INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D27/03

Salaries tax – source of income – whether arising in or derived from Hong Kong – statutory exemption – whether all services rendered outside Hong Kong – 60 day grace period – visits – section 8, 8(1A) and 8(1B) of the Inland Revenue Ordinance ('IRO').

Panel: Mathew Ho Chi Ming (chairman), John Lee Luen Wai and Norman Ngai Wai Yiu.

Dates of hearing: 12 June 2000 and 8 April 2003.
Date of decision: 7 June 2003.

The taxpayer was employed in Hong Kong by a Hong Kong company to work as a technician in a factory in China.

The taxpayer was not required to perform any services in Hong Kong although he purchased spare parts in Hong Kong for the factory occasionally.

He did not pay any income tax in China though he paid some money (less than the tax which would have been payable if properly taxed) to persons alleging to be officials in China.

There were also disputes whether the taxpayer would be considered as visitor as his home was in Hong Kong, and whether he spent more than 60 days in Hong Kong during the year of assessment.

Held:

1. The Board found the taxpayer's salary was income arising in or derived from Hong Kong. He was employed in Hong Kong by a Hong Kong company. The fact that the place where he rendered his services was outside Hong Kong on its own did not render his income offshore (CIR v Goepfert applied).

2. The Board, on the other hand, found the taxpayer rendered all of his services in China. The purchase of the spare parts in Hong Kong could not be considered as performing services for the employer and it was done very rarely. Thus, his income was exempt from salaries tax under section 8(1A)(b).

Obiter:

1. If necessary, the Board would have held that the taxpayer did not pay income tax in China. What he paid to the alleged officials was not tax payment but for avoiding real tax. Thus, section 8(1A)(c) did not apply.

2. If necessary, the Board would have also held that the 60 day grace period in section 8(1B) did not apply. Though the taxpayer could 'visit' Hong Kong, his visits to Hong Kong exceeded 60 days in all the approaches considered by the Board (CIR v So Chak Kwong, Jack, D29/89, D12/94, D11/97, D54/97, D107/99, D20/00 and D37/01 considered).

Appeal allowed.

Cases referred to:

CIR v Goepfert 2 HKTC 210
CIR v So Chak Kwong, Jack 2 HKTC 17
D37/01, IRBRD, vol 16, 326
D29/89, IRBRD, vol 4, 340
D11/97, IRBRD, vol 12, 147
D12/94, IRBRD, vol 9, 131
D107/99 (unpublished)
D20/00, IRBRD, vol 15, 297
D54/97, IRBRD, vol 12, 354

Chan Siu Ying for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Nature of appeal

1. The Appellant ('the Taxpayer') is appealing against the determination of the Commissioner of Inland Revenue dated 4 March 1999 ('the Determination') in relation to his salaries tax assessment for the year of assessment 1994/95. The Taxpayer was employed by either the Employer or a factory related to the Employer in China as a technician responsible for the supervision of machinery in the Chinese factory. The Taxpayer's case was that he rendered his services in China and hence his salary from that employment was not taxable in Hong Kong.

Grounds of appeal

2. The grounds of the Taxpayer's appeal can be found in his notice of appeal received by the Board on 4 October 1999, written representation of Ms B dated 18 May 2000 and a pre-appeal letter from the Taxpayer to the Revenue dated 11 November 1997. The Taxpayer had not sought to add to these grounds at the hearing of this appeal. These grounds are as follows:

(a) The Taxpayer was an employee of the Employer's company in China ('Company A'); thus implying that he was not an employee of the Employer. The Employer in Hong Kong and Company A had the same bosses. There was only an oral employment contract. The Taxpayer had to follow the working hours and holidays of Company A.

(b) Further the Taxpayer had paid Chinese tax in respect of the disputed income.

(c) The Taxpayer did not have to perform any services for his employer in Hong Kong. What he did was to purchase spare parts once or twice during the year of assessment in question. On these occasions he was not asked to do so and he was merely helping his colleagues as a matter of convenience. He returned to Hong Kong due to his family duties and commitments and for medical reasons.

