Case No. D41/09

Salaries tax – assessable income – salaries tax paid by employer – employer paid provisional tax in excess of actual tax liability – whether constituted perquisite – section 9(1) of the Inland Revenue Ordinance ('IRO').

Assessable income – apportionment of income – by time spent in Hong Kong – whether apportionment should be done on days or on seconds – section 3 of Apportionment Ordinance

Panel: Colin Cohen (chairman), Corinne Marie D'ALMADA REMEDIOS and David Yip Sai On.

Date of hearing: 29 October 2009.
Date of decision: 18 December 2009.

The Taxpayer was seconded by his company from Japan to Hong Kong. During the year of assessment 2004/05, the Taxpayer spent part of his time in Hong Kong, and was subsequently seconded out of Hong Kong. The Assessor apportioned his salary by reference to the time he stayed in Hong Kong, which came to 205.5 days. The Assessor also added the salaries tax of $131,203 (which included final tax for 2003/04 and provisional tax for 2004/05) the Taxpayer's employer paid to the Taxpayer in the year of assessment 2004/05 to the assessable income. On the Taxpayer's objection, the Assessor accepted that the Taxpayer only stayed in Hong Kong for 244 days in 2004/05, and apportioned his salary by adopting 160 days as the time he stayed in Hong Kong. The Taxpayer appealed against the revised assessment. He argued that it was erroneous for the Assessor to adopt $131,203 as this was more than his actual tax liability for 2004/05. Also, he argued that apportionment of time should be done by reference to the seconds but not the days that he was in Hong Kong, and thus he was only in Hong Kong for 151.9 days.

Held:

1. The Taxpayer's employer did pay $131,203 during the year of assessment 2004/05 to discharge the Taxpayer's tax liability. The money was paid to the Government to discharge the Taxpayer's debt in the form of his tax liability. Therefore, this amount fell under the meaning of 'perquisite' under section 9(1) of the IRO, and thus constituted part of his income (David Hardy Glynn v CIR [1990] 2 AC 298; Hartland v Diggines [1926] AC 289 applied).

2. The Taxpayer or his employer filed no notice with the IRD when the

Taxpayer departed Hong Kong, and hence the latter was never aware of the fact that the Taxpayer had departed Hong Kong before the end of the year of assessment 2004/05. Hence, it could not be speculated as to what would happen as to the provisional tax the employer already paid to the Taxpayer. Any argument that the IRD should not include the provisional tax paid by the employer in the Taxpayer's assessable income should be ignored. In any event, this argument would only benefit the employer as it was the party who actually paid the provisional tax.

3. Apportionment of income based on time should be done on the unit of days spent in Hong Kong, as stated in section 3 of the Apportionment Ordinance (Chapter 18). The Taxpayer gave no evidence to show that there was a specific allocation of any income in relation to services rendered by him inside and outside Hong Kong. Thus, the general principle should be adopted (CIR v Goepfert 2 HKTC 210 applied; D106/89, IRBRD, vol 6, 391; D49/94, IRBRD, vol 9, 285; D1/96, IRBRD, vol 11, 290; D53/96, IRBRD, vol 11, 586 and D28/04, IRBRD, vol 19, 226 considered).

4. Therefore, the appeal was dismissed and the revised assessment confirmed.

Appeal dismissed.

Cases referred to:

David Hardy Glynn v CIR [1990] 2 AC 298
Hartland v Diggines [1926] AC 289
CIR v Goepfert 2 HKTC 210
D106/89, IRBRD, vol 6, 391
D49/94, IRBRD, vol 9, 285
D1/96, IRBRD, vol 11, 290
D53/96, IRBRD, vol 11, 586
D28/04, IRBRD, vol 19, 226

Robert J H Tibbo Counsel instructed by Mr Stanley So of Messrs Stanley So & Co, Certified Public Accountants, for the taxpayer.
Paul H M Leung Counsel instructed by Ms Carmen Y M Chan Senior Government Counsel of the Department of Justice for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by Mr A ('the Taxpayer') in respect of the Determination by the Deputy Commissioner of Inland Revenue dated 27 April 2009 in respect of the salaries tax assessment for the year of assessment 2004/05 ('the Determination') under charge no. X-XXXXXXX-XX-X.

