INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D43/94

Salaries tax – source of income – whether continuous employment or new contract.

Panel: Robert Wei Wen Nam QC (chairman), Victor R P Hughes and Tse Tak Yin.

Dates of hearing: 28 and 29 July 1994.
Date of decision: 17 October 1994

The taxpayer was employed by a company in Hong Kong. He was relocated to another country. His terms of employment were changed. The employee submitted that there had been a termination of employment and a new employment under new terms. The Commissioner maintained that there was only one continuous employment.

Held:

The Board decided that as a matter of fact the employment of the taxpayer had not been terminated. There was only one continuous employment throughout the period and that employment was located in Hong Kong.

Appeal dismissed.

Cases referred to:

B/R 20/69, IRBRD, vol 1, 3
CIR v Goepfert 2 HKTC 210
D101/89, IRBRD, vol 6, 375
D37/88, IRBRD, vol 3, 360
D67/89, IRBRD, vol 5, 52

Tam Tai Pang for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by an individual (the Taxpayer) against the salaries tax assessment raised on him for the year of assessment 1990/91, as revised by the Commissioner of Inland Revenue's determination dated 23 February 1994. He claims that

the income earned by him during the period when he worked in Country A should be exempted from tax.

2. His employer was a company incorporated in Hong Kong in 1970. In August 1990, it relocated part of its operation to Country A.

3. The Taxpayer commenced employment with the employer in Position X in 1983. As a result of the relocation to Country A, the Taxpayer entered into a second employment contract with the employer, and went to work in Country A in Position Y at a salary of $17,500 per month as compared with the $9,000 per month salary he had been earning while working in Hong Kong. Ever since he commenced work in Country A and until 31 March 1991, the Taxpayer rendered all his services under the second employment contract in Country A.

4. One of the matters in dispute is when the Taxpayer commenced duty under the second employment contract. The Taxpayer asserted that it was 7 August 1990 while the Commissioner argued that it was 1 August 1990. It is not in dispute that the Taxpayer left Hong Kong on 7 August 1990 and arrived and started work in Country A on that day. The question is whether he may not already have commenced duty under the second employment contract on 1 August 1990 in Hong Kong. The contract documents are confusing; the Taxpayer could not explain why the parties' signatures were different on the two photocopies of the contract which were laid before us, nor why one of the copies stated 'You will commence employment with us on 7 August 1990' while on the other copy the date in that sentence was left blank and the date of 1 August 1990 was rubber-stamped at the top of the first page and the bottom of the second and last page. However, light is shed on the matter by the employer's breakdown of the Taxpayer's remuneration for the year ended 31 March 1991 which is reproduced below:

	Hong Kong	**Country A**	**Total**
	$	**$**	**$**
Salary	37,742.00	136,612.80	174,354.80
Bonus	8,100.00	21,483.33	29,583.33
Overtime	_____	2,049.90	2,049.90
	45,842.00	160,146.03	205,988.03

From the breakdown of salary it may be inferred that the Taxpayer earned $9,000 per month until 6 August 1990 ($9,000 × (4 + 6/31) and $17,500 per month from 7 August 1990 onwards ($17,500 × (7 + 25/31)); we therefore find that the Taxpayer commenced duty under the second employment contract in Country A on 7 August 1990. It was submitted that there must have been a period of briefing and induction before actual commencement of work and that period should be taken into account in determining the date when and the place where the Taxpayer commenced duty under the second employment contract. We do not think the argument carries the matter any further; in the absence of evidence to the

contrary, we are entitled to, and we do, assume that briefing and induction took place in Country A and that the employer's breakdown correctly reflected that factor.

5. The main dispute is about the employment in relation to the second employment contract. First of all, 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. For example, a person who is employed by a Hong Kong company and is paid by the Hong Kong company from money originating in Hong Kong to perform services elsewhere is liable to salaries tax, because the source of the income, the employment, is located in Hong Kong (B/R 20/69, IRBRD, vol 1, 3 explained and approved in CIR v Goepfert 2 HKTC 210 at 231-232 and 237). Furthermore, 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 (see D101/89, IRBRD, vol 6, 375), and notwithstanding that the employee is seconded or transferred to work outside Hong Kong (see D37/88, IRBRD, vol 3, 360 and D67/89, IRBRD, vol 5, 52).

6. Income from an employment which is located in Hong Kong is liable to salaries tax under section 8(1) of the Inland Revenue Ordinance (the IRO) (CIR v Goepfert at 234). The Taxpayer's case is that the employment in relation to the second employment contract was located in Country A;' that in any event it was a new employment which arose upon the termination of the old employment which existed for the duration of the first employment contract; therefore there was no salaries tax to pay in respect of his income from the new employment because he rendered all his services in connection with the new employment in Country A (section 8(1A)(b)(ii) of the IRO). In support of his argument, the Taxpayer repeatedly pointed our: that the terms of the second employment contract were different from those of the first employment contract; that, in particular, by the second employment contract he was appointed to a new post; that his place of work under the second employment contract was in Country A, and that he rendered all his services under the second employment contract in Country A.

7. On the other hand, representative for the Commissioner submitted that there was in this case only one continuous employment. He enumerated a number of grounds including the following: (1) there was no break between the first and second employment contracts; (2) the Taxpayer's seniority and accumulation of the provident fund contributions continued notwithstanding the change of contracts; (3) the