(d) The Taxpayer disagreed with the Revenue's calculation of the number of days that he had spent in Hong Kong. According to the Revenue, during the year of assessment 1994/95, the Taxpayer was in Hong Kong for 144 days. This calculation takes any part of one day in any 24-hour period commencing 12 a.m. as one whole day. While the Taxpayer does not dispute the Hong Kong entry and exit dates presented by the Revenue, the Taxpayer's case is that the calculation of the number of days should be 96.5 days taking fraction of a day as half days. Further if 52 Sundays, 7 days standard holidays and 10 days paid leave are further deducted, the total number of working days in Hong Kong was only 27.5 days.

Issues

3. The issues to be determined in this appeal are:

(a) Since the Taxpayer allegedly rendered his services under his employment contract outside Hong Kong, did the Taxpayer's salary income for the year of assessment 1994/95 fall within section 8(1) of the IRO; viz did his income arise in or was it derived from Hong Kong from any office or employment of profit?

(b) If the Taxpayer's salary was chargeable to tax under section 8(1), did the Taxpayer render all of the services in connection with his employment outside Hong Kong so that the exemption from tax in section 8(1A)(b)(ii) of the IRO applied?

(c) If the Taxpayer did not render all of his services outside Hong Kong, did the Taxpayer visit Hong Kong for periods not exceeding 60 days during the year of assessment 1994/95 so that any services which he may have rendered in Hong Kong is not to be taken into account as services rendered in Hong Kong under the exemption in section 8(1B) of the IRO?

Hearings

4. At the first hearing on 12 June 2000, the Taxpayer's wife and Ms B appeared on behalf of the Taxpayer as the authorized representatives of the Taxpayer. The Board heard that the Taxpayer had been arrested by the Customs Department of China and had been detained in custody. There was difficulty in communicating with him. The Taxpayer's representatives indicated the Taxpayer might prefer to attend the Board's hearing and to give evidence personally. The Taxpayer's representatives applied for, and was granted, an adjournment to ascertain the Taxpayer's availability and whether he would give testimony. By a letter dated 6 September 2000 to the Board, the Taxpayer's wife requested that the appeal be adjourned further until the Taxpayer returned to Hong Kong so that he could appear in person.

5. During the adjournment, the Board had made its own enquiries regarding the circumstances surrounding the Taxpayer's incarceration in China by corresponding with his Chinese lawyers and the relevant mainland Chinese authorities. What the Board had been able to gather was the following information. On 16 December 1999, the Taxpayer together with three other persons were detained by the Customs criminal investigations unit. On 24 January 2000 the Municipal People's Procuratorate authorized placing the Taxpayer in custody and three days later, the Taxpayer was arrested. On 1 February 2001 the Customs authorities transferred the case to the Municipal People's Procuratorate for prosecution. There was a hearing in the Intermediate People's Court on 15 May 2001 on smuggling charges against the Taxpayer and three others for transferring the import of certain paper raw materials of the Employer from one contract to another resulting in a loss of state revenue of RMB2,058,571. The Board is not aware of the result of the trial. It was difficult getting accurate information independently. Despite the Board's attempted enquiries with the relevant authorities, the bulk of the information and documents relating to the Taxpayer's detention was supplied by his wife. But it was beyond doubt that the Taxpayer had been detained officially in China over alleged smuggling activities.

6. On or about 10 March 2003, the Taxpayer contacted and informed the Board that he had returned to Hong Kong and that he was prepared to proceed with the hearing of his appeal. On 8 April 2003, the Board had its substantive hearing of this appeal.

Preliminary issues

7. First, two preliminary issues.

(a) Late appeal

(i) Under section 66(1) of the IRO, the appeal to the Board must be given within one month after the transmission of the Determination to the Taxpayer. The Board is allowed to extend this period if the Taxpayer is prevented from appealing due to reasons of illness, being outside Hong Kong or any other reasonable cause.

(ii) The Determination dated 4 March 1999 was transmitted to the Taxpayer. The Taxpayer appealed to the Board on 4 October 1999, six months past the deadline. In the written submission to the Board signed by the Taxpayer's representative Ms B dated 18 May 2000, Ms B stated that as the Taxpayer was absent from Hong Kong for a long period of time and the Inland Revenue Department ('IRD') had sent correspondence to two addresses (one of which was not frequented by the Taxpayer), this caused the appeal to be lodged beyond its deadline.

(iii) At the hearing before the Board, the Revenue indicated that it would not take issue on the lateness of the appeal. On this basis the Board allowed the extension of time and proceeded to hear the appeal.

