Case No. D22/11

Salaries tax – assessable income – Appellant worked in Hong Kong and abroad – apportionment of income based on the time spent in Hong Kong and abroad – whether such apportionment appropriate – sections 8, 8(1A) and 8(1) of the Inland Revenue Ordinance ('IRO').

Salaries tax – allowance – married person's allowance – entitlement of the allowance when Appellant divorced his spouse but was required to maintain her – sections 2 and 29 of the IRO.

Panel: Albert T da Rosa, Jr (chairman), Corinne Marie D'Almada Remedios and James Todd Wood.

Date of hearing: 1 April 2011.
Date of decision: 7 September 2011.

The Appellant was employed abroad, but was seconded to Hong Kong to another company during the relevant year of assessment. He stayed in Hong Kong for 273.5 days, and worked both in and outside Hong Kong during that time. By way of a determination ('the determination'), the Deputy Commissioner apportioned the income the Appellant received from his employer abroad by the amount of time the Appellant spent in Hong Kong, and raised additional salaries tax assessment of the income he notionally earned in Hong Kong. The Appellant appealed against the determination, arguing it as unfair that he was also taxed for the entire income by his original country. He also appealed against the determination's refusal to give him the married person's allowance. He divorced his wife shortly before the relevant year of assessment, but he continued to pay maintenance to his ex-wife during the relevant year of assessment.

Held:

1. The determination was right to apportion the income he earned from his employer abroad by the time method, because the Appellant rendered some of his services in Hong Kong and some of his services outside Hong Kong (D11/05, (2005-06) IRBRD, vol 20, 296; D28/04, IRBRD, vol 19, 226 followed; sections 2 and 3 of Apportionment Ordinance considered). Section 8 of the IRO provides that salaries tax shall be charged on income derived from Hong Kong by any employment.

2. The Appellant cannot rely on the exclusions in section 8(1A) of the IRO, because his visits in Hong Kong were more than 60 days in total during the

relevant year of assessment. The determination only charged salaries tax on the income as apportioned to his stay in Hong Kong, so it cannot be argued that the apportioned income was derived from services rendered outside Hong Kong.

3. The fact that the Appellant was also taxed for the entire income abroad was irrelevant.

4. There was no marriage in subsistence during any time in the relevant year of assessment, and thus no married person's allowance under section 29(1) of the IRO could be available to the Appellant. This is so even though the Appellant's sense of grievance is real and not fanciful, and the rationale for not according a divorced person supporting his former spouse the equivalent of the married person's allowance is difficult to fathom (Sit Kwok Keung v Commissioner of Inland Revenue CACV 3137/2001 [2002] 3 HKLRD 286 considered).

Appeal dismissed.

Cases referred to:

D11/05, (2005-06) IRBRD, vol 20, 296
D28/04, IRBRD, vol 19, 226
Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKTC Vol 2 210
Sit Kwok Keung v Commissioner of Inland Revenue CACV 3137/2001 [2002] 3 HKLRD 286

Taxpayer in person.
Leung To Shan and Leung Wing Chi for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The 'Appellant' objected to the additional salaries tax assessment for the year of assessment 2004/05 raised on him by the Inland Revenue Department.

2. Two sources of income are in question:

2.1. income from Company A in Country B; and

2.2. income from Company C (Hong Kong) Limited (Company C).

3. Originally, the Assessor raised on the Appellant the following estimated salaries tax assessment for the year of assessment 2004/05 to which the Appellant did not object:

	$
Income	174,460
Less:	
Basic allowance	(100,000)
Net chargeable income	74,460
Tax payable thereon	5,024

4. By his determination dated 5 November 2010 (the 'determination') the Deputy Commissioner of Inland Revenue raised additional salaries tax assessment on the Appellant for the year of assessment 2004/05 as revised as follows:

	$	$
Housing allowance from Company C		158,600
Income from Company A attributable to services rendered in Hong Kong		288,513
		447,113
Less:		
Basic allowance	100,000	
Child allowance	60,000	(160,000)
Net chargeable income		287,113
Less:		
Net chargeable income already assessed		(74,460)
Additional net chargeable income		212,653
Additional tax payable thereon		41,598

5. The Appellant appeals against the determination.

Hearing

6. At the hearing,

6.1. the parties agreed to the facts as stated in paragraph 1 (1) to (16) of the determination; and

6.2. the Appellant elected not to give evidence on oath.

