Case No. D35/05

Salaries tax – source of income – identity of employer – time apportionment basis – sections 8 and 9 of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Robin M Bridge and David Yip Sai On.

Dates of hearing: 11, 12, 13 April and 23 May 2005.
Date of decision: 8 August 2005.

The taxpayer objected to the salaries tax assessment for the years of assessment 2000/01, 2001/02 and 2002/03. He asserted that:

- Prior to 28 Feb 2001, he was employed by Company B, a Hong Kong Company.
- From 1 March 2001, his employment with Company B was transferred to Company C, the holding company of Company B.
- Both the place of business and place of residence of Company C were outside Hong Kong.
- As such, the income from 1 March 2001 onwards was not sourced in Hong Kong but should be apportioned based on the time he spent within and out of Hong Kong.

Held:

1. The asserted 'transfer' of the taxpayer's employment from Company B to Company C out of Hong Kong on 1 March 2001 is unsustainable on facts.

2. Indeed, there has been clear, unequivocal and incontrovertible evidence that even after the 'transfer' on 1 March 2001, the Taxpayer was still under the employment of Company B:

   2.1 Representations made to the Immigration Department for his work permit in Hong Kong.

   2.2 Registration with and representations to the Securities and Futures

Commission for his licence to act as an investment adviser and a dealers' representative in Hong Kong.

2.3 Representation through his business card which impressed the world that Company B was at all times his employer.

3. As the source of income is fundamentally a Hong Kong employment, all the taxpayer's income is caught by section 8(1) of IRO irrespective of where he actually rendered the services. As such, there is no room for apportionment.

Appeal dismissed.

Cases referred to:

Goepfert [1987] 2 HKTC 210
D87/00, IRBRD, vol 15, 750

Steven Sieker of Messrs Baker & McKenzie for the taxpayer.
Yvonne Cheng Counsel instructed by Department of Justice for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by Mr A ('the Taxpayer') against the Deputy Commissioner's determination dated the 2 August 2004 in respect of the Taxpayer's objection against the salaries tax assessments for the years of assessment 2000/01, 2001/02 and 2002/03. The Taxpayer has asserted that his income from 1 March 2001 should not be considered as income sourced from his Hong Kong employment under section 8(1) of the Inland Revenue Ordinance (Chapter 112) ('IRO') but instead should be apportioned between the time spent within and outside Hong Kong under section 8(1A)(a) of the IRO.

Agreed facts

2. 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 assessment for the year of assessment 2000/01 and salaries tax assessments for the years

of assessment 2001/02 and 2002/03 raised on him. The Taxpayer claims that his income from 1 March 2001 onwards should be apportioned between the number of days he spent within and outside Hong Kong and only that portion which relates to the period he spent within Hong Kong should be subject to salaries tax.

(2) Company B filed employer' s return for the year ended 31 March 2000, and filed the notification under section 52(5) of the IRO (required of an employer of an employee who is about to cease to be employed) for the period 1 April 2000 to 28 February 2001 in respect of the Taxpayer and reported, inter alia, the following:

	(a)	(b)
Period of employment	1-6-1999- 31-3-2000	1-4-2000- 28-2-2001
Capacity in which employed	Vice President	Executive Director
Reason for cessation	-	Transfer

Income -		
Salary	$724,999	$900,000
Bonus	2,183,454	-
Other rewards, allowances or perquisites	161,107	11,229,774
Total	$3,069,560	$12,129,774
Place of residence provided by employer	Yes	No
Period provided	7-6-1999- 6-11-1999	
Rent paid to landlord by employee	$250,000	
Rent refunded to employee	$250,000	
Whether the employee was wholly or partly paid by an overseas concern	No	No
Expected date of cessation of employment		28 February 2001

(3) Company C filed employer's returns for the years ended 31 March 2001 to 2003 in respect of the Taxpayer showing, inter alia, the following:

	(a)	(b)	(c)
Period of employment	1-3-2001-31-3-2001	1-4-2001-31-3-2002	1-4-2002-31-3-2003
Capacity in which employed	Executive Director		Managing Director
Income -			
Salary	$ 99,803	$1,296,513	$1,571,880
Bonus	-	4,963,348	6,009,125
Other rewards, allowances or perquisites	39,922	243,645	179,072
Total	$139,725	$6,503,506	$7,760,077
Place of residence provided by employer	No	No	No
Whether the employee was wholly or partly paid by an overseas concern	Yes	Yes	Yes
Name of the overseas concern	Company C	Company C	Company C
Remark	'The Taxpayer should be eligible for time−apportionment claim'		

(4) (a) The Taxpayer in his tax return – individuals for the year of assessment 1999/2000 declared the same particulars of income and quarters as shown in fact (2)(a).

