Case No. D42/12

Salaries tax – whether the income should be assessable to salaries tax – section 8(1), 8(1A) and 8(1B) of the Inland Revenue Ordinance – whether taxpayer can claim exemption under section 8(1A)(c) – function of the Board.

Panel: Huen Wong (chairman), Lam Ting Kwok Paul and Yeung Eirene.

Date of hearing: 28 September 2012
Date of decision: 11 December 2012.

The Taxpayer was employed by a Company B to carry out projects in a joint venture with Company C in Country D. The Taxpayer objected to the salaries tax assessment raised on him. The Taxpayer claims that the portion of his income derived from services rendered outside Hong Kong should not be chargeable to salaries tax.

The Taxpayer claimed that his income from employment during the relevant period should not be chargeable to salaries tax because:

(a) He worked overseas and worked on a construction project of the Company B – Company C joint venture and did nothing else for the Hong Kong business of Company B.

(b) He signed an employment contract with the JV for working in the Area F project. The locality of his employment during the secondment period was Area F. The Taxpayer purported to differentiate between the phrases 'employment location' and 'employment locality'.

(c) His income during the relevant period should only be countable to the taxation system of Country D. The fact that he paid zero salary tax in Country D did not mean that he was required to pay tax in Hong Kong, otherwise his tax responsibility would be doubled and duplicated.

(d) the Taxpayer was not asking for a complete exemption of all his income in the entire year of assessment 2008/09 but only for the relevant period.

(e) His colleague, whose case was almost the same as his except the secondment period, succeeded in claiming exemption of income. The different tax treatment on him is unfair.

The issue for the Board's decision is whether the Taxpayer's salaries earned during the relevant period should be chargeable to salaries tax.

Held:

1. The available evidence proves that during the relevant period, the Taxpayer was under the continuous employment with Company B and that the employment was located in Hong Kong. It follows that the Taxpayer's entire income from Company B for the year of assessment including the income for the relevant period, should be assessable to salaries tax under section 8(1)(a) of the Ordinance unless relief is available under section 8(1A)(b)(ii) as read in conjunction with section 8(1B) or under section 8(1A)(c) (Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888 followed).

2. The next question to ask is therefore whether the Taxpayer can claim relief under section 8(1A)(b)(ii). To qualify for exemption under this section, the Taxpayer has to establish that he rendered outside Hong Kong all the services in connection with his employment. For the purpose of determining whether or not all services are rendered outside Hong Kong, section 8(1B) provides that 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.

3. Once income is caught by section 8(1), there is no provision for apportionment (Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888 followed).

4. The Board then has to consider whether the Taxpayer can claim exemption under section 8(1A)(c) by satisfying:

   (i) his income for the relevant period derived from services rendered by him in a territory outside Hong Kong;

   (ii) by the laws of that territory, the income was chargeable to tax of substantially the same as salaries tax under the Ordinance; and

   (iii) the Commissioner is satisfied that the Taxpayer had paid tax of that nature in that territory in respect of the income.

   Since not all the three requirements mentioned above are satisfied, the exemption provided under section 8(1A)(c) of the Ordinance is not applicable to the Taxpayer (D34/01, IRBRD, vol 16, 303 followed).

5. Under section 4 of the Ordinance which deals with official secrecy, the Revenue is precluded from divulging information regarding the tax position of the Taxpayer's colleague including whether his case was indistinguishable from the Taxpayer's. The function of the Board is to look at the facts of this Appeal and decide whether the salaries tax assessment was correctly made in accordance with the Ordinance. The Board does not have the judicial review jurisdiction which is exclusively enjoyed by the High Court. As such, whether the Appellant was unfairly treated compared with his colleague is not a matter for the Board to investigate (Lo Tim Fat v Commissioner of Inland Revenue [2006] 2 HKLRD 689 and D126/02, IRBRD, vol 18, 188 followed).

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
D43/94, IRBRD, vol 9, 278
D67/89, IRBRD, vol 5, 52
D34/01, IRBRD, vol 16, 303
Lo Tim Fat v Commissioner of Inland Revenue [2006] 2 HKLRD 689
D126/02, IRBRD, vol 18, 188

Taxpayer in person.
Chan Tsui Fung and Ng Sui Ling for the Commissioner of Inland Revenue.