(b) Dependent parent allowance

(i) The Taxpayer claimed dependent parent allowance in the written submission by Ms B. The Revenue's representatives at both hearings before this Board had indicated that this dependent parent allowance claim would be allowed so that the assessable income of $135,058 in this appeal (confirmed by the Determination) would be reduced by $40,000 to $95,058.

(ii) Thus, according to the Revenue's calculation, if the Taxpayer failed in this appeal, the tax payable would then be decreased from $19,211 to $11,211.

The law

8. The basic charge and source of income

(a) The basic charging section for salaries tax is section 8(1) of the IRO which provides as follows:

> '*(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.*'

(b) To determine the source of the salary, it is necessary to decide which is the place where the income really comes to the Taxpayer. We apply the rationale set out by Macdougall J in CIR v Goepfert 2 HKTC 210 at page 237: '*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 Wilfrid Greene said, regard must first be had to the contract of employment ... 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 focus of the source of income, the employment.*'

(c) Insofar as the place where the service is rendered, Macdougall J in CIR v Goepfert said at page 236: '*It follows that the place where the services are rendered is not relevant to the enquiry under section 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be completely ignored.*' We would not go so far as to completely ignore the place where the services rendered since it can form one of the factors which may be taken into consideration. However we are certain that the place where the services are rendered cannot on its own be considered as a decisive factor in determining the source of income.

9. Statutory exemption (services outside Hong Kong or paid foreign tax)

(a) A taxpayer who is liable to tax under the basic charge in section 8(1) can claim relief under section 8(1A)(b) and (c) which read as follows:

> '*(b) excludes income derived from services rendered by a person who –*

(i) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft; and

(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.'

(b) Hence, a taxpayer is not assessable to salaries tax if (a) he renders all his services outside Hong Kong in a year; or (b) he has paid foreign tax in the foreign country which is substantially of the same nature as Hong Kong salaries tax.

(c) There is one important issue in this appeal regarding the interpretation of the words 'all the services in connection with his employment'. What happens when an employee performs services in Hong Kong for his employer which are outside the scope of his employment or contractual duties? Such services may have been done rarely, irregularly, casually, voluntarily or informally or on an ad hoc basis or for sheer convenience. Can a taxpayer be said to have rendered all his services outside Hong Kong if he had performed such extraneous services in Hong Kong? Can such extraneous services be considered as services at all? We know of no decided cases relating to this question.

10. 60 day grace period – services in Hong Kong not considered as rendered in Hong Kong

(a) In determining whether a taxpayer has rendered his services outside Hong Kong, no account can be taken of services rendered by him during visits to Hong Kong totaling not more than 60 days under section 8(1B) of the IRO which reads as follows:

'*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.*'

(b) In section 8(1B), a 1986 High Court decision held that the word 'days' qualifies 'visit', and not 'services rendered'. But this was recently queried.

(i) The question is: should the days visiting Hong Kong refer to (a) only visits spent rendering services in Hong Kong; or (b) all the visits to Hong Kong irrespective of whether services were rendered. This question was answered by the High Court in CIR v So Chak Kwong, Jack 2 HKTC 17. It was held that the words 'not exceeding a total of 60 days' qualify the word 'visit' and not the words 'services rendered'. Mortimer J at page 188 said: '*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.*'

(ii) This was queried in D37/01, IRBRD, vol 16, 326 where the Board there said at page 329: '*With respect, that will give rise to extraordinary results. For example, someone spending 61 days of holidays or weekends in Hong Kong will not qualify for exemption if he so much as spent half an hour on an ad hoc assignment for his employer in Hong Kong. Such an absurd result could not possibly be the intention of the legislature.*' And at page 330: '*It may be that the words "services rendered" should be construed to mean regular work contemplated by the contract of employment and exclude any work done on an ad hoc or an informal basis. Be that as it may, we are bound by the decision in the So Chak Kwong, Jack case. All that we can say is that it is perhaps time for the legislature to review this subsection to clarify precisely what is the true intention of this subsection.*'

(iii) We are bound by the So Chak Kwong, Jack case. Our interpretation of the current status of the law is that, in counting the 60 days, days visiting Hong Kong include any visits to Hong Kong irrespective of whether services have been rendered in Hong Kong during those visits. By extension of this principle, since 'days' refer to any visit, it cannot be argued that 'days' must be 'work days'. However D37/01 queried

whether in the interpretation of 'services rendered', work done on an ad hoc or informal basis should be excluded from 'services rendered'. In a similar way, we have raised this question but in a different context under section 8(1A)(b) in paragraph 9(c).

