Case No. D32/07

Salaries tax – whether the taxpayer's employment was a non-Hong Kong employment – whether salaries tax should be chargeable on a time apportionment basis – sections 8(1)(a), 9, 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Julia Frances Charlton and Lo Pui Yin.

Dates of hearing: 15, 16, 20 and 21 August 2007.
Date of decision: 13 November 2007.

The Taxpayer was employed by Company B during the years of assessment in question. The employment agreement signed by Company B bore the address of Company B's office in Hong Kong. Company B was a limited liability company established in Country D and carried on, inter alia, investment banking business.

It is the Taxpayer's case that he was hired outside of Hong Kong. The terms of his assignment to the Hong Kong office were negotiated and concluded outside Hong Kong prior to his transfer. Throughout his employment, he was ultimately under the supervision, direction and control of a group management committee, which primarily carried out its activities in Country D. Further, the superior management and control of Company B was exercised by various committees sitting in Country D and Company B should be regarded as resident in Country D.

The Taxpayer claims that he held a non-Hong Kong employment with Company B and therefore his income should be apportioned between the time spent within and outside Hong Kong.

Held:

1. When determining the locality of a taxpayer's employment, the correct approach is to consider 'where the income really comes to the employee'. The Board needs to consider all relevant facts in coming to this particular conclusion. The place where the services are rendered by the employee is not necessarily relevant. (CIR v Goepfert (1987) 2 HKTC 210 applied.)

2. The Board rejects the Taxpayer's submission that it is only supposed to look at three factors: (a) where the employer is resident; (b) where the employment contract was

negotiated and concluded; and (c) from where the employee's remuneration was paid.

3. To look for the place where the income really came to the employee, the first consideration has to be the contract of employment. This is however not a conclusive matter. All factors have to be considered. The place of payment is obviously an important indicator of the locality of the contract and may very well be prima facie the locality of the contract. However, it is not conclusive even though, in most cases, the place of payment was the locality of the contract. (Lee Hung Kwong v CIR [2005] 4 HKLRD 80 applied.)

4. As regards the residency of a company, the test is not where it is registered, but 'where it really keeps house and does business'. It is normal and common for a subsidiary to follow the wishes of its parent company and that even if all that the subsidiary's board of directors does is to implement such wishes, this does not mean that the subsidiary is managed and controlled in the parent's place of residence. (Wood v Holden [2005] STC 789 applied.)

5. The Taxpayer's employment was sourced and came to him in Hong Kong. His employment was in Hong Kong and he was interviewed by key personnel here in Hong Kong. The contract of employment was clearly most closely connected with Hong Kong and the particular post was specifically created for the team in Hong Kong. The Taxpayer reported to his various supervisors in Hong Kong who were in turn responsible for his promotion. The Taxpayer was also paid in Hong Kong.

6. Company B was clearly resident in Hong Kong. It is quite clear that the central management and control of Company B was in Hong Kong. The fact that the constitution of Company B vested the management of the company in its directors to the exclusion of its shareholders will also conclude that very wide management powers were given to the directors. In the present case, 27 of the 30 directors of Company B had their residence in Hong Kong.

Appeal dismissed.

Cases referred to:

Bullock v The Unit Construction Co Ltd (1960) 38 TC 712
Wood and another v Holden (Inspector of Taxes) (2006) STC 443
D123/02, IRBRD, vol 18, 150
CIR v Goepfert (1987) 2 HKTC 210
Lee Hung Kwong v CIR [2005] 4 HKLRD 80

D40/90, IRBRD, vol 5, 306
D87/00, IRBRD, vol 15, 750
D59/03, IRBRD, vol 18, 626
De Beers Consolidated Mines, Ltd v Howe (1996) 5 TC 198
Bullock v The Unit Consolidation Co Ltd (1959) 38 TC 712
Wood and another v Holden [2005] STC 789
Koitaki Para Rubber Estates Ltd v FCT (194) 64 CLR 15
News Datacom Limited v Atkinson (SC/3041/2005)
News Data Security Products Ltd v Atkinson (SC/3042/2005)

Michael Olesnicky and Pierre Chan of Messrs Baker & McKenzie for the taxpayer.
Yvonne Cheng Counsel instructed by Department of Justice and Johnny Chan Senior Government Counsel for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by Mr A ('the Taxpayer') against the Deputy Commissioner of Inland Revenue's determination dated the 10 January 2007 in respect of the Taxpayer's objection to the additional salaries tax assessments for the years of assessment 1998/99, 1999/2000 and 2000/01 raised on him.

2. The issue in dispute between the parties is whether the Taxpayer's employment with Company B was a non-Hong Kong employment and as such, he should be chargeable to salaries tax on a time apportionment basis. The Taxpayer claims that he held a non-Hong Kong employment with Company B and therefore his income should be apportioned between the time spent within and outside Hong Kong under section 8(1)(a) of the Inland Revenue Ordinance ('IRO').

The agreed facts

3. The following facts were agreed by the parties and we find them as facts:

(1) Mr A ['the Taxpayer'] has objected to the Additional Salaries Tax Assessments for the years of assessment 1998/99, 1999/2000 and 2000/01 raised on him. The Taxpayer claims that he held a non-Hong Kong employment with Company B such that only the income derived from his services rendered in Hong Kong should be chargeable to salaries tax.

(2) (a) Company B was a limited liability company established under the laws of the state of State C, Country D in 1994. Its registered office in State C was at Address E Company B was registered as an oversea company in Hong Kong under Part XI of the Companies Ordinance.

(b) At all relevant times, Company B was carrying on the business of 'securities broking, investment banking advisory, asset management and underwriting services and the provision of management, administrative and liaison services to other group companies' at an office in Hong Kong which was initially located at Address F and later at Address G.

(c) At all relevant times, Company B filed profits tax returns and financial accounts to the Inland Revenue Department in Hong Kong.

(3) (a) On 22 July 1994, a copy of the Limited Liability Company Agreement of Company B dated 18 February 1994 ['the LLC Agreement'] was filed to the Companies Registry in Hong Kong.

(b) On 7 June 1999, Company H, on behalf of Company B, filed a Return of Alteration in the Charter, Statutes etc. of an Oversea Company to the Companies Registry in Hong Kong. The Return attached a certified copy of Amended and Restated Limited Liability Company Agreement of Company B dated 29 November 1997 ['the Amended LLC Agreement']. The Return also attached a Secretary's Certificate signed by Mr I, the Assistant Secretary of Company B, certifying that the Amended LLC Agreement was still in effect as of 20 May 1999.

(4) According to list of directors and secretary, returns of alteration in directors or secretary and notifications of changes of secretary and directors filed by Company B to the Companies Registry in Hong Kong, the following persons were directors of Company B:

	Name of the person	Period(s) in the years of assessment 1998/99, 1999/2000 and 2000/01 during which the person served as a director of Company B
(a)	Mr J *	1-4-1998 – 9-9-1999

