14. The Taxpayer contended:
- 14.1. The Company did not have any business in Hong Kong. It was formed as an investment vehicle for the Mainland Subsidiaries which carried on business in Mainland China;
  - 14.2. The majority of the Company's directors were Mainland China residents and the head office of the Company was in Mainland China.
  - 14.3. Therefore the central management and resident of the Company were outside Hong Kong.
15. The Respondent contended otherwise.

**Legal principles**

***Location of office equals location of company***

16. Both parties referred to the case of McMillan v Guest [1942] 24 TC 190, there,

16.1. Lord Wright (at page 203-204) stated that:

*‘ In my opinion, the place where it is exercised, if it is exercised anywhere at all, is not necessarily the test. .... Exercising no doubt does involve activity in the office or employment, but a man may have an office and draw the emoluments without doing any work at all. ....I agree with the Master of the Rolls that it is in the office of director that the crucial test is to be found, because “every right which a director has and every duty which the law, general or special, imposes on the director is to be exercised in this country and nowhere else,” .... It is, I think the true test in a case like this, ’*

(Thus the test lies not in where the particular director exercises his office but in where lies that office.)

16.2. Lord Atkin (at page 202) stated:

*‘ The office of director of an English company, the head seat and directing power of which is admitted to be in the United Kingdom, seems to me of necessity to be located where the company is. ’*

17. Both parties rightly proceeded on the basis that *‘The office of director of a ... company, ..., ... of necessity to be located where the company is. ’*

18. What they differ is on the location of the listed company in question and the factors relevant in determining the answer to that question.

### ***Question of fact***

19. In Case No D123/02, IRBRD, vol 18, 150 the Board said at page 167,

19.1. *‘One matter that appears to have been overlooked by both sides is that source of income is always a hard, practical matter of fact. In Goepfert’s case, cited above, Macdougall J at page 237 stated that:*

*“in deciding the crucial issue [of source of employment income], 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 the income, ...” ’*

19.2. *‘We appreciate that Goepfert’s case was decided in the context of determining the source of employment income and not, as in the current appeal, income from an office. However, in our view, the approach commended by Macdougall J is equally applicable to determining the source of income from an office. The judgement reminds us forcefully*

*that source of income is always fact dependent and should not be determined simply by formulae, such as by sole reference to the place the board of directors meets in cases involving the location of the office of a company director. We will return to this matter later in our decision.'*

20. We could draw guidance from previous decisions but at the end of the day it is our assessment of the facts that matters.

21. The office of a director is located in the place where the company is located. See paragraph 16 herein.

***Place of real business***

22. In Todd v The Egyptian Delta Land and Investment Co Ltd [1928] 14 TC 119, the House of Lord held that incorporation under the Companies Acts and the consequential arrangement necessary to comply with those Acts did not alone render a company resident in the United Kingdom. The test for a company residence is not where it is registered but where its real business is carried on.

23. In The Swedish Central Railway Co Ltd v Thompson [1924] 9 TC 342, it was undisputed that the control and management of the appellant company was in Sweden. Yet, Rowlatt J held that the appellant company was resident in the UK, where it performed some vital organic operations incidental to its existence as a company. Rowlatt J elaborated his decision at page 353:

*' ... the Company is not merely active in England in the sense that it is carrying on some of its operations there but it is in England performing some of the vital organic operations incidental to its existence as a company – keeping its seal (its registered office may be merely an address), having the banking account, its transfer books, its accounts made up and audited, and paying its dividend in London. Now those are vital functions affecting the very life and centre of the organization of the Company, and it seems to me that if a company can have two residences at all, one of them must be in the place where, in addition to being the place of its registration, it performs these functions.'*

24. In Charter View Holdings (BVI) Ltd v Corona Investments Ltd & Another [1998] 1 HKLRD 469, the issue of whether the plaintiff was ordinarily resident in Hong Kong came before Keith J, who made the following comments at page 471:

*' In Insurance Co. of the State of Pennsylvania v. Grand Union Insurance Co. Ltd [1988] 2 HKLR 541, the Court of Appeal held that, for the purpose of O.23 r.1(1)(a)4, the ordinary residence of a limited company is to be decided by reference to where its central management and control is. However, the application of that test is not straightforward. It was considered in Re Little*



*Olympian Each Ways Ltd [1995] 1 WLR 560. Three propositions can be derived from the judgment of Lindsay J:*

