Case No. D40/07

Salaries tax – whether services rendered outside Hong Kong – '60 days' rule – fraction-equals-whole approach – whether time apportionment necessary – Inland Revenue Ordinance ('IRO') section 8(1B).

Panel: Anthony So Chun Kung (chairman), Leung Hing Fung and Leung Lit On.

Date of hearing: 12 July 2006.
Date of decision: 18 January 2008.

The taxpayer was employed as the Asia Pacific regional manager of Company B, which was engaged in the provision of money brokerage services. The taxpayer appealed against the salaries tax assessment for 2002/03 on the following three grounds:

(1) He rendered outside Hong Kong all the services in connection with his employment;

(2) He visited Hong Kong for not more than a total of 60 days; and

(3) He had a non-Hong Kong employment and should be assessed on a time apportionment basis.

Held:

1. As the taxpayer had claimed tax exemption under section 8(1B), the Board found it amounts to an admission that he rendered services in Hong Kong, ground (1) failed.

2. The Board found the fraction-equals-whole approach is the correct method in computing the 60 days (D11/03, D20/00 followed; D37/01, D27/03, So Chak Kwong Jack not followed). The taxpayer was physically in Hong Kong for 77 days, he cannot rely on the '60 days' rule exemption under section 8(1B), ground (2) also failed.

3. As the Board decided the taxpayer's employment with Company B was a Hong Kong employment, thus ground (3) must also fail.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174
Commissioner of Inland Revenue v George Andrew Goepfert 2 HKTC 210
D20/97, IRBRD, vol 12, 161
D146/98, IRBRD, vol 13, 693
D76/00, IRBRD, vol 15, 695
D37/01, IRBRD, vol 16, 326
D27/03, IRBRD, vol 18, 448
IRC v Bladnoch Distillery Co Ltd [1948] 1 All ER 616
Attorney-General v Equiticorp Industries Group Ltd [1996] 1 NCLR 528
Kwong Mile Services Ltd v Commissioner of Inland Revenue (2004) 7 HKCHAR 275
Lee Hung Kwong v CIR [2005] 4 HKLRD 80
D40/90, IRBRD, vol 5, 306
D11/97, IRBRD, vol 12, 147
D20/00, IRBRD, vol 15, 297
D11/03, IRBRD, vol 18, 355
D39/04, IRBRD, vol 19, 319
CIR v Goepfert (1987) 2 HKTC 210

Steven Rudolf Sieker of Messrs Baker & McKenzie for the taxpayer.
Eugene Fung Counsel instructed by Department of Justice for the Commissioner of Inland Revenue.

Decision:

The appeal

1. This is an appeal by Mr A ('the Taxpayer') against the determination of the Deputy Commissioner of Inland Revenue dated 21 December 2005. In the determination, the Deputy Commissioner of Inland Revenue confirmed a salaries tax assessment for the year of assessment 2002/03 under charge number 9-1525919-03-6, dated 17 November 2003, showing net chargeable income of $21,995,003 with tax payable of $3,299,250.

Background facts

2. Upon hearing the evidence and scrutinising the documents submitted, the Board finds the following as background facts of the case:

(1) Company B is a company incorporated in Hong Kong on 25 April 1978. At all relevant times, Company B carried on business in Hong Kong and had its place of business located at Address C. Company B was engaged in the provision of money brokerage services for money market, capital market and derivatives activities.

(2) By an employment contract ('the Contract') between Company B and the Taxpayer (Appendix A, B1 pages 15-16), the Taxpayer was employed as Regional Manager of Company B for the Asia Pacific region. The Contract stated the following:

'**1.** Duration of the contract

This contract takes effect as from December 16, 2001 for a fixed term of one year until December 15, 2002.

2. *Job description*

(The Taxpayer) shall perform the duties as Regional Manager for the Asia Pacific region (excluding Fixed income) and will be reporting to the Chief Executive Officer of [Holding Co C].

(The Taxpayer) will travel extensively throughout the Asia Pacific region. All reasonable travel expenses will be reimbursed to (the Taxpayer) on presentation of receipts accepted by his superior.

3. *Remuneration*

As compensation for his work, (the Taxpayer) shall receive the following payments:

(a) A fixed annual net salary of **Yen 42'000'000.- (forty-two million)**, payable in twelve monthly instalments of **Yen 3'500'000.-** each.

(b) An annual sharing of our [City M] offices interest rates swap section bonus pool, to be determined by the Management but not less than **Yen 25'000'000.- (twenty-five million)** per quarter.

(c) Loyalty bonus of **Yen 40' 000' 000.- (forty million)** per year paid quarterly (in February, May, August and November).

(d) Reasonable school expenses for his children.

(e) Personal medical insurance.

(f) One business class flight per year to join his family in [City N].

4. Specific conditions

Any taxes due is the sole responsibility of (the Taxpayer).

This contract constitutes the entire agreement between (the Taxpayer) and the [Group D].'

(3) Company B filed an Employer's return for the year ended 31 March 2003 (B1, page 31) in respect of the Taxpayer showing, inter alia, the following particulars:

Period of employment	:	1-4-2002 – 31-3-2003
Capacity in which employed	:	Regional Director
Income		
Salary	:	$2,683,486
Bonus		19,311,517
Total		$21,995,003

(4) (a) In his 2002/03 Tax Return (Appendix B, B1 pages 17-20), the Taxpayer declared the same employment income as per Fact (3) above and claimed full exemption in respect of his total income of $21,995,003 under section 8(1B) of the Inland Revenue Ordinance ['the IRO'].

(b) The Taxpayer stated that he had been in Hong Kong for 47 days during the year ended 31 March 2003 (Appendix B1 & B2, B1 pages 21-22).

(5) According to the records of the Immigration Department (R1 pages 34-40), the assessor compiled a schedule (B1, pages 5-6, the Determination paragraph 1(6)) showing that the Taxpayer was present in Hong Kong for the following number of days during the year ended 31 March 2003 (on the basis that part of a day spent in Hong Kong was counted as one day in Hong Kong):

Trip No	Arrival at Hong Kong			Departure from Hong Kong			No of days in Hong Kong
	Date	Day of week	Time	Date	Day of week	Time	
1	30-3-2002	Sat	22:29	1-4-2002	Mon	11:55	1*
2	2-4-2002	Tue	10:19	2-4-2002	Tue	14:41	1
3	13-4-2002	Sat	23:36	14-4-2002	Sun	15:26	2
4	18-4-2002	Thu	22:46	20-4-2002	Sat	17:23	3
5	22-4-2002	Mon	10:50	24-4-2002	Wed	17:55	3
6	1-7-2002	Mon	15:07	5-7-2002	Fri	08:32	5
7	15-7-2002	Mon	21:17	17-7-2002	Wed	07:51	3
8	7-8-2002	Wed	13:43	11-8-2002	Sun	14:58	5
9	12-8-2002	Mon	13:40	13-8-2002	Tue	09:35	2
10	23-8-2002	Fri	23:51	24-8-2002	Sat	12:45	2
11	31-8-2002	Sat	15:06	1-9-2002	Sun	14:43	2
12	6-9-2002	Fri	13:21	7-9-2002	Sat	14:38	2
13	15-9-2002	Sun	22:11	17-9-2002	Tue	08:06	3
14	19-9-2002	Thu	22:09	20-9-2002	Fri	19:34	2
15	21-9-2002	Sat	09:04	21-9-2002	Sat	13:37	1
16	10-10-2002	Thu	15:07	11-10-2002	Fri	12:50	2
17	19-10-2002	Sat	18:44	20-10-2002	Sun	18:15	2
18	24-10-2002	Thu	17:17	24-10-2002	Thu	20:34	1
19	31-10-2002	Thu	18:11	2-11-2002	Sat	14:09	3
20	4-11-2002	Mon	10:53	6-11-2002	Wed	08:09	3
21	21-11-2002	Thu	13:49	23-11-2002	Sat	16:25	3
22	25-11-2002	Mon	10:27	25-11-2002	Mon	13:38	1
23	1-12-2002	Sun	18:11	4-12-2002	Wed	08:24	4
24	13-12-2002	Fri	13:54	14-12-2002	Sat	11:45	2
25	16-12-2002	Mon	00:06	17-12-2002	Tue	11:22	2
26	21-1-2003	Tue	14:12	22-1-2003	Wed	19:09	2
27	25-2-2003	Tue	15:02	28-2-2003	Fri	09:01	4
28	10-3-2003	Mon	13:31	11-3-2003	Tue	16:17	2
29	12-3-2003	Wed	00:39	12-3-2003	Wed	08:14	1
30	14-3-2003	Fri	20:46	14-3-2003	Fri	21:59	1
31	16-3-2003	Sun	12:50	16-3-2003	Sun	19:42	1
32	26-3-2003	Wed	18:15	26-3-2003	Wed	23:04	1
33	27-3-2003	Thu	12:43	28-3-2003	Fri	00:45	)
34	28-3-2003	Fri	19:04	1-4-2003	Tue	09:49	) 5**
						Total	77

* computed as from 1-4-2002

** computed up to 31-3-2003

(6) The assessor raised on the Taxpayer (R1, page 32) the following salaries tax

assessment for the year of assessment 2002/03:

Assessable income [Fact (3)]	$21,995,003
Tax payable	$3,299,250

Assessor's notes (R1, page 33):

1. Tax assessed at standard rate

2. Section 8(1B) of the IRO not applicable as you visited Hong Kong more than 60 days (days of arrival and departure counted as 2 days)

(7) Company E ['the Representative'], on behalf of the Taxpayer, objected (R1, pages 49-51) to the above 2002/03 salaries tax assessment on the ground that the income assessed was excessive. In amplification of the ground of objection, the Representative stated:

'… (the Taxpayer) came to Hong Kong during the year of assessment 2002/03 purely for the purpose of going to PRC and Macao for golfing, gambling, shopping and sightseeing. (The Taxpayer) has no work place in Hong Kong, he does not maintain any residence in Hong Kong, he has no family members or relatives in Hong Kong, and he has no business running in Hong Kong … for the year ended 31 March 2002…(the Taxpayer) only visited Hong Kong for less than 15 days. During 2002/03, (the Taxpayer) visited Hong Kong more often because he enjoys the golf and gambling facilities in Macao and PRC and that is why during most of his trips to Hong Kong he did not stay in Hong Kong but went to PRC or Macao immediately after arrival to Hong Kong. For certain trips to Hong Kong, (the Taxpayer) stayed in Hong Kong for shopping before he went to the golf course in Macao or PRC. After the golf session in Macao or PRC, (the Taxpayer) has to come back to Hong Kong to take the flight to [City N] or [City M] where he spends most of his time for working….