(b) The Taxpayer in each of his tax returns – individuals for the years of assessment 2000/01 to 2002/03 attached a computation of assessable income. The particulars and income that the Taxpayer reported in the 2000/01 to 2002/03 tax returns and computations were as follows:

	(i)		(ii)	(iii)
Year of assessment	2000/01		2001/02	2002/03
For the period	1-4-2000-28-2-2001	1-3-2001-31-3-2001	1-4-2001-31-3-2002	1-4-2002-31-3-2002
Name of employer	Company B	Company C	Company C	Company C
Assessable income [see Note below]	$10,469,530	$81,131	$4,240,642	$5,230,079
Note				
Income [i]	$10,469,530	$139,725	$6,503,506	$7,760,077

No of days in Hong Kong including leave attributable to services in Hong Kong [ii]	-	18	238	246
Total days in the period [iii]	-	31	365	365
Assessable income ([i] x [ii]/[iii])	$10,469,530	$81,131	$4,240,642	$5,230,079

(5) (a) Company B was incorporated as a private limited company in Hong Kong on 9 March 1984. It changed its name to Company D on 14 August 1984 and then to the present one on 7 June 1999. At all relevant times, Company B's principal business consisted of trading in foreign exchange contracts and conducting investment bank activities. Its business address was Address E ['the HK Address'].

(b) Company C was incorporated in Country F on 22 November 1995. Its registered address was Address G. Company C had filed employer's returns in respect of its employees for years ended 31 March 1998 to 2003. Company C is not registered under the Business Registration Ordinance nor is it registered as an overseas company under the Companies Ordinance.

(6) Based on the income returned, the assessor raised on the Taxpayer the following salaries tax assessment for the years of assessment 1999/2000 and 2000/01:

		$
(a)	Year of assessment 1999/2000	
	Income [fact (2)(a)]	3,069,560
	Quarters	153,981
	Assessable income	3,223,541
	Tax payable thereon (@15% tax rate)	483,531
(b)	Year of assessment 2000/01	
	Income	
	Company B [fact (4)(b)(i)]	10,469,530
	Company C [fact (4)(b)(i)]	81,131
	Assessable income	10,550,661

Tax payable thereon (@15% tax rate)	1,582,599

The Taxpayer did not object to the above assessments, which then became final and conclusive in terms of section 70 of the IRO.

(7) The assessor was of the view that the Taxpayer's entire income from Company C should be subject to salaries tax. He therefore raised on the Taxpayer the following additional salaries tax assessment for the year of assessment 2000/01 and salaries tax assessments for the years of assessment 2001/02 and 2002/03:

Year of assessment	2000/01	2001/02	2002/03
Income	(1) $12,269,499	(3) $6,503,506	(4) $7,760,077
Less: Charitable donations	-	(1,301)	(300)
Assessable income	12,269,499	$6,502,205	$7,759,777
Less: Amount previously assessed	(2) 10,550,661		
Additional assessable income	$1,718,838		
Tax payable thereon (@15% tax rate)		$975,330	$1,163,966
Additional tax payable thereon (@15% tax rate)	$257,825		

Note

(1) ($12,129,774 [fact (2)(b)]+$139,725 [fact (3)(a)])
(2) Fact (6)(b)
(3) Fact (3)(b)
(4) Fact (3)(c)

(8) Accounting Firm H ['the Representative'], on behalf of the Taxpayer, objected to the assessments in fact (7) above on the grounds that the Taxpayer should be eligible for 'time-apportionment'.

(9) In amplification of the grounds of objection, the Representative stated the following:

(a) '(The Taxpayer) is an employee of [Company C]. [Company C] is a company whose central management and control is outside Hong Kong. The members of the Board of Directors of the company reside

outside Hong Kong. It is not registered in Hong Kong and does not have a business license in Hong Kong.'

(b) '[Company C] should not be considered as carrying on business in Hong Kong by merely seconding employees to be based in Hong Kong having regional responsibilities around the Asia Pacific region.'

(c) '(The Taxpayer's) employment contract with [Company C] was negotiated, concluded and enforceable outside of Hong Kong.'

(d) '(The Taxpayer's) roles (having regional responsibilities) with [Company C] are distinctively different from those with [Company B] (his previous employer).'

(e) '(The Taxpayer's) remuneration is paid to him into his bank account outside of Hong Kong.'

(f) '… (the Taxpayer's) employment with [Company C] fulfills the three basic criteria for a successful time-apportionment claim as stipulated in paragraph 3 of Departmental Interpretation and Practice Notes No. 10, and the change of his employment entity from [Company B] to [Company C] was commercially justifiable, he should be eligible for time-apportionment claim for the year of assessment 2000/01 onwards on his employment income derived from [Company C].'

(10) In response to the assessor's request for the Taxpayer's business name cards in respect of his employment with Company B and Company C, a name card at B1 - 87 was supplied. The name card showed that the Taxpayer's position was Managing Director. The name card also showed the name of Company B and the HK Address.

(11) In reply to the assessor's enquiries, the Representative stated the following:

(a) (i) The directors of Company B at the relevant times were as follows:

From 1 April 2000 to 31 March 2001	From 1 April 2001 to 31 March 2002
Mr I	Mr I
Mr J	Mr J

Mr K	Mr K
Mr L	Mr L (resigned on 31 August 2001)
Mr M	Mr M (resigned on 31 July 2001)
Mr N	Mr N
Mr O (resigned on 15 March 2001)	-

From 1 April 2000 to 31 March 2001	From 1 April 2001 to 31 March 2002
Mr P (resigned on 15 August 2000)	-
Mr Q (appointed on 5 January 2001)	Mr Q
Mr R	Mr R (resigned on 31 January 2002)
Mr S (resigned on 30 November 2000)	-
Mr T	Mr T
-	Mr U (appointed on 3 December 2001)
-	Mr V (appointed on 6 December 2001)
-	Mr W (appointed on 6 December 2001)
-	Mr X (appointed on 24 January 2002)

The above directors were 'employees of the different [Group Y] entities, they only serve an advisory role with [Company B] in view of the benefit to the [Group Y] as a whole.'