- (i) *The mere assertion of where the company's central management and control is unsatisfactory. What is needed are the primary facts on which that assertion is based.*
- (ii) *All the circumstances in which the company carries on its business should be taken into account, though the weight to be applied to each factor will obviously differ from case to case. Those factors include the provisions of the company's objects clause, the place of incorporation, the place where the company's real trade and business is carried on, the place where the company's books are kept, the place where the company's administration is carried out, the place where the directors with power to disapprove of local steps or to require different ones to be taken themselves meet or are resident, the place where its chief office is or where the company secretary is to be found, and the place where its most significant assets are.*
- (iii) *In applying the test to a non-trading company, it may be more important than would otherwise be the case to have regard to the nature of the company's corporate activities.*

*... since the company does not trade, I have paid more regard than would otherwise be the case to the company's corporate activities.'*

### ***Multiple places of residence***

25. In De Beers Consolidated Mines, Limited v Howe [1906] 5 TC 198, the Lord Chancellor, at pages 212 and 213, stated that:

*'In applying the conception of residence to a Company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A Company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see whether it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a Company. Otherwise, it might have its chief seat of management and its centre of trading in England, under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Chief Baron Kelly and Baron Huddleston, in the *Calcutta Jute Mills v. Nicholson and the Cesena Sulphur Company v. Nicholson*, now thirty years ago, involved the principle that a Company resides, for purposes of Income Tax, where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule; and the real business is carried on where the*

*central management and control actually abides.*

*It remains to be considered whether the present case falls within that rule. This is a pure question of fact, to be determined, not according to the construction of this or that regulation of byelaw, but upon a scrutiny of the course of business and trading.'*

26. In Swedish Central Railway Company, Limited v Thompson, [1925] 9 TC 342 ('the Swedish Central Railway Case'), the case of De Beers was also discussed. In delivering his judgment in the Swedish Central Railway Case, Cave LC stated [at page 372] that:

*'My Lords, in my opinion a registered company can have more than one residence for the purposes of the Income Tax Acts.'*

Then he referred to the passage quoted in paragraph 25 above and went to say the following on pages 372 and 373:

*'The effect of (De Beer) is that, when the central management and control of a company abides in a particular place, the company is held for purposes of Income Tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence...; and in principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may "keep house and do business" in more than one place; and if so, it may have more than one residence.'*

27. In Union Corporation Ltd v CIR 34 TC 207, Sir Raymond Evershed M.R. held at page 271:

*'The company may be properly found to reside in a country where it "really does business", that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority, is to some substantial degree to be found. In our judgment, the formula "where the central power and authority abides" does not demand that the Court should look, and look only, to the place where is found the final and supreme authority.'*

28. In D59/03, IRBRD, vol 18, 626, the Board at paragraph 41 stated that:

*'...we are mindful of the Union Corporation case where it was held the formula "where the central power and authority abides" does not demand that the court should look, and look only, to the place where the final and supreme*

*authority is found, and also the decision in De Beers case that what was required was “a scrutiny of the course of business and trading”.*

## **Disputed Facts**

### ***Place of board meetings***

29. The Respondent contends that the Taxpayer participated in a substantial number of board meetings in Hong Kong.

30. Since we are dealing with the question of the place of residence of the Company, the place at which the Taxpayer participated in the board meeting of the Company is in itself irrelevant; save to the extent it contributes to the overall picture of the place where these board meetings are held as one of the many facts for consideration of where the Company is.

31. Based on the place of meeting as stated by the Company in its minutes of the board meetings for the relevant years (the ‘Minutes’),

31.1. for the year 2005/06: 7 out of the 16 board meetings were stated to have been held in Mainland China; and

31.2. for the year 2006/07: 6 out of 10 of the board meetings were stated to have been held in Hong Kong.

32. The Taxpayer attempted to persuade us that the board meetings were held in Mainland China because,

32.1. most of the directors who participated in each relevant meeting were resident in Mainland China; and

32.2. the meetings might have been arranged by staff in Mainland China.

33. The Minutes distinguish between situations,

33.1. where a director is stated to have called into the meeting via his/her phone from a place where he/she is: for such situation, from the phone number shown, one can note the place where it is registered but not the place from where the call is made; and

33.2. where directors dialed into a pre-arranged Hong Kong phone number from a place where he/she is. For such situation, there is no hard evidence on either the actual place from where the directors made the calls nor the details of the actual arrangements made by the staff for us to determine the place of such arrangements.