Decision:

Agreed statement of fact

1. The Appellant agreed to the facts stated in sub-paragraphs (1) to (12) of the paragraph under 'Facts Upon Which The Determination Was Arrived At' as appeared in the Determination of the Deputy Commissioner of Inland Revenue ('the Revenue') dated 4 January 2012 ('the Determination'). These facts are:

(1) Mr A ('the Taxpayer') has objected to the 2008/09 salaries tax assessment raised on him. The Taxpayer claims that the portion of his income derived from services rendered outside Hong Kong should not be chargeable to salaries tax.

(2) (a) Company B is a private company incorporated in Hong Kong in 1961 and carrying on business in Hong Kong. The principal business of Company B is the design and construction of building works.

(b) At the relevant times, Company B carried out projects in a joint venture with Company C in Country D.

(3) By a letter dated 7 June 2006 ('the Employment Contract-HK'), Company B offered to employ the Taxpayer as Safety Officer with effect from 16 June 2006. The Employment Contract-HK included, among others, the following term:

'14) [The Taxpayer] will be required to work in such place(s), within or outside the jurisdiction of Hong Kong and without geographic limitation, as designated by [Company B]. Such places may include but are not limited to the premises of [Company B's] associated companies, the companies within the Group of companies or the premises of their customers or business associates or joint venture partners within or outside the jurisdiction of Hong Kong.'

The Taxpayer signified the acceptance of the offer by signing the Employment Contract-HK on 16 June 2006.

(4) (a) By an email dated 28 August 2008, Company B informed the Taxpayer that he would be transferred from a project in Area E, Hong Kong to a project in Area F, Country D ('the Area F Project') with effect from 1 October 2008.

(b) According to a summary of allowances / benefits applicable to existing staff of Company B seconded to work in Country D:

(i) existing staff member was transferred on secondment basis only;

(ii) overseas / hardship allowance was equivalent to 30% of monthly basic salary, that is salary package = basic salary x 1.30;

(iii) gratuity calculated based on the number of months stationed in Country D would be granted on satisfactory completion of the project, but no pro-rata gratuity was payable if the staff member requested to transfer back to Hong Kong, resigned or was dismissed with cause;

(iv) medical / hospitalization benefits and life & personal accident insurance were remained as per policy in Hong Kong or to be covered by local Country D scheme while MPF benefit was to be remained as per policy in Hong Kong;

(v) all other employment terms and conditions should remain unchanged.

(c) By a contract dated 8 November 2008 ('the Contract-Company C'), the Taxpayer agreed to work for Company C as Security Officer in Country D from 28 October 2008 with a basic salary of 12,000 dollars in the currency of Country D per month, which was equivalent to HKD25,305 per month.

(d) By an email dated 6 July 2009, Company B informed the Taxpayer that he would be transferred from the Area F Project to a Hotel G project in Hong Kong with effect from 16 July 2009.

(5) Company B filed an employer's return in respect of the Taxpayer for the year of assessment 2008/09 which showed, among others, the following particulars:

(a)	Capacity in which employed	:	Safety Officer
(b)	Period of employment	:	1-4-2008 – 31-3-2009
(c)	Total income	:	HK$424,201
(d)	Whether the employee was wholly or partly paid by an overseas company either in Hong Kong or overseas	:	No

(6) In his 2008/09 Tax Return – Individuals, the Taxpayer declared and provided, among others, the following information:

(a) The total income from Company B for the period from 1 April 2008 to 30 September 2008 was $177,900.

(b) He had been transferred by Company B to work in Area F, Country D for the period from 1 October 2008 to 31 March 2009 ('the Relevant Period').

(c) He claimed deduction of retirement scheme contributions in the amount of $12,000.

(7) The Assessor raised on the Taxpayer the following 2008/09 salaries tax assessment:

	$
Income [Fact (5)(c)]	424,201
Less: Retirement scheme contributions [Fact (6)(c)]	12,000
	412,201
Less: Basic allowance	108,000
Net Chargeable Income	304,201
Tax Payable thereon	31,714

(8) The Taxpayer objected against the assessment in Fact (7) on the ground that his income during the Relevant Period when he worked in Area F, Country D should be exempt from salaries tax.

(9) In correspondence with the Assessor, Company B provided, among others, the following information.

(a) Company B had not amended the terms and conditions of the Employment Contract-HK.

(b) The employment relationship between the Taxpayer and Company B had not been terminated on 30 September 2008.