(ii) The directors of Company C during years of assessment 2000/01 and 2001/02 were Mr Z and Mr AA. They resided in Country AB and were not based in Hong Kong. They were not on the payroll of Company C.

(b) '(The Taxpayer's) employment with [Company C] was negotiated and concluded through telephone discussions with [Ms AC], a Human Resources Principal based in [City AD] and (the Taxpayer) in [City AE] in February 2001.'

(c) '… it is [Group Y's] general policy not to give employment termination and/or offer letters when employees change employers with the group. In the case of [Company C], employment agreement between the company and (the Taxpayer) was conducted verbally followed up by a letter of confirmation.'

(d) '… it is [Group Y's] global policy to have the local business entity's name appearing on the business card regardless of whether it is the actual employing entity. Since [Company C's] employees are usually based in Hong Kong due to the fact that the regional headquarters of the [Group Y] is located in Hong Kong, the employees' business cards bear the office address of [Company B]. However, this does not necessarily mean they are employed by [Company B].'

(e) '… [Group Y's] retirement schemes are based on an employee's original employing jurisdiction. If an employee changes employers within the Group, the employee has the option to continue to participate in his/her previous retirement scheme or enrol in the new scheme in the new jurisdiction. … during (the Taxpayer's) employment with [Company B] and [Company C], he participated in the Hong Kong Pension Plan.'

(12) The Representative, on behalf of Company C, further stated the following:

<u>In relation to Company C's background</u>

(a) Company C's business address was Address AF in Country AB. It was incorporated due to the restructuring of the Group Y. The Hong Kong and Country AG operations were transferred to Company C at the year end of 1995 while the Country AH operation was transferred to Company C in early 1996. Company C commenced its function of

employing senior executives who had regional responsibilities in May 1997.

(b) Company C was the holding company for Group Y's operations in Hong Kong, Country AH and Country AG. It conducted business through at least twenty-three subsidiaries (six in Hong Kong, eight in Country AH and nine in Country AG) including Company B, the operating entity of Group Y in Hong Kong. Company C and its subsidiaries altogether had approximately two thousand employees across the Asia Pacific region. As at 31 December 2002, Company C had net assets of HK$6.089 billion (approximately US$780 million) per its Balance Sheet.

(c) Company C was a wholly owned subsidiary of Company AI, a Country AB company with its central management and control in the Country AB.

(d) Company C was not a resident in Hong Kong. It did not maintain any office in Hong Kong. Neither was it registered in Hong Kong with the Companies Registry nor the Business Registration Office.

(e) The management and control of Company C was in Country AB where the company's two directors were based. The board meetings of Company C were held in Country AB. All matters pertaining to Company C had to be forwarded and approved by the management in the Country AB.

(f) Both the place of business and place of residence of Company C were outside Hong Kong.

<u>In relation to Company C engagement with its employees</u>

(g) In order to better handle and control regional business opportunities, employees of Group Y were continuously assigned to work around the world for exchanging/gaining different exposure/experience and therefore, might not stay within the same entity throughout the employment with the group.

(h) The employees of Company C were senior executives of Group Y with regional responsibilities and oversaw various entities of the group around the region.

(i) Employees who were eligible to be transferred to Company C:

(a) included executive director or managing director level with regional responsibilities; and

(b) had to travel outside Hong Kong to discharge regional responsibilities.

(j) Company C's employees could be categorized as follows:

(a) Those who were transferred either from overseas Group Y entities or from third party overseas entities to Company C directly. These employees were not subject to Hong Kong tax during their previous offshore employment.

(b) Those who were employed by an overseas Group Y entity before taking up their employment with Company C. These employees were eligible for time-apportionment during their previous offshore employment.

(c) Those who were previously employed by Company B or third party local entity.

(k) Company C's employees primarily worked in the office of respective Group Y's overseas entities during their business trips. By the same token, they primarily worked in the office premise of Company B during their workdays spent in Hong Kong.

(l) (a) The Hong Kong work visa application was outsourced by Group Y to an external party – Legal Firm AP. Company B, being the Hong Kong operating company of the Group Y, was designated as the sponsor of the work visa of the Group's expatriate working in Hong Kong.

(b) The external advisor opined that, strictly speaking, a sponsor should inform the Immigration Department of any change in the employment visa applicant in Hong Kong. However, it was the practice in the market that under certain situation this was not adhered to. The market practice was adopted in the case of Company C's employees.

(13) In support of the claim, the Representative furnished copies of the following:

Document

A memorandum in the letterhead of Company B dated 30 June 1995 to the Taxpayer on the subject of 'Change in Status to a Hong Kong Local Employee'

A interoffice memorandum dated 25 February 1996 to the Taxpayer on the subject of 'Transition to [Country AH] Local Package'

A interoffice memorandum in the letterhead of Company B dated 20 May 1999 to the Taxpayer on the subject of 'Relocation from [Country AH] to Hong Kong as a Local Employee'

A letter dated 8 February 2001 from Ms AC [Fact (11)(b)] to the Taxpayer

The organisation chart of Company B and Company C in October 2002

A letter dated 9 April 2003 from Legal Firm AP in which the following was stated:

'Under existing Hong Kong immigration policy, a sponsor undertakes to inform the Immigration Department of any changes in the employment of the visa applicant in Hong Kong. This undertaking exists regardless of the legal relationship between the sponsor and the visa applicant.