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34. An analysis of the Minutes is set out in Annexure hereto. We note:
- 34.1. that a different majority combination of results would occur depending on the emphasis placed on different factors;
  - 34.2. that if the stated place of the meeting in the minutes is adopted, then the majority of the board meetings were held in Mainland China for the year 2005/06 but in Hong Kong for the year 2006/07;
  - 34.3. that if the stated place of physical presence of the directors at the place of stated place of meeting is added to the place from which they called into the meeting (assuming that the phone number of the director stated in the minutes is the place of his call), then in both years 2005/06 and 2006/07 the majority of the board meetings were held in Mainland China;
  - 34.4. that if the stated place of physical presence of the directors at the place of stated place of meeting is added to the place of the call in number, then in both years 2005/06 and 2006/07 the majority of the board meetings were held in Hong Kong; and
  - 34.5. that if one combines the results in paragraphs 34.3 and 34.4 herein but disregards as inapplicable where one factor ‘meetings with Hong Kong dial in numbers’ or ‘meeting where directors dialed from their own phone’ were absent, then there is a tie for the year 2005/06 but the majority of the meetings were held in Mainland China for the year 2006/07.
35. Thus, this factor of the ‘place of board meeting’ is not so dominating that one can come to the conclusion that the place of management and control of the Company is in Mainland China as contended by the Taxpayer.

***Business and employees of subsidiaries***

36. The Taxpayer contends that the bulk of the business of the Company and its subsidiaries (the ‘Group’) in the relevant years were carried out in Mainland China by staff in Mainland China and therefore the Company ought to be considered as resident in China.
37. The Respondent has no quarrel with that position in so far as it concerns the Group.
38. However, the Respondent contends that it is the position of the Company (and not the Group) that matters. We agree.

39. We note that:

39.1. The information initially supplied by the Company in the agreed facts set out in paragraph 7.12(a) was wrong and the true position is that those employees employed outside Hong Kong were employees of the subsidiaries of the Company rather than of the Company itself.

39.2. The directors' report of the Company (attached to the 2005 annual report of the company) states under the heading '*Principal Activities*' that '*The Company acts as an investment holding company. Its subsidiaries are principally engaged in (words omitted here) in the People's Republic of China.*'

39.3. The principal business activity of the company is described as 'Investment Holdings'.

39.4. The income statement of the company shows that interest income and interest expense were the main income and expense of the company.

39.5. The balance sheet of the company shows that the main assets of the company were the interest in subsidiaries.

40. The activities of the subsidiaries are not the activities of the holding company.

41. From the evidence available to us, the main activities of the Company in which the Taxpayer holds the office of his directorship is to maintain its status as a company whose securities are listed on the Stock Exchange of Hong Kong and to leverage on the Hong Kong banking and financial infrastructure to obtain corporate finance.

### **Company resident in Hong Kong**

42. We find that the Company was resident in Hong Kong having regard to the following facts:

42.1. Our findings as stated in paragraphs 39 to 41 herein;

42.2. The Company was registered as an oversea company in Hong Kong under Companies Ordinance (Chapter 32) (the 'Company Ordinance'). By registering as an oversea company under Part XI of the Companies Ordinance, the Company established a place of business in Hong Kong. Section 332 of the Companies Ordinance provides that Part XI shall apply to all companies incorporated outside Hong Kong which establish a place of business in Hong Kong. The phrase 'place of business' is defined under section 341 of the Companies Ordinance to include a share transfer or share registration office but does not include

a local representative established with the approval of the Monetary Authority under section 46 of the Banking Ordinance (Chapter 155). At all relevant times, the Company maintained its principal place of business, Branch Share Registrar and the Transfer Office in Hong Kong. It is clear that the Company had established a place of business in Hong Kong.

- 42.3. The Company had business presence in Hong Kong through the Hong Kong Address. As shown in the applications for business registration, the Company carried on a business of investment holding in an address in Hong Kong and this was subsequently changed to the Hong Kong Address.
- 42.4. The Company's shares were listed on The Stock Exchange of Hong Kong Limited. It was required to comply with the Rules Governing the Listing of Securities on the Stock Exchange ('the Listing Rules'). The appointment of the Appellant as an independent non-executive director of the Company was to comply with and was governed by the Listing Rules.
- 42.5. The Company conducted the following business activities in Hong Kong:
- (a) liaising with and/or raising fund from the banks;
  - (b) liaising with and/or raising fund from the investors;
  - (c) issuing of notes or bonds;
  - (d) preparing accounts.
- 42.6. Some of the Company's directors' meetings and committees' meetings were held in Hong Kong.
- 42.7. At all relevant times, the annual general meetings of the Company were held in Hong Kong. In the meetings, matters discussed included the following:
- (a) to receive and to consider the audited financial statements and the reports of the directors and auditors;
  - (b) to declare final dividend;
  - (c) to re-elect retiring directors and to authorize the board of directors to fix the directors' fees; and

(d) to re-appoint the auditors and to authorize the board of directors to fix their remuneration.