(c) The duties performed by the Taxpayer in both Hong Kong and Area F during the year ended 31 March 2009 were to assist the site management to implement and maintain all safety systems and policies.

(d) Under the Country D federal income tax legislation, personal incomes were not subject to taxation in any of the states in Country D.

(10) The Assessor considered that the Taxpayer had a Hong Kong employment continuously throughout the year of assessment 2008/09 and thus his entire income should be subject to salaries tax. The Assessor wrote to the Taxpayer explaining the above and inviting him to withdraw his objection.

(11) The Taxpayer refused to withdraw the objection and forwarded the following contentions and documents.

(a) 'I was seconded by [Company B] from Hong Kong to [Area F] and work for a project [at the Relevant Period] and the company of the

project was [Company B-Company C] Joint Venture.'

(b) He reported duty in Area F on 1 October 2008. He later signed an employment contract with Company C in Area F, Country D and was granted a resident visa. During the Relevant Period, he only worked for Company C in Area F, Country D and did not work for Company B in Hong Kong.

(c) '[T]he salaries [for the Relevant Period] were paid by [Company B] because I was only seconded to [the Area F Project] but still work for [Company B]. The salaries were given to my personal Bank H bank account and I received the salary payments via Bank H … The bank account was started few years ago in Hong Kong …'

(d) A breakdown of his salaries income showing monthly salary of $29,650 for the period from 1 April 2008 to 30 September 2008 and $38,545 (that is $29,650 x 1.3) for the Relevant Period.

(e) According to the local tax system in Country D, his taxable income was zero. Hence, he had not paid any income tax in Area F.

(f) 'I would like to again clarify and emphasize that the salaries [for the Relevant Period] were paid by [Company B] but I was totally seconded to a project at Area F from Hong Kong and none of Hong Kong's business. Therefore, my income was NOT earned in Hong Kong and so the income in [the Relevant Period] should not be counted in the Hong Kong taxation calculation.'

(g) 'My colleague … was also seconded to the same project in Area F of the same company from Hong Kong in the same year but the only difference is that he was considered to be success in taxation review.'

(h) Copy of name card showing the Taxpayer as Safety Officer of Company B.

(12) According to information provided by the Immigration Department, the Assessor ascertained that the Taxpayer was present in Hong Kong for 192 days during the year of assessment 2008/09, which included 180 days during the period from 1 April 2008 to 30 September 2008 and 12 days during the Relevant Period (for the purpose of section 8(1B) of the Inland Revenue Ordinance ('the IRO'), part of a day was counted as one day).

The appeal

2. (i) In the Determination, the Revenue did not accept the Taxpayer's claim that his income was not earned in Hong Kong and was therefore not subject to Hong Kong tax.

(ii) Salaries tax assessment for the year of assessment 2008/09 under Charge Number X-XXXXXXX-XX-X, dated 29 September 2009, showing net chargeable income of $304,201 with tax payable thereon of $31,714 was therefore confirmed.

(iii) The Taxpayer now appeals to this Board against the Determination.

The issue

3. The issue for the Board's decision is whether the Taxpayer's salaries earned during the Relevant Period should be chargeable to salaries tax.

The relevant statutory provisions

4. The Revenue referred the Board to the following statutory provisions:

Charge of Salaries Tax

(1) Section 8(1) of the Inland Revenue Ordinance ('the Ordinance'):

'*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; …'

(2) Section 8(1A) of the Ordinance:

'*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) …

(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.'

(3) Section 8(1B) of the Ordinance:

' *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.'*

Ascertainment of assessable income

(4) Section 11B of the Ordinance:

' *The assessable income of a person in any year of assessment shall be the aggregate amount of income accruing to him from all sources in that year of assessment.'*

(5) Section 11D of the Ordinance:

' *For the purpose of section 11B-*

…

(b) income accrues to a person when he becomes entitled to claim payment thereof:'

Burden of proof

(6) Section 68(4) of the Ordinance:

' *The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

The relevant tax cases

5. The Revenue also referred the Board to the following authorities:

Source of income

(7) Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888, ('Goepfert case') in which Macdougall, J, after referring to a number of UK cases and decisions of the Board, made the following comments on the approach to resolve the issue of whether income 'arises in or is derived from Hong Kong' from an employment:

(a) '*It follows that the place where the services are rendered is not relevant to the enquiry under s. 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be completely ignored.'*