(c) There is controversy in interpreting the word 'visit'. Can a person with a home in Hong Kong be considered as 'visiting' Hong Kong although he may have been living outside Hong Kong?

(i) The interpretation of the word 'visits' has been taken to mean that residents of Hong Kong who for all intent and purposes are outside Hong Kong for most of a year of assessment can never 'visit' Hong Kong. This was the interpretation adopted in D29/89, IRBRD, vol 4, 340 where the Board in that case decided that section 8(1B) was inapplicable to a Hong Kong resident employed in Hong Kong but whose working place was essentially outside Hong Kong. The reason was that the taxpayer in that Board decision was normally a Hong Kong resident working in China. This was despite the fact that the taxpayer was in Hong Kong for only 107 days (taking fractions of a day to be one whole day) and according to the taxpayer's calculations he was in Hong Kong for 27 'working' days (viz excluding weekends, public holidays and unpaid leaves). D29/89 decided as he was resident in Hong Kong and not in China, he could not be taken as having 'visited' Hong Kong within the meaning of section 8(1B). As obiter, the Board in D29/89 was of the view that even if the taxpayer could have been considered as 'visiting' Hong Kong, he could not have met the 60 day grace period requirement as the Board had adopted the interpretation of 'day' to include fractions of a day.

(ii) Another Board in D11/97, IRBRD, vol 12, 147 queried this interpretation of 'visits'. The Board stated that: '*The meaning of the word must of course be construed in its context. The context of section 8(1B) is that the person is ex hypothesi outside the jurisdiction for most of the year and the word "visit" may not be inapposite to describe a period of short stay. It seems to us somewhat precarious to hang on that single word an intention, not otherwise expressed, on the part of the legislature to exclude from the beneficial application of section 8(1B) all persons who have their home in Hong Kong.*'

(iii) We agree with the approach in D11/97. We are not persuaded by the rationale in D29/89 or the arguments put forward by the Revenue in this appeal. We will not deprive a taxpayer of the benefit of section 8(1B) purely on the ground that the taxpayer is a Hong Kong resident or has a

home in Hong Kong. First, the Board will have to look at whether a taxpayer was rendering outside Hong Kong all of his services. Then the Board will decide whether the 60 day rule in section 8(1B) applies in favour of the taxpayer so that any services that he did render in Hong Kong for visits totalling less than 60 days will not be used against the taxpayer when determining whether he did render all his services outside Hong Kong.

(d) The word 'day' in section 8(1B) has been the subject of two types of queries: (i) Does 'day' include any day irrespective of whether it is a working day, non-working day, weekend, midweek, public holiday or paid leave or unpaid leave? Or does it include only the 'working' time or day element? (ii) Should fractions of a day be taken to be one whole day so that arrival and departure dates are each included as a day (assuming arrival and departure did not take place within the same day)? Or should they be taken as exactly what they are; fractions only?

(i) D37/01 favoured, obiter, the exclusion of non-working hours in the calculation of the 60 days. But given the High Court decision in the So Chak Kwong, Jack case and in the context of circumstances envisioned in section 8(1B), we believe that this is untenable. Services can be rendered irrespective of whether the time in Hong Kong were working days or not. Under the same rationale in the So Chak Kwong, Jack case, 'days' include any visit and not only just visits in which services were rendered or visits which were working days or had working hours.

(ii) On the question of whether a part day should be considered as a whole day, the legal position is not so clear. From the cases to which we have been referred, this issue was first raised in D29/89 which mentioned as obiter that fractions of a day was to be considered as one day. This principle was applied in D12/94, IRBRD, vol 9, 131, D11/97, D107/99 unpublished and D20/00, IRBRD, vol 15, 297. D20/00 considered this issue with benefit of reasoned and detailed submissions on the law on this issue from the representatives of both the taxpayer and Revenue in that case. It applied the fraction day = whole day approach. But this approach has been queried in other Board cases D54/97, IRBRD, vol 12, 354 and D37/01. The fraction = whole approach contradicts the rule of interpretation of tax laws that ambiguities should be resolved in favour of taxpayers. Thus we disagree with the fraction = whole approach.