This undertaking notwithstanding, we are aware that sponsors regularly do not advise the Immigration Department of employment changes where the change of employment is from one group company to another and the visa holder still remains in the employ of the overall group which continues to employ the applicant and the sponsor has not changed. There is an understanding and market practice amongst many employers/sponsors to only notify the Immigration Department where there is a change of employment to a completely different and unrelated entity along with a change in sponsor. This is despite the fact that as a legal requirement, any change in employment should be notified to the Immigration Department. Quite often, changes within the same overall group are not advised to the Immigration Department.'

(14) To give effect to the Tax Exemption (2001 Tax Year) Order, salaries tax payable by the Taxpayer for the year of assessment 2001/02 [fact (7)] was reduced by $3,000 from $975,330 to $972,330.

(15) (a) During the Taxpayer's employment with Company B, his compensation was deposited into his bank account with Bank AJ in Hong Kong dollars. His account number was xxx-xxx-xxxxxx-xxx.

(b) The Taxpayer's compensation during his employment with Company C was deposited into his bank account with Bank AK in City AD in Country AB dollars. His account number is xxx-xxxxx-xx.

Evidence

3. The Taxpayer called three witnesses, himself, Mr AL and Mr AA.

4. The Taxpayer had intended to call Mr R, however, it was agreed that the witness statement signed by Mr R would stand as his evidence.

A. The Taxpayer's evidence

5. The Taxpayer stated that he had been employed by the Group Y ('the Group') since 1992 in the areas of investment banking (1992 to 1995) and investment-related research (from 1995). He confirmed that he had worked in a number of offices of the Group in Country AM, City AD, Hong Kong and Country AH. He confirmed that he is currently the Head of Global Telecom Research for the Group. It was clear that the Taxpayer always took the view that he was part of the Group.

6. He was based in Country AH from 1 March 1997 to 31 May 1999. During that time, he was mainly involved in research on telecom stocks in the South East Asia Region. He was relocated to Hong Kong on 1 June 1999. He was employed by Company B. As part of his relocation to Hong Kong, he confirmed that he gradually resumed regional research responsibilities in respect of telecom stock for the Asia Pacific Region. He confirmed that he was promoted to become an Executive Director of the Group effective from 1 December 2000. He then stated that he was responsible for coordinating and supervising research on telecom stocks in the Asia Pacific Region. Shortly after his promotion when he became an Executive Director of the Group, he received an offer to be employed by Company C, he asserted that this was due to his regional responsibilities and his seniority within the Group. He advised us that this offer was received whilst he was in City AE between 6 February 2001 and 9 February 2001. He indicated that he had a telephone conversation with Ms AC who was then based in City AD. He advised us that he subsequently received a letter dated 8 February 2001 from Company C confirming his new position We set out the letter in full as follows:

'February 8, 2001

[Mr A],

[Company B],
[Address AN]
Hong Kong

Dear [Mr A],

I write to confirm our telephone discussions when you were in [City AE].

As discussed and agreed, since your role has expanded and you now have senior regional responsibilities extending throughout the Asia Pacific region, you will be transferred to the Firm's regional holding company in Asia, [Company C]. I am pleased to confirm your employment with [Company C] with effect from March 1, 2001. Your current employment with [Company B] will cease on February 28, 2001.

[Company C's] payroll is operated in [Country AH], through the Firm's current payroll service provider, [xxx]. Your base salary will be paid monthly in US dollars via direct deposit into your offshore US dollar bank account.

Sincerely,
Signed [Ms AC]
Authorized Signatory
[Company C]'

This letter was on the notepaper 'Company B'. The letter confirmed the transfer to the holding company Company C and dealt with the payment of his salary. It did not set out or provide for any terms of employment.

It was clear that since 1 March 2001, the Taxpayer was paid by Company C in US dollars into his account in Country AB. He stated that in December 2002, he was promoted to become a Managing Director of the Group and again he confirmed to us that he remained the Head of Global Telecom Research for the Group. However, it is quite clear from the Taxpayer's evidence that he was promoted to the Head of Global Telecom Research on 1 December 2001 which was some nine months after his transfer to Company C.

7. After hearing the Taxpayer and reviewing his evidence, it is clear to us after his claimed transfer to Company C, the Taxpayer simply continued in his pre-existing position as the Head of Asian Telecom Research and indeed, kept his pre-existing title of Executive Director. We also accept that the Taxpayer's eventual promotion in December 2001 was part of his gradual progression in his career with the Group. In his evidence the Taxpayer claimed and suggested that this role changed significantly after his transfer from focusing on stocks of wireless communications carriers in the PRC and communicating primarily with potential investors in the greater China region to communicating primarily with global and regional investors located in the US, Europe and

throughout Asia. The Taxpayer produced a table setting out details of various research reports produced. We set out the table below:

Country or region	1-1998 to 28-2-1998	1-3-1998 to 28-2-1999	1-3-1999 to 29-2-2000	1-3-2000 to 28-2-2001	1-3-2001 to 28-2-2002	1.-3-2002 to 28-2-2003	1-3-2003 to 29-2-2004	1-3-2004 to 28-2-2005
Cross-regional								
Asia Pacific	7	47	69	84	63	36	14	10
Global	4	11	60	75	26	52	30	6
Asian countries								
Thailand	2	25	54	23	36	25	24	15
Malaysia	7	14	0	3	0	8	3	8
China	0	2	29	54	52	40	33	29
Singapore	0	11	10	34	5	7	12	9
Japan	0	1	7	5	0	2	3	2
Hong Kong	0	0	41	43	29	14	6	2
Philippines	0	0	8	21	5	1	0	3
Indonesia	0	0	15	13	2	1	2	10
S Korea	0	0	43	78	56	65	38	51
Taiwan	0	0	0	1	8	16	7	3
India	0	0	0	0	0	15	8	0
Totals	**9**	**53**	**207**	**275**	**193**	**194**	**136**	**132**
Rest of World								
Australia	2	2	1	5	5	0	0	0
New Zealand	2	9	3	0	0	0	0	0
UK	0	0	0	0	0	0	0	1
Europe	0	0	2	0	0	0	0	0
USA	0	20	30	23	4	2	4	0
Canada	0	0	4	0	0	0	0	0
Latin America	0	1	0	0	1	0	0	0
Mexico	0	0	0	0	1	0	0	0
Brazil	0	0	0	0	1	0	0	0
Totals	**4**	**32**	**40**	**28**	**12**	**2**	**4**	**1**

It can be seen from the Taxpayer' s own list of research reports that after his transfer the number of reports on global stocks and non-Asian countries did not increase but actually dropped. The Taxpayer, however, tried to explain to us that this was because the list of reports included both those in which he participated as primary analyst and those in which he participated in a supervisory rather than in an author' s role. However, he accepted that he took responsibility for the reports he supervised. We incline that in one form or another, the Taxpayer' s involvement with global work, whether as author or supervisor, fell after his transfer. In any event, we find that the table produced by the Taxpayer does not support the claim of the dramatic change upon the transfer of 1 March 2001. We find that in the terms of actual numbers, in the year of assessment prior to his transfer (2000/01) and the year of assessment afterwards (2001/02), there was no change in the number of regional/global reports authored by the Taxpayer.

8. The Taxpayer tried to suggest that he had to spend an incremental number of days outside Hong Kong after his 'transfer' in order to discharge his duties. The true position we find was correctly set out in the following table:

Period	Time spent out of HK	Percentage of period spent out of HK
10-7-1999 to 31-3-2000	128 out of 265 days *[if ignore Country AH time: 106/265 days]*	48.3% *[40%]*
1-4-2000 to 28-2-2001	135.5 out of 334 days *[if ignore Country AH time: 118.5/334 days]*	40.6% *[35.5%]*
1-3-2001 to 31-3-2001	13 out of 31 days	41.9%
1-4-2001 to 31-3-2002	164 out of 365 days	44.9%
1-4-2002 to 31-3-2003	145 out of 365 days	39.7%

9. During the course of cross-examination, the Taxpayer gave two reasons as to why he spent a lot of time out of Hong Kong in the first two periods. First he said that he spent a lot of time in Country AH for personal reasons. But we find that if one ignores all the time spent in Country AH in the first two periods, this does not show any sharp demarcation before and after the transfer. Second, he said that during the second period, he spent a significant time out of Hong Kong on one very large project. Again, while we find this may very be the case, this is not the time which can be ignored, because it was nevertheless time spent on business. We do not see that the Taxpayer visited significantly more countries after the transfer than before. The Taxpayer accepted that there was no real change in additional countries which he visited before and after his transfer, with the qualification that such analysis of countries did not focus on the duration of the trips. However, we find that there was no dramatic increase in the number of countries visited after his transfer. From the evidence of the Taxpayer, it is quite clear that his reporting lines did not change before and after his transfer. Indeed, he continued to report to Mr R. The change in reporting lines did not come until he was promoted to the Head of Global Telecom Research. Again, the Taxpayer when asked whether there was any reason why he could not perform his job if he had remained as an Company B employee rather than becoming an Company C employee, he could not identify any reason and just repeated his point that he had become more senior as his role gradually developed.

10. The Taxpayer claimed and asserted to us that on 1 March 2001, his employment was transferred from Company B to Company C. The Taxpayer accepted that all documents submitted to the Immigration Department during the material time by the Taxpayer's employer

were submitted by Company B. Even after his transfer of employment, this continued to be the case. Company B's application on the 13 August 2002 to extend the Taxpayer's visa was a letter confirming that he was still employed by Company B. The letter states as follows:

'August 13, 2002

…..

Dear Sir,

Re: [Company B]
Visa Extension for [Mr A] (and/or dependants)

This is to confirm that [Mr A] is employed by [Company B], currently working in Hong Kong as an Executive Director in our Equity Division. As [Mr A's] visa is going to expire, we would like to apply for an extension.

Enclosed are completed and signed forms for the application of the above applicants. Your early consideration of these applications will be much appreciated. Thank you very much for your kind attention.

Yours faithfully,
[Company B]
Signed [Mr AO]
Director
Human Resources'

11. This letter is of critical significance and importance, since it can be seen that the Director of Immigration was informed that the Taxpayer is employed by Company B, currently working in Hong Kong as an Executive Director in their Equity Division. It can also be seen that this letter was signed for and on behalf of Company B. In his evidence, the Taxpayer confirmed to us that he relied on the Human Resources Department to deal with and complete all relevant formalities in respect of his application for Hong Kong SAR immigration status.