(b)	Mr K *	1-4-1998 – 12-12-2000
(c)	Mr L *	1-4-1998 – 28-11-1998
(d)	Mr M *	1-4-1998 – 12-12-2000
(e)	Mr N *	1-4-1998 – 13-12-1999
(f)	Mr O *	1-4-1998 – 12-1-1999 9-9-1999 – 12-12-2000
(g)	Mr P *	1-4-1998 – 12-1-1999
(h)	Mr Q *	1-4-1998 – 31-3-2001
(i)	Mr R *	1-4-1998 – 12-1-1999
(j)	Mr S *	1-4-1998 – 13-12-1999
(k)	Mr T * (appointed on 12-11-1997)	1-4-1998 – 12-12-2000
(l)	Mr U *	1-4-1998 – 13-12-1999
(m)	Mr V	1-4-1998 – 22-9-1999
(n)	Mr W *	1-4-1998 – 22-9-1999
(o)	Mr X *	1-4-1998 – 7-1-2000
(p)	Mr Y *	14-4-1998 – 12-1-1999
(q)	Mr Z *	14-4-1998 – 12-1-1999
(r)	Mr AA	14-4-1998 – 12-1-1999
(s)	Mr AB *	14-4-1998 – 12-1-1999 9-9-1999 – 13-12-1999
(t)	Mr AC *	14-4-1998 – 12-1-1999 13-12-1999 – 31-3-2001
(u)	Mr AD *	13-12-1999 – 31-3-2001
(v)	Mr AE *	9-9-1999 – 13-12-1999
(w)	Mr AF *	9-9-1999 – 13-12-1999
(x)	Mr AG *	13-12-1999 – 31-3-2001
(y)	Mr AH	25-2-2000 – 31-3-2001
(z)	Mr AI *	25-2-2000 – 31-3-2001
(aa)	Mr AJ *	14-9-2000 – 31-3-2001
(bb)	Mr AK *	12-12-2000 – 31-3-2001
(cc)	Mr AL *	8-1-2001 – 31-3-2001
(dd)	Mr AM *	19-3-2001 – 31-3-2001

* Hong Kong addresses were reported in the list of directors and secretary/the returns of alteration in directors or secretary/the notifications of changes of secretary and directors filed to the Companies Registry in Hong Kong.

(5) By letter dated 31 March 1998 [‘the Employment Agreement’], the Taxpayer was offered an employment with Company B.

The Employment Agreement was signed by Mr T of Company B. It bore the address of Company B' s office in Hong Kong (i.e. Address F [Fact (2)(b)]) and was posted to the Taxpayer at his address in Country AN. The Taxpayer signed the Employment Agreement accepting the offer and dated 5 April 1998.

(6) Company B filed employer' s returns of remuneration and pensions for the years ended 31 March 1999, 31 March 2000 and 31 March 2001 respectively in respect of the Taxpayer reporting the following particulars:

		1998/99	**1999/2000**	**2000/01**
(a)	Capacity in which employed	Analyst	Associate	Associate
(b)	Period covered	1-6-1998 – 31-3-1999	1-4-1999 – 31-3-2000	1-4-2000 – 31-3-2001
(c)	Particulars of income -	USD	USD	HK$
	Salary	44,134	71,667	588,817
	Bonus	1,321	99,497	1,512,649
	Other Rewards, Allowances or Perquisites	31,631	17,415	528,696
	Total	77,086	188,579	2,630,162
(d)	Particulars of place of residence provided -			
	Address	Address AO [Hong Kong]	Address AP [Hong Kong]	Address AQ [Hong Kong]
	Period	1-6-1998 – 7-3-1999	1-4-1999 – 9-10-1999	8-4-2000 – 7-2-2001
	Nature	Flat	Flat	Flat
	Rent paid to landlord by employee	Yes	Yes	HK$260,000
	Rent refunded to employee	Yes	Yes	HK$260,000
	Address	Address AP [Hong Kong]	Address AQ [Hong Kong]	--
	Period	8-3-1999 – 31-3-1999	10-10-1999 – 31-3-2000	--
	Nature	Flat	Flat	--
	Rent paid to landlord by employee	Yes	Yes	--

	Rent refunded to employee	Yes	Yes	--
(e)	Whether the employee was wholly or partly paid by an overseas concern either in Hong Kong or overseas	Yes	Yes	Yes
	Name of the overseas concern	Company B	Company B	Company B
	Address	Address E	Address E	Address E
	Amount (if known)	As reported per (c) & (d) above	As reported per (c) & (d) above	As reported per (c) & (d) above

(7) In his tax returns – Individuals for the years of assessment 1998/99, 1999/2000 and 2000/01, the Taxpayer reported the following particulars of income:

(a) Year of assessment 1998/99

(i)	Employer	:	Company B
(ii)	Capacity in which employed	:	Analyst
(iii)	Particulars	:	Salary & Allowances
(iv)	Period	:	1-6-98 to 31-3-99
(v)	Amount	:	HK$308,354
(vi)	Value of quarters provided	:	HK$30,835
(vii)	Total income [(v) + (vi)]	:	HK$339,189 (Note)

Note

A computation of tax liability and a schedule of the Taxpayer' s trips outside Hong Kong for the period from 1 June 1998 to 31 March 1999 were enclosed in the return showing the calculation of the Taxpayer' s declared total income as follows:

Employment with Company B		HK$
Salary & Allowances per the employer' s return of remuneration and pensions [Fact (6)(c)] (US$77,086 x 7.7209)	:	595,173

Amount assessable based on physical presence in Hong Kong		
595,173 x 157.5 / 304.0	:	308,354
Add: Rental Value (308,354 x 10%)	:	30,835
Total Assessable Income for 1998/99	:	339,189

(b) Year of assessment 1999/2000

(i)	Name of employer	:	Company B
(ii)	Capacity employed	:	Associate
(iii)	Period	:	1-4-1999 – 31-3-2000
(iv)	Grand total of income	:	HK$1,457,546
(v)	Amount to be excluded from the total income by reason of relating back / exemption of income	:	HK$760,632
(vi)	Total value of all places of residence provided	:	HK$69,691
(vii)	Net assessable income [(iv) – (v) + (vi)]	:	HK$766,605 (Note)

Note

A computation of assessable income and a schedule of the Taxpayer' s trips outside Hong Kong for the year ended 31 March 2000 were enclosed in the return showing the calculation of the net assessable income declared by the Taxpayer as follows:

Employment with Company B		HK$
Salary & Allowances per the employer' s return of remuneration and pensions [Fact (6)(c)] (US$188,579 x 7.7291)	:	1,457,546

Amount assessable based on physical presence in Hong Kong		
1,457,546 x 175.0 / 366.0	:	696,914
Add: Rental Value (696,914 x 10%)	:	69,691
Total Assessable Income for 1999/2000	:	766,605

(c) Year of assessment 2000/01

(i)	Name of employer	:	Company B
(ii)	Capacity employed	:	Associate
(iii)	Period	:	1-4-2000 – 31-3-2001
(iv)	Grand total of income	:	HK$2,630,162
(v)	Amount to be excluded from the total income by reason of relating back / exemption of income	:	HK$1,340,302
(vi)	Total value of all places of residence provided	:	HK$108,136

Note

A computation of tax liability and a schedule of the Taxpayer' s trips outside Hong Kong for the year ended 31 March 2001 were enclosed in the return showing the calculation of the Taxpayer' s assessable income as follows:

Employment with Company B		HK$
Salary & Allowances per the employer' s return of remuneration and pensions [Fact (6)(c)]	:	2,630,162

Amount assessable based on physical presence in Hong Kong

2,630,162 x 179.0 / 365.0	:	1,289,860
Add: Rental Value		
(1,289,860 x 10% x 306/365)	:	108,136
Assessable Income for 2000/2001	:	1,397,996

(8) The assessor raised on the Taxpayer the following salaries tax assessments for the years of assessment 1998/99, 1999/2000 and 2000/01:

	1998/99	**1999/2000**	**2000/01**
	HK$	HK$	HK$
Income [Notes to Facts (7)(a), (b) & (c)]	308,354	696,914	1,289,860

Residence [Notes to Facts (7)(a), (b) & (c)]	30,835	69,691	108,136
Total assessable income	339,189	766,605	1,397,996
Less: Allowances	(108,000)	(216,000)	(216,000)
Net chargeable income	231,189	550,605	1,181,996
Tax payable	28,802	83,102	190,439

(9) (a) In response to the assessor's enquiries, Company AR (formerly known as Company AS) ['the Representative'] asserted that the Taxpayer's employment was a non-Hong Kong employment on the following grounds:

(i) '(The Taxpayer) was hired in [Country AN] on April 20, 1998 by Company [AT], Representative Office [in Country AN] which is located at [Address AU]. With effect from June 1, 1998, (the Taxpayer) was transferred to ([Company B]), a company established under [Country D] law with offices at [Address G]. [Company AT] and [Company B] are each predominately owned directly or indirectly by The [Group AV], a corporation established under the laws of the [State C] in [Country D].'