(iii) Should fractions of a day be considered as one whole day when calculating the 60 days? The Revenue answers yes. Taxpayers answer no and point

to the inherent unfairness to the Revenue's approach. A taxpayer entering Hong Kong in the evening of one day and leave Hong Kong the next day within 24 hours of arrival is taken to have visited Hong Kong for two days. In the context of Hong Kong residents working in China returning home for the weekend, this can work especially harshly. A taxpayer returns to Hong Kong in the afternoon or evening of Saturday after his workweek in China and leave Hong Kong on the Sunday evening to be ready for work in China on Monday will have spent 104 days (excluding midweek holidays) in Hong Kong. But we must remember that the 60 day grace period works only if the taxpayer has rendered some services in Hong Kong during his 104 days in Hong Kong. If he had not rendered any services at all in Hong Kong during those 104 days, his salary is still exempt from tax under section 8(1A)(b). The harshness comes from the fact that he is then effectively deprived of the benefit of the 60 day grace period if he performs any services under his employment contract should he need to perform some services during those weekends in Hong Kong or should he need to return to Hong Kong during mid-weekdays to perform such services. Compare his situation with that of a taxpayer who does not have a home in Hong Kong or does not have to come home to Hong Kong during the weekends. This 'non-Hong Kong' taxpayer can take advantage of the 60 day grace period to allow him to perform some of his services in Hong Kong so long as his visits do not total 60 days. In short, a Hong Kong resident with a family in Hong Kong and who regularly returns to Hong Kong to spend quality time with his family cannot avail himself of the 60 day grace period afforded to a complete non-Hong Kong person.

(iv) If the fraction of a day = whole day formula is said to work harshly against taxpayers or against rules of interpretation of tax statutes, what are the alternatives? There are the following:

(1) There is the sum-of-all-parts approach where all the fractions of any part day are simply totaled to give whole days. This approach gives maximum benefit to taxpayers but is unreasonable since stays in Hong Kong of less than 24 hours should as a matter of common sense be considered as at least one day.

(2) Alternatively, a day can be divided into two parts of 12 hours each commencing with twelve o'clock with any hours in Hong Kong less than 12 hours being counted as half a day. By giving half days, the harshness of the whole day approach may be mitigated.

(3) The third approach is more complicated; but it also mitigates the harshness of fraction = whole approach and the other extreme of sum-of-all-parts approach. Each trip to Hong Kong in which the stay in Hong Kong is 24 hours or less is to be counted as one day. For each stay over 24 hours, the total hours in Hong Kong will be divided into 24 hours to count as whole days with the remaining fraction of 24 hours being totaled up using the sum-of-all-parts approach. In essence, this approach treats every trip to Hong Kong lasting less than 24 hours as one day and every trip more than 24 hours will have any additional hours beyond the initial 24 hours treated as fractions of a day. Of course, if there were two or more trips to Hong Kong within the same day, all the trips added together should be counted as only one day.

(v) None of the suggested alternatives have any legal basis. But then again neither did the fraction = whole approach have any legal basis when it was first considered by the Board in D29/89. We believe that the Revenue and the Board should adopt a flexible approach by looking at the circumstances of each case. Did the taxpayer have a family in Hong Kong? Is he a Hong Kong resident with close connections with Hong Kong? Is he a foreigner with no connections whatsoever? What was the principal reason for the visit to Hong Kong? How long was each visit? How frequent were the visits? Are there any records of entry and departure times and dates? There may be other questions which need to be considered depending on the facts of each case.

Burden of proof

11. The burden of proving that the tax assessment is excessive or incorrect is on the Taxpayer under section 68(4) of the IRO.

The evidence

12. The following documentary evidence was put before the Board.

(a) The certificate of incorporation, the business registration application and annual returns of the Employer for 1994, 1995 and 1996. These papers showed that the Employer is a Hong Kong company operating in Hong Kong.

(b) The Employer's replies to the Revenue's enquiries dated 13 May 1996, 18 July 1997, 28 December 1998 and 30 May 2000 giving the following information:

(i) There was no signed employment contract between the Employer and the Taxpayer. In the periods prior to March 1995 and March 1998, the Taxpayer worked in the Employer's factory in China in a factory floor supervision role. He was not required to return to Hong Kong for meetings or handling documents. He was not required to perform any work in Hong Kong. He had not taken any holidays and he had paid leave of seven days as per the practice in China.