12. In his evidence, the Taxpayer confirmed that he was registered with the Securities and Futures Commission ('SFC') as an investment adviser and a dealers' representative. In cross-examination, it was put to him that all application forms to the SFC for registration were in the name of Company B and not Company C. His attention was drawn to the relevant provisions of the Securities and Futures Ordinance ('SFO') which was repealed in 2002 and the subsequent Securities and Futures Ordinance (Chapter 571) and it was put to him that Company C was never and is not a Hong Kong registered institution and as such, the Taxpayer's employment can only be

achieved through Company B. His attention was drawn to the serious consequences listed in the statutes in failure to comply with the relevant provisions of the legislation and the potential consequences of any declarations in the forms being false or misleading.

13. The Taxpayer confirmed that he relied very heavily on his colleagues who worked in the Legal and Compliance and/or Human Resources Departments to complete and fill in the relevant forms.

14. However, our view is clear that the Taxpayer knew and must have known the importance of being SFC registered and to ensure that his personal details were totally accurate.

15. We accept that the Taxpayer must have known the importance of stating correctly to authorities the contents of the SFC forms. We find as a fact that those forms clearly show that all licences as cover him were applied for in the name of Company B and again we find that he must have known that this was the entity which was employing him when he signed the relevant forms. We find that the Taxpayer being a senior employee of the Group and having regard to his responsibilities as to various reports which he was supervising or authoring, must have been fully aware as to the licensing obligations that fell upon his shoulders and those of the Group.

16. The Board put to him the following question:

> 'Q : Are you not aware that to carry out your activities, what you did, you must comply with the registrations with the SFC?
>
> A : Yes on the one hand, yes absolutely I am aware that I need to be properly registered …..'.

We find as a fact that when the Taxpayer completed and signed the relevant registration forms he was employed by Company B.

17. We find as a fact as the Taxpayer confirmed in his evidence that he had no intention to deceive the SFC or the Immigration Department in signing the documents representing that he was employed by Company B. He confirmed the veracity of such documents which were, he asserted, prepared by those with the appropriate expertise. He confirmed that the documents were prepared by persons in the Group who must have been aware of the importance of the distinction between legal entities and the importance of complying with the law.

18. The Taxpayer was cross-examined with respect to his name card. His name card indicated that he held the post of Managing Director in 'Group Y' - a position to which he was promoted only in December 2002, after the transfer. Yet it is clear that on his card, the name of Company B was printed and not Company C. No satisfactory explanation was given for this other than the fact that it was a group policy to have a local business entity's name appearing on the

business card regardless of whether it was the actual employer. The bland assertion that Company C's employees were usually based in Hong Kong so their cards bore the office address of Company B did not impress us. However, we find as a matter of fact that it is quite clear that his name card clearly gives the impression as to who his true employer was and there can be no doubt that the card was intended to convey that the Taxpayer was a Managing Director of Company B.

B. Mr AL

19. Mr AL advised that he has been the Head of Human Resources for Asia Pacific Region of the Group since 1997. He confirmed that he was responsible for employment-related matters of the Group in this region including those of Company C, the holding company for group operations in the region including Hong Kong, Country AG and Country AH.

20. We find Mr AL to be an experienced Human Resources Manager.

21. In response to a question from the Board, Mr AL confirmed that the application to extend the Taxpayer's visa on the 13 August 2002 signed by Mr AO, his colleague who was a Director of Human Resources would not have been written in a letter to the Immigration Department, had the Taxpayer not been an employee of Company B. Mr AL accepted that if there was to be any change of employer, the failure to notify the Immigration Department was an error on the part of the Human Resources Department of the Group. He confirmed in his evidence the importance of complying with Immigration Regulations and said he was fully aware as to the importance of the relevant provisions in the Immigration Ordinance and the consequences that follow if these provisions are breached.

22. In short, Mr AL confirmed and accepted that there had been an error on the part of the Human Resources Department in dealing with the Taxpayer's immigration status. His explanation for the error was that his Department understood there to be a market practice that it was not necessary to inform the Immigration Department when the new employee was being transferred or appointed to a new post within the same group of the Group Y. He relied on the advice given to him by the Group's solicitors, Legal Firm AP. However, we are unable to accept this explanation. We find that:

(a) Mr AL was familiar with Hong Kong SAR Immigration requirements and the serious consequences for breaching them.

(b) He accepted and agreed in cross-examination that it was of fundamental importance to know which legal entity a particular colleague was working for especially with regard to informing the Director of Immigration because the Immigration Department would wish to know whether a visa applicant was working for a Hong Kong company.

(c) He also confirmed in cross-examination that all employees of the Group were required not only to adhere to the law but to positively acquaint themselves with the law and to conduct themselves in a manner which was above simple obedience of the law. He drew the Board's attention to the Group Y Code of Conduct which reads as follows:

'You must comply with all applicable laws and regulations and in the jurisdictions in which the Firm does business. To that end: you must know and comply with the particular legal and regulatory obligations imposed upon your part of the Firm's business ….. You may be held personally liable for any improper or illegal acts committed during your employment ….. ignorance of the law or rules is neither a defense to nor an excuse from penalties or sanctions …..'