(ii) 'The terms of (the Taxpayer's) assignment to the Hong Kong office were negotiated and concluded outside Hong Kong prior to his transfer. Since the commencement of his employment, (the Taxpayer) was and continues to be ultimately under the supervision, direction and control of the [Group AV] Management Committee. The [Group AV] Management Committee primarily carries out its activities in [Country D]. Whether (the Taxpayer) remains in Hong Kong or is assigned to a [Group AV] affiliate outside Hong Kong is ultimately the decision of the [Group AV] Management Committee.'

(iii) '(The Taxpayer's) remuneration was paid to him in Hong Kong to cover his living expenses, although he could have chosen to be paid entirely or partially in [Country D]. Nonetheless, (the Taxpayer) remained a member of [Country D] retirement program and participated in the medical scheme of [Group AV]

in [Country D]. Practice Notes No.10 makes clear that place of payment is the least important of the three factors quoted above.'

(b) The Representative provided a letter dated 1 December 1999 issued by Company B to the assessor to support the Taxpayer' s claim.

(10) The assessor raised on the Taxpayer the following additional salaries tax assessments for the years of assessment 1998/99, 1999/2000 and 2000/01:

(a) Year of assessment 1998/99

	Revised total amounts assessed	Amounts previously assessed	Additional Assessment
	HK$	HK$	HK$
Income	595,173 [Note to Fact (7)(a)]	308,354 [Fact (8)]	286,819
Residence	59,517 (595,173 x 10%)	30,835 [Fact (8)]	28,682
Total assessable income	654,690	339,189	315,501
Less: Allowances	(108,000)	(108,000)	--
Net chargeable income	546,690	231,189	315,501
Tax payable	82,437 (i)	28,802 (ii)	
Additional tax payable [(i)-(ii)]			53,635

(b) Year of assessment 1999/2000

	Revised total amounts assessed	Amounts previously assessed	Additional Assessment
	HK$	HK$	HK$

Income	1,457,546 [Fact (7)(b)(iv)]	696,914 [Fact (8)]	760,632 [Fact (7)(b)(v)]
Residence	145,754 (1,457,546 x 10%)	69,691 [Fact (8)]	76,063
Total assessable income	1,603,300	766,605	836,695
Less: Allowances	(216,000)	(216,000)	--
Net chargeable income	1,387,300	550,605	836,695
Tax payable	225,341 (i)	83,102 (ii)	
Additional tax payable [(i)-(ii)]			142,239

(c) Year of assessment 2000/01

	Revised total amounts assessed	Amounts previously assessed	Additional Assessment
	HK$	HK$	HK$
Income	2,630,162 [Fact (7)(c)(iv)]	1,289,860 [Fact (8)]	1,340,302 [Fact (7)(c)(v)]
Residence	220,501 (2,630,162 x 10% x 306/365 [Note to Fact (7)(c)])	108,136 [Fact (8)]	112,365
Total assessable income	2,850,663	1,397,996	1,452,667
Less: Allowances	--	(216,000)	216,000
Net chargeable income	2,850,663	1,181,996	1,668,667

Tax payable	427,599 (at standard rate) (i)	190,439 (ii)	
Additional tax payable [(i)-(ii)]			237,160

(11) On behalf of the Taxpayer, the Representative objected against the above additional assessments on the ground that the Taxpayer should be entitled to time apportionment of his income.

(12) The assessor has obtained the following documents from the Immigration Department:

(a) A completed Hong Kong visa application form signed by the Taxpayer on 7 April 1998. The Taxpayer declared in the application form that his employer in Hong Kong was Company B located at Address F.

(b) An application dated 23 April 1998 filed by Company B in respect of the Taxpayer' s employment visa in Hong Kong. Company B made the following declarations in the application:

(i) Particulars of applicant

Proposed length of stay in Hong Kong	:	2 years
Purpose	:	Work

(ii) Particulars of sponsor

Full name	:	Company B
Business address	:	Address F

(c) A letter dated 22 April 1998 filed by Company B in connection with the Taxpayer' s application for an employment visa. It was stated in the letter that:

'This office has experienced rapid expansion, particularly in the Investment Banking Division. In order to meet with the requirements and workload of the division, it has been decided that (the Taxpayer) be employed by the Hong Kong office for three years to staff a new position.'

(d) A letter dated 31 May 1999 filed by Company B in connection with the application for extension of the Taxpayer's employment visa for two years.

(e) A letter dated 14 December 2000 filed by Company B in connection with the application for extension of the Taxpayer's employment visa and his wife's dependent visa for two years.

(13) Having considered the available information, the assessor was of the view that the location of the Taxpayer's employment with Company B was in Hong Kong and that the Taxpayer's claim for time apportionment of his income could not be accepted.

(14) The Representative did not accept the assessor's view.

(a) In its letter dated 2 March 2005, the Representative claimed that:

(i) The superior management and control of Company B was exercised by the Management Committee and various other committees of Group AV in Country D and that the residence of Company B was in Country D. Hence, the Taxpayer's employer, Company B, was not resident in Hong Kong;

(ii) the Taxpayer negotiated and concluded the Employment Agreement with Company B in Country AN and not in Hong Kong;

(iii) little weight should be placed on the fact that the Taxpayer's remuneration was paid into a Hong Kong bank account; and

(iv) in the above circumstances, the Taxpayer did not enter into a Hong Kong employment with Company B and hence he should entitle to claim time apportionment of his income.

(b) The following information was also found in the Representative's letter:

(i) '(The Taxpayer's) job description as an analyst with the (Principal Investment Area) team based in Hong Kong was as follows:

a. Researching and assessing potential investment opportunities, both qualitatively and quantitatively.

b. Building and operating complex financial models for company valuation purposes.

c. Participating in business due diligence on potential investments.

d. Contributing to the preparation of discussion materials on proposed investment opportunities for the consideration of the Investment Committee.

e. Gaining a sound understanding of leveraged finance products and procedures and helping to structure investments.

f. Assisting in the undertaking of the various technical aspects of the execution of a private equity investment.

g. Helping to monitor investments.'

(ii) '(The Taxpayer's) immediate supervisor in the Years of Assessment in question was [Mr AW]. [Mr AW] reported to [Mr N]. [Mr N] was and remains responsible for (Principal Investment Area) in Asia. [Mr N] is responsible to the Investment Committee. [Mr N] has been based in [City AX] of [Country D] since January 2000.'

(15) (a) The Representative provided the following further documents to support the Taxpayer's claim for time-apportionment of his income:

(i) Certified true copy of Company B's certificate of registration of oversea company in Hong Kong dated 22 July 1994.

(ii) Certified true copy of Company B's amended and restated certificate of formation dated 25 November 1997.

(iii) Certified true copy of the license issued to Company B by the Securities and Futures Commission on 30 May 2005.

(iv) Copies of audited financial statements of Company B for the 1999, 2000 and 2001 fiscal years.

(v) Copies of corporate tax filings made by Company B to the Inland Revenue Department in Hong Kong for the years of assessment 1999/2000, 2000/01 and 2001/02.

(vi) 1999, 2000, 2001 and 2004 Annual Reports of the Group AV.

(vii) Copies of Forms 1065 issued by Company B to its partners.

(viii) The Taxpayer's Statutory Declaration dated 8 August 2005 concerning his employment with Company B.

(16) On 3 November 2005, Company B provided information and documents concerning the Group AV Management Committee.