42.8. The Company filed returns with the Companies Registry. It also filed employer's returns and Profits Tax returns together with financial statements with the Revenue.

42.9. The Company employed staff in Hong Kong. For the years of assessment 2005/06 and 2006/07, the Company employed respectively 10 and 15 employees in Hong Kong. A list from the Respondent shows that positions held by the employees in Hong Kong were chief executive officer, executive director, financial controller, non-executive director, investor relationship manager, investor relationship associate, office officer, accounting manager, accountant, assistant accountant and assistant company secretary.

42.10. The Company maintained bank accounts in Hong Kong.

42.11. The Company's accounts were audited in Hong Kong.

43. The homepage disclosed that the Company attracted international investors as it was listed in Hong Kong. Besides, the Appellant admitted that the Company was established in Hong Kong to act as 'a window to communicate with bankers and investors'.

44. Modern day companies organised their activities in a wide variety of ways. Often, no single factor is determinative. Given the substantial connecting factors we find above, there is no doubt that the Company is resident in Hong Kong – irrespective of whether it is also resident elsewhere.

### **Conclusion**

45. The Taxpayer has not discharged the burden of proving that the assessments in question are excessive or incorrect. The Appeal is dismissed and the assessment is confirmed.

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**Annexure**

Date of Meeting	Total No of Participating Directors	No. of Directors at Place of Meeting + No. of Directors according to place via which the directors called			No. of Directors at Place of Meeting + No. of Directors according to place of dial in number		
		HK	Mainland	Elsewhere	HK	Mainland	Elsewhere
20-04-2005	12	5	7	0	12	0	0
10-06-2005	6	#3	3	0	1	0	0
10-06-2005	4	2	#2	0	0	#0	0
22-06-2005	6	2	4	0	0	4	0
21-07-2005	10	*3	*	*	*3	*	*
02-08-2005	6	#3	3	0	#1	0	0
31-08-2005	6	3	#3	0	0	#3	0
21-09-2005	12	6	0	1	12	0	0
05-10-2005	6	0	3	1	#3	3	0
09-11-2005	6	0	3	0	3	#3	0
20-12-2005	6	2	4	0	0	4	0
20-12-2005	6	2	4	0	0	4	0
30-12-2005	13	1	0	0	13	0	0
15-02-2006	7	3	4	0	1	0	0
03-03-2006	5	1	4	0	0	3	0
15-03-2006	6	#3	3	0	3	0	0
<b>2005/2006 Total:</b>		<b>4</b>	<b>6</b>	<b>0</b>	<b>4</b>	<b>2</b>	<b>0</b>

Notes:

\* = Taking only directors physically at place of meeting since the place via which phone calls are made and the place of dial in are unknown.

# = Where the numbers are equal, assuming the position on the place of the Chairman tips the balance.

Shaded grey = Irrelevant because the "place via which the directors called" or the "place of dial in number" not applicable where none of the directors used that mode for that particular meeting.

**Bold** and *Italic* Number = the place where the majority took place according to the specified criteria.



Date of Meeting	Total No of Participating Directors	No. of Directors at Place of Meeting + No. of Directors according to place via which the directors called			No. of Directors at Place of Meeting + No. of Directors according to place of dial in number		
		HK	Mainland	Elsewhere	HK	Mainland	Elsewhere
06-04-2006	8	2	6	0	0	4	0
20-04-2006	13	4	8	1	4	0	0
05-06-2006	6	3	#3	0	0	3	0
24-07-2006	13	3	10	0	0	10	0
20-09-2006	13	5	8	0	3	0	0
03-11-2006	6	#3	3	0	1	0	0
08-12-2006	13	4	9	0	1	0	0
19-12-2006	13	3	10	0	1	0	0
28-02-2007	13	4	9	0	1	0	0
22-03-2007	13	2	11	0	0	6	0
<b>2006/2007 Total:</b>		<b>1</b>	<b>9</b>	<b>1</b>	<b>6</b>	<b>4</b>	<b>0</b>

Notes as before.

Year of Assessment	Total No of Meetings	Stated Place of Meeting		No. of Directors at Place of Meeting + No. of Directors according to place via which the directors called			No. of Directors at Place of Meeting + No. of Directors according to place of dial in number			Disregarding inapplicable criteria		
		HK	Mainland	HK	Mainland	Elsewhere	HK	Mainland	Elsewhere	HK	Mainland	Elsewhere
2005/06	16	7	9	4	6	6	4	2	8	8		
2006/07	10	6	4	1	9	9	N/A	N/A	1	9		