23. We conclude therefore that in the light of the above, it is very difficult to believe that the Human Resources Department were content to act on the basis of vague market practice, given the strict requirements of the legislative requirements and the known sanctions for breach.

24. In cross-examination, Miss Cheng put to Mr AL a letter dated the 14 March 2005 from Legal Firm AP addressed to the Director of Immigration. This letter reads as follows:

'14 March 2005

…..

Dear Sir,

[Mr A]
Hong Kong Identity Card Number: Pxxxxxx(x)
Notification of Technical Change of Employer Status in Hong Kong

Please be advised that we are the solicitors for [Group Y] of the [Country AB] (originally known as [Group Y Inc.]), its subsidiary in Hong Kong, [Company B] (formerly known as xxxx), and the abovenamed [Mr A].

You will note from your records we previously assisted [Company B] in securing [Mr A's] Hong Kong employment visa in July, 1999. Employment entry visa labels, serial numbers [xxxxxxxx] and as superseded by [yyyyyyyy], were granted to [Mr A] on 2 August, 1999, and 27 August, 1999, and activated.

We are instructed to advise a management decision was made on 1 March, 2001, to change [Mr A's] employer from [Company B] to [Company C], another company within the [Group Y] of

companies. [Mr A's] employment visa sponsor, has and will continue to be [Company B]. Due to a technical misunderstanding, since the sponsor remained the same, our client failed to inform your department of the change of employer in 2001 and apologies for any inconvenience caused. We are instructed to hereby provide you notification of the change of employer.

In support of the notification, we enclose the following documents for your consideration:

1. Sponsorship form, duly completed and executed;

2. Duly completed and executed from ID91, and authorization letter;

3. Self-explanatory letter from [Company B] regarding [Mr A's] notification of technical change of employer status in Hong Kong;

4. Copy [Mr A's] Hong Kong identity card; and

5. Copy [Mr A's] [Country AM] passport (with relevant pages included).

Based on the above, our client would kindly ask that this notification of [Mr A's] technical change of employer status be noted on your files.

We trust the above is in order. Should you have any further questions, please do not hesitate to contact Mr. [xxxx] or Ms [yyyy] (tel: xxxx-xxxx) of our office. Thank you for your kind attention to this matter.

We look forward to hearing from you soon.

Yours faithfully,
Sd. [Legal Firm AP]'

25. Mr AL could give no satisfactory explanation as to the meaning of 'technical change of employer'; in short, he confirmed that the Group had previously got matters wrong and are now informing the Immigration Department of the correct status. We conclude that the previous allegation that the reason for not informing the Immigration Department that there was a change in market practice is totally undermined by this letter. No satisfactory explanation has been given as to why it was thought that the market practice was a sufficient answer in 2001 but not in 2005. Indeed, it is of interest to note that Mr AL could not give an explanation as to why upon the cessation of employment in 2001, they felt it necessary to inform the Inland Revenue but not to inform the Director of Immigration. We conclude that Mr AL has not given any satisfactory explanation as to why 'technical change of employment' was used. If one also looks at the short application form used in March 2005 and attached to Legal Firm AP's letter, the name of the

employing company was written as 'Group Y' (sic) and the reasons for the request was 'employment with Group Y in Hong Kong'.

26. In cross-examination, the Taxpayer's business card was also put to Mr AL. Again, he confirmed that the card clearly gives the impression that the Taxpayer was a Managing Director of Company B. He accepted this proposition. He also confirm that the Human Resources Department issued these business cards. He was unable to give a satisfactory explanation to us as to why the Taxpayer's business card should be printed in such a way.

27. We have no hesitation in coming to the conclusion that Mr AL never gave any satisfactory explanation as to why representations which clearly were incorrect were made both to the Immigration Department and indeed, to the SFC with regard to the Taxpayer's immigration and SFC registration status.

C. Mr AA

28. Mr AA gave evidence that he was and had been a Managing Director of Company C since 11 May 1998. He confirmed that Mr Z and himself had been the only directors of Company C. He confirm that both himself and Mr Z continued to be based in the Country AB whilst acting as directors of Company C. He confirmed that Company C is a holding company for the Group's operations in the Asia-Pacific Region including Hong Kong, Country AG and Country AH. He confirmed that Company C became the regional holding company as a result of the Group's restructuring in 1995 and 1996. He stated that Company C had been centrally controlled by Mr Z and himself in Country AB. He confirmed that Company C employs senior group employees charged with regional responsibilities of the Group to look after the business activities of Company C and its subsidiaries. However, he also confirmed that staff employment matters of Company C had been fully delegated to the Human Resources Department of the Group. He stated that the Human Resources Department of the Group handled the employment related matters of those senior employees.

D. Mr R

29. The Taxpayer also relied on the witness statement of Mr R. Mr R confirmed that he was a Director of Equity Research for the Asia Pacific Region for Group Y from November 1995 to April 2001. He confirmed that whilst he was based in Hong Kong and during the Taxpayer's employment with Company B, he was his immediate supervisor.

Burden of proof

30. The burden of proving that the salaries tax assessments are excessive or incorrect lies on the Taxpayer. We refer to section 68(4) of the IRO. We accept that it is for the Taxpayer to

establish why his income does not fall within section 8(1) of the IRO, rather than for the Deputy Commissioner to prove a case.