7. In relation to the Appellant's Hong Kong tax position, his grounds of appeal are as follows:

7.1. he should be exempted from Hong Kong salaries tax for remuneration paid to him by Company A, his employer in Country B; and

7.2. he is entitled to the married person's allowance (that is on top of the child allowance in respect of his two children conceded by the Respondent in the determination).

8. In other words, for the assessment in the determination as contained in paragraph 4 herein, the Appellant is only contesting the attribution of income of $288,513 he received from Company A but not the other attribution of income set out in the determination. The Appellant is also contesting the Respondent's decision to disallow his claim for the married person's allowance.

9. The Appellant clarified he wanted to proceed with the appeal because he felt that it was unjust that he should be subject to double taxation both in Country B and in Hong Kong. He said:

> ' ... I was divorced and according to the [law in Country B] I have to pay to my kids and also to my wife an allowance. And in [Country B] I can deduct this allowance from my salary because it goes to the income to my wife and she has to pay tax for that. That is actually what I not agree or what I would like to know is how I have to pay the tax here when I have already paid my tax in [Country B]..... I have not fully contracted in Hong Kong, then from my point of view is it that I can choose where I can pay my tax.'

> ' ... That means for this kind of amount we pay two times tax. I mean, it is not that I don't want to pay the tax.'

Findings

10. Based on the agreed facts and inferences drawn therefrom, we find as follows:

10.1. the Appellant has been employed by Company A in Country B since 1 December 1998;

10.2. the Appellant entered into an agreement (the 'HK Employment Agreement') dated 5 January 2004 with both Company A and Company C under which he was seconded to Company C in Hong Kong from 5 January 2004 for a period of three years and his salary was to be paid by Company A into his account in Country B;

10.3. during the period when the Appellant was seconded to Company C,

(a) he worked both in Hong Kong and outside Hong Kong;

(b) he was paid by Company A and for the year of assessment 2004/05 he was paid $443,400 by Company A for his employment;

(c) part of that payment was for his work done in Hong Kong for Company C and part of it was for work done outside Hong Kong for Company A;

10.4. the Appellant was divorced from his wife on 22 March 2004, that is before the commencement of the year of assessment 2004/05 on 1 April 2004; and

10.5. for the year of assessment 2004/05,

(a) the Appellant spent 237.5 days in Hong Kong out of 365 days for the year; and

(b) his ex-wife and his children were in Country B.

Issues and analysis

Source of income

11. Section 8 of the Inland Revenue Ordinance (the 'Ordinance') provides:

'*Salaries tax shall, ..., be charged ... on every person in respect of his income arising in or* ***derived from Hong Kong from*** *the following sources:*

(a) ***any*** *...* ***employment*** *of profit; and (b) ....'* (emphasis underlined and in bold).

12. Section 8(1A)(a) of the Ordinance provides:

'*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;'* (emphasis underlined and in bold).

13. The question is whether the HK$443,400 or any part thereof paid by Company A to the Appellant is *'... income ... derived from Hong Kong from ... any employment'* or *'income derived from services rendered in Hong Kong'* or not.

14. The Respondent determined that the Appellant derived income from services rendered in Hong Kong within the meaning of section 8(1A)(a) of the Ordinance and she

apportioned the remuneration of HK$443,400 earned by the Appellant from Company A in accordance with the number of days (273.5) he spent in Hong Kong during the year of assessment. On such apportionment, $288,513 being 273.5/365 of the Appellant's income of HK$443,400 from Company A was determined to be income derived from services rendered in Hong Kong for the year of assessment 2004/05 and was taxable.

15. Like the Board in D11/05, (2005-06) IRBRD, vol 20, 296, we accept that the time apportionment method is an acceptable basis for apportioning income and note that it has consistently been followed in virtually all cases to which section 8(1A)(a) of the Ordinance applies (for instance D28/04, IRBRD, vol 19, 226). In our view, the time apportionment method adopted by the Respondent in computing the Appellant's income is a fair, reasonable and appropriate basis in the circumstances of the present case. In arriving at this view, we are aided by Apportionment Ordinance which provides in section 3 that:

> '*All rents, **annuities**, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.*' (emphasis underlined and in bold)

The definition of '*annuities*' in section 2 of that ordinance states that it '*includes salaries and pensions*'.

16. With regard to the two exclusions in section 8(1A) of the Ordinance:

(1) The exclusion in 8(1A)(b) as read with section 8(1B) is not applicable because the Appellant rendered some of his services in Hong Kong and some of his services outside Hong Kong and the services rendered in Hong Kong were rendered during visits that exceeded a total of 60 days during the year of assessment 2004/05: see Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKTC Vol 2 210 at 238.