…For other trips which (the Taxpayer) only spent a few days in Hong Kong, the purpose of which were for transit to other locations or shopping in Hong Kong. The above activities, though significantly increased the number of days spent by (the Taxpayer) in Hong Kong, were purely caused by the fact that there is no international fight to Macao and Shenzhen and therefore (the Taxpayer) has no choice but to transit at Hong Kong…

After all, though the number of days spent in Hong Kong by (the Taxpayer)

during the year of assessment 2002/03 according to your Department's interpretation is more than 60, (the Taxpayer) submits that he did not perform any services in Hong Kong during the said year as all the trips to Hong Kong were not for business purposes. (The Taxpayer's) role in the organization is to manage and develop the Group's international business and therefore it is not intended that he has to perform any duties in Hong Kong. This is evidenced by the facts that (the Taxpayer) does not have an office in Hong Kong, he does not have to report to anyone in Hong Kong, he has no subordinate in Hong Kong, and he has no responsibility for projects undertaken in Hong Kong. That also explains why for most of the time (the Taxpayer) stays in [City N] and [City M] because these locations are (the Taxpayer's) principle (sic) work place. Also, (the Taxpayer) usually arrives Hong Kong very late in the evening and leaves Hong Kong in the morning and it is clear that he cannot perform any service during the period when he was in Hong Kong.'

(8) In support of the objection, the Representative supplied the following documents:

(a) The Taxpayer's monthly travel schedules for the year ended 31 March 2003 (Appendix C, B1 pages 23-28 & 23A-28A) in which it was marked that trips numbered 10, 11, 12, 16 and 26 in Fact (5) were for the purpose of transit to other countries.

(b) A confirmation letter dated 17 December 2003 issued by Company B (Appendix D, B1 page 29).

(9) In response to the assessor's enquiries (R1, pages 54-55), Company B provided the following information (R1, pages 56-58):

(a) The Contract was negotiated and concluded in December 2001 and it was enforceable in Hong Kong.

(b) The Taxpayer was a Regional Executive of the Group and due to his job nature he was required to travel extensively throughout the Asia Pacific region to perform his services and report his work progress to the Group's Senior Management in Country F, Country O, Country G and Country P. During the year ended 31 March 2003, the Taxpayer spent considerable amount of time in Country Q, Country L, Country K and China to develop the Group's business there.

(c) Company B did not require the Taxpayer to render any service in Hong Kong during the year ended 31 March 2003.

(d) Company B' s office working hours were from 8:00 a.m. to 6:00 p.m. from Monday to Friday.

(e) Under the Group' s instruction, Company B paid income to the Taxpayer due to the international nature of his work and recovered 100% of the cost from Company B' s affiliate in Country F.

(f) The Taxpayer' s remuneration for the year ended 31 March 2003 was paid in JPY (R1, page 58):

	Salary	**Bonus**	**Total**
Apr-02	3,500,000		3,500,000
May-02	3,500,000		3,500,000
Jun-02	3,500,000		3,500,000
Jul-02	3,500,000	72,750,000	76,250,000
Aug-02	3,500,000		3,500,000
Sep-02	3,500,000		3,500,000
Oct-02	3,500,000	66,000,000	69,500,000
Nov-02	3,500,000		3,500,000
Dec-02	3,500,000	10,000,000	13,500,000
Jan-03	3,500,000	62,500,000	66,000,000
Feb-03	3,500,000	91,000,000	94,500,000
Mar-03	3,500,000		3,500,000
Total in JPY	42,000,000	302,250,000	344,250,000
Total in HKD (/122.08*7.8)	2,683,486.24	19,311, 517.04	21,995,003.28

(10) The Representative put forward the following contentions (R1 pages 59-60, 62-64):

(a) '(The Taxpayer) is a Regional Executive of [Company B], his duty is to develop and look after the regional business of [Company B] and report his findings to the Senior Management in [Country F]. Due to this job nature (the Taxpayer) is required to report his duty to the Senior Management only, which exercise no control over when (the Taxpayer) decides to go on leave. Therefore (the Taxpayer) is free to take whatever amount of leave as long as his leave pattern does not disrupt [Company B's] business and impair his performance. In fact in order to meet business deadline (the Taxpayer) is required to travel

extensively on weekends in lieu of that he has considerable leeway to take break on weekdays whenever he feels fit to.

In addition, for certain stays in Hong Kong they were purely for transit to other locations either because there was no direct flight between the 2 locations or simply to avoid extremely long flying hours.'

(b) '…(the Taxpayer) did not visit the Hong Kong office to attend meetings or to report/discuss progress of work or seek instruction during his stays in Hong Kong.'

(c) '(The Taxpayer)…is not required to seek approval from anyone for taking annual leave, sick leave or compensatory leave…(the Taxpayer' s) performance is evaluated by the Senior Management in [Country F] purely based on the result he achieved. Therefore (the Taxpayer) is free to take whatever amount of leave day he thinks appropriate.'

(d) 'Being an [Citizen of Country L] (the Taxpayer) is required to report his worldwide income to the [Country L] Tax Office and pay [Country L] Income Tax. However, due to his extensive presence outside [Country L] and the fact that he does not maintain a place of residence in [Country L] he has not reported his income to the [Country L] Tax Office yet.'

(e) 'We have gathered copies of (the Taxpayer' s) credit card statements from August 2002 to March 2003 (Appendix E1-E13, B1 pages 30-42); the nature of his spending in Hong Kong can give an indication as to what he was doing in Hong Kong:

Month	**Day**	**Activity**	**Reference**
Aug 02	7, 12	Resting and doctor consultation	[Appendices E1, E2, E3]
Sep 02	6, 20	Shopping and resting	[Appendices E4, E5, E6]
Oct 02	10, 11	From [Country Q], resting in HK and then flew to [Country K] then to [Country L]	[Appendices E7, E8]

Nov 02	4, 21, 25	From [Country L], shopping, resting and then flew to [Country Q]	[Appendices E9, E10]
Feb 03	25	From [Country L], resting and shopping and then flew to [Country Q]	[Appendices E11, E12, E13]

… all the credit card expenses were first settled by [Company B] and then 100% recharged to a group company in [Country F].'

(11) By letter dated 6 June 2005 (R1 pages 65-66), Company B supplied the following information:

(a) 'The terms of employment with (the Taxpayer) remained unchanged although no new employment contract was entered into for the period from 16 December 2002 to 30 June 2003.'

(b) '(The Taxpayer) is the Regional Director for the Asia Pacific region and he is responsible for developing and marketing the Group's international business… (the Taxpayer) is continuously traveling all the time over the Asian Pacific region. (The Taxpayer's) main duties are regional planning and control and he oversees the performance of the senior brokers.

During 2002/03, (the Taxpayer's) main responsibilities were to recruit personnel to support the Group's expansion of its Asian business, monitor their performance and determine the bonus award; these services were mainly carried out in [Country Q] and [Country F] where (the Taxpayer) spent most of his time in [Company B's] [City M] and [City R] offices. Nonetheless, (the Taxpayer) also travelled extensively throughout Asia to look after [Company B's] Asian business in other countries as well… (The Taxpayer) also reported his work progress to the Group's Senior Management in [Country F] and [Country G].'

Taxpayer's grounds of appeal

3. The Taxpayer put forward three grounds of appeal:

(1) The Taxpayer rendered outside Hong Kong all the services in connection with his employment in the year of assessment 2002/03 and his income derived from his employment in the year of assessment 2002/03 should therefore not be chargeable to salaries tax pursuant to section 8(1A)(b)(ii) of the IRO.

(2) If the Board is of the view that the Taxpayer did render services in connection with his employment in Hong Kong in the year of assessment 2002/03, the Taxpayer visited Hong Kong for not more than a total of 60 days in the year of assessment 2002/03 and his income should therefore not be chargeable to salaries tax pursuant to section 8(1B) of the IRO.

(3) If the Board is of the view that the Taxpayer did render services in Hong Kong during visits exceeding a total of 60 days in the year of assessment 2002/03, the Taxpayer had a non-Hong Kong employment and should therefore be chargeable to salaries tax on his income from his employment on a time apportionment basis pursuant to section 8(1A)(a) of the IRO.

Representation and witnesses called

4. In the hearing, the Taxpayer was represented by Mr Sieker and the Respondent by Mr Fung.

5. Mr Sieker called two factual witnesses, Mr H, the Managing Director of Company B to give oral evidence for the Taxpayer, and the Taxpayer.

6. Mr Fung did not call any witness.

Law and authorities

7. The Board has been asked to consider Section 8(1), 8(1A), 8(1B), and 68(4) of the Inland Revenue Ordinance ('IRO') which provide as follows:

'8(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources-

(a) any office or employment of profit; and
(b) any pension.

(1A) For the 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) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft; and
(ii) renders outside Hong Kong all the services in connection with his employment; and

(c) excludes income derived by a person from services rendered by him in any territory outside Hong Kong where-
(i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and
(ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.

(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.'

'68(4) The onus of proving that the assessment appealed against is excessive or incorrect shall be on the (taxpayer).'

8. The Taxpayer cited the following authorities:

Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174
Commissioner of Inland Revenue v George Andrew Goepfert 2 HKTC 210
D20/97, IRBRD, vol 12, 161
D146/98, IRBRD, vol 13, 693
D76/00, IRBRD, vol 15, 695
D37/01, IRBRD, vol 16, 326
D27/03, IRBRD, vol 18, 448

9. The Respondent cited the following authorities:

IRC v Bladnoch Distillery Co Ltd [1948] 1 All ER 616
Attorney-General v Equiticorp Industries Group Ltd [1996] 1 NCLR 528
Kwong Mile Services Ltd v Commissioner of Inland Revenue (2004) 7 HKCHAR 275
Lee Hung Kwong v CIR [2005] 4 HKLRD 80
D40/90 (1990), IRBRD, vol 5, 306
D11/97 (1997), IRBRD, vol 12, 147
D20/00 (2000), IRBRD, vol 15, 297
D11/03 (2003), IRBRD, vol 18, 355
D39/04 (2004), IRBRD, vol 19, 319

Analysis

Ground (1) - No services rendered in Hong Kong?

10. Mr Sieker for the Taxpayer invited the Board to go straight into finding whether the Taxpayer had rendered all services outside Hong Kong in the subject year of assessment 2002/03. He said that section 8(1A)(b)(ii) of the IRO provides the Taxpayer a complete exemption and if the Taxpayer had rendered all services outside Hong Kong, he should not be chargeable to Hong Kong salaries tax in any event and the question whether or not his income was sourced from Hong Kong or otherwise would not be relevant.

11. We disagree with Mr Sieker.

12. Deputy Judge To in Lee Hung Kwong v CIR [2005] 4 HKLRD 80 and 89F-90A [R2/11] said:

> *'It is plainly obvious that the charge or the liability to salaries tax is created by s.8(1). The crucial words of the charge are income arising in or derived from Hong Kong from one of the two sources, namely (a) any office or employment of profit and (b) any pension. Section 8(1A)(a) expressly brings into the charge income derived from services rendered in Hong Kong and s.8(1A)(b) expressly excludes income from certain categories of persons who render outside Hong Kong all the services in connection with their employment. Both subsections are silent as to the source of the income thus included or excluded. If the income included under s.8(1A)(a) is an income from a Hong Kong source, the subsection clearly serves no useful purpose. The purpose of the subsection must be to bring into the charge income from a source outside Hong Kong if the services are rendered in Hong Kong. Likewise, the purpose of section s.8(1A)(b) must be to exclude from the charge an income from a Hong Kong source if the person renders outside Hong Kong all services in connection with his employment. Thus, the question which falls to be decided in any particular case is whether the income which is sought to be charged is income from a Hong*

> *Kong source and the place where the services are rendered is irrelevant. If the income is from a Hong Kong source, it is subject to the charge whether the services are rendered in or outside Hong Kong, unless it falls within the exception under s.8(1A)(b).' (emphasis added)*

13. As ruled by Deputy Judge To, the basic tenet for the operation of section 8(1A)(b)(ii) is that the income concerned is from a Hong Kong source and not outside. For if the income concerned was sourced outside Hong Kong, we would not be dealing with exclusion under section 8(1A)(b)(ii), rather, we would be dealing with inclusion under section 8(1A)(a) to taxable income sourced outside if the services concerned are *rendered* in Hong Kong. That is to say, where services are rendered would only be an ancillary question to ask after we have first ascertained the actual source of an income.

14. Macdougall J in CIR v Goepfert (1987) 2 HKTC 210 at 236 [A3/Tab 2] said:

> *'As a matter of statutory interpretation I am unable to escape the conclusion that, although sec. 8(1) must be construed in the light of and in conjunction with section 8(1A), section 8(1A)(a) creates a liability to tax additional to that which arises under section 8(1). It is an extension to the basic charge under section 8(1). If it were otherwise section 8(1A)(a) would be virtually otiose and section 8(1A)(b) completely unnecessary.'*

15. Sections 8(1A)(a) and 8(1A)(b) are extensions to the basic charge under section 8(1); we would therefore start with the basic charge under section 8(1) by considering the question of the source or locality of employment before considering additional liabilities under section 8(1A)(a), or their exclusion under section 8(1A)(b) or section 8(1B).

Section 8(1) - Source of Taxpayer's income

16. Deputy Judge To in Lee Hung Kwong said [R2/011-012]:

> *'…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…*
>
> *…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 Wilfred Greene MR said, regard must first be had to the contract of employment…'*

17. The Contract was entered by the Taxpayer as the employee with a Hong Kong company (Company B) as the employer [B1/15-16]. The Taxpayer was paid by Company B in Hong Kong and his Contract was enforceable against Company B in Hong Kong [R1/42]. The place where the income really comes to the Taxpayer, according to his Contract with Company B, must be Hong Kong.

18. Mr Sieker however argued that irrespective of what was written in the employment contract, Company B was not the true employer of the Taxpayer and that the Board should look behind or to look through the contract of employment to find the true employer by examining the totality of facts from a practical and substantive perspective.

19. Mr Sieker cited the Board of Review decision in D20/97, IRBRD, vol 12, 161 pointing out that the Board in that case looked through an employment contract to find the Taxpayer's employment of Hong Kong source because of the connections of the Taxpayer's employment to Hong Kong. Mr Sieker argued that the facts were basically reversed in this case and invited this Board to look through the Taxpayer's Contract with Company B as offshore because of the offshore connections of the Taxpayer's employment.

20. Mr Sieker also cited the High Court's decision in Goepfert arguing that the test in determining the locality of the Taxpayer's employment is 'totality of facts' as laid down therein. He invited the Board to consider the following factors of Taxpayer's employment and said that the Taxpayer's employment has minimal connections to Hong Kong (paragraph 46 Closing Submission) and accordingly its locality thereof should be non-Hong Kong:

(a) The Contract between Taxpayer and Company B was concluded outside Hong Kong;

(b) The Taxpayer had no responsibilities for Company B in Hong Kong;

(c) The Taxpayer did not report to anyone in Hong Kong;

(d) The Taxpayer's remuneration was fully recharged to Company B's parent in Country F;

(e) The Taxpayer did not participate in any MPF or other retirement scheme in Hong Kong;

(f) The Taxpayer was paid in Japanese Yen with 85% linked to the performance of the City M offices.

21. Mr Sieker argued that we could not rely on the Contract the Taxpayer entered with Company B of Hong Kong to find the locality of Taxpayer's employment, instead we need to look

behind or through the Contract into the substance of the arrangement as in D20/97 or to consider 'totality of factors' as in Goepfert to find out the real source of Taxpayer's income.

22. We disagree with Mr Sieker.

23. As Sir Wilfred Greene MR said, regard must first be had to the contract of employment; if we could identify the locality on face of the contract of employment, there was no reason why we need to look behind the contract as in D20/97 or to consider other factors in totality as in Goepfert to construct the locality thereof.

24. The Taxpayer purposefully entered into an employment contract with Company B in Hong Kong. By his admission in the hearing, the Taxpayer had a choice to locate his employment wherever he wanted but he chose Hong Kong:

In examination in chief at page 23 of the transcript:

'[Mr A]: … As I mentioned, I joined the company in 1997, I am a [Language of Country Q] speaker. I speak perfect Japanese. I have been in [Country Q] since, I first went to [Country Q] in 1980, university in [Country Q]. I have been working in the money markets in [Country Q] since '86 so my speciality is in [Country Q]. The contract is, you will notice, my remuneration is all based in yen and my bonus, performance bonus is based on the performance of the [City M] office. Prior to arranging to get paid in Hong Kong, I was paid in [Country F] Head Office. After 2001, I continued to be paid by the Head Office but we decided to put a contract in Hong Kong because I was having problems with the [Country Gs] bank in [City I] due to the English and we decided that this is the right time zone, I was going to travel a little bit more now to China, [Country K], [Country S] so I requested to get paid in Hong Kong so it was done for administration purposes…

In cross examination at page 36 of the transcript:

Q: Right. Now, moving on to the next paragraph, paragraph 5 (of Taxpayer's witness statement), you say that you, you chose to enter into employment with the Group's entity in Hong Kong instead of an entity elsewhere as a matter of convenience. So that sounds as if you had a choice in terms of where you wanted to, to, I mean, which, in terms of the employer, you chose Hong Kong?

A: I had no, no need to put it in Hong Kong and even if, today, I can put back to Country F, if I wanted to. Yes, I have a choice, yes. I mean if you were successful, you have a certain amount of leverage.

Q: Right. Right and you picked Hong Kong as the place.

A: Yes, I chose Hong Kong.

25. In the circumstances, it is unnecessary, indeed inappropriate, to look through the Taxpayer' s Contract with Company B in Hong Kong or to consider other factors in order to reconstruct the locality of the Taxpayer' s employment.

26. Further, in his Tax Return and Appendix to BIR60 for the year of assessment 2002/03 ('Tax Return 2002/03') filed on 30 June 2003 **[B1/18]**, the Taxpayer stated that he had income in the total sum of HK$21,995,003 from his employer Company B, which was chargeable to salaries tax in Hong Kong, and claimed exclusion under section 8(1B) of the IRO on the basis he was present in Hong Kong for only 47 days during the period **[B1/21; R1/46]**.

27. In his earlier Tax Return and Appendix to BIR60 for year of assessment 2001/02 ('Tax Return 2001/02') filed on 25 February 2003, the Taxpayer also stated that his employment services were rendered in Hong Kong but claimed such service were rendered in Hong Kong during visits not exceeding a total of 60 days during the year **[R3/5]**.

28. In his ensuing contract which was effective on 1 July 2003 **[R1/2]**, the day following the Taxpayer' s filing of his Tax Return 2002/03 on 30 June 2003 **[B1/17]**, the Taxpayer expressly submitted himself to the exclusive jurisdiction of the Courts of Hong Kong.

29. Indeed, all letters written to the Commissioner by the Representative of the Taxpayer respectively on 14 May 2003 **[R1/42]**, 30 June 2003 **[R1/46]**, 26 September 2003 **[R1/47]**, 17 December 2003 **[R1/49]**, 21 January 2004 **[R1/59],** showed that the Taxpayer accepted his employment with Company B as Hong Kong employment., accordingly his income from Company B had a Hong Kong source.

30. Mr Sieker also argued that the Taxpayer entered his Contract with Company B as a matter of convenience and Company B served only as a paymaster. As authority, he cited two Board of Review decisions in D146/98, IRBRD, vol 13, 693 and D76/00, IRBRD, vol 15, 695.

31. Mr Sieker argued that the Taxpayer did not have any responsibilities in Hong Kong and did not work for the Hong Kong company or for its benefit. He argued that the Taxpayer was essentially engaged to perform work and report to the Country F parent company, there was no substantial connection to Hong Kong, and the Taxpayer' s employment was therefore as a practical hard matter of fact an offshore employment. As evidence, Mr Sieker called as witnesses the

Taxpayer and Mr H, the Managing Director of Company B, who both testified in the hearing that the Taxpayer did not have any subordinates or any office in Hong Kong and that the Taxpayer was not performing any employment services and had no responsibility at all in Hong Kong.

32. We must point out that D146/98 and D76/00 as cited by Mr Sieker are distinguishable from this case. Both D146/98 and D76/00 involve dual employment where an employee had signed two employment contracts, one with a Hong Kong company and the other with a PRC company. The respective Boards having decided that all employment services were actually rendered for the benefit of the Mainland employers, found the Hong Kong employers in fact the paymasters. The respective Boards of D146/98 and D76/00 in their respective decisions were in fact attributing income source to two concurrent employers of two localities. In this case, evidence shows that the Taxpayer had one single employment contract with one single employer, Company B in Hong Kong, accordingly no question of attribution of source or locality of income could arise. It is therefore inappropriate for this Board to apply D146/98 and D76/00 in this case and we reject the Taxpayer' s paymaster argument.

33. The Contract might have been signed by the Taxpayer outside Hong Kong, with no MPF or retirement scheme in Hong Kong, and paid in non-Hong Kong currency; the Taxpayer might have no responsibilities and did not report to anyone in Company B in Hong Kong, and his remuneration was fully recharged to Company B' s parent in Country F, and he might be rendering services for the advantages and benefits of the Country F parent company, or even the Country Q Office and the Country K Office, but all these factors could not change the fact that at all material times the Taxpayer chose to put his Contract with Company B of Hong Kong and he did get paid as he chose in Hong Kong. His employment for that purpose is clearly located in Hong Kong. After having chosen to locate his employment in Hong Kong, it is unreasonable for the Taxpayer to later argue that what he had chosen was in fact a paymaster.

34. We therefore find that for the year of assessment 2002/03, the Taxpayer did enter his Contract with Company B as Hong Kong employment and his income had a Hong Kong source and in this respect, the place and indeed the manner how he performed his services was not relevant.

Section 8(1A)(b)(ii) – Rendered all services outside Hong Kong?

35. It is common ground that while section 8(1) charges on Hong Kong sourced income, section 8(1A)(b)(ii) provides a complete exemption for all income derived by a person who renders outside Hong Kong all the services in connection with his employment. That is to say, as long as an employee provides **all** employment services outside Hong Kong, income earned will be excluded from salaries tax. Whether the Taxpayer performed all employment services outside Hong Kong, however, is a question of fact.

36. The Taxpayer asserted that during year of assessment 2002/03, he did not render any

services in connection with his employment with Company B in Hong Kong.

37. Mr Fung for the Respondent however referred the Board to the Taxpayer's Tax Return 2002/03 [B1/21] wherein the Taxpayer and the Representative relied only on exemption under section 8(1B) and not section 8(1A)(b)(ii). In section 6 of the Appendix to the Tax Return 2001/02 [R3/5] the Taxpayer claimed under section 8(1B) asserting 'services were rendered in Hong Kong during visits not exceeding a total of 60 days during the year'. According to Mr Fung, the Taxpayer had by his own Tax Return and Appendix to BIR60 admitted having rendered services in Hong Kong.

38. Mr Sieker argued that when the Taxpayer in his Tax Return 2002/03 claimed exemption under section 8(1B), he was in fact claiming exemption under the 60 days rule which was a separate exemption applicable also to cases under section 8(1A)(b)(ii) where a taxpayer rendered all services outside Hong Kong. Mr Sieker argued that the fact that the Taxpayer was not explicit in claiming under section 8(1A)(b)(ii) in his Tax Return 2002/03 was not an admission that he rendered services in Hong Kong.

39. We accept Mr Fung's view and reject Mr Sieker's argument.

40. It is simple logic that a taxpayer who rendered <u>all</u> services outside Hong Kong could not have rendered any services in Hong Kong. Likewise, a taxpayer who rendered certain services in Hong Kong could not claim he rendered <u>all</u> services outside Hong Kong. Accordingly, when exemption was claimed under section 8(1B), we could only infer that the Taxpayer rendered services in Hong Kong, and that he could not have rendered <u>all</u> services outside Hong Kong. That is to say, a claim under section 8(1B) necessarily excludes a claim under section 8(1A)(b)(ii) and vice versa. A claim under section 8(1B) must therefore constitute an admission that services were rendered in Hong Kong, though not all services.

41. The Taxpayer signed his Tax Return and Appendix to BIR60 for year 2001/02 on 24 February 2003 and for year 2002/03 on 27 June 2003. The two consecutive Tax Returns and Appendixes to BIR60 were signed by the Taxpayer under the advice and representation of tax professionals, after having declared that the information given was true, correct and complete. We could not accept the Taxpayer's excuse saying that the Tax Return and Appendix were filled in by the Representative as a standard response because it was easier to obtain exemption under section 8(1B) and that he did not mean by what he had declared (Transcript/46). The Representative was not called to give evidence and we could not believe that the Representative as professionals would have filled in the Tax Return and Appendix stating that the Taxpayer rendered services in Hong Kong despite the fact that he did not render any services at all in Hong Kong. We therefore find that the Taxpayer by claiming tax exemption under section 8(1B) was merely stating the fact as it was that he did render services in Hong Kong in the relevant tax years. At least, that was the Taxpayer's position and understanding in respect of his income received from Company B at the time of his filing of his Tax Returns.

42. Mr Sieker however asked the Board to decide that the Taxpayer had not rendered any services in Hong Kong, in contrast to what the Taxpayer had declared in his Tax Returns.

43. Mr Sieker argued that the Taxpayer had no responsibilities and did not attend the office in Hong Kong and that Mr H, the Managing Director of Company B testified to that effect. Mr Sieker also argued that the Taxpayer reported directly to the Chief Executive Officer of Holding Company C in Country F, and did not report to anyone in Hong Kong and no one in Hong Kong including Mr H reported to the Taxpayer, and that it was not intended that the Taxpayer would render any of his services in Hong Kong.

44. Mr Sieker invited the Board to consider that 'if the Taxpayer has provided a satisfactory explanation as to why he was not required to perform services in Hong Kong, he should be regarded as having performed all the services outside Hong Kong unless there is some evidence or at least a compelling inference pointing to the actual performance of his services in Hong Kong.' Mr Sieker said that for otherwise it would be impossible for anyone to prove a 'negative' (that is, that the Taxpayer did not render any services in Hong Kong) [Closing submission paragraph 15].

45. We disagree with Mr Sieker. Section 8(1A)(b)(ii) provides exemption to a taxpayer who rendered <u>all</u> the services in connection with his employment outside Hong Kong. Exemption under section 8(1A)(b)(ii) therefore requires proof that a taxpayer did render all services outside Hong Kong and in this connection, each and every of his visit or stay in Hong Kong must therefore be shown to be wholly unconnected with his employment or work. By showing that a taxpayer had no responsibilities or not required to perform services in Hong Kong is not enough; it must be shown that his visit or stay in Hong Kong was in fact unconnected with his employment or work. In this respect, one would expect to draw compelling inference if such visit or stay happened during weekends or public holidays or for purpose clearly unconnected, for instance, attending wedding that such visit and stay were unconnected with employment or work.

46. Immigration record (fact (5)) however shows that for the period from 1 April 2002 to 31 March 2003 the Taxpayer visited Hong Kong for a total of 77 days out of which only 18 days were Saturdays and Sundays, 4 days where the Taxpayer arrived and departed on the same day, the remaining 55 days were all weekdays. We find it difficult to believe that the Taxpayer did not render employment services when he was in Hong Kong during the 55 weekdays out of his 77 days of visit in Hong Kong.

47. For instance, as Mr Fung pointed out that in the year 2002/03, the Taxpayer was in Hong Kong when his boss Mr J was also in Hong Kong on four occasions. Mr Fung argued that it could not be mere coincidence that Mr J and the Taxpayer were together in Hong Kong four times in one year, on one occasion arriving Hong Kong on the same date, and on other two occasions leaving Hong Kong on the same date for the same destination. Reasonable inference is

that the Taxpayer was in fact performing his employment duties during those visits in Hong Kong.

48. Mr Sieker however relied on the testimony of Mr H the Managing Director of Company B who said he was responsible for Hong Kong independently and he always met Mr J alone in the absence of the Taxpayer to argue that despite the fact that the Taxpayer arrived and departed Hong Kong on several occasions at the same times as Mr J did, the Taxpayer would not have performed any employment duties as it would be inconceivable that Mr J would conduct any Hong Kong planning with the Taxpayer without involving Mr H (Taxpayer's submission paragraph 12). We are not convinced by Mr Sieker's argument, particularly in view of the fact that Mr J was at the material time also a director of Company B.

49. Under cross-examination, Mr H recollected that Mr J had asked the Taxpayer to come to Hong Kong for meetings (transcript 15-16):

'Chairman: So are you saying that in all meetings, if it touches on Hong Kong business, [Mr A] is not there?

[Mr H]: No, because I mean in fact just to give you a little bit of background, I was recruited by the founder of the company so I joined the company in 1993. So I have [citizenship of Country G] nationality. I speak fluent [language of Country G] so that is the reason why, you know, I, I , all along, I wanted to, to report to, to the Head Office people and [Mr J] was, I mean, [people of Country F], we spoke most of the time in French so that is the reason why for personal reasons or for business reasons, most of the time I, I met with [Mr J] alone and both of us, we spoke in French and then on the Hong Kong business and [Mr A] didn't even have the numbers of, for Hong Kong, I mean I don't think he knew what's going on in Hong Kong so I mean, for for my meetings with [Mr J], it was between the two of us. Yes, but obviously for the stay of [Mr J] in Hong Kong, after he met me, I understand that sometimes, I mean, he would ask [Mr A], you know, to come to Hong Kong to meet with him but separately. Yes.'

50. The Taxpayer in cross examination did not deny meeting with Mr J in Hong Kong, he instead claimed that such meetings were not formal and not about business of the Group in Hong Kong (transcript 71-74).

'Q: … As far as I can see by comparing your movement records with [Mr J's] movement records, there were four occasions in 2002 and 2003 where both of you visited Hong Kong at the same time and would you, can you remember what you did on each of those occasions?

A: Firstly, you have tabled there so I have had a look at it. On no occasion are we here totally at the same time. He has come in a day before attending his business. I think I stated earlier that on one occasion, we went off to [Country K] together. We went to [Country K] at the same time from here. Again, apart from having a drink, we, [Mr J] is no longer with the Group, he fell out with the Group but we never, didn't stay at the same hotel for instance. [Mr J] is a very private man. He did his things his own way. We never attended the office together. We never talked about the Hong Kong office together. We may have had dinner or a drink together but never to the extent that all of our time spent together in Hong Kong. We never met in the morning spent all day together.

…

Q: And when [Mr J] was in Hong Kong, you never talked about the business of the Group in Hong Kong?

A: In Hong Kong, definitely no because I had no responsibility whatsoever.

Q: No, but I mean, just say a casual conversation.

A: Of course, if you are in a certain industry and you are going to meet your boss somewhere, of course, during the conversation, again, there were no formal meetings, there was no need for a formal meeting. If he wanted to see the figures of [City M] or, or look at the [City M] operation, he would come to [City M] to look at that but of course, if we are having dinner, you would say 'how's it going?" then of course but if you want to try to say that we sat down and plotted the growth of Hong Kong together…

Q: No, that's not what I am suggesting. I am not suggesting a formal meeting.

A: I am not going to say we never talked about anything about work, but, but the reason to meet in Hong Kong, if we met in Hong Kong was a social one or again on the way to [Country L] or on the way to [Country K], maybe he introduced me to [Mr H] and we had dinner with [Mr H]. I had to meet [Mr H] for the first time some time so…'

51. But we find it difficult to believe that Mr J, a person in charge of the Group D (as well as a director of Company B), a global enterprise, would summon the Taxpayer, his regional manager, to meetings in Hong Kong not for business but for dinner or gatherings, and not once but on at least four occasions. The only reasonable inference to draw is that there was business in Hong

Kong. We therefore find it difficult to believe that the Taxpayer was not performing his employment during his meetings with Mr J in Hong Kong.

52. According to his Contract with Company B, the Taxpayer was employed as 'Regional Manager for the Asia Pacific region' and he was required to 'travel extensively throughout the Asia Pacific region.' [B1/15]

53. Mr H, the Managing Director of Company B in a letter to IRD dated 6 June 2005 [B1/65] stated:

> '[The Taxpayer] is the Regional Director for the Asia Pacific region and he is responsible for developing and marketing the Group's international business. Please note that [the Taxpayer] is continuously travelling all the time over the Asian Pacific region. [The Taxpayer's] main duties are regional planning and control and he oversees the performance of the senior brokers.
>
> During 2002/03, [the Taxpayer's] main responsibilities were to recruit personnel to support the Group's expansion of its Asian business, monitor their performance and determine the bonus award; these services were mainly carried out in [Country Q] and [Country L] where [the Taxpayer] spent most of his time in our [City M] and [City R] offices…'

54. The Representative of the Taxpayer by a letter written to the IRD dated 26 September 2003 [R1/47] also stated, 'In addition to playing golf, we understand [the Taxpayer] also attended certain social gatherings with clients in Hong Kong and conduct interviews for candidates from Hong Kong.'

55. On the question of social gatherings with clients, Mr Sieker asserted that such gatherings at most were 'casual contacts' insufficient to constitute performance of employment services (Taxpayer's closing submission paragraph 17). But the responsibilities of the Taxpayer included developing and marketing the Group's international business, and for that purpose gatherings and contacts with clients could not be said as causal and outside his employment duties. Indeed, the Group's Annual Report for year 2003 had commended the Taxpayer for having overseen expansion of operations including Hong Kong (paragraph 58 below). It is only reasonable to infer that the Taxpayer was performing employment services by attending gatherings with clients in Hong Kong.

56. On the question of conducting interviews for candidates, Mr Sieker asserted that the Taxpayer had only interviewed a person for the [Country T's] business in 2001/02, but did not interview anyone in 2002/03 (Taxpayer's closing submission paragraph 16). The Taxpayer in the cross examination testified as follows (transcript 55-57):

‘Q: Yes. Now, this paragraph, apart from talking about attending social gatherings, it also talks about conducting interviews for candidates from Hong Kong, so again, I mean, did you ever conduct interviews in Hong Kong?

…

A: So questions were asked and it was obvious that I only spent 13 and a half days in, in Hong Kong that year so it was attempted to reply to the questions of the Revenue Department. The only, answering your question, the only person I can remember is I was trying to employ a [Country T] guy for the [Country K] office who was working for a competitor in Hong Kong so I met him on a, again it would have been on a social occasion and asked him whether he would consider joining [Group D] but that would be the extent of it.

Q: You mentioned about this interview with the [Country T] guy in [Country K] office, that was, that took place in 01/02, right?

A: Yes.

Q: What about the year of assessment that we are talking about, from 2002 to 2003, did you also conduct similar interviews in Hong Kong?

A: Not to my knowledge.

Q: And presumably you would accept that conducting these interviews would be part of your duties as a Regional Manager?

A: Well, if I find a candidate, I mean, this particular [Country T] guy came, he finally came to Country Q, he came with the family… but if it was performed, it was performed on behalf of [Group D in Country K], not on behalf of [Company B].

Mr L O Leung: Was [Country K] under your jurisdiction?

[Mr A]: Well, it wasn’t until, it wasn’t until December ’03. I became a Director then.

Chairman: But the [Country T] guy was employed in the years 01/02?

[MR A]: No, he didn’t decide to join us until July ’03 so I mean I just met the guy…

Chairman: But you do the, you just told us that you did the interview in 01/02?

[Mr A]: Well, it is not a formal interview. I just made the initial contact and said would you consider working for [Group D].

Chairman: So when did the interview take place?

[Mr A]: It was not a formal interview, it is just, you know, a matter of interest to myself…

Chairman: Well, you met him, when was it?

[Mr A]: I don't remember but it would have been in this 01/02 period because quite frankly, he came to [Country Q] with his wife.'

57. According to his testimony, the Taxpayer met a [Country T] candidate in Hong Kong in 2001/02 and asked him to consider working for Group D and the Country T candidate decided to join until July 2003. If no interview took place during 2002/03, it would mean the Country T candidate did not meet the Taxpayer to follow up on the proposed employment for at least 16 months. It is difficult to believe a Country T candidate would decide to join a new employer without any following up meetings for a 16 months period since initial contact particularly when such move would mean relocating his family to Country Q! In the premise, we are not convinced that the Taxpayer did not meet the Country T candidate in Hong Kong in 2002/03.

58. Further, the 2003 Annual Report of the Group ('the 2003 Annual Report') [R3/36] also reported Taxpayer's involvement in Hong Kong:

> '[The Taxpayer] has overseen the expansion of [Group D's] presence in Asia and [Country L], first in [City M] since 1997, and more recently in Hong Kong, [Country K] and [City R], where he developed operations in interest rate derivatives.' (emphasis added)

59. The Taxpayer however argued that his involvement began only after his appointment to the Executive Board in October 2003 and the departure of his boss Mr J in December 2003, a period outside the subject year of assessment 2002/03 (Taxpayer's closing submission paragraph 10).

60. We do not believe that the Taxpayer began involved in Asian area including Hong Kong only after Mr J left in October 2003. In his testimony, the Taxpayer admitted having made contacts in Hong Kong in recruiting employees on behalf of the Country K office in 2001/02. If Country K was not under his jurisdiction until December 2003 as he claimed, on what authority could he offer employment in 2001/02 for the Country T candidate to accept in July 2003? He

might not be the director of the Country K office until December 2003, but he was the Regional Manager for the Asia Pacific region. He would have acted under his authority as the Regional Manager for the Asia Pacific region which covered Hong Kong in recruiting the Country T candidate from Hong Kong in the material time in 2001/02 through to July 2003. It is only reasonable for us to infer that the Taxpayer did get himself involved in overseeing expansion of Group D's presence in the Asian area as reported in the 2003 Annual Report, and for that purpose he did perform recruitment services in Hong Kong in the least since 2001/02 through to 2003. We therefore reject Mr Sieker's submission that the period stated as '*more recently* in Hong Kong…' in the 2003 Annual Report [R3/36] meant the year of assessment 2003/04 and not 2002/03 (the year in dispute) (Taxapayer's closing submission paragraph 10).

61. Indeed, his involvement in Group D's expansion as reported in the 2003 Annual Report was consistent with his employment duties as 'Regional Manager for the Asia Pacific Region' under the Contract with Company B [B1/15] which employment duties Company B and the Representative confirmed to include developing and marketing the Group's international business and recruiting personnel (paragraphs 53 & 54 above). Such employment duties by their nature require traveling and meeting with people.

62. As a matter of fact, the Contract expressly required the Taxpayer to travel extensively throughout the Asia Pacific region [B1/15], and Asia Pacific region must be meant to include Hong Kong. The Contract also provided to reimburse the Taxpayer of all reasonable travel expenses, and that must also be meant to include travelling in Hong Kong.

63. The Taxpayer did incur expenses in Hong Kong in using a credit card in the account name of Company B, summary for the period between August 2002 and March 2003 is as follows:

Date	**Transaction**	**Amount** (HK$)	**Reference**
7-8-2002	AA Restaurant	302.50	B1/30
8-8-2002	Club BB Hong Kong	1,380.00	B1/32
9-8-2002	CC Development Ltd (CT) Hong Kong	6,386.00	B1/32
10-8-2002	The DD Hotel Hong Kong	25,577.80	B1/30
10-8-2002	EE	1,431.10	B1/30
10-8-2002	FF Bar Hong Kong	2,288.00	B1/31
11-8-2002	GG Club Hong Kong	396.00	B1/32
12-8-2002	HH Medical Centre Ltd	450.00	B1/32
12-8-2002	Dr II	900.00	B1/32
13-8-2002	The JJ Hotel	25,482.42	B1/30
13-8-2002	The JJ Hotel	108.00	B1/30
25-8-2002	The DD Hong Kong	7,406.30	B1/30
	Total	**72,108.12**	

6-9-2002	KK Bar Hong Kong	740.30	B1/33
6-9-2002	LL Asia Pacific Limited Hong Kong	9,660.00	B1/35
16-9-2002	MM (Bar & Eatery) Hong Kong	320.00	B1/34
20-9-2002	NN Bar Hong Kong	861.30	B1/34
21-9-2002	OO Airways Ltd	4,070.00	B1/35
	Total	**15,651.60**	
10-10-2002	The PP Restaurant	6,551.60	B1/36
20-10-2002	QQ Sauna Hong Kong	3,363.00	B1/37
23-10-2002	RR Airway Limited	4,380.00	B1/38
	Total	**14,294.60**	
4-11-2002	SS HK Limited	5,900.00	B1/39
23-11-2002	The Bar Hong Kong TT	2,034.00	B1/38
	Total	**7,934.00**	
25-2-2003	The UU Club HK	330.00	B1/40
25-2-2003	The UU Club HK	580.00	B1/40
27-2-2003	VV Restaurant Hong Kong	710.00	B1/41
27-2-2003	WW Department Store Hong Kong	6,095.00	B1/42
27-2-2003	XX Sports Appenal Shop Hong Kong	2,565.10	B1/42
	Total	**10,280.10**	
26-3-2003	The YY Hotel	621.50	B1/41
26-3-2003	The YY Hotel	621.50	B1/41
26-3-2003	ZZ Hong Kong	3,173.50	B1/42
	Total	**4,419.50**	

64. The Taxpayer however argued that 'although I use the corporate credit card provided by [Company B] while I was in Hong Kong, my personal expenses were deducted from the actual payment of my remuneration.' [A1/Tab1, paragraph 9] In the hearing, the Taxpayer claimed that he was given a lot of leeway to spend on Company B's corporate card, and that all transactions as shown thereon were not used in connection with his employment, but rather to pay for his personal expenses (transcript/75-77). Mr Sieker on the other hand submitted that Company B's corporate card expenses in fact were charged back by Company B to its Country F parent company, and that Company B did not claim tax deduction in Hong Kong for Company B's credit card expenses and that was because such credit card expenses were not Company B's business expenses (Taxpayer's submission paragraph 8).

65. Whether or not Company B deducted such corporate credit expenses from Taxpayer's remuneration or charged back to its Country F parent company or claimed tax

deduction thereof in Hong Kong could not change the fact that the Taxpayer did incur corporate credit card expenses while travelling in Hong Kong. The relevant question is whether or not such travelling in Hong Kong using the corporate credit card was related to the Taxpayer's employment.

66. The Contract had not provided for reimbursement of personal expenses, why would Company B issue to the Taxpayer a corporate credit card to be used by the Taxpayer for his personal expenses to be subsequently deducted from his remuneration? Reasonable inference is that the corporate credit card must be intended by Company B to be used by the Taxpayer in connection with his employment.

67. After all, aside from bare assertion, the Taxpayer adduced no evidence showing deduction of corporate card transactions from his remuneration or charging back to Company B's Country F parent company. On the question of corporate credit card expenses, we reject the Taxpayer's argument and Mr Sieker's submission that they were not connected with employment.

68. Mr Sieker also argued that not all work-related activities constituted rendering of services for the purposes of section 8(1A)(b)(ii). He submitted that we must disregard 'work-related activities' that are done casually, voluntarily and infrequently. As authority, he cited D27/03, IRBRD, vol 18, 448, where a taxpayer employed by a Hong Kong company to act as a technician in charge of production machinery for a China factory purchased spare parts in Hong Kong for the manufacturing business was not regarded as performing services in Hong Kong. The Board in D27/03 said:

> *'We are of the view that, in the circumstances of this case, the purchase of spare parts in Hong Kong performed by the Taxpayer cannot be considered as the Taxpayer performing any services for the Employer. The purchase was outside his scope of work, it was done casually, voluntarily, only once or twice and for convenience. He was doing something that he was neither required nor asked to do under his employment contract. By so doing it was merely more convenient or easier for him to discharge his duties …' [A3 – Tab 6 at paragraph 17]*

69. We fail to see how D27/03 could assist in the Taxpayer's case. The Taxpayer was a regional manager responsible for developing and marketing international business of a global group, his employment contract specifically required him to travel extensively which he did. The Taxpayer's activities in Hong Kong like meeting clients, recruiting personnel, attending meetings as summoned by superiors, etc as reviewed above, all fell inside his employment duties under the Contract performance of which he was commended in the 2003 Annual Report. They were all employment services which the Taxpayer was employed to render. There is no way we could ever consider the Taxpayer's activities as 'done casually, voluntarily, only once or twice and for convenience' as the taxpayer in D27/03. We therefore reject Mr Sieker's submission that the Taxpayer's activities in Hong Kong were not 'services' rendered for the purposes of section

8(1A)(b)(ii).

Conclusion on Ground 1

70. For all the above reasons, we find that the Taxpayer did render services in connection with his employment with Company B in Hong Kong in the material year 2002/03 and we reject the Taxpayer's claim for tax exemption under section 8(1A)(b)(ii).

71. To complete our conclusion on Ground 1, we must mention that the Taxpayer has claimed that he used Hong Kong only as a place of transit for holidays, shopping and sightseeing, playing golf and gambling in Macau. As already reviewed, however, we are not satisfied that the Taxpayer did not perform any services in connection with his employment with Company B during his visits or stays in Hong Kong in the year of assessment 2002/03. Whether or not the Taxpayer has also used Hong Kong as a place of transit for holidays, shopping and sightseeing, playing golf and gambling in Macau as claimed would therefore become non-issues, because the fact still remains that the Taxpayer did render services in connection with his employment in Hong Kong in the year of assessment 2002/03.

Ground 2 –Visited Hong Kong for not more than 60 days?

72. The Taxpayer also claimed exemption under section 8(1B) of the IRO which provides,

> *'In determining whether or not all services are rendered outside Hong Kong for the purpose 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.'*

73. The Revenue adopted the fraction–equals-whole approach in counting fractions of a day not as fractions, but as whole days (fact (5)); as a result, the Deputy Commissioner in his determination affirmed that the Taxpayer was present in Hong Kong for 77 days during the year of assessment 2002/03, and the Taxpayer was not entitled to exemption under the 60 days rule of section 8(1B) of the IRO.

74. Mr Sieker for the Taxpayer argued that the Revenue's computation was wrong. He cited D37/01, IRBRD, vol 16, 326 saying that the Revenue's computation of 'days' to include part of a day will cause great injustice.

75. Mr Sieker also cited D27/03, IRBRD, vol 18, 448 saying that the fraction-equals-whole approach contradicts the rule of tax law interpretation that ambiguities should be resolved in favour of taxpayers. The Board in D27/03 decided that there were alternative approaches in calculating 'days' for the purpose of section 8(1B) which would be more

favourable than the fraction-equals-whole approach and it was believed that the Revenue and the Board should adopt a flexible approach by looking at the circumstances of each case to mitigate the harshness in the fraction-equals-whole approach.

76. In this case, Mr Sieker suggested six alternative approaches in calculating the number of days for the purpose of the 60 days rule in section 8(1B) of the IRO:

Approach A: Fractions to be counted as fractions - where all the fractions of any part day are simply totaled to give whole days.

Approach B: Half-day approach – each day is divided into two half day (from 12:00 am to 11:59 am and from 12:00 noon to 11:59 pm) and for visits falling inside each half day segment to be counted as half day.

Approach C: Day and hour approach – each trip to Hong Kong in which the stay in Hong Kong is not more than 24 hours is to be counted as one day. For each stay over 24 hours, the total time in Hong Kong will be counted by hours.

Approach D: Departure and arrival as one day approach - to disregard the date of departure if the taxpayer does not arrive and depart Hong Kong on the same day.

Approach E: Disregard short term transit approach - to disregard the short-term presence of the Taxpayer in Hong Kong for the purposes of 'transit' in calculating the number of days of visits in Hong Kong.

Approach F: Presence during working hours approach - to count only the number of days on which the Taxpayer was present in Hong Kong during working hours.

77. Mr Sieker argued that Taxpayer' s visits in Hong Kong as calculated under any of his six approaches would not exceed 60 days and accordingly the Taxpayer should enjoy the exemption under section 8(1B) of the IRO:

Trip No	Arrival at Hong Kong			Departure from Hong Kong			No of days in Hong Kong					
	Date	Day	Time	Date	Day	Time						
							A Hrs	B Half Days	C Days + (Hrs)	D Departure & Arrival = 1 day	E Disregard short term transit	F Presence during working hrs
1.	30-3-2002*	Sat	22:29	1-4-2002	Mon	11:55	12	0.5	1	1	1	1

2.	2-4-2002	Tue	10:19	2-4-2002	Tue	14:41	5	1	1	1	0	1
3.	13-4-2002	Sat	23:36	14-4-2002	Sun	15:26	16	1.5	1	1	0	0
4.	18-4-2002	Thu	22:46	20-4-2002	Sat	17:23	43	2.5	1 + (18)	2	3	1
5.	22-4-2002	Mon	10:50	24-4-2002	Wed	17:55	56	3	2 + (7)	2	3	3
6.	1-7-2002 Public holiday	Mon	15:07	5-7-2002	Fri	08:32	90	4	3 + (17)	4	5	4
7.	15-7-2002	Mon	21:17	17-7-2002	Wed	07:51	35	2	1 + (10)	2	3	1
8.	7-8-2002	Wed	13:43	11-8-2002	Sun	14:58	98	4	4 + (1)	4	5	3
9.	12-8-2002	Mon	13:40	13-8-2002	Tue	09:35	20	1	1	1	0	2
10.	23-8-2002	Fri	23:51	24-8-2002	Sat	12:45	13	1.5	1	1	0	0
11.	31-8-2002	Sat	15:06	1-9-2002	Sun	14:43	24	1.5	1	1	0	0
12.	6-9-2002	Fri	13:21	7-9-2002	Sat	14:38	26	1.5	1 + (1)	1	0	1
13.	15-9-2002	Sun	22:11	17-9-2002	Tue	08:06	34	2	1 + (9)	2	3	2
14.	19-9-2002	Thu	22:09	20-9-2002	Fri	19:34	22	1.5	1	1	2	1
15.	21-9-2002	Sat	09:04	21-9-2002	Sat	13:37	5	1	1	1	0	0
16.	10-10-2002	Thu	15:07	11-10-2002	Fri	12:50	22	1.5	1	1	0	2
17.	19-10-2002	Sat	18:44	20-10-2002	Sun	18:15	24	1.5	1	1	0	0
18.	24-10-2002	Thu	17:17	24-10-2002	Thu	20:34	4	0.5	1	1	0	1
19.	31-10-2002	Thu	18:11	2-11-2002	Sat	14:09	44	2.5	1 + (19)	2	3	1
20.	4-11-2002	Mon	10:53	6-11-2002	Wed	08:09	46	2.5	1 + (21)	2	3	3
21.	21-11-2002	Thu	13:49	23-11-2002	Sat	16:25	51	2.5	2 + (2)	2	3	2
22.	25-11-2002	Mon	10:27	25-11-2002	Mon	13:38	4	1	1	1	0	1
23.	1-12-2002	Sun	18:11	4-12-2002	Wed	08:24	63	3	2 + (14)	3	4	3
24.	13-12-2002	Fri	13:54	14-12-2002	Sat	11:45	22	1	1	1	0	1
25.	16-12-2002	Mon	00:06	17-12-2002	Tue	11:22	36	1.5	1 + (11)	1	2	2
26.	21-1-2003	Tue	14:12	22-1-2003	Wed	19:09	29	1.5	1 + (4)	1	2	2
27.	25-2-2003	Tue	15:02	28-2-2003	Fri	09:01	66	3	2 + (17)	3	4	4
28.	10-3-2003	Mon	13:31	11-3-2003	Tue	16:17	27	1.5	1 + (2)	1	2	2
29.	12-3-2003	Wed	00:39	12-3-2003	Wed	08:14	8	0.5	1	1	0	1
30.	14-3-2003	Fri	20:46	14-3-2003	Fri	21:59	2	0.5	1	1	0	0
31.	16-3-2003	Sun	12:50	16-3-2003	Sun	19:42	7	0.5	1	1	0	0
32.	26-3-2003	Wed	18:15	26-3-2003	Wed	23:04	5	0.5	1	1	0	0
33.	27-3-2003	Thu	12:43	28-3-2003	Fri	00:45	13	1	1	1	0	1
34.	28-3-2003	Fri	19:04	1-4-2003*	Tue	09:49	77	3.5	3 + (4)	4	4	1
						Total	1049 hours i.e., **44 days**	**59 days**	45 days + 157 hours i.e., **51 days + 13 hours**	**53 days**	**52 days**	**47 days**

* outside the year of assessment 2002/03 (1 April 2002 to 31 March 2003)

78. Mr Sieker also drew our attention to the fact that in CIR v So Chak Kwong Jack (1986) 2 HKTC 174 [A3/tab 1, 180], the Commissioner adopted Approach D in counting the date of the arrival and the date of departure as one single day and not as two separate days. He argued that although So Chak Kwong Jack was not a precedent on the method of calculation, it signified that the Commissioner in that case had adopted different methods of calculation of days for the purposes of section 8(1B) of the IRO.