(b) *'Specifically, it is necessary to look for the place where the income really comes to the employee, that is to say, where the source of income, the employment, is located. As Sir Wilfrid Greene said, regard must first be had to the contract of employment.'*

(c) *'There can be no doubt therefore that in deciding the crucial issue, the Commissioner may need to look further than the external or superficial features of the employment. Appearance may be deceptive. He may need to examine other factors that point to the real locus of the source of income, the employment.*

It occurs to me that sometimes when reference is made to the so called "totality of facts" test it may be that what is meant is this very process. If that is what it means then it is not an enquiry of a nature different from that to which the English cases refer, but is descriptive of the process adopted to ascertain the true answer to the question that arises under s. 8(1).'

(d) *'Having stated what I consider to be the proper test to be applied in determining for the purpose of s. 8(1) whether income arises in or is derived from Hong Kong from employment, the position may, in my view, be summarised as follows.*

If during a year of assessment a person's income falls within the basic charge to salaries tax under s. 8(1), his entire salary is subject to salaries tax wherever his services may have been rendered, subject only to the so called "60 days rule" that operates when the taxpayer can claim relief by way of exemption under s. 8(1A)(b) as read with s. 8(1B). Thus, once income is caught by s. 8(1) there is no provision for apportionment.' (The Goepfert case was decided before the enactment of section 8(1A)(c) of the Ordinance).

(8) Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80, in which Deputy Judge To (as he then was) fully concurred with the view of Macdougall, J in Goepfert and said the following:

(a) *'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).'*

(b) *'Thus, the test as to the source of income is to look for the place where the income really comes to the employee. As Sir Wilfrid Green MR said, regard must first be had to the contract of employment. This must include consideration as to the place where the employee is to be paid, where the contract of employment was negotiated and entered into and whether the employer is resident in the jurisdiction. But none of these factors are determinative. … Consideration of these factors shows the very process adopted in ascertaining the locality of the contract. This is perhaps what have been referred to as the totality test.'*

(9) In Lee Hung Kwong, Deputy Judge To pointed out that secondment does not necessarily change the location of employment. He said the following:

'*There is no definition of secondment under the Inland Revenue Ordinance. In Board of Review decision D55/91, the Board held that secondment is a period of temporary employment at the end of which the employee returns to his general employment. I concur with that view. Depending on the circumstances of the case, a secondment may be based on a contract of service made between the temporary employer and the employee with the consent of the general employer, or it may simply be a case of the general employer directing the employee to go and do some*

work for the temporary employer without involving the creation of a contract of service between the temporary employer and the employee. A secondment does not necessarily change the location of employment. It depends on the terms of the secondment and in particular and ultimately where the income comes to the employee, ie the source of the income, etc. In the eventual analysis, it is this question which has to be determined and it has to be determined by looking for the place where the income really comes to the employee.'

(10) In D43/94, IRBRD, vol 9, 278, a taxpayer who was employed by a company in Hong Kong claimed that the income earned by him during the period when he worked in Country A should be exempted from salaries tax. In dismissing the taxpayer's appeal, the Board said the following:

(a) *'… one must bear in mind the difference between the employment and the services rendered under the employment contract. An employment is a state in which an employee is employed by an employer; it is the source of the employee's income, but it is not necessarily located where the employee renders his services under the employment contract.'*

(b) '… the same employment may continue notwithstanding the variation of the terms and conditions of the employment contract or even the replacement of the entire contract by a new employment contract … and notwithstanding that the employee is seconded or transferred to work outside Hong Kong.'

(11) In D67/89, IRBRD, vol 5, 52, the taxpayer was employed in Hong Kong and was assigned to perform services for a joint venture company in China. He claimed that he was separately employed by another company to perform his services in China and should not be subject to Salaries Tax. In finding that at all material times the taxpayer continued to be employed by his one and only employer, the Board said:

' The relationship of master and servant is one of great importance and not a casual relationship. Commencement of employment and termination of employment have many effects and are subject to various statutory controls including the Employment Ordinance and the Inland Revenue Ordinance. On the facts and evidence before us we are not able to find that the employment of the Taxpayer with the company was terminated, suspended or otherwise held in abeyance.'

Relief under section 8(1A)(c) of the Ordinance

(12) In D34/01, IRBRD, vol 16, 303, the Board held that to qualify for an exemption under section 8(1A)(c) of the Ordinance, there are three requirements namely:

(a) that the taxpayer derived income from services overseas;

(b) that the income was chargeable to tax of a similar nature to salaries tax; and

(c) that the Commissioner is satisfied that the person has paid tax of that nature in that territory in respect of the income.

Reference to colleagues' cases

(13) In Lo Tim Fat v Commissioner of Inland Revenue [2006] 2 HKLRD 689, Mr Recorder Edward Chan, SC said:

> *'10. In support of his contention, the appellant refers to a case where the respondent assessed the profit tax liability of one of his colleagues in the same position as his on the basis that only a certain portion of the signing fees were treated as trading receipt for the first year. The appellant contended that his colleague was in fact in the same position as his and the documentations signed were also similar. The respondent's response is that under the Ordinance, the respondent cannot divulge information about other taxpayers and is thus unable to comment on this case referred to by the appellant. Having considered the material submitted to me on the appellant's colleague's case, I would consider that the case is of little value in assisting me in the determination of this appeal. Even assuming that the two cases are in fact indistinguishable, and that there is a discrepancy in the respondent's treatment of the appellant's case and his colleague's case, it does not show that the treatment of the colleague's case is necessarily correct.'*

(14) In D126/02, IRBRD, vol 18, 188, the taxpayer argued, among other things, that he had been treated unfairly by the Inland Revenue Department as he was not treated in the same way as his colleagues. The Board raised the issue of whether it had any jurisdiction to set aside an otherwise valid and legal assessment on the basis that to maintain the same would infringe the principle of fairness. The Board inclined to accept that it, as a statutory body, did not have the review jurisdiction

enjoyed exclusively by the High Court and it was beyond the Board's power to grant any relief in the nature of judicial review.

The Taxpayer's case

6. The Taxpayer claimed that his income from employment during the Relevant Period should not be chargeable to salaries tax because:

(a) He worked overseas in Area F. He worked on a construction project of the Company B-Company C Joint Venture ('the JV') and did nothing else for the Hong Kong business of Company B.

(b) He signed an employment contract with the JV for working in the Area F Project. The locality of his employment during the secondment period was Area F. The Taxpayer purported to differentiate between the phrases 'employment location' and 'employment locality'.

(c) His income during the Relevant Period should only be countable to the taxation system of Country D. The fact that he paid zero salary tax in Country D did not mean that he was required to pay tax in Hong Kong, otherwise his tax responsibility would be doubled and duplicated.

(d) The Taxpayer was not asking for a complete exemption of all his income in the entire year of assessment 2008/09 but only for the Relevant Period.

(e) His colleague, whose case was almost the same as his except the secondment period, succeeded in claiming exemption of income. The different tax treatment on him is unfair.

The evidence

7. The Taxpayer did not dispute the fact that he was still under the employment with Company B during the Relevant Period. In his notice of appeal, the Taxpayer stated 'I was employed by a Hong Kong company but work for another JV Company, [Company B-Company C] JV, in [Area F]'.

8. During the hearing, there is evidence to show that:

(a) The Taxpayer was still under Company B's employment during the Secondment Period. Indeed, Company B's posting of the Appellant from Hong Kong to Country D and subsequently back to Hong Kong was in accordance with clauses 12 and 14 of the Employment Contract-HK.

(b) The Taxpayer was on the payroll of Company B during the Relevant Period. Company B continued to pay him remuneration in Hong Kong.

(c) Company B and the Taxpayer continued to make contributions to MPF scheme in their capcities of employer and employee respectively.

(d) The Taxpayer was still entitled to hospital and life insurance benefits provided by Company B during the Relevant Period.

(e) The Taxpayer continued to earn and take annual leave. All leave days were counted towards his leave balance with Company B.

(f) Company B in the capacity of the Taxpayer's employer filed Employer's Returns for the respective years ended 31 March 2009 and 2010. In the returns, Company B reported the employment of the Taxpayer for the entire period from 1 April 2008 to 31 March 2010 and that the Taxpayer was not paid by any overseas company.

(g) In his Tax Returns – Individuals for the respective years of assessment 2008/09 and 2009/10, the Taxpayer declared Company B as his employer for the entire period from 1 April 2008 to 31 March 2010.

(h) In reply to the Assessor's enquiries, the Taxpayer identified Company B as his employer for the Revelant Period.