(17) (a) On 1 February 2006, the Representative provided a legal submission on the tax residence of Company B dated 26 January 2006 prepared by Messrs Baker & McKenzie.

(b) On 2 February 2006, the Representative provided another legal submission on the tax residence of Company B prepared by Messrs Baker & McKenzie.

(18) In its letter dated 15 May 2006, Messrs Baker & McKenzie claimed that:

(a) 'as a matter of law, the Management Committee of [Group AV] can exercise, and it in fact exercises, de facto control over the affairs of [Company B] notwithstanding what is provided in (the Amended LLC Agreement);'

(b) 'the terms of (the Amended LLC Agreement) are not important for the purposes of determining the residency of [Company B] if the Management Committee exercises de facto control over the affairs of [Company B]; and'

(c) 'it is not necessary to consider whether [Company B] has a dual residence when the Management Committee exercises superior control over the affairs of [Company B].'

In support of its claim, Messrs Baker & McKenzie relied on the House of Lords' decision in Bullock v The Unit Construction Co Ltd (1960) 38 TC 712.

(19) In its letter dated 30 June 2006, the Representative reiterated that the superior management and control of Company B was exercised in Country D and that Company B should be regarded as resident in Country D. The Representative provided the following documents to substantiate its claim:

(a) an extract from a book entitled Book AY written by XXXX;

(b) a memorandum to the Operating Committee in City AX [of Country D] dated 20 March 1998 regarding the opening of the Country AN branch of Company B;

(c) a memorandum to the Risk Committee of Group AV in City AX [of Country D] dated 15 July 1998 regarding the obtaining of Country AN Stock Exchange Membership;

(d) a memorandum to the Management Committee in City AX [of Country D] dated 25 January 1999 regarding the opening of the Country AZ branch and to report on the status of the opening of the Country AN branch;

(e) a written consent of managing directors of Company B dated 12 January 1999 to appoint personnel to open and operate bank accounts of Company B;

(f) copies of minutes of Company B directors' meetings held at Address F and a summary of the said minutes.

(20) (a) On 24 October 2006, Messrs Baker & McKenzie provided further legal submissions on the tax residence of Company B, including an analysis of the application of the decisions in Bullock (above), Wood and another v Holden (Inspector of Taxes) (2006) STC443, and the Board of Review Decision D123/02, IRBRD, vol 18, 150 to the Taxpayer' s objection. It was contended that:

(i) '[Company B] carries on business in Hong Kong, as well as [Country AN], [Country AZ], and [Country BA]. This fact does not make [Company B] resident in all of these countries. One must have regard to the superior control, i.e. central management and control, of [Company B]. (*Bullock*)'

(ii) 'The fact that some directors' meetings were held in Hong Kong is not relevant, in view of the fact that such meetings were

perfunctory and informal, and designed only to implement controlling decisions that had been made by the Committees in [Country D]. (*Koitaki*)'

(iii) 'The true supervisory and controlling decisions affecting [Company B] were made in the [Country D]. [Company B] is therefore resident in the [Country D].'

(iv) 'The fact that the constituent documents of [Company B] state that "management of [Company B] shall be vested exclusively in the directors" is not relevant if that is in fact not a true statement of the factual position. Instead, regard must be had to where de facto management and control is exercised. This was by the Committees in [Country D]. If a different analysis were adopted, the result is that taxpayers could artificially manipulate the residency of a company simply by drafting its constituent documents in the desired manner.'

(v) 'Based on this analysis, it is substantiated that [Company B] is resident in [Country D].'

(b) Messrs Baker & McKenzie provided the following further supporting documents:

(i) A declaration of Ms BB, General Counsel of The Group AV dated 25 September 2006 concerning the functions and operations of various committees of Group AV.

(ii) A declaration of Mr Z, a former director of Company B [Fact (4)(q)].

(iii) A declaration of Mr BC, the General Counsel of Company B concerning the committees of Group AV.

Evidence of the Taxpayer

4. The Taxpayer gave evidence before us. He was born in Country AN, but spent his school years in Country BD, where his father worked. He graduated from University BE in February 1995. Before commencing work, he spent one year in the military service in Country AN. Having completed his military service, he commenced work at Company BF in Country AN for 2½ years. He in turn wrote to Company B in search of position with them. On cross-examination, however, he suggested for the first time that what he had written was by way of an email to City AX

[of Country D]. It is of interest to note that that email has never been produced.

5. However, be that as it may, the Taxpayer was interviewed initially in Country AN. That interview was conducted by persons who traveled from Hong Kong, namely Mr BG, Mr AW and Mr BH. The Taxpayer was then invited to attend a further series of interviews in Hong Kong.

6. It is clear from his evidence that five or six interviews were held at Company B's offices in Hong Kong and these interviews were with members of the Principal Investment Area Team ('PIA Team') to appoint an analyst. The Taxpayer also confirmed that he was interviewed by Mr N who was the Head of the PIA Team.

7. We are clearly of the view that the second round of interviews were important. Although the Taxpayer tried to play down these interviews and tried to give the impression that the point of these interviews was to see whether or not he would fit in, this was clearly not the case. It was quite clear that during the course of the interviews in Hong Kong, he was asked detailed questions with regards to his ability and his particular experience and expertise and knowledge on how he would run various forecast models. He was also interviewed on substantial issues relating to his basic understanding of corporate finance and his knowledge of the Country AN market.

8. It is also quite clear in our view that the objective of the interviews was for the Hong Kong team to be satisfied that he was a suitable candidate and he was the type of person whom they wish to join their PIA Team.

9. The Taxpayer stated to us that he never negotiated any terms of employment during the interviews here in Hong Kong. It is also clear in our view that he never negotiated any terms either in Hong Kong or in Country AN. Indeed, he accepted that he was very much attracted to a position within Group AV. At that particular time, it was quite clear that Group AV offered very favourable terms of employment and he was of the view that if appointed, he would obtain far better terms than he previously was experiencing with his then employer.

10. Hence, we accept that negotiation of terms was never an important issue and indeed, in his evidence, he stated that he never negotiated any terms at all.

11. We conclude that the deliberations with regard to offering him employment must have been made by the PIA Team which was in Hong Kong. Indeed, this is supported by a letter dated 2 March 2005 addressed by Company AS to the Commissioner of Inland Revenue where they stated at paragraph 2(i):

> 'i) After deliberating on the relative merits of the candidates that had sought the position of an Analyst in [Company B's] PIA team the decision was taken by [Company B] to extend an offer of employment to [Mr A].'

12. We have no hesitation in concluding that the decision to offer employment to the Taxpayer was made in Hong Kong.

13. The Taxpayer then returned to Country AN. In his evidence, the Taxpayer was not sure as to how he was contacted. He first indicated that on cross-examination, he was called by Mr BG' s assistant from Hong Kong. He also indicated that he may have been called directly from Mr BG from Hong Kong or alternatively, he thought he might have been called when Mr BG had arrived in Country AN. However, we do take the view that the letter of Company AS dated 2 March 2005 is indeed helpful. In paragraph 2(j), they stated:

> 'j) The decision of [Company B] to extend an offer of employment to [Mr A] was initially communicated to [Mr A] (who was at that time in [Country AN]) by telephone. The terms of the offer that was to be extended to [Mr A] were outlined in broad terms at this time.'

14. However, be that as it may, it is quite clear that Mr BG did meet with the Taxpayer in Country AN for the purpose of sounding out whether or not the Taxpayer would accept an offer if this was put to him. In short, Company B were of the view that they did not wish to send an offer letter which was going to be rejected. The Taxpayer indicated that he would be prepared to accept employment if such an offer came forth.

15. It is quite clear that an offer letter did follow and this was by virtue of a letter dated 31 March 1998. This letter was written on Company B' s letterhead. It bore the company' s Hong Kong address at Address F and it was sent from Hong Kong. That letter offered him a position as an Analyst in the PIA Team of Company B. It stated that:

> '….. As you know, people are the key to our business and we are extremely excited about having you as part of our team. …..'

The letter however also stated that:

> 'This offer and any employment with [Group AV] are conditional upon the satisfactory completion of a valid work visa and other checks including pre- and post-employment background, reference and credit checks. The start of your active employment will be determined after discussions between you and the firm. It will, to a great extent, depend on when your work visa and mandatory registrations can be obtained. Please note that it currently takes 6-8 weeks from receipt of your completed paperwork to obtain a Hong Kong work visa. For all persons holding sales, trading, corporate finance and research positions it will take a further 2-3 weeks to obtain registration with the Securities and Futures Commission (the "SFC"), Hong Kong. Please contact [XXX] at (852) [XXXX-XXXX] in Hong Kong to discuss the Hong Kong work visa application process and YYY at (852)

[XXXX-XXXX] to discuss registration. Enclosed are the visa application forms and the registration application forms for your completion.'

16. In our view, it is quite clear that the Taxpayer would relocate to Hong Kong and would obtain the appropriate visa and SFC registrations. It is also clear that any start date was subject to ensuring there was sufficient time to complete the appropriate visa and SFC registrations. Although it is quite clear that the letter of acceptance by the Taxpayer was signed in Country AN, we take the view that this is of little significance or effect. We conclude that all relevant substantive acts that led up to the decision to offer the post of Analyst in the PIA Team was taken in Hong Kong, he was to become part of the PIA Team and that Team was based in Hong Kong. Hence, we conclude that although the Taxpayer signed and posted back his employment contract from Country AN, his contract only became effective and concluded after the work permit and the SFC registration had been completed.

17. This is also reinforced by the fact that the Taxpayer accepted that the work permit and the obtaining of a visa was a crucial condition. It is clear that once these had been obtained, the Taxpayer did travel to Hong Kong to start his employment with Company B. In cross-examination, the Taxpayer indicated that he only stayed and worked in Country AN between April and June 1998 because his Hong Kong work permit had not yet been issued. Again, this reinforces that it was an event in Hong Kong which triggered the commencement of the Taxpayer's employment.

18. The Taxpayer gave evidence as to exactly what his role and his duties were with Company B. He was part of the PIA Team which operated as an integrated team operating out of Hong Kong. He stated to us that the various Vice-Presidents would choose various projects. They would meet in Hong Kong normally on a Monday morning and then dispersed and traveled throughout the region looking at various projects and investments. We accept that the Taxpayer traveled extensively throughout the region during his early years with Company B. However, we are clearly of the view that his post was created for the Hong Kong operations of Company B. It is also quite clear that his post was specifically created for the Hong Kong operations. No matter where the Taxpayer was to work, he was always employed by Company B and based in Hong Kong.

19. The Taxpayer also gave evidence as to whom he reported. It is quite clear that the supervisors and those to whom he reported were based in Hong Kong. Indeed, Mr AW during the years of assessment was the head of the sub-team. Mr AW was responsible for the Taxpayer and in turn, reported to Mr N who also lived in Hong Kong until January 2000. In our view, we have no hesitation again in concluding that he worked for Company B and in turn, provided his services to that company. Again, this is reinforced by the fact that he was a registered securities dealer for Company B and no one else. In particular, we have regard to his SFC registration documentation.

20. The Taxpayer during the course of his evidence never denied that the place where he was paid was Hong Kong. This included not only his basic salary but his bonus and refunds of rent

paid for his apartments. It is accepted that he lived and resided first in the Mid-levels and then moved to the Peak. All payments were made in Hong Kong. It is also clear that the Taxpayer accepted that he was also provided with other benefits by Company B in Hong Kong, for example, his medical insurance coverage. Although this policy was issued by a Country D insurer, any benefits that were obtained by this policy could be obtained here in Hong Kong. If sick, he would seek reimbursement for payments made to the Hong Kong medical practitioners.

21. Although there was some evidence before us that the cost of remuneration of the Taxpayer was charged to Company BI in City AX [of Country D], in our view this is neither here nor there. We do not accept that the true payer of remuneration of the Taxpayer was an entity in City AX [of Country D]. It is quite clear in our view and the evidence is unequivocal and incontrovertible that the Taxpayer worked for Company B, he was paid in Hong Kong. However, we do accept that Company B in turn provided various services to Company BI.

Evidence of the place of residence of Company B

22. Much of the time of this appeal was taken up with evidence being called on behalf of the Taxpayer in order to determine the place of residence of Company B. Mr Olesnicky called various past and current employees of Company B or Group AV in order to support his proposition that Company B was not resident in Hong Kong.

Evidence of Ms BJ

23. Ms BJ was and is the Company Secretary of Group AV in Hong Kong. She joined in August 2000. She drew to our attention the fact that there were various board minutes. Some of these she indicated were 'paper meetings', that is no physical meetings of the directors actually took place and that these minutes were only prepared for central corporate formalities concerning such matters as registration with the SFC and audited financial statements.

24. However, in 1999 and 2000, there was a physical board meeting held each year. She advised us that the directors of Company B were provided with an overview of the business and the purpose of these meetings were to demonstrate to regulatory authorities that the directors did get together to meet to get themselves appraised of the activities of Company B. She stated that Company B does not have a traditional corporate structure where the business of each company is controlled by its directors. She talked about Company B operating as one global firm.

25. Indeed, this particular theme was reinforced by the other witnesses called on behalf of the Taxpayer. She again emphasized that Company B as a whole is controlled through a committee structure and this particular theme was also supported by the other witnesses whom the Taxpayer called.

26. However, from the documents which were put to her, it is quite clear that Company B

was incorporated in State C [of Country D] and Company B had no place of business in State C [of Country D]. It was put to her that of the 30 directors of Company B during the various periods of the years of assessment in question, 27 of them were resident in Hong Kong. The particulars of directors were filed pursuant to the requirements sections 33(1) and (2) of the Companies Ordinance (Chapter 32). The relevant filings required that each director' s usual residential address was to be included.

27. There has never been any suggestion by the Taxpayer nor Ms BJ that any of these filings were incorrect. It is quite clear that any changes of address needed to be informed to the Companies Registry.

28. Ms BJ in her evidence confirmed that the Limited Liability Company Agreement ('the LLC Agreement') and the amended and reinstated Limited Liability Company Agreement ('the Amended LLC Agreement') were basically the constitutional documents of Company B. We take the view that these are very important documents and we give particular weight to the Amended LLC Agreement which was in force during the relevant years of assessment being the subject matter of this appeal.

29. It can be seen and Ms BJ confirmed that:

(i) The directors were authorized to decide an appropriate fiscal year for Company B and to make all elections for tax and other purposes as may be deemed;

(ii) The directors had the power to change the number of directors;

(iii) Clause 1.07 – The purpose of LLC stated as follows:

'LLC is organized for the purpose of engaging (directly or through subsidiary or affiliated companies or both) in any businesses or activities that may lawfully be engaged in by a limited liability company formed under the [State C] Act, including (but not limited to) engaging directly or through one or more subsidiaries or affiliates in the general investment banking, financial services and securities and commodities businesses in Hong Kong.'

However, we would mention that the original agreement had not mentioned the words 'Hong Kong'.

30. Having considered carefully the constitution of Company B, it is unequivocal and incontrovertible that the central management and control of Company B were vested in its directors and the directors indeed had a wide range of powers which dealt with the running of the business.

Evidence of Mr Z

31. Mr Z gave evidence that he was a director of Company B from 14 April 1998 to 12 January 1999. He indicated to us that he had retired from this position in 2005 but is still an advisory director within Group AV.

32. He gave evidence about his responsibilities as Head of Investment Banking in China. He advised us that he had responsibility for sourcing deals with companies which were involved in initial public offerings of their shares. He indicated to us that it was he who decided how his time each day was spent best and how and which clients should be approached.

