Case No. D26/96

Salaries tax – employment – place of service – source of income – 60 days limit – whether liable to salaries tax – section 8 of the Inland Revenue Ordinance.

Panel: Ronny Wong Fook Hum QC (chairman), Gregory Robert Scott Crichton and Archie William Parnell.

Date of hearing: 29 April 1996.
Date of decision: 10 July 1996.

The taxpayer was employed by a Hong Kong company (Company A) as a factory manager of a factory in Country D. The Commissioner concluded that the taxpayer was in Hong Kong for a total of 180 days in the year in question. The taxpayer maintained that all his services were rendered in Country D, so he was not liable to the salaries tax of Hong Kong levied against him.

Held:

The Board was satisfied that the taxpayer's income in question derived from Hong Kong from a source of employment. Company A directed the operation of the factory in Country D. The taxpayer was paid in Hong Kong and services were rendered in Hong Kong. The taxpayer visited Hong Kong far exceeded the 60 days limit and there was no evidence that he paid any tax in Country D. Accordingly the taxpayer is within the tax ambit of section 8 of the IRO.

Appeal dismissed.

Cases referred to:

CIR v Goepfert 2 HKTC 210
CIR v So Chak Kwong Jack 2 HKTC 174
D12/94, IRBRD, vol 9, 131

Jennifer Chan for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Background of this case

1. On 18 September 1992, the Taxpayer commenced his employment with Company A, a company incorporated in Hong Kong on 14 October 1988. According to the Employee Record maintained by Company A, the Taxpayer had previously worked as the Deputy Factory Manager of Factory B, a Company A factory, in Place C of Country D.

2. On 31 April 1994, Company A submitted an employer's return in respect of the Taxpayer's salary for the period between 1 April 1993 to 31 March 1994. An address in Place E of Hong Kong was given as the Taxpayer's residential address. 'Place C of Country D' was entered in the column in respect of the capacity in which the Taxpayer was employed.

3. According to the arrival/departure record maintained by the Director of Immigration, during the year in question, the Taxpayer usually returned to Hong Kong from Place C on Saturday afternoon. He would spend Sunday with his family and would leave for Place C on the following Monday. By way of example we have summarised his time of arrival and departure for the months of April to June 1993 in Schedule I annexed to this decision. Counting both his days in and his days out, the Revenue maintains that the Taxpayer was in Hong Kong for a total of 180 days in the year in question.

4. In response to enquiries raised by the Revenue, Company A through a firm of Certified Public Accountants informed the Revenue on 6 June 1995 the following:

> '… [the Taxpayer] rendered no service to the Hong Kong office. He acted as assistant factory manager and his duty is to manage the factory in Country D. However, he will come to the Hong Kong office on Monday to report his work to the management…'

5. The Taxpayer did not accept this statement. In his notice of appeal dated 15 December 1995, he stated that:

> 'In early 1990, the company had cancelled all the works required to be carried out in Hong Kong. (Only staff stationed in Hong Kong had meetings) but no staff employed to station in Country D.'

6. The Taxpayer maintained that as all his services were rendered in Place C, he is not liable for the salaries tax assessment levied against him.

Evidence of the Taxpayer before us

7. The Taxpayer informed us on oath that:

a. He was employed by the Hong Kong company to be regularly and permanently stationed in the factory in Country D. Company A only maintains an office in Hong Kong with no production machine or equipment.

b. He reported to Mr F of Company A during Mr F's regular visits (3 times a week) to the factory in Place C.

c. He was paid by direct credit into a bank account in Hong Kong.

d. Habitually he spent his Sundays in Hong Kong. On Monday mornings he would leave Hong Kong for Country D. He usually left in the forenoon so that he would arrive Place C sometime after 4 p.m.

e. There were occasions when he left late to deal with his personal and family affairs.

f. '… from time to time when work left over in company unfinished in Hong Kong would take such work with me back to Country D to have it completed.' Whilst he pointed out that he was not bound to report to the Hong Kong office on the Mondays, he accepted that 'But on and off when there were instructions from the company for me to go back. Yes, I have to'.

The relevant statutory provisions as interpreted by the Court

8. Section 8 of the Inland Revenue Ordinance (the IRO) (Chapter 112) 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; and

(b) any pension.

(1A) For the purpose 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;

(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; and

(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.

(1B) In determining whether or not all services are rendered outside Hong Kong for the purposes of subsection (1A) no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment'.

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

10. In relation to the exclusion under section 1(1A)(b):

a. Mortimer J (as he then was) pointed out in CIR v So Chak Kwong Jack 2 HKTC 174 that:

> *'The words "not exceeding a total of 60 days" qualify the word "visits" and not the words "services rendered". Were it otherwise the Section would be expressed differently. In order to take the benefit of the Section therefore a Taxpayer must not render services during visits which exceed a total of 60 days in the relevant period'.*

b. We agree with the reasoning of the Board of Review in D12/94 that for the purpose of computation of the 60 days, part days should be included in the calculation.

Applying these principles to the facts of this case

11. We are of the view that the Taxpayer's income in question derived from Hong Kong from a source of employment. Company A is a Hong Kong company. At the material times, they maintained an office in Hong Kong where they (through Mr F) directed the operation of Factory B. When called upon to do so, the Taxpayer attended the Hong Kong office of Company A to perform tasks as directed by that office. The Taxpayer was further paid in Hong Kong by Company A.

12. Whilst we entertain doubts as to the accuracy of Company A's letter of 6 June 1995, the Taxpayer's own evidence failed to persuade us that no service in respect of his employment was rendered in Hong Kong at all. His admission that from time to time there were instructions from the Hong Kong office of Company A to report to that office for instructions and to take delivery of accessories to Place C lead us to conclude that some services were rendered in Hong Kong.

13. His visits to Hong Kong far exceeded the 60 days limit.

14. There is no evidence whatsoever that he paid any tax in China in respect of the income in question.

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

Our decision

16. We confirm the assessment and dismiss the appeal.

SCHEDULE I

Date	Day of the week	Time of arrival	Time of departure
3-4-1993	Saturday	5:12 p.m.	
6-4-1993	Tuesday		12:10 p.m.
10-4-1993	Saturday	1:59 p.m.	
12-4-1993	Monday		8:35 a.m.
17-4-1993	Saturday	6:26 p.m.	
19-4-1993	Monday		10:42 a.m.
24-4-1993	Saturday	6:21 p.m.	
26-4-1993	Monday		12:36 p.m.
30-4-1993	Friday	5:32 p.m.	
3-5-1993	Monday		12:06 p.m.
8-5-1993	Saturday	5:18 p.m.	
10-5-1993	Monday		11:27 a.m.
15-5-1993	Saturday	5:27 p.m.	
17-5-1993	Monday		11:56 a.m.
22-5-1993	Saturday	5:04 p.m.	
24-5-1993	Monday		10:57 a.m.
29-5-1993	Saturday	12:30 p.m.	
31-5-1993	Monday		12:52 p.m.

1-6-1993	Tuesday	1:26 p.m.	
2-6-1993	Wednesday		8:25 a.m.
5-6-1993	Saturday	5:37 p.m.	
7-6-1995	Monday		1:36 p.m.
12-6-1993	Saturday	5:42 p.m.	
14-6-1993	Monday		8:57 a.m.
19-6-1993	Saturday	6:33 p.m.	
21-6-1993	Monday		4 p.m.
25-6-1993	Friday	5:19 p.m.	
28-6-1993	Monday		8:48 a.m.