79. In short, Mr Sieker challenged the Revenue' s computation on three reasons, (1) that calculation of days using the fraction-equals-whole approach will cause great injustice as commented by the Board in D37/01, (2) that the fraction-equals-whole approach contradicts the rule of tax law interpretation that ambiguities should be resolved in favour of taxpayers as commented by the Board in D27/03, and (3) that the Commissioner had in So Chak Kwong Jack case adopted an approach other than the fraction-equals-whole approach in counting the days of visits.

Great injustice in the fraction-equals-whole approach?

80. The Board in D37/01 said,

> *'10…the Revenue relies on Commissioner of Inland Revenue v So Chak Kwong, Jack (1986) 2 HKTC 174, a decision of Mortimer J as he then was in 1986. It was an extremely short judgment with hardly any argument as to how the section (section 8(1B) of the IRO) should be construed. This was not surprising as the appeal was by the Revenue and the taxpayer did not appear. The learned Judge was thus deprived of proper arguments to the contrary. The learned Judge decided the matter on the basis that grammatically, the words "not exceeding in total of 60 days" must qualify the word "visits" and not "services rendered".*
>
> *11 With respect, that will give rise to extraordinary results. For example, someone spending 61 days of holidays or weekends in Hong Kong will not qualify for exemption if he so much as spent half an hour on an ad hoc assignment for his employer in Hong Kong. Such an absurd result could not possibly be the intention of the legislature.*
>
> ….
>
> *14. The draconian construction referred to above will work to even greater injustice if the word ' days' is to include part of a day…'*

81. With respect, we do not share the above view of the Board in D37/01.

82. Exemption under section 8(1B) is alternate to section 8(1A)(b)(ii). Under section 8(1A)(b)(ii), exemption is allowed if a taxpayer rendered all services outside Hong Kong. Under section 8(1B), exemption is allowed even if services were being rendered inside Hong Kong provided they were rendered during visits not exceeding 60 days. A taxpayer rendering no services in Hong Kong could certainly claim exemption from Hong Kong tax under section 8(1A)(b)(ii). A taxpayer rendering services in Hong Kong however must satisfy the '60 days rule' of section 8(1B) if he/she claims tax exemption. He must arrange his visits in Hong Kong in such a way that he could not be said to have visited Hong Kong for over 60 days.

83. The language in section 8(1B) plainly states 'visits not exceeding a total of 60 days'. There is no qualification or limitation to the word 'days'. We cannot say a person is not visiting Hong Kong on a day because he enters Hong Kong close to the end of that day. Likewise, we could not say a person is not in Hong Kong as a visitor on a day because he departs at a very early hour of that day. There is no reason why we should not count a day as a day of visit just because a person has chosen to visit at a very late hour of that day or he has chosen to depart at a very early hour of that day. After all, each taxpayer is fully entitled to arrange his visit in Hong Kong in any way to maximize the length of his physical presence during his visits. He could have entered at very early hour on the day of entry, likewise, he could have departed at very late hour on the day of departure. This Board should not interfere to count a day not as a day of visit just because a taxpayer has not maximized his physical presence in Hong Kong as a result of his late-hour arrival or his early–hour departure. We fail to see any room for passing value judgment against the fraction-equals-whole approach. We disagree that there is injustice or unfairness in the fraction-equals-whole approach. Whether late-hour or early-hour, the day he arrives Hong Kong should be counted as a day of his visit, likewise, the day he departs Hong Kong should also be counted as another day.

84. The Board in D39/04 (2004), IRBRD, vol 19, 319, 329 [R2/34] said,

> '27. *We are firmly of the view that the law is as follows:*
>
> *(i) The words "not exceeding 60 days" in section 8(1B) of the IRO qualify the word "visits" and not the words "services rendered".*
>
> *(ii) For the purpose of calculating the 60 days in section 8(1B) of the IRO, any part of a day is regarded as one day.*
>
> …
>
> *30. The Taxpayer relied heavily on the Board of Review Decision No. D37/01. With the greatest respect to the Board sitting in that case, we take the view that that decision is against all the other authorities and we decline to follow it.*

> *31. We should add that there is nothing unjust about the law as we have stated it in paragraph 27 above. Section 8 of the IRO imposes a charge for salaries tax and at the same time grants an exemption to persons who can satisfy the conditions laid down. It is incumbent upon a person who wishes to take the benefit of the exemption to satisfy such conditions.'*

85. We agree with the above view of the Board in D39/04 and decline to follow D37/01.

Ambiguity in the fraction-equals-whole approach?

86. The Board in D27/03 said,

> '10(d)(ii) *On the question of whether a part day should be considered as a whole day, the legal position is not so clear. From the cases to which we have been referred, this issue was first raised in D29/89 which mentioned as obiter that fractions of a day was to be considered as one day. This principle was applied in D12/94, IRBRD, vol 9, 131, D11/97, D107/99 unpublished and D20/00, IRBRD, vol 15, 297. D20/00 considered this issue with benefit of reasoned and detailed submissions on the law on this issue from the representatives of both the taxpayer and Revenue in that case. It applied the fraction day = whole day approach. But this approach has been queried in other Board cases D54/97, IRBRD, vol 12, 354 and D37/01. The fraction = whole approach contradicts the rule of interpretation of tax laws that ambiguities should be resolved in favour of taxpayers. Thus we disagree with the fraction = whole approach.'*

87. With respect, we are not persuaded by the reasoning of the Board in D27/03. It is true that there is no statutory definition of the word 'days' for the purpose of Section 8(1B). It is also true that the fraction-equals-whole approach has been queried by the Board in cases D54/97, IRBRD, vol 12, 354 and D37/01. But that does not justify a conclusion that the meaning of the word 'days' in the context of 'visits not exceeding a total of 60 days' is ambiguous, and that the fraction-equals-whole approach for the purpose of section 8(1B) has contradicted the rule of tax law interpretation that ambiguities should be resolved in favour of taxpayers.

88. Let us revisit section 8(1B) of the IRO.

89. Relevant part of section 8(1B) is '… no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days…' Above wordings could have two meanings, one is to count the 60 days by the number of days of services rendered in Hong Kong and one is to count by number of days of visits. If we count by the number of days of visits,

'extraordinary results' as illustrated by the Board in D37/01 may arise. A taxpayer visiting Hong Kong for a total of 61 days not working will not qualify for exemption if he so much as spent half an hour on an *ad hoc* assignment for his employer in Hong Kong whereas a taxpayer working for 60 days will qualify.

90. Mortimer J in So Chak Kwong, Jack decided that the relevant words 'not exceeding in total of 60 days' must qualify the word 'visits' and not 'services rendered':

> *'The Board of Review was persuaded that Section 8(1B) was ambiguous and capable of two interpretations. I disagree. In this regard this Section is clear and unambiguous. The words "not exceeding a total of 60 days" qualify the word "visits" and not the words "services rendered". Were it otherwise the Section would be expressed differently. In order to take the benefit of the Section therefore a Taxpayer must not render services during visits which exceed a total of 60 days in the relevant period.'*

91. In counting the 60 days, therefore, any visits made by the taxpayer, no matter whether the taxpayer rendered any services during any of those visits, should be included.

92. The respective Board in D37/01 and D27/03 both felt bound by the High Court decision of So Chak Kwong, Jack. This Board certainly is no less bound by So Chak Kwong Jack than the Board in D37/01 and D27/03. For the purpose of section 8(1B), therefore, there is only one method of counting the 60 days and that is by the number of days of visits and not the days of services. There is no ambiguity.

93. What constitutes a day of visit in Hong Kong? Ordinary language would mean any day when a person is present in Hong Kong and it does not matter at which hour he arrives or at which hour he departs. This is the so-called fraction-equals-whole approach.

94. The Board in D20/00, IRBRD, vol 15, 297 held,

> *'36. The terms of section 8(1B) are simple. The one we are concerned with is the length of visits which should not exceed a total of 60 days for the year of assessment for the purpose of entitlement to exemption of salaries tax. The relevant words are "visits not exceeding a total of 60 days". There is no definition or qualification of the words "days" for the purpose of this provision. In particular, the provision does not say "visits not exceeding a period in total amounting to 60 days". Thus, in the ordinary sense of the language of section 8(1B) and for the purpose of computing time for the purpose of section 8(1B), as an example, when a person arrives today and leaves tomorrow even if the duration of his visit is less than 48 hours, one would treat his visit as two days. Should the legislature have*

> *intended the duration to be otherwise computed, we think it would so stipulate in the legislation.'*

95. We agree with the above view of the Board in D20/00. Interpretation of section 8(1B) in its ordinary language indicates that we should adopt the fraction-equals-whole approach in counting the number of days of visits.

96. Mr Fung on the other hand submitted that the plain wordings 'visits not exceeding a total of 60 days' of section 8(1B) leave no room for qualifying 'visits' by the purpose of such visits, nor for qualifying 'days' by number of hours, half-days, 24-hours, or counting arrival and departure as one. Mr Fung said that none of the six approaches suggested by Mr Sieker (see paragraph 76 above) could satisfy the plain wordings of section 8(1B); all six approaches in one way or another involve re-writing the wordings in section 8(1B):

Approach A: Fractions to be counted as fractions
Mr Fung submits that section 8(1B) does not say and therefore could not be construed as 'visits not exceeding a total of period which adds up to 60 days' or 'visits not exceeding a total of 60 full days'.