2. On 26 May 2009, the Taxpayer through his representatives, Messrs Stanley So & Co., filed a notice of appeal on the grounds '….. *that the assessment is incorrect, excessive and are not calculated in accordance with provisions of the IRO.*'

3. At the hearing before the Board, Counsel for the Taxpayer, Mr Robert J H Tibbo ('Mr Tibbo') put forward two new grounds of appeal, namely:

> '(1) The Salaries Tax Paid by the Employer which incorporates the Provisional Tax, is in excess of the actual salaries tax liability of the Appellant for 2004/05. The excess payment of tax by the employer is monies to be returned to the employer of the taxpayer and is not salary of or benefit to the employee and belongs to and is to be returned to the employer. As a result, the Tax Payable in the Determination, which includes the excess provisional tax, is incorrect and excessive.
>
> (2) The actual time the Appellant was present in Hong Kong during the period of 1 April 2004 to 30 November 2004 ("Period"), based on the recorded Hong Kong Immigration Department data, is less than that calculated by the Assessor. The result is the Appellant's assessable income is lower than that stated by the Commissioner in the Determination and the Tax Payable in the Determination is incorrect and excessive. In particular:
>
> (a) The Appellant was present in Hong Kong for 151 days during the Period, whereas the Commissioner claims the Appellant was present in Hong Kong for 160 days. The Commissioner erred by using an arbitrary basis of one half day for any given single entry into or single exit from Hong Kong, no matter how many seconds, minutes or hours the Appellant was actually in Hong Kong; and
>
> (b) The Commissioner erred by failing to rely upon the accurate entry and exit records of the Appellant during the Period, such records recording time down to the second, and to calculate the Appellant's time in Hong Kong on that basis.'

4. Mr Paul H M Leung, Counsel for the Inland Revenue Department ('IRD') ('Mr Leung') did not raise any objection to us exercising our discretion pursuant to section 66(1A)

to extend time to allow the grounds of appeal to be amended. Hence, we granted leave to do so.

The issues

5. There were only two calculations that were now contended by the Taxpayer to be incorrect:

(a) the actual time the Taxpayer was present in Hong Kong during 1 April 2004 to 30 November 2004, based on the Statement of Travel Records provided by the Immigration Department, was less than that calculated by the Assessor. Hence, his assessable income should be lower and the tax payable in the Determination is excessive; and

(b) the salaries tax paid by his employer, Company B, is in excess of his actual salaries tax liability for 2004/05 and therefore the tax payable in the Determination is excessive.

Agreed facts

6. The facts upon which the Determination was arrived at were agreed. We find them as facts:

'(1) [Mr A] ('the Taxpayer') has objected to the Salaries Tax Assessment for the year of assessment 2004/05 raised on him. The Taxpayer claims that the income assessed is excessive.

(2) The Taxpayer started his employment with a Japanese company, [Company C], in April 1979. In June 2003, the Taxpayer was seconded to Hong Kong.

(3) [Company B] filed an Employer's Return of Remuneration and Pensions in respect of the Taxpayer for the year of assessment 2004/05 showing, inter alia, the following particulars:

Period of employment	:	1-4-2004 – 31-3-2005
Capacity in which employed	:	Deputy General Manager
Income -	:	
Salary		$816,986
Bonus		140,580
Salaries tax paid by employer		113,876
Total		$1,071,442

Place of residence provided	:	Yes
Period provided	:	1-4-2004 – 31-3-2005

(4) (a) In his Tax Return – Individuals for the year of assessment 2004/05, the Taxpayer declared employment income of $957,566 from [Company B] and quarters benefit provided by its associated company. He also declared that [Company B] paid salaries tax for him.

(b) The Taxpayer claimed that his income should be apportioned on a time-basis and computed his assessable income as follows:

Income after time-basis apportionment	
$(816,986 + 140,580) [Fact (3)] x (365 -212.5*) days /365 days	$400,078
Add: Salaries tax paid by employer [Fact (3)]	113,876
	513,954
Add: Rental value	51,395
Assessable income	$565,349

* The Taxpayer counted, for each trip abroad, both the day of departure and day of return as 2 days outside Hong Kong. In case where the departure and return happened on the same day, the Taxpayer counted the number of day outside Hong Kong as ½ day.

(c) The Taxpayer also claimed that he was permanently assigned to Shenzhen factories as from 1 December 2004 and since then rendered all his services entirely outside Hong Kong and paid tax thereon in Mainland China.

(5) The Assessor raised on the Taxpayer the following salaries tax assessment for the year of assessment 2004/05:

Income after time-basis apportionment	
($816,986 + $140,580)[Fact (3)] x 205.5 days[1] /365 days	$539,122
Add: Salaries tax paid by employer[2]	131,203
	670,325
Add: Rental value	67,032
Assessable income	737,357
Less: Total allowances	(260,000)
Net chargeable income	$477,357
Tax payable thereon	$84,671

Note 1: The day of departure and day of return together were counted

as 1 day in Hong Kong.

Note 2: 2003/04 final tax $61,895 + 2004/05 provisional tax $69,308 = $131,203
The tax was paid on 28 December 2004.

(6) The Taxpayer, through Messrs Stanley So & Co. ('the Tax Representatives'), objected against the above assessment on the ground that it was excessive and incorrect. He claimed that the correct total number of days for which he stayed in Hong Kong during the year of assessment 2004/05 should be 152.5 days (i.e. 365 days – 212.5 days) [Fact (4)(b)] instead of 205.5 days [Fact (5)].

(7) On divers dates, the Tax Representatives made the following contentions and put forward a number of settlement proposals:

Proposal 1

(a) The assessable income should be computed as follows:

Income after time-basis apportionment ($816,986 + $140,580) [Fact (3)] x 167 days /365 days	$438,119
Add: Salaries tax paid by employer	131,203
	569,322
Add: Rental value	56,932
Assessable income	$626,254

(b) The public holidays and Sundays that the Taxpayer spent on his private trips as a tourist in Hong Kong were not relevant to his services rendered in Hong Kong and should not be counted as working days for tax purposes.

Proposal 2

(c) Before December 2004, the Taxpayer was a Deputy General Manager of the Mainland China factories which were under the control of a group of Hong Kong companies and had offices in Hong Kong. During the period from 1 April to 30 November 2004, the Taxpayer occasionally attended the group's Hong Kong offices for business purposes. However, on 1 December 2004, he was permanently assigned to a regional office in Shenzhen and further on 31 October 2005, exclusively to the Wuxi office, the latter was totally independent from the regional offices in Hong Kong, Shenzhen and Guangzhou. He had not rendered services in Hong Kong and did not need to report duty

to any Hong Kong company since then. The date of cessation of employment in Hong Kong should be 30 November 2004.

(d) After 30 November 2004, the Taxpayer visited Hong Kong merely for the purposes of moving his personal belongings to his new residence in Mainland China and dealing with his personal affairs such as banking matters and visiting consulates' offices.

(e) The salaries tax computation should be made up to 30 November 2004 and the assessable income should be computed as follows:

Income for the period from 1-4-2004 to 30-11-2004 ($816,986 + $140,580) [Fact (3)] x 244 days /365 days	$640,126
Income after time-basis apportionment	
$640,126 x 134.5 days /244 days	$352,856
Add: Salaries tax paid by employer	131,203
	484,059
Add: Rental value	48,405
Assessable income	$532,464

Proposal 3

(f) The Taxpayer had been required to report income to the Mainland tax authority since March 2005. The Individual Income Tax receipt furnished by the Tax Representatives showed that a total income of RMB85,482 was subject to tax in Mainland China for March 2005.

(g) The legislation did not prescribe that sections 8(1A)(a), 8(1A)(b) and 8(1A)(c) of the Inland Revenue Ordinance ('the Ordinance') were mutually exclusive to each other. Neither were there any specific provisions under the Ordinance which prevented the double counting of excluded income as provided for in section 19(2) of the Ordinance. Therefore, the income for March 2005 could be excluded twice under sections 8(1A)(a) and 8(1A)(c) respectively.

(h) The salaries tax paid by the employer for tax computation purpose should exclude the provisional tax for the year of assessment 2004/05 which was never a final tax liability in the basis period for the year.

(i) The principle under the case of David Hardy Glynn was "salaries tax borne by employer". These were the sums contracted to be paid by the employer, i.e. the sums the employee was entitled to

claim. It should be the amount of tax on the Taxpayer's income for the year of assessment 2003/04, which was reported in May 2004.

(j) The amount of tax which had to be borne by the employer in the year of assessment 2004/05 should be the final tax for the year of assessment 2003/04 only. The Taxpayer's income for the year of assessment 2004/05 was reported on 30 June 2005. He did not have any right to claim the tax payment from his employer before the filing date of 30 June 2005. The earliest time that the payment of the 2004/05 tax was incurred should be the year of assessment 2005/06, i.e. after the last day of the year of assessment 2004/05. This accrual concept had been endorsed by the Inland Revenue Board of Review Decision D78/88.