The charging provision

31. The charging provision for salaries tax is section 8 of the IRO:

> *'(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 derive from services rendered by a person who - …*
>
> *(ii) renders outside Hong Kong all the services in connection with his employment …*
>
> *(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 ….. 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.'*

32. Section 9 provides an expansive definition of 'income from any office or employment'.

33. We accept that the effect of these provisions is that:

(a) where a source of income is fundamentally a Hong Kong employment, all the income is charged under section 8(1) irrespective of where the services were actually rendered (save for certain exceptions which are not relevant in this appeal – see section 8(1A)(b)(ii), (c), 8(1B). Once income is caught by section 8(1) there is therefore no room for apportionment;

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

34. It is accepted that it is settled law that in deciding whether an employment is a Hong Kong employment within section 8(1) of the IRO or a non-Hong Kong employment within section 8(1A)(a) is determined by a consideration of all relevant factors. This has come to be known as the 'totality of facts' test – see:

(a) Goepfert [1987] 2 HKTC 210; and

(b) D87/00, IRBRD, vol 15, 750.

The authorities are clear that the Board can go behind appearances to discover the reality of the situation and we are entitled to scrutinize all evidence, documentary or otherwise that is relevant to the matters and issues before the Board.

35. Having considered all matters, the issue for us in this case is to consider the identity of the Taxpayer's employer. Having considered and reviewed all the evidence and having carefully looked at the facts before us, we have no hesitation in coming to the conclusion that the Taxpayer's employer was Company B during the relevant years of assessment. In our view, the evidence is clear, unequivocal and incontrovertible. We rely on the following:

Representations to the Immigration Department

(a) it clearly was a failure to notify the Immigration Department at the material time of the Taxpayer's 'transfer', and the continued positive representations to the Director of Immigration that the Taxpayer was employed by Company B;

(b) the seriousness of the making of false representations to the Director of Immigration and the fact that the legal/compliance colleagues of the Taxpayer must have been aware of this;

(c) the inherent implausibility of the explanation of 'market practice' now given for the representations previously made to the Director of Immigration.

Registration with and representations to the SFC

(d) the fact that under both the old and the new legislation, the Taxpayer could have carried out his work only for Company B, and certainly not for Company C;

(e) the continued failure to notify the SFC at the material time of the Taxpayer's 'transfer' and the continued positive representations that the Taxpayer was (a) employed by Company B and (b) carrying out of regulated activities for Company B;

(f) the seriousness of the making of false representations to the SFC and the fact that the legal/compliance colleagues of the Taxpayer must have been aware of these;

(g) the complete absence of explanation as to why representations, which are now admitted to be false, were made;

Representation through business card

(h) the representation of the Taxpayer as a Managing Director of Company B on his business card even after his 'transfer';

(i) the inadequate explanations or speculation as to why his business cards made such representations.

36. Our review of the evidence in its totality shows that the Taxpayer was employed by Company B. Although there was undoubtedly an assertion of there being a 'transfer' of employment to Company C, this can never be sustained on the facts that we have found.

37. In our view, it was quite clear that the Taxpayer's employer was Company B. The Taxpayer's argument that the representations put forward to the Director of Immigration were merely a mistake cannot be made out or accepted. There was no evidence to support this. Those acting for the Taxpayer never called anyone who was responsible and who dealt with this matter to give direct evidence as to exactly what did take place. Again, we rely very heavily on the contemporaneous letter dated 13 August 2002 which states that Company B was the employer.

38. We have to say that the letter of 14 March 2005 written just before the appeal was heard is of a little persuasive value to us and indeed, could be said to be self-serving. We add that no satisfactory explanation has been given for the contradictory explanations given to the Hong Kong Authorities. The Taxpayer's advisers told the Immigration Department and the SFC that the Taxpayer worked for Company B to enable a work permit and a securities licence to be obtained; however, on the other hand, they advised the Inland Revenue that the Taxpayer worked for Company C.

39. We have reminded ourselves that the burden of proof is on the Taxpayer and no attempt has been made by him to call any witnesses who could give evidence or give an explanation as to what actually took place.

40. We have come to the conclusion that the Taxpayer had to be registered by Company B because he was based in Hong Kong. The only reason for him to be registered with the SFC was because he needed to carry out regulated activities for Company B in Hong Kong and in turn had to be employed by Company B.

41. We rely on the Taxpayer's business card. If for example his contention was correct that there was an employment relationship with Company C, we would have expected that this to have been reflected on his business card. It is quite clear that his business card was an unequivocal representation that Company B's name was inserted to give the impression to the world who is responsible for the Taxpayer's activities and to whom members of the public can complain if the need arises. In our view, this again reinforces the fact that the employment was with Company B and always remained so.

Conclusions

42. We have no hesitation that in the light of all the above facts and our findings and on any analysis of the facts before us that the Taxpayer was employed by Company B and not Company C.

43. The representations by the Taxpayer and Company B to all concerned (other than the Inland Revenue) were that Company B was his employer. Hence, having found that Company B was the true employer and there was no need for us to go any further and to consider any remaining facts of the totality of issues because the Taxpayer all along accepted that the locality of his employment with Company B is in Hong Kong.

44. Hence, for the above reasons, we will have no hesitation in dismissing the appeal. Finally, we wish to thank the parties and their representatives for the assistance they have given us in dealing with this matter.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS