Case No. D35/02

Salaries tax – secondment to mainland – whether all services rendered outside Hong Kong.

Panel: Ronny Wong Fook Hum SC (chairman), William Cheng Chuk Man and Frederick Kan Ka Chong.

Date of hearing: 9 May 2002.
Date of decision: 22 July 2002.

The appellant was employed by Company A and Company B in Hong Kong as a financial controller but he was seconded to work in the mainland during the years of assessment 1995/96 to 1998/99.

The main issue is whether he rendered outside Hong Kong all the services in connection with his employment.

When the appellant came back to Hong Kong, he, inter alia, reported business matters to the head office and also discussed with staff of accounts department on the differences between the accounting rules in Hong Kong and in the mainland.

Held:

The Board held that these acts were part and parcel of the functions which the appellant discharged in connection with his employment and were performed in Hong Kong. He did not therefore render outside Hong Kong all the services in connection with his employment.

Appeal dismissed.

Tsui Siu Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. Company A was a company incorporated in Hong Kong. According to a business registration dated 1 March 1979, Company A carried on a business of 'Manufacturers of Electronic Products'. Company A was subsequently wound up pursuant to a special resolution passed on 23 November 2001.

2. Company B (Zhongshan) is a company incorporated on 21 June 1994. According to a business registration dated 30 June 1994, Company B (Zhongshan) carried on business at Address C in Hong Kong.

3. By letter dated 31 March 1995 ('the Engagement Letter'), Company A offered the Appellant employment as 'Financial Controller' at a monthly salary of $18,000. Clause 16 of the Engagement Letter provided that:

> 'You shall at all times accept transfer or secondment within the Group without reservation as a lateral move with changes in duties, supervision, work conditions but without loss of service or reduction in remuneration and benefits'.

4. By letter dated 21 May 1996, Company A informed the Revenue that during the period between 1 April 1995 and 31 March 1996, the Appellant was seconded to their 'associate subsidiary' Company D (Zhongshan) although the Appellant's salary 'was wholly paid in Hong Kong'. By letter dated 17 April 1997, Company A made a similar intimation to the Revenue in respect of the Appellant's secondment to Company D (Zhongshan) during the period between 1 April 1996 and 31 March 1997.

5. By letter dated 29 May 1997 ('the Transfer Letter'), Company B (Zhongshan) confirmed with the Appellant his transfer to that company and his secondment to Company D (Zhongshan) with effect from 1 April 1997. Clause 1 of the Transfer Letter provided that the Appellant's 'Position' was that of 'Financial Controller, Finance Department'. Clause 4 of the Transfer Letter further provided that the Appellant's 'Working Location' was in 'Zhongshan, the People's Republic of China'.

6. By letters dated 15 April 1998 and 10 March 1999, Company B (Zhongshan) informed the Revenue of the Appellant's secondment to Company D (Zhongshan) for the period between 1 April 1997 and 31 March 1999.

7. The Appellant paid PRC tax in respect of parts of his earnings during the years of assessment 1995/96 to 1998/99. The Revenue accepts that those parts of the Appellant's earnings are not taxable by virtue of section 8(1A)(c)(ii) of the Inland Revenue Ordinance (Chapter 112)

('IRO'). The issue before us is whether the balance of the Appellant's income is within the Hong Kong tax net.

8. There is no dispute between the parties that during the relevant tax years, the Appellant visited Hong Kong for more than 60 days with the result that the Appellant is not entitled to any exemption under section 8(1B) of the IRO. The question is whether the Appellant rendered outside Hong Kong all the services in connection with his employment for the purpose of section 8(1A)(b)(ii) of the IRO.

The position of the Appellant in pre-hearing correspondence with the Revenue

9. In letter dated 18 October 2000, the Appellant informed the Revenue that 'I do not have to perform any duty in Hong Kong except sometimes reporting business matters in Head Office and therefore I should be exempted from Hong Kong salaries tax while working in Zhongshan PRC'.

10. In letter dated 7 March 2001, the Appellant asserted that he did not perform any service in Hong Kong. He had no desk or telephone contact in the office of Company A. His name card described his sole position as financial controller of Company D (Zhongshan).

11. In letter dated 15 May 2001, the Appellant argued that reporting to the head office in Hong Kong two to three times per year and liaising with colleagues in Hong Kong should not be regarded as rendering services in Hong Kong.

12. In letter dated 23 August 2001, the Appellant explained that when he visited the personnel department in Hong Kong, he discussed leave entitlements, annual transfer and job progression with his colleagues in that department. The Appellant further explained that he visited the accounts department in Hong Kong in order to get himself acquainted with staff of that department so as to minimise future disputes in settlement of accounts between the operations in Hong Kong and in PRC. He also discussed with staff of that department on proper bookkeeping to cater for differences between the applicable rules in Hong Kong and in PRC. The Appellant also said that there were occasions when he came to Hong Kong to meet representatives of various banks in order to take them for visits in Company D (Zhongshan).

The hearing before us

13. At the hearing before us, the Appellant confirmed that the letter dated 23 August 2001 was applicable generally to all the tax years in question. He said he would make on average two to three visits to Hong Kong each year for such purposes.

Our decision

14. The Appellant's employers were Company A and Company B (Zhongshan). Both are companies incorporated in Hong Kong. The relevant contracts of employment were embodied in the letters dated 31 March 1995 and 29 May 1997. The Appellant was paid in Hong Kong. There is therefore no doubt that the Appellant's employment was sourced in Hong Kong. The fact that he held himself out to the outside world as the financial controller of Company D (Zhongshan) does not affect the contractual position that subsisted between himself on the one part and Company A or Company B (Zhongshan) on the other part.

15. We have no doubt that he rendered in Hong Kong services in connection with his employment with Company A or Company B (Zhongshan). Most if not all the acts referred to in paragraphs 9, 11 and 12 above were not mere social pleasantries. The acts were not gratuitous but were part and parcel of the functions which the Appellant discharged in connection with his employment. Those acts were performed in Hong Kong. He did not therefore render outside Hong Kong all the services in connection with his employment. He is therefore not entitled to the exemption under section 8(1A)(b)(ii) of the IRO.

16. For these reasons, we dismiss the Appellant's appeal.