(ii) The Taxpayer was paid his monthly salary between 1992 and 1999 in Hong Kong dollar cheques.

(iii) In the year of assessment 1994/95, the Taxpayer's working hours and holidays followed the practice in China. The Employer's work hours in China was 8:00 a.m. to 5:00 p.m. Mondays to Saturdays. The Taxpayer had not taken any leave in the year of assessment 1994/95. In the year of assessment 1994/95, the Taxpayer had taken the Chinese public holidays on 1 May, 1 and 2 October, 1 January, Chinese New Year days 1, 2 and 3. In 1994, the Taxpayer did not take holidays for 11, 18 and 25 April 1994 (note: these are Mondays).

(c) An employment application form of the Employer signed by the Taxpayer as applicant in 1992.

(d) A work place identity card of the Taxpayer dated 7 March 1997 with the Taxpayer's picture and rubber chop impression of the Employer. The identity card is that of a factory in China.

(e) Two tax payment certificates of payment of foreigner income tax at the rate of 25% for the tax periods of October to December 1997 and January to March 1999.

(f) Records of the dates and times of arrival and departure of the Taxpayer into and out of Hong Kong from the Immigration Department together with a calendar and spreadsheets analyzing such arrivals and departures prepared by the Revenue.

13. The Taxpayer appeared and gave oral testimony. Apart from the documents already produced to the IRD and the Board prior to the second hearing, no additional documents were produced by the Taxpayer. The Taxpayer's wife also appeared and made submissions to the Board. The Taxpayer professed his ignorance of his legal position and rights. He gave evidence in a straightforward manner and gave the Board no reason to doubt his testimony. We accept his evidence.

Findings of fact

14. Based on the written evidence submitted to the Board and the testimony of the Taxpayer, we make the following findings of fact.

(a) The Taxpayer is employed by the Employer in 1992 as a technician in a factory in China operated by the Employer. He remained in this position until 1999.

(b) The Employer is a company incorporated in Hong Kong on 7 May 1992 in the business of trading and manufacturing. Its principal place of business was in Tuen Mun and its registered office was at Tai Wai.

(c) The Taxpayer was an acquaintance of one of the owners or directors of the Employer, Ms C, as they had worked together for many years since 1979 in a similar business as fellow employees. There was no written employment contract between the Employer and the Taxpayer. The Taxpayer's salary was paid by the Employer monthly by cheque in Hong Kong dollars.

(d) The place where the Taxpayer rendered his services was in a factory in China. He was responsible for production planning and the maintenance and repairs of machinery in the factory.

(e) The scope of his employment meant that he was in charge of the maintenance of the machines in the factory and it included the purchase of spare parts for these machines. Where the spare parts could be obtained in China, he would purchase them. Where they were not available in China, he would ask his employer in Hong Kong to purchase them. The spare parts purchased in Hong Kong were delivered to the Chinese factory by his Hong Kong boss or by the delivery trucks between Hong Kong and the factory.

(f) Under the terms of his employment, he was not required to return to the Hong Kong office for meetings. He was not required to handle documents. He was not required to carry out any duties in Hong Kong.

(g) He had purchased some spare parts for the factory while he was in Hong Kong. He did so voluntarily and as a matter of convenience only. But this happened very rarely and only on one or two occasions during the year of assessment under appeal.

(h) The Taxpayer's working hours and holidays follow the Employer's office in China. His working hours were between 8:00 a.m. and 5:00 p.m. fom

Mondays to Saturdays. The Taxpayer had not taken any paid leave during the year of assessment 1994/95. But the Employer was not particular about his exact working hours as long as he had done his job. At least so far as his work hours and work days were concerned, he was given a free hand by his boss, Ms C. There was a lot of trust between him and his boss due to their long working relationship. When he worked overtime at night or during public holidays, he did not receive additional pay.

(i) The Taxpayer arrived in and departed from Hong Kong at the times and on the days as set out in annexure A of the Determination. During the year of assessment 1994/95, he was mostly living in China, returning to Hong Kong only during weekends to reunite with his family. His parents were also living in Hong Kong. Usually he returned to Hong Kong arriving in the afternoon of a Sunday and departing in the afternoon of Monday. For the year of assessment 1994/95, he had spent more days in Hong Kong than his other years for the following reasons:

(i) He had hurt his spine that year and he returned to Hong Kong for medical treatment.