33. He stated to us that he oversaw the managing directors within his division who were working on specific projects and dealt with the various teams in selection of those projects which were put forward for consideration. He was involved with the appointment of lawyers and accountants who assisted in implementing various deals. He was involved with the scrutiny of various business proposals that were put forward to various committees and led the team in presentations of their intended recommendations.

34. He informed us that 'as the number one guy, I look at strategic issues ….. I have oversight'. He also indicated to us that he would sign letters of engagement with clients. He saw himself as running the China business. He also indicated that other heads of other divisions would have their own level of responsibilities similar to his own.

35. Again, we are of the view having regard to his evidence that the descriptions he gave were indicative and indeed, as Ms Cheng quite rightly pointed out in her submissions 'classic descriptions of management and control'.

36. In his evidence, Mr Z attempted to show why so many directors of Company B were appointed and in turn, Company B did not organize regular board meetings. In short, he indicated that the operations were organized along business lines and each was specialized. He stated that there were various Chinese walls built up between the different business operations. However, we also conclude that as in Ms BJ' s evidence, which we have dealt with above, it is quite clear that the directors did get together from time to time to update each other on the progress of their respective business lines.

37. During the course of his evidence, Mr Z indicated that at the end of the day, the approval of various deals that were completed by all the teams in Hong Kong were always subject to approval and agreement by what he described as 'the wise men' in City AX [of Country D]. He was referring to the way in which the firm operated.

38. It is clear that there was an extensive and sophisticated interaction between the personnel of Company B and the relevant committees in City AX [of Country D]. Mr Z explained

how the relevant divisions interacted with the committees. It was clear however that from Mr Z's evidence that the directors of Company B were the key persons who were responsible for managing and directing operations of each business division in Company B.

39. It was also clear that it was his initial efforts to identify the business and deal with current business proposals. In turn, proposals were put to the committees. These proposals were refined after feedback if necessary.

40. Indeed, Mr Z in his evidence again stressed that credibility in dealing with the investment committee was very important and it was up to him to ensure that his particular divisions performed.

41. We do not for one moment accept that Mr Z gave evidence that the various committees in City AX [of Country D] 'usurped' the management and control of Company B. In our view, it is quite clear that there was an extensive dialogue going backwards and forwards between the various committees and Company B.

42. We find and conclude that there was no usurpation of any management and control of Company B by the committees in City AX [of Country D] so as to ensure that Company B became resident outside Hong Kong, that is in City AX [of Country D].

43. It is also clear from the evidence of Mr Z and Ms BJ that the 27 directors of Company B in Hong Kong were the leaders, that is, managing directors, they had substantial skills leadership to enable them to advise their clients and handle their various senior officers. Mr Z confirmed this on cross-examination.

44. They were paid substantial salaries in recognition of their abilities to perform. We do not accept Mr Z's statement 'from my knowledge, during my time as a director of [Company B], I can confirm that the directors and staff of [Company B] simply implemented the directions of the Committees in [City AX] [of Country D]'. In our view, this was not the case. The evidence that we have heard does not support this particular proposition. We also conclude from Ms BJ that the relationship between the Hong Kong team and the committees indeed was an interactive process, there were exchanges of views and if the investment committees expressed certain views, then they would leave it to the Hong Kong team to refine and redo the proposals.

Evidence of Mr BK

45. Mr BK is the Federation Chief Financial Controller. He informed us that his function was to oversee the financial reporting of the Group AV entities in Asia. He gave evidence as to the committees' structure that existed over a period of time and the way in which the committees interacted and operated. Mr BK in his evidence did not take matters that much further than Mr Z. In his witness statement, he gave a rather bland statement that 'All key business decisions of [Group

AV] in Asia (including Hong Kong) are required to be approved by the relevant Committees'. However, on cross-examination, it is quite clear that he indicated that Mr N's responsibilities were to oversee merchant banking and that he was the prime source of potential investments and in turn, recommended investments to funds domiciled in City AX [of Country D] and recommended buying or selling. Again, this illustrates the fact that Company B was putting forward proposals and making investment decisions.

Evidence of Mr BC

46. Mr BC stated that he was responsible for Group AV's legal department in non-Japan Asia. He had joined Group AV in March 1992 and he had spent part of his time with Group AV in City BL [of Country BO] where he was a member of the Special Execution Group ('SEG'). That group consisted primarily of lawyers. He served as a [Region BM's] head of SEG from January 1996 to September, 1999 and global head of SEG from October 1999 until taking up his position here in Hong Kong in May 2004. He drew to our attention that he was counsel to the commitments committee, he gave us some indication as to how the commitments committee met and operated. They were both based in Country D or Region BM. He recollected that at least two-thirds of the members of the committee were based in City AX [of Country D]. He stated that they met weekly or on an ad hoc basis. He advised us that they participated by way of telephone or video conference calling. He also stated that the length of the meetings would vary and they depended upon the various items on the agenda and the complexity of the various matters. He stated that the commitments committee and the capital committee had various policies and procedures that dealt with various specific transactions. He drew to our attention the procedure whereby these teams would prepare a memorandum covering the prescribed items which would result in pre-approval. He indicated to us that for various deals that were coming out of Asia, 75% to 80% were not pre-approved. He confirmed that at least half of the deals from Asia that were discussed required some follow up with the Committee before they were approved. He also drew to our attention the fact that for deals that were not approved, the team could seek to appeal the decision or go to the global management committee or executive office in City AX [of Country D]. Again, he confirmed that from his experience, these committees form the very important way in which the Group is run, they stem from the days in which Group AV was a partnership and in turn, City AX [of Country D] wanted to manage the business and control potential liabilities by keeping a tight control over what was being done in other regions.

47. In cross-examination, Ms Cheng drew to Mr BC's attention the various filings that were made with the SFC and in particular drew to his attention the various licences that were obtained from the SFC to enable Company B to act as securities dealer, investment adviser and commodities trader. His attention was drawn to various warnings that were contained in the forms that any false or misleading information was an offence. His attention was drawn to a question which stated:

> 'Will any person, other than the directors or shareholders of the corporation, have control over the corporation's business?'.

48. His attention was also drawn to the fact that after registration, the registered person had an ongoing obligation to keep the SFC informed of any changes in the information provided, that is any change in control, etc.

49. In June 1994, Company B applied to the SFC for registration as a securities dealer and Mr BC confirmed that in the relevant answers to the various questions as to whether or not any other director or person would have control over the corporation's business, Company B answered unequivocally 'no'.

50. In December 1994, the SFC wrote to Company B reminding it of its obligations to report any changes in the information supplied in connection with the application for registration. Company B also filed various annual returns and from 1994 to 2001 and always declared positively that aside from change in directors or shareholders, there had not been any change in the control of the business.

51. In his evidence, Mr BC confirmed the accuracy of the returns that were filed with the SFC. In cross-examination, it was put to Mr BC that these forms clearly showed to the SFC that Company B was not controlled by anybody who is not a director or a shareholder. Mr BC however sought to explain the declarations by indicating that the forms were directed at finding out the 'legal' or 'technical' control of Company B that is the identities of the person who had the formal legal authority to act on behalf of Company B.

52. However, in our view, it is quite clear that the responses to the questions in the forms are unequivocal and incontrovertible. The explanation put forward by Mr BC suggests that one does not need to have regard to what is stated in the returns and the forms since the SFC was well aware as to the overall structure of the Group AV and its mode of operation. With great respect, we found this part of Mr BC's evidence to be unsatisfactory and indeed, somewhat self-serving. Indeed, he relied on a letter written on behalf of Company B by Company BN dated 7 July 1994. However, that letter makes no reference to the committee structure. What the letter does show is that the SFC did follow up on the information provided in Company B's application forms.