Sections 8(1A)(b) and 8(1B) provide as follows:

> '*For the purposes of this Part, income arising in or derived from Hong Kong from **any employment** –*
>
> *(a) ...*
>
> *(b) **excludes** income derived from services rendered by a person who*
>
> *(i) ....*
>
> *(ii) renders outside Hong Kong all the services in connection with his employment*' (emphasis underlined and in bold).

'*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.*'

(2) The exclusion in section 8(1A)(c) of the Ordinance is also not applicable because only that portion of the Appellant's income apportioned to his stay in Hong Kong was subjected to salaries tax by the Respondent.

Section 8(1A)(c) provides as follows:

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

(a) ...

(b) ...

(c) ***excludes*** *income derived by a person from services* ***rendered*** *by him in any territory* ***outside Hong Kong*** *where-*

(i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and

(ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.' (emphasis underlined and in bold).

17. In summary, we find that $288,513 (being 273.5/365 of the Appellant's income of HK$443,400 from Company A) falls within the inclusive provisions of section 8(1A)(a) and has been correctly included in the Appellant's income, and that none of the exclusion provisions in section 8(1A) are applicable.

18. Finally, we wish to note that the Appellant claims that his income (including the amount apportioned by the Respondent to Hong Kong pursuant to section 8(1A)(a)) was also taxed in Country B and that he considers the situation unfair. If in fact Country B taxed the whole income from Company A without apportionment, then the Country B's system of taxation is apparently more rigid than our system which does not tax income which is chargeable to tax in the territory where the services giving rise to the income are rendered. The Appellant may well consider taking the matter up with the authorities in Country B.

Married person's allowance

19. 'Married person's allowance' is provided for under section 29(1) of the Ordinance and available to a taxpayer *'... if a person is, at any time during that year, married ...'* and various attributes regarding *'the spouse'* or *'husband'* or *'wife'* of the taxpayer are met.

20. Under section 2(1) of the Ordinance 'husband', 'spouse' and 'wife' are all defined in relation to 'marriage' which is defined to mean:

> *'(a) any marriage recognized by the law of Hong Kong; or*
>
> *(b) any marriage, whether or not so recognized, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so, but shall not, in the case of a marriage which is both potentially and actually polygamous, include marriage between a man and any wife other than the principal wife, and "married"(結婚) shall be construed accordingly;'*

21. The Appellant was divorced from his wife on 22 March 2004 by an Order of the Courts in Country B. There is no difference for the purpose of section 29(1) whether the divorce decree is made by a local court or an overseas court.

22. Thus there is no marriage in subsistence during any time in the year of assessment (that is from 1 April 2004 to 31 March 2005) and no 'married person's allowance' under section 29(1) of the Ordinance could be available to the Appellant.

23. In this regard we could do not better than echo the sentiment of the Honourable Mrs Justice Le Pichon JA in Sit Kwok Keung v Commissioner of Inland Revenue CACV 3137/2001 [2002] 3 HKLRD 286 (CA) at pages 289 to 290:

> *'8 Whilst, as a matter of statutory construction, the appellant is not entitled to the married person's allowance, the appellant's sense of grievance in being deprived of the married person's allowance when, in reality, he is compelled to support his former wife under a court order, is real and not fanciful. ... Maintenance payments made to Madam Yim pursuant to the court order are not deductible under s.12(1) of the Ordinance because they do not satisfy the conditions of that section.*
>
> *9 The rationale for not according a divorced person the equivalent of the married person's allowance when he is nonetheless legally liable to support his former spouse is difficult to fathom. For my part, I have considerable sympathy with persons (of which there must be many) in the position of the appellant. The position under the legislation as it stands does seem to be both unfair and inequitable. It may be of more than passing interest to note the position in other jurisdictions. For example, under UK tax legislation, some form of tax relief has always been available. Under new rules brought in 1988, which apply, inter alia, to*

all court orders made on or after 1 July 1988, tax relief is available to the spouse making the maintenance payment. The rules are complex but the concept is very similar to granting the married couple's allowance. See generally, Jackson's Matrimonial Finance and Taxation (6th ed.) chap.6 where the extent of UK tax relief is considered at para.6.10.

10 Quite why some form of tax relief is not available in Hong Kong is not readily apparent. However, redress lies not in the hands of the court but the Legislature. It is perhaps timely to invite its attention to this "iniquity".'

Decision

24. In the circumstances, the appeal is dismissed and we confirm the revised assessment in the determination as set out in paragraph 4 herein.