(ii) His child was entering primary one in Hong Kong. His aged parents were staying with him. His wife needed more assistance from him as she, being from mainland China, was not familiar with Hong Kong environment. She often telephoned him for assistance.

(j) The Taxpayer did not pay any income tax in China during the year of assessment 1994/95. He did pay some money to persons alleging to be officials in China which he took to be Chinese tax. It was some sort of unofficial payment which was a sum less than the tax which would have been payable if he had been properly taxed. But he did not get proper tax payment receipts from them.

(k) Throughout his employment with the Employer between 1992 and 1999, his position and scope of employment had not changed. He did not have to pay any Hong Kong salaries tax for the years of assessment 1993/94, 1995/96 and 1996/97 as the Revenue considered that his services were rendered outside Hong Kong. For the years of assessment 1997/98 and 1998/99, the Taxpayer did not have to pay salaries tax because his income was below his allowances and no tax would have been payable.

Findings on source of income – section 8(1)

15. From our findings of fact, we conclude that the Taxpayer's salary was prima facie chargeable to tax under section 8(1) of the IRO as income which arose in or was derived in Hong Kong. The fact that the place where he rendered his services was outside Hong Kong on its own does not render his income offshore. He applied to the Employer for employment. He was employed in Hong Kong by a Hong Kong company which operated a business in Hong Kong. He was paid in Hong Kong dollars. His home was in Hong Kong to which he returned almost every weekend. We do not agree with his half-hearted assertion that he was an employee of Company A. He frankly testified that he was employed by the Employer to work in the factory in China. The work place identity card of the factory in China, even if it had been dated the year of assessment 1994/95 (which it was not), is consistent with the Taxpayer having to work in the factory. But this identity card does not on its own show that he was an employee of Company A. Further the identity card had the chop impression of the Employer.

Findings on exemptions from tax under section 8(1A)(b) and (c)

16. From our findings of fact, we conclude that the Taxpayer had rendered all of the services in connection with his employment in China. And for the following reasons:

(a) The Taxpayer had frankly and consistently admitted that he had purchased spare parts in Hong Kong for the factory. But this was done voluntarily, without the request of his employer and purely as a convenience. And this occurred only once or twice during the year of assessment in question.

(b) The Taxpayer was not required under the terms of his employment to perform any services in Hong Kong. There were arrangements in place for parts purchased in Hong Kong which would be purchased by people in Hong Kong and delivered to the factory in China by the usual trucks plying from Hong Kong to the factory and by other colleagues.

(c) From his description of his work functions, he was not a factory manager, general manager or senior administrative staff. He was really a technician in charge of the production machinery. It is unlikely that he would have to make any reports regarding the Chinese side of the business as suggested by the Revenue.

(d) We accept his reasons why for the year of assessment 1994/95 he had to return to Hong Kong more often than his other years. He had been consistent and honest in giving these reasons and informing the Revenue and the Board on what he had done in these Hong Kong visits. His returns to Hong Kong were for family and medical reasons. His returns had nothing to do with his employment. The pattern of his returns to Hong Kong were consistent with the reasons for his returns. His returns were mostly during weekends except one weekend on 15

January 1995. His weekends in Hong Kong were sometimes Sundays and Mondays and other times included Saturdays as well. There were very occasional weekends when he did not return to Hong Kong. We accept that the Employer was not particular of his exact working hours and time so long as the machinery was kept in good running condition. Excluding Mondays which were linked with his weekends in Hong Kong and the Chinese New Year holidays, the Taxpayer had returned to Hong Kong during mid-week on ten mid-week working days staying mostly for one to four hours with one day entering twice with a total stay in Hong Kong of about 11 hours.

(e) Although the Revenue did not have the exact information regarding the tax returns and tax assessments of the Taxpayer while he was working for the Employer in the factory in China for the years of assessment 1993/94, 1995/96, 1996/97, 1997/98 and 1998/99, the Revenue was able to confirm that no Hong Kong tax was payable by the Taxpayer for these years. Throughout these years, the Taxpayer's position and function at the factory had not changed. The assessors who did the assessments for these years had, on the evidence before him, come to the view that the Taxpayer had rendered all his services outside Hong Kong for the years of assessment 1993/94, 1995/96 and 1996/97. For the years of assessment 1997/98 and 1998/99, the question is academic since no salaries tax would have been payable on his income for these years as it did not exceed his personal allowances.