(k) Any excess money over final tax payable, even if paid by the employer, would be refunded to the employer in due course and thus should not be a perquisite under the David Hardy Glynn principle. In any event, the overpayment should be in the nature of a temporary advance at the time of payment. There was no provision under the Ordinance to charge tax on a loan.

(l) There was no evidence to prove that the payment of the tax of $131,203 was made by the employer on 28 December 2004. According to the Employer's Return, the maximum amount of tax paid should be $113,876 only.

(m) The assessable income should be computed as follows:

Income after time-basis apportionment	
($815,763 + $140,580) [Fact (9)(b)] x 205.5 days /365 days	$538,434
Less: Income excluded under section 8(1A)(c) of the Ordinance [Fact (9)(b)]	(67,823)
	470,611
Add: Salaries tax paid by employer [Fact (5)]	61,895
	532,506
Add: Rental value	53,250
Assessable income	$585,756

(8) The Assessor rejected all the above settlement proposals as in Fact (7). To expedite the finalization of the assessment, the Tax Representatives put forth a new settlement proposal as follows:

Income after time-basis apportionment
($815,763 + $140,580) [Fact (9)(b)] x 16,242,500 seconds

/31,536,000* seconds	$492,560
Add: Salaries tax paid by employer	61,895
	554,455
Add: Rental value	55,445
Assessable income	$609,900

* 365 days x 24 hours x 60 minutes x 60 seconds = 31,536,000 seconds

(9) In reply to the Assessor's enquiries, [Company B] provided the following information:

(a) The Taxpayer was responsible for the factory's affairs. Before 1 December 2004, he occasionally attended [Company B's] Hong Kong offices for certain management meetings. On 1 December 2004, he was assigned exclusively to [Company B's] Shenzhen offices and meetings were held in Shenzhen thereafter. From that date, he was not required to attend any meetings in Hong Kong and report duty to [Company B's] offices in Hong Kong. He had not rendered any services in Hong Kong in connection with his employment with [Company B].

(b) The breakdown of the Taxpayer's employment income for the year of assessment 2004/05 was as follows:

Month	Salary ($)	Bonus ($)
Apr 2004	66,400	
May 2004	66,470	
Jun 2004	70,378	
Jul 2004	67,432	86,506
Aug 2004	66,368	
Sep 2004	67,152	
Oct 2004	67,152	
Nov 2004	69,467	54,074
Dec 2004	69,055	
Jan 2005	69,301	
Feb 2005	68,765	
Mar 2005	67,823	
Total income	815,763	140,580
Add: Income overstated	1,223	-
Income reported [Fact (3)]	816,986	140,580

(c) The tax payment of $131,203 [Fact (5)] was made by [Company B].

(10) The Assessor now accepts that the Taxpayer did not render services to his employer in Hong Kong during the period from 1 December 2004 to 31 March 2005 and therefore the income for that period could be excluded when apportioning the income under section 8(1A)(a) of the Ordinance. However, she is of the view that the time apportionment basis should employ unit of days rather than seconds. Moreover, she considers that the tax payment of $131,203 made by [Company B] on 28 December 2004 [Fact (9)(c)] should be assessed in full in the year of assessment 2004/05. She proposes to revise the salaries tax assessment for the year of assessment 2004/05 as follows:

Income after time-basis apportionment	
$681,399[1] x 160 days[2] /244 days	$446,819
Add: Salaries tax paid by employer	131,203
	578,022
Add: Rental value	57,802
Assessable income	635,824
Less: Total allowances	(260,000)
Net chargeable income	$375,824
Tax payable thereon	$64,364

Note 1: $(815,763 + 140,580 - 69,055 - 69,301 - 68,765 - 67,823) [Fact (9)(b)] = $681,399

Note 2: The day of departure and day of return together are counted as 1 day in Hong Kong.'

Evidence

7. Mr Tibbo did not call the Taxpayer to give evidence in respect of this matter. However, he did call Ms D.

The evidence of Ms D

8. Ms D is the General Manager of Company E. She advised us that she has been employed by Company E for the past 16 years.

9. She drew to our attention that the Taxpayer had been working for Group F of Japan. He was first employed on 1 April 1979 by Company C. She informed us that he was initially seconded to work in Hong Kong. He was sponsored and received an employment visa to work in Hong Kong. She advised us that on or about 30 November 2004, he was seconded to Group F factory in Shenzhen, Guangdong Province and some time thereafter, there was a further secondment to Group F factory in Wuxi, Jiangsu Province.