53. In our view, it is quite clear that the SFC did not follow up on any information regarding the alleged committee controls because it was never told about them. We accept Ms Cheng's submission that putting Mr BC's evidence at the highest, his claim that the SFC knew all along about the Group AV mode of operations is imprecise and indeed, there is no documentary evidence to show exactly what the SFC knew.

54. We rely on the relevant returns and forms that were filed with the SFC whereby it made it unequivocal and clear that there was a declaration by Company B that it was not controlled

by any one other than its shareholders and directors.

Our Analysis of the Law

55. The charging provisions for salaries tax are set out in section 8 of the IRO and 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;*
>
> .....
>
> *(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment-*
>
> *(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services;*
>
> *(b) excludes income derived from services rendered by a person who-*
>
> *(i) .....; 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.

(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.'

56. Section 9 of the IRD also provides a very exhaustive and expansive definition of 'income from any office or employment'. We accept that the effect of the above provisions is that:

(a) where a source of income is fundamentally a Hong Kong employment, then all the income is charged under section 8(1) irrespective of where the services were actually rendered (other than for specific exceptions which are not relevant in respect of this appeal). Hence, once income is caught by section 8(1), there is no room for any apportionment;

(b) however, where a source of income is fundamentally an appointment outside Hong Kong, the income generated from services rendered in Hong Kong will in turn be charged under section 8(1A)(a), save for income covered by the '60-day rule' in section 8(1B).

See CIR v Goepfert (1987) 2 HKTC 210 ('the Goepfert Decision')

57. When determining the locality of a taxpayer's employment, we believe that the correct approach that the Board has to embark upon is to consider 'where the income really comes to the employee' per the Goepfert Decision at 237. We are also of the view and we have no doubt that the correct approach is that we need to consider all relevant facts in coming to this particular conclusion. We again accept that the place where the services are rendered by the employee is not necessarily relevant.

58. However, Mr Olesnicky on behalf of the Taxpayer has submitted to us that we are only supposed to look at three factors:

(a) where is the employer resident;

(b) where was the employment contract negotiated and concluded;

(c) from where the employee's remuneration was paid .

59. With great respect to the submission put forward by Mr Olesnicky, we are of the

view that there can be no basis for such a submission. We believe that the authorities are unequivocal and clear and indeed, the submissions of Mr Olesnicky have been rejected by previous decisions of the Board. In our view, it is beyond doubt that the correct approach is as set out in the Goepfert Decision, where Macdougall, J approved the 'totality of facts' test when determining the locality of an employment. At page 237, he states as follows:

> '.....
>
> *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.*
>
> *This does not mean that the Commissioner may not look behind the appearances to discover the reality. The Commissioner is not bound to accept as conclusive, any claim made by an employee in this connexion. He is entitled to scrutinise all evidence, documentary or otherwise, that is relevant to this matter.*
>
> *If any authority be needed for this basic proposition one needs only to refer to the words of Lord Normand at page 155 of Bray v. Colenbrander:-*
>
> > *"My Lords, in each of these appeals the Respondent entered into a contract of employment with an employer resident abroad. The contract was in each case entered into in the country of employer's residence and it provided for payment of the employee's remuneration in that country. Parenthetically it should be said that there is no suggestion that the place of payment was nominal or pretended, or that the real or genuine place of payment was not the place specified in the contract. Nothing, therefore of what follows in this opinion in any way touches a case where the designated place of payment is challenged as nominal or pretended and unreal."*
>
> *There can be no doubt therefore that in deciding the cruicial issue, the Commissioner may need to look further than the external or superficial features of the employment. Appearances may be deceptive. He may need to examine other factors that point to the real locus of the source of income, the employment.*
>
> *It occurs to me that sometimes when reference is made to the so called "totality of facts" test it may be that what is meant is this very process. .....'*

60. Macdougall J' s approach as set out above has been further reviewed and examined by Deputy Judge A To in Lee Hung Kwong v CIR [2005] 4 HKLRD 80 ('Lee Hung Kwong Decision'). In particular the following passages are of assistance:

> '24. *In Commissioner of Inland Revenue v. Geopfert [1987] 2 HKTC 210, after satisfying himself that the question posed under the United Kingdom taxing statue was essentially the same question posed under s.8(1) of the Inland Revenue Ordinance, Macdougall J adopted the principles developed in the English cases, Foulsham v Pickles [1925] AC 458, Bennett v Marshall [1938] 1 KB 591 and Bray & Another v Colenbrander & Another [1953] AC 503. These cases were decided in 1925, 1938 and 1953 respectively, the first and last having been decided by the House of Lords and the second one by the Court of Appeal. In Bray & Another v Colenbrander & Another, after reviewing the earlier authorities, Lord Norman concluded at p.511:*
>
> > *The House of Lords … in Foulsham v Pickles have definitely decided that in the case of an employment the locality of the source of income is not the place where the activities of the employee are exercised but the place either where the contract for payment is deemed to have a locality or where the payments for the employment are made, which may mean the same thing.*
>
> *Thus, where the source of income is from an employment, the locality of the source of income is the place where the contract for payment is deemed to have a locality. By "contract for payment", Lord Normand must mean the contract of employment based on which the employee earned his payment and not necessarily the place where the payments are made. The place of payment is of course an important indicator of the locality of the contract and is prima facie the locality of the contract. But it is not conclusive: see for example Bennett v Marshall. If an employee enters into a contract of employment in Hong Kong with an employer resident in Hong Kong but had his salary paid into his Swiss bank account, it can hardly be doubted that the locality of his contract is in Hong Kong. His income is from a Hong Kong source. In most cases, the place of payment is the locality of the contract. That must be why Lord Normand said that the two may mean the same thing, but not that the two mean the same thing.*
>
> …
>
> *26. The judgment of Sir Wilfrid Greene MR in Bennett v Marshall [1938] 1 KB 591 was approved by the House of Lords. Thus, the test as to the source of income is to look for the place where the income really comes to the employee.*

> *As Sir Wilfrid Greene MR said, regard must first be had to the contract of employment. This must include consideration as to the place where the employee is to be paid, where the contract of employment was negotiated and entered into and whether the employer is resident in the jurisdiction. But none of these factors are determinative. If the employer is resident in Hong Kong and entered into a contract of employment with an employee in Hong Kong, the employer must be carrying on business in Hong Kong from which the employer's profits in substance arise. The locality of the contract must therefore also be in Hong Kong: see for example, Foulsham v Pickles [1925] AC 458. On the other hand, if the employer is not resident in Hong Kong, but came to Hong Kong to recruit employees to work exclusively in China. The locality of the contract is not in Hong Kong. Consideration of these factors shows the very process adopted in ascertaining the locality of the contract. This is perhaps what has been referred to as the totality test.'*

61. Hence, in our view, it is clear that Deputy Judge A To made it perfectly clear that the approach to be taken was to look for the place where the income really came to the employee and that the first consideration had to be the contract of employment. He also indicated that this was not a conclusive matter and that all factors had to be considered. Again, he clearly stated that the place of payment was obviously an important indicator of the locality of the contract and may very well be prima facie the locality of the contract. He clearly took the view that it is not conclusive even though, in most cases, the place of payment was the locality of the contract. We again have no hesitation in accepting that the correct approach in considering all facts attaches importance to the Board bearing in mind that appearances may be deceptive and as such, the Board can go beyond the appearances to discover the reality. Decisions of the Board reinforce this approach, in particular D40/90, IRBRD, vol 5, 306, D87/00, IRBRD, vol 15, 750 and D59/03, IRBRD, vol 18, 626. We are of the view that all these authorities support and show that the Goepfert Decision approved the application of the 'totality of facts' test in determining the issue where the source of income of the employment is located.