9. The Taxpayer also argued that there are different legal effects of the terms 'employment location' and 'employment locality'. The Board has not found any merit in such arguments.

10. The Taxpayer reported duty in Country D on 1 October 2008 upon the instructions of Company B. The Contract-Company C, however, was not made until about one month later that is 8 November 2008. It was stated to be effective from 28 October 2008. The Contract-Company C therefore appeared to have no direct relevance with the Taxpayer's secondment which took effect on 1 October 2008 except as mentioned by Company B, it was for the purpose of applying for an employment visa in Area J in Country D.

11. Despite that the Contract-Company C provided for the payment of monthly salary and allowance to the Taxpayer and that Company C should bear the cost of air ticket on commencement and termination, there is no evidence that Company C had made any such payment.

The relevant principles

12. The Board finds that the available evidence proves that during the Relevant Period, the Taxpayer was under the continuous employment with Company B and that the employment was located in Hong Kong. This is in line with the judgment in Goepfert case that is 'the place where the services are rendered is not relevant to the enquiring under Section 8(1) as to whether income arises in or is derived from Hong Kong.' It follows that the Taxpayer's entire income from Company B for the year of assessment 2008/09, including the income for the Relevant Period, should be assessable to salaries tax under section 8(1)(a) of the Ordinance unless relief is available under section 8(1A)(b)(ii) as read in conjunction with section 8(1B) or under section 8(1A)(c).

13. The next question to ask is therefore whether the Taxpayer can claim relief under section 8(1A)(b)(ii). To qualify for exemption under this section, the Taxpayer has to establish that he rendered outside Hong Kong all the services in connection with his employment. For the purpose of determining whether or not all services are rendered outside Hong Kong, section 8(1B) provides that 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.

14. The Taxpayer rendered services both in Hong Kong (during the period between 1 April 2008 and 30 September 2008) and Country D (during the Relevant Period) in the year of assessment 2008/09. According to the records of the Immigration Department, the Taxpayer was present in Hong Kong for 192 days in the basis period for the year of assessment 2008/09 (that is from 1 April 2008 to 31 March 2009). The 60-day rule is therefore not applicable. As such, he cannot be said to have rendered outside Hong Kong all the services in connection with his employment with Company B.

15. It should also be noted that according to the Goepfert case, once income is caught by section 8(1), there is no provision for apportionment.

16. The Board then has to consider whether the Taxpayer can claim exemption under section 8(1A)(c) by satisfying three requirements as mentioned in the case D34/01:

(i) his income for the Relevant Period derived from services rendered by him in a territory outside Hong Kong (that is Country D);

(ii) by the laws of that territory, the income was chargeable to tax of substantially the same nature as salaries tax under the Ordinance; and

(iii) the Commissioner is satisfied that the Taxpayer had paid tax of that nature in that territory in respect of the income.

17. This is undisputed that under the Country D federal income tax legislation, personal incomes including all forms of salary were not subject to taxation. There is also no

evidence that the Taxpayer's income for the Relevant Period was chargeable to any tax in Country D nor had he paid any tax in Country D in respect of the income. Since not all the three requirements mentioned above are satisfied, the exemption provided under section 8(1A)(c) of the Ordinance is not applicable to the Taxpayer.

Reference to colleague's case

18. The Taxpayer claimed that his colleague had been allowed 'exemption of employment income' for the period of secondment in Country D and that he should be given a fair treatment. The Revenue accepts that it owes a duty to administer the Ordinance consistently and to treat all taxpayers fairly. However, under section 4 of the Ordinance which deals with official secrecy, the Revenue is precluded from divulging information regarding the tax position of the Taxpayer's colleague including whether his case was indistinguishable from the Taxpayer's. Following the Lo Tim Fat case, the Board accepts the Revenue's refusal to comment on the other case.

19. Further, as mentioned in the case D126/02, the function of the Board is to look at the facts of this Appeal and decide whether the Salaries Tax Assessment 2008/09 was correctly made in accordance with the Ordinance. The Board does not have the judicial review jurisdiction which is exclusively enjoyed by the High Court. As such, whether the Appellant was unfairly treated compared with his colleague is not a matter for the Board to investigate.

Conclusion

20. For reasons given above, the Board holds that Taxpayer has not discharged his onus of proving that the assessment mentioned in paragraph 1(7) above is excessive or incorrect and the Taxpayer's appeal is therefore dismissed.