17. We are of the view that, in the circumstances of this case, the purchase of spare parts in Hong Kong performed by the Taxpayer cannot be considered as the Taxpayer performing any services for the Employer. The purchase was outside his scope of work, it was done casually, voluntarily, only once or twice and for convenience. He was doing something that he was neither required nor asked to do under his employment contract. By so doing it was merely more convenient or easier for him to discharge his duties. And he did it only very rarely. Due to the combination of all the aforesaid factors, what the Taxpayer did was on the thin borderline of (a) on the one hand, services to the employer and (b) on the other hand, convenience to himself so that he could perform his services easier. We have opted for the latter given the unique situation of this case. Thus all his services in connection with his employment were outside Hong Kong.

18. Thus based on the aforesaid rationale, we conclude that the disputed income is exempt from salaries tax under section 8(1A)(b).

19. If we were wrong on this, we must look at whether the exemption in section 8(1A)(c) applied; that is, that the Taxpayer had paid income tax of similar nature in China. According to the Taxpayer's own evidence, we are of the view that he did not pay any such tax during the year of assessment 1994/95. We do not put much weight on whether he was able to produce any tax payment receipts for the year of assessment 1994/95; and he was unable to do so. The receipts

that he did produce related to periods later than the year of assessment 1994/95. In the earlier years of his employment, he had paid some money to someone, perhaps even tax officials in China, which he considered as tax. But the real nature of such payment could not have been real tax payments since the payment may be an amount less than the official rate in order to avoid paying the higher real tax. Thus section 8(1A)(c) would not be available to exempt the disputed income from salaries tax.

Findings on the 60 day grace period – section 8(1B)

20. If we were wrong in our conclusion that the Taxpayer's income is exempt from tax under section 8(1A)(b) and the Taxpayer could not be considered as having rendered all the services in connection with his employment outside Hong Kong, then the purchase of the spare parts would be considered as services rendered in Hong Kong. We are then left to answer the question of whether the 60 day grace period in section 8(1B) can be applied so that his services in Hong Kong would not be taken into consideration if his visits to Hong Kong did not exceed 60 days.

21. We have expressed our views on the interpretation of the words 'visit' and 'days' in section 8(1B) in paragraph 10. The Taxpayer could 'visit' Hong Kong even though he is a Hong Kong resident or has a home in Hong Kong.

22. In counting 'days', we make no distinction between working and non-working days or considered working hours. We disagree with the Taxpayer's calculation of 27.5 days where only working days are taken into account.

23. Using the sum-of-all-parts approach by adding up all the hours in Hong Kong and then dividing the sum by 24 hours, this gives about 1673 hours or 69.7 days. This calculation has not taken into consideration the seven visits to Hong Kong where the record does not show arrival and/or departure time (6 August 1994, 25 February 1995 and all visits in March 1995) which if taken into account would be yet longer than the 69.7 days. Using the half day approach calculation of the Taxpayer gives 96.5 days. This is still over the 60 day grace period. Using the third alternative approach set out in paragraph 10(d)(iv)(3), the Taxpayer has returned to Hong Kong on 63 occasions of which two occasions were in the same day netting the visits to 61 visits. Even without counting those visits which were over 24 hours, the Taxpayer would be over the 60 day grace period. Thus using any of the three alternative approaches set out in paragraph 10(d)(iv), the 60 day grace period in section 8(1B) is exceeded.

24. Thus, section 8(1B) is not applicable to the disputed income and would not have assisted the Taxpayer in excluding any services which he may have performed in Hong Kong when considering whether he had rendered all the services in connection with his employment under section 8(1A)(b).

Conclusions

25. In conclusion, the disputed income is sourced in Hong Kong and chargeable to salaries tax under section 8(1). It is exempted from tax under section 8(1A)(b) as all the services rendered by the Taxpayer were rendered outside Hong Kong. The appeal is allowed.

26. We thank the Revenue's representatives for their thorough preparation and fair presentation and citation of previous cases and Board decisions.