Approach B: Half-day approach
Mr Fung says that section 8(1B) does not say 'visits not exceeding a total of 120 half days'. Half-day approach adopted in the Arrangement between the Mainland of China and the HKSAR for the Avoidance of Double Taxation is not relevant to construe section 8(1B).

Approach C: Day and hour approach
Mr Fung says that the word 'day' in section 8(1B) cannot bear such convoluted meaning.

Approach D: Departure and arrival as one day approach
Mr Fung says that section 8(1B) plainly does not say this.

Approach E: Disregard short term transit approach
Mr Fung says that section 8(1B) plainly does not disregard short term presence.

Approach F: Presence during working hours approach
Mr Fung says that section 8(1B) does not say 'visits not exceeding a total of 60 days on which the person was present in Hong Kong from 8 a.m. to 6 p.m. on Monday to Friday'.

97. We accept Mr Fung's submission.

98. The Board in D11/03 (2003), IRBRD, vol 18, 355 at 357 [R2/32] held:

'A long line of cases ... before this Board has consistently held that fractions of a day should count as whole days. The Appellant maintains that those cases are out of date given the relative ease on the part of the Revenue in obtaining the time that he came into and went out of Hong Kong. We do not accept this argument. The construction that fractions of a day should count as whole days has the merit of certainty. The alternative construction would impose an intolerable burden on the Revenue in adding up minutes if not seconds. That could not have been the legislative intent.'

99. Ambiguity does not exist if we adopt the fraction-equals-whole approach in interpreting the plain wordings of section 8(1B). Ambiguities exist only if we attempt to complicate the word 'days' with some other qualification or definition. Indeed, there could be no boundary for other method of calculation which a taxpayer may consider more favourable and preferable to him. We therefore decide that for the purpose of calculating the number of 'days of visits' for the purpose of section 8(1B), fractions of a day should be counted as whole days.

The Commissioner in So Chak Kwong Jack counted the date of departure and date of arrival as one day

100. The Commissioner in So Chak Kwong Jack counted the date of departure and date of arrival as one day for the purpose of section 8(1B) (A3, Tab 1, Fact (11) at page 180). Such a method of calculation escaped scrutiny; it was neither reviewed nor endorsed by the Court in So Chak Kwong Jack. We simply do not know why the Commissioner in So Chak Kwong Jack counted the days of visits in manner as he did and we have no benefit of consideration of arguments over such a calculation method. As conceded by Mr Sieker, So Chak Kwong Jack is simply not a precedent on the method of calculation of days of visits for the purpose of section 8(1B). We are not bound to adopt the approach used by the Commissioner in So Chak Kwong Jack.

101. Instead, as held in D11/03 (paragraph 98 above), there is a long line of cases showing that the Board has consistently held that fractions of a day should count as whole days.

102. The Board in D20/00, IRBRD, vol 15, 297 also held,

'39. ... Other Board of Review decisions have been cited to us, in which in computing time for the purpose of section 8(1B), fraction of a day counts as a whole of a day. We find the reasoning in those cases persuasive and we cannot think of any reasons why they should not be followed.'

103. We share a similar view. Unless our legislature amends section 8(1B) by introducing other form of calculation of the 60 days, the wordings of section 8(1B) as they are point to only one method, and that is the fraction-equals-whole approach.

Conclusion on Ground 2

104 For all the reasons stated above, we decide that for the purpose of section 8(1B) of the IRO, part of a day shall be counted as a 'day'. Computed on the fraction-equals-whole approach, the Taxpayer was physically in Hong Kong for 77 days between 01-04-2002 and 31-03-2003 (fact (5)). The Taxpayer therefore cannot rely on the '60 days' rule exemption under section 8(1B).

Ground 3 – Offshore employment and time apportionment?

105 Taxpayer's third ground of appeal was premised on his argument that he had an offshore employment and that his income from his offshore employment was chargeable to Hong Kong salaries tax only by inclusion under section 8(1A)(a) over income derived from services rendered in Hong Kong.

106 In our analysis of section 8(1) (paragraphs 16 – 34 above), we have decided that the Taxpayer's employment with Company B was a Hong Kong employment and that his income was sourced in Hong Kong. We will not repeat our above analysis over the source of Taxpayer's income for the year of assessment of 2002/03.

107 We would, however, say a few words on the 'substance over form' argument of the Taxpayer's to complete our analysis.

108 Mr Sieker for the Taxpayer argued that the rule in determining the locality of an employment was to look into the substance of the employment as part of the totality of facts. He cited cases like Geopfert, D20/97, D146/98 and D76/00, saying that we should disregard the employment contract or its deceptive appearances.

109 Mr Sieker argued that the Court of Final Appeal's decision in Kwong Mile Services Ltd v CIR (2004) 7 HKCFAR 275, 282 held that we have to judge the source of income according to the practical reality, meaning that the ascertainment of the actual source of a given income is a practical, hard matter of fact, and we have to look at the practical reality to discover the true source.

110 Mr Fung for the Revenue submitted that there is no general principle of law that one can prefer the substance of a transaction over its form.

111 Mr Fung quoted Bokhary PJ in Kwong Mile Services Ltd at 282C saying,

> *'9. Judging the matter of source as one of practical reality does not involve disregarding the accurate legal analysis of transactions…'*

112 Mr Fung also quoted McKay J in Attorney-General v Equiticorp Industries Group Ltd [1996] 1 NZLR 528 at 538 saying,

> *'The essence of the argument is that a Court of equity will ignore such matters in order to do justice. A Court of equity will certainly look at the true nature of a transaction, and will not be deterred by a sham. There is no principle of equity, however, that empowers the Court to ignore the true nature of a transaction and substitute some other concept. The appeal to "justice" as a reason for such an approach is to a justice which is in the eye of the beholder, is unstructured and unprincipled, and is unreliable. The true principle is that stated by Richardson J in NZI Bank Ltd v Euro-National Corporation Ltd …*
>
> > *"The legal principles are well settled. First the true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. It is not to be determined by an assessment of the broad substance of the transaction measured by the overall economic consequences to the participants. The forms adopted cannot be dismissed as mere machinery for effecting other purposes. At common law there is no half-way house between sham and characterisation of the transaction according to the true nature of the legal arrangements actually entered into and carried out. A document may be brushed aside if and to the extent it is a sham in two situations. The first is where the document does not reflect the true agreement between the parties in which the cloak is removed and recognition is given to their common intentions. The second is where the document was bona fide in inception but the parties have departed from their initial agreement while leaving the original documentation to stand unaltered. Once it is established that a transaction is not a sham its legal effect will be respected."*
>
> *That statement is supported inter alia by the judgment of the Privy Council in Chow Yoong Hong … and by the more recent cases in this Court to which Richardson J referred. Mr Williams referred to the "commercial and practical reality of the case" when "stripped of its technical details". We do not think one can arrive at either commercial reality or practical reality without a proper examination of the actual contracts made by the parties. Once these are accepted as genuine, they cannot be disregarded.*
>
> *A similar appeal in a revenue case to ignore the legal position and regard what*

was called "the substance of the matter" was firmly rejected by Lord Tomlin in Inland Revenue Commissioners v Duke of Westminster [1936] AC 1, 19. The supposed doctrine, he said, was based on misunderstanding, and the sooner it was dispelled the better it would be for all concerned. In Commissioner of Inland Revenue v Europa Oil (NZ) Ltd [1971] NZLR 641 the Privy Council similarly rejected an appeal to "substance", and emphasised the importance of the actual contractual arrangements made …'

113 We fully agree with the judgment of Bokhary PJ in Kwong Mile Services Ltd and McKay J in Equiticorp Industries Group Ltd. In particular we accept the legal principle stated by Richardson J in NZI Bank Ltd v Euro-National Corporation Ltd quoted in Equiticorp Industries Group Ltd as the true statement of law. The true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. The legal arrangement actually entered into and carried out by the Taxpayer was his Contract with Company B Hong Kong.

114 Mr Fung pointed out the Taxpayer was running two inherently inconsistent cases. On the one hand the Taxpayer relied on the Contract with Company B for the source of his employment, using the remuneration clause thereof [B1/16] to contend that 85% of Taxpayer's remuneration came from City M whereby making his employment a non-Hong Kong one. On the other hand, the Taxpayer argued that there were deceptive features in the employment contract which after being disregarded would show that his true employer was in fact the Country F parent company. Mr Fung argued that either the Contract with Company B was a sham and must be disregarded altogether or it must be respected in its entirety, the Taxpayer should not be allowed to hold on the Contract so as to collect his employment income from a Hong Kong employer, Company B, at the same time to disregard Company B Hong Kong as the employer under the Contract and claimed that his true employer was the Country F parent company.

115 We accept Mr Fung's submission.

116 In the hearing, the Taxpayer admitted that his initial employment contract was with the Country F Head Office. He changed for himself a Contract with a Hong Kong employer in order to collect his employment income in Hong Kong. The Taxpayer needed the Contract with Company B Hong Kong in order not to collect his employment income directly in Country F so as to avoid in his words 'administration problems' in Country F (transcript 81). Despite his remuneration was measured mainly by his performance in the City M office and the money allegedly came from Country F, the Taxpayer chose to enter the Contract with Company B Hong Kong. With his Contract with Company B Hong Kong, the Taxpayer would not be troubled anymore with any 'administration problems' in Country F and indeed City M. All 'administration problems' would be dealt with in Hong Kong. His employment and Contract with Company B Hong Kong could not be a sham and could not be disregarded.

Conclusion on Ground 3

117 The Contract he entered with Company B Hong Kong delivered to the Taxpayer what he had arranged, and that was, a Hong Kong employer and payment of employment income in Hong Kong. Taxpayer's employment with Company B Hong Kong must therefore be a Hong Kong employment and not an offshore employment. Section 8(1A)(a) of the IRO and time apportionment could not be applicable to this case.

Conclusions

118 In light of our above analysis and findings, we conclude that the Taxpayer's employment with Company B was located in Hong Kong and his income thereof was subject to Hong Kong tax. In the year of assessment 2002/03, the Taxpayer did perform services in connection with his employment in Hong Kong, and he did visit Hong Kong for more than 60 days. His income from Company B Hong Kong for the year of assessment 2002/03 is therefore fully chargeable to Hong Kong salaries tax.

119 In the result, we dismiss Taxpayer's appeal and confirm the salaries tax assessment for the year of assessment 2002/03 under charge number 9-1525919-03-6 as determined by the Deputy Commissioner on 21 December 2005.