10. She advised us that it was the normal practice of Company C of Japan that any

salaries tax incurred by the Taxpayer would be borne by Group F of Japan. She informed us that she dealt with all matters relevant to finalizing and making payment of the relevant tax assessments including provisional tax payments.

11. The expatriate employees had their mailing address at her office and it was a standard practice for her to open and deal with all communications and correspondence both with the IRD and the Immigration Department. She informed us that Company B would pay the tax and any provisional tax of an employee once she had received the relevant assessments from the IRD.

12. She confirmed that upon receiving a notice for the assessment period of 2003/04 in the sum of $131,203, she arranged to make payment. She advised us that she made the payment in one go and did not wait until the relevant instalment dates were due.

13. She also advised us that upon receiving the final assessment for 2004/05, if any tax monies were refunded from the IRD to the Taxpayer, she would inform the Taxpayer by email and in turn, request reimbursement.

14. On cross-examination by Mr Leung, Ms D confirmed that Company C had paid all of the Taxpayer's tax liabilities before the due date and did so by the end of December 2004.

15. Ms D also confirmed that Company C did notify the IRD pursuant to section 52(6) of the IRO in respect of the Taxpayer's departure from Hong Kong. However, the notice which they gave was in respect of his departure on 1 November 2005, that is, in respect of his intended secondment to Wuxi. She confirmed that no notice was given to the IRD in respect of the Taxpayer's departure on or about 30 November 2004. Hence, the IRD was never aware as to the fact that the Taxpayer had indeed departed Hong Kong in 2004.

Salaries tax paid by the employer

16. Section 9(1) of the IRO provides as follows:

> *'(1) Income from any office or employment includes – (a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others …..'*

17. It is clear that a perquisite includes not only money which is actually paid to an employee, but in turn money which is paid in discharge of a debt of that employee. Our attention was drawn to the following authorities:

(a) David Hardy Glynn v CIR [1990] 2 AC 298; and
(b) Hartland v Diggines [1926] AC 289,

which clearly support such a proposition.

18. The evidence before us was incontrovertible and unequivocal. Company C paid the Taxpayer's salaries tax to the IRD on 28 December 2004. In our view, there can clearly be no doubt that the sum of $113,203 was clearly a perquisite for the purpose of section 9 of the IRO for the relevant year of assessment 2004/05. In short, this was being money paid by Company B during that year of assessment in discharge of a debt of the Taxpayer, namely, his tax liability.

19. We also have no hesitation in accepting the submissions by Mr Leung that provisional tax is a debt due by the Taxpayer to the Government. Every person who is chargeable to salaries tax in respect of any years of assessment is liable to pay provisional salaries tax in respect of that year of assessment in accordance with Part XA of the IRO – section 63B(1) of the IRO. Section 63C(7) of the IRO also clearly provides that provisional salaries tax shall be deemed to be a tax charged under the provisions of the IRO and a notice of the amount of provisional tax issued by the IRO shall be deemed to be a notice of assessment.

20. It is also clear that and we accept the tax shall be paid notwithstanding any notice of objection or appeal, unless such sum is held over pending the result of such objection or appeal (section 71(2) of the IRO).

21. Therefore, we accept that tax due and payable under the IRO is clearly a civil debt due to the Government (section 75(1)). We have therefore no difficulties concluding that when Company B paid $131,203 on 28 December 2004, there can be no doubt that they were discharging the Taxpayer's debt.

22. Mr Tibbo submitted to us that since the Taxpayer had left or was about to leave Hong Kong, the provisional tax calculation was incorrect and in turn, in his submission, it clearly exceeded the Taxpayer's actual tax liability. He submitted that due to the Taxpayer having left Hong Kong, this will result in what he called a perverse and unacceptable result which the legislation could not have envisaged, that is the Taxpayer would have been entitled to a refund due to the fact that he had left Hong Kong and he was no longer working in the territory.

23. However, as we have found, the Taxpayer or Company B did not give the IRD any notice that he was leaving Hong Kong in November 2004.

24. It is also clear that there is no evidence put before us that the Taxpayer made any attempt to attend at the IRD offices and deal with all formalities with regard to finalizing his tax position since he was leaving Hong Kong. No such action was taken. The Taxpayer was not called to give evidence before us and there was no evidence that he made any repayment of the perquisite to his employer. We cannot therefore speculate as to what would have happened.