62. Mr Olesnicky in his submissions asked us to accept that the Lee Hung Kwong Decision is a development of the relevant principles which in turn in his submissions expanded the single factor of place of payment in Goepfert to a 3-factor test. He urged upon us that we should disregard previous Board decisions and come to the conclusion that the 3-factor test that he is putting forward is indeed the correct approach. With great respect to Mr Olesnicky, this is not supported by the authorities and indeed as can be seen above, such a submission runs in the face of the Goepfert and Lee Hung Kwong, which in our view bind this Board. We reject this approach.

63. Further submissions were put to us in respect of whether Company B, the Taxpayer's employer, was resident in Hong Kong or in City AX [of Country D].

64. We accept the submission by Ms Cheng on behalf of the Commissioner that the test

for a company' s residence is not where it is registered but 'where 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 … a company resides for purposes of income tax where its real business is carried on … and the real business is carried on where the central management and control actually abides' De Beers Consolidated Mines, Ltd v Howe (1996) 5 TC 198 at 213. Ms Cheng in her helpful submissions drew our attention to the following authorities:

(a) Bullock v The Unit Construction Co Ltd (1959) 38 TC 712; and

(b) Wood and another v Holden [2005] STC 789.

65. In her submission, Ms Cheng emphasized that Wood v Holden emphasized the important distinction between the parent company exercising management and control of its subsidiary (usurpation) and merely influencing management and control. She submits that the fact that a subsidiary company generally follows the wishes of its parent company is normal. However, this does not mean that the subsidiary company is centrally managed and controlled by the parent.

66. In Wood v Holden Park J reviewed Bullock v The Unit Construction Co Ltd (1959) 38 TC 712 and took the view that this was a highly exceptional case where the UK parent company in that decision usurped the functions of the board of directors of the African subsidiaries for the express purpose of stemming their financial losses and in order to do so, the parent company (a) took control even of minor matters, and (b) operated the subsidiaries without following the procedures set down in the subsidairies' constitutions, so that much of what went on 'may have been irregular, or even unconstitutional'.

67. Our attention was drawn to the judgment of Park J in Wood v Holden where he stated as follows:

> *'[24] That is not the normal situation as between a parent company and its subsidiaries, and in any consideration of the principles governing the common law of corporate residence the normal realities of the parent and subsidiary relationship have to be taken into account. They were not relevant in the Calcutta Fute or Cesena Sulphur cases, or in De Beers. In all those cases the companies were not subsidiaries. Unit Construction did involve subsidiaries, but, as I have explained, the circumstances were exceptional. In the context of a group of companies where maters proceed in a normal way and not in an exceptional way it is to be expected that the parent company will have plans for what it wants its subsidiaries to do, and that the directors of the subsidiaries will ordinarily be willing to go along with the parent company' s wishes. If in those circumstances the subsidiaries were resident for tax purposes wherever the parent company is resident the consequences would, in my view, be*

unsatisfactory, productive of double taxation clashes between different jurisdictions, and disruptive of national tax systems.

[25] There is a difference between, on the one hand, exercising management and control and, on the other hand, being able to influence those who exercise management and control. There is another difference, highlighted by Unit Construction v Bullock, between, on the one hand, usurping the power of a local board to take decisions concerning the company and, on the other hand, ensuring that the local board knows what the parent company desires the decisions to be. It is also necessary to keep in mind that, while the cases which I have referred to so far all involved the residence of companies with active continuing businesses, it is possible (and is common in modern international finance and commerce) for a company to be established which may have limited functions to perform, sometimes being functions which do not require the company to remain in existence for long. Such companies are sometimes referred to as vehicle companies or SPVs (special purpose vehicles). 'Vehicle' has a belittling sound to it, but such companies exist. They can and do fulfil important functions within international groups, and they are principals, not mere nominees or agents, in whatever roles they are established to undertake. They usually have board meetings in the jurisdictions in which they are believed to be resident, but the meetings may not be frequent or lengthy. The reason why not is that in many cases the things which such companies do, though important, tend not to involve much positive outward activity. So the companies do not need frequent and lengthy board meetings'

68. Park J's decision in Wood v Holden was affirmed on appeal [2006] 1 WLR 1393. Again, the Court of Appeal agreed that there was a distinction between the parent company usurping the subsidiary and the parent company influencing the subsidiary.

69. We accept the submissions put forward by Ms Cheng, by reference to Wood v Holden that it is normal and common for a subsidiary to follow the wishes of its parent company and that even if all that the subsidiary's board of directors does is to implement such wishes, this does not mean that the subsidiary is managed and controlled in the parent's place of residence. However, it is accepted that in exceptional cases where the board is ignored, there may be the situation that the decision of the board has been usurped and the company is being managed from the parent's place of residence as in Unit Construction v Bullock.

70. Mr Olesnicky on behalf of the Taxpayer referred us to:

Koitaki Para Rubber Estates Ltd v FCT (194) 64 CLR 15

News Datacom Limited v Atkinson (SC/3041/2005)

News Data Security Products Limited v Atkinson (SC/3042/2005)

71. In our view, these cases can be distinguished from the present case before us in that of control and management in those cases could very well be divided amongst the number of places.

Burden of proof

72. We have no difficulties in accepting the submissions on behalf of the Commissioner that the burden of proof clearly falls upon the shoulders of the Taxpayer. In particular, we rely on section 68(4) of the IRO. It is unequivocal and clear that the Taxpayer has to establish why his income does not fall within section 8(1) of the IRO. We take the view that it is clear that the Taxpayer needs to discharge not only the evidential burden but also the persuasive burden. In particular, we accept the submission put forward by Ms Cheng that the burden is on the Taxpayer to show why we should hold that Company B was managed and controlled in City AX [of Country D].

Our conclusions

73. Having considered all the evidence with care and having had the opportunity to review all submissions forcefully put to us by Mr Olesnicky and Ms Cheng, we have no difficulties in concluding that the Taxpayer' s employment was sourced and came to him in Hong Kong. Our review and analysis of the evidence clearly shows that the Taxpayer' s employment was that of the PIA Team in Hong Kong and he was interviewed by key personnel here in Hong Kong. We conclude also that the contract of employment was clearly most closely connected with Hong Kong and that the particular post was specifically created for the PIA Team. The Taxpayer reported to his various supervisors in Hong Kong who were in turn responsible for his promotion. The Taxpayer was also paid in Hong Kong.

74. We also have no hesitation in concluding that Company B was clearly resident in Hong Kong. We have examined all the relevant authorities and have looked at the evidence and again, it is quite clear that the central management and control of Company B was in Hong Kong. We rely on the fact that the constitution of Company B vested the management of the company in its directors to the exclusion of its shareholders will also conclude that very wide management powers were given to the directors.

75. We also rely on the relevant returns that were made to the SFC where it was unequivocally stated that Company B was not controlled or managed by anybody other than its shareholders and its directors. There was never any mention in any returns that the City AX [of Country D] committees controlled, managed or ran Company B.

76. We also rely on the fact that during the relevant years of assessment, there were 27

directors who had their residence in Hong Kong and various business operations were conducted by Company B. The evidence clearly shows that these directors were senior people and were within the managing director class.

77. It is also quite clear that Company B through its various teams would submit various business proposals to various committees in City AX [of Country D] for their consideration. Although there was a strong interaction and dialogue between the committees and Company B, it is clear that those committees never by-passed or usurped or took over the management of the directors.

78. It is also quite clear from the evidence that we have heard that Company B did put forward time and time again proposals to City AX for their review and consideration.

79. Hence, considering all matters and having carefully reviewed the evidence, we find it as a matter of fact that Company B was resident in Hong Kong and we again accept the submissions of Ms Cheng that it is plainly unarguable that Company B was resident in City AX [of Country D].

80. Therefore, we have no hesitation in dismissing the Taxpayer's appeal. Finally, we wish to take this opportunity of thanking the parties for their assistance and their submissions in respect of this matter.