25. However, Mr Tibbo's argument seems to be formulated and put forward on the basis of the interest of the employer, Company B. Mr Tibbo was trying to suggest that since the employer had discharged the tax in full on 28 December 2004, it was inevitable that the

Taxpayer would be entitled to a refund and as such, there was an implied condition in his terms of employment that he would reimburse his employer this particular sum.

26. However, this in our view is a speculative submission which really has no relevance to the actual facts that are before us. In short, the Taxpayer could have, if he so wished, sorted out his personal affairs and dealt with the provisional tax assessment that was rendered.

27. The thrust of the above submission suggests that Company B themselves may have paid more than they should have and as such, there was an unjust enrichment by the IRD. Mr Tibbo also submitted that all of this resulted in a perverse and unjust result. Again, this argument has no bearing or relevance in respect of the appeal before us by the Taxpayer. Again, as we have stated above, this cannot be made out. Indeed, we have no hesitation in concluding that Company B discharge of the Taxpayer's tax liability on 28 December 2004 was a perquisite which must be included as part of his taxable income and Company C did indeed discharge that debt. Hence, there was no miscalculation.

The apportionment argument

28. Section 8(1) provides as follows:

> *'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 ….. any office or employment of profit …..'*

29. Section 8(1A) provides as follows:

> *'….. income arising in or derived from Hong Kong from any employment - (a) includes, ….., all income derived from services rendered in Hong Kong including leave pay attributable to such services …..'*

30. The issue for us to consider is the proper basis for determining the amount of income derived from the services which the Taxpayer rendered in Hong Kong. Therefore, an apportionment must be carried out on the basis or a formula which relates to the services that are rendered in Hong Kong. The revised assessment as determined by the Deputy Commissioner of the IRD in the Determination was calculated by utilising the 'time in - time out' appointment basis.

31. This in turn treats income as an even rate from day to day. Again, it is quite clear that this is the basis which has been followed consistently by the IRD. We also refer to CIR v Goepfert 2 HKTC 210. We have no hesitation in accepting the submission that the 'time in – time out' formula is a method which is utilized to assess the income chargeable, is the correct formula. Of course, we accept that the application of the formula is not set in concrete and can be displaced by the facts of each particular case which comes before the Board from time to time. In the case before us, no evidence has been put before us to show that there was a specific allocation of any income in relation to services rendered by the

Taxpayer inside and outside Hong Kong and in particular, we refer to:

(a) D106/89, IRBRD, vol 6, 391;

(b) D49/94, IRBRD, vol 9, 285;

(c) D1/96, IRBRD, vol 11, 290;

(d) D53/96, IRBRD, vol 11, 586; and

(e) D28/04, IRBRD, vol 19, 226.

32. We also have no hesitation in accepting that in the absence of any evidence to the contrary, the Taxpayer's salary would also accrue from day to day and we rely on the section 3 of the Apportionment Ordinance (Chapter 18) which provides as follows:

> *'All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.'*

33. We would also mention that section 2 of the Apportionment Ordinance defines the word 'annuities' to include salaries.

34. Mr Tibbo however submitted that the way forward in respect of this matter would be to calculate the Taxpayer's time spent in Hong Kong by reference to a number of seconds as opposed to a day by day calculation and in turn, by relying on the time unit by way of a calculation in reference to the number of seconds in Hong Kong, this would provide a different result. Therefore, he asserts by calculating the Taxpayer's actual time spent in Hong Kong in seconds and in turn, he relies on the information and data presented by the Hong Kong Immigration Department, the Taxpayer would have spent less than 160 days in Hong Kong between 1 April 2004 and 30 November 2004. He therefore submits that the Taxpayer only spent 151.9 days (13,063,000 seconds during the relevant time frame).

35. We have no hesitation in rejecting this submission. The purpose of the apportionment exercise is to clearly apportion the Taxpayer's salary between services rendered inside and outside Hong Kong. The salary as Mr Leung quite correctly pointed out is income that obviously accrues from day to day. We accept this as being the correct approach.

Conclusions

36. Therefore, having considered all matters very carefully and having reviewed the evidence, the authorities and submissions put to us on behalf of the Taxpayer, we have no hesitation in coming to the conclusion that none of the submissions put forward has been

made out and therefore, we dismiss the appeal and uphold the Determination for the year of assessment 2004/05.

37. Finally, we take this opportunity of thanking the parties for their assistance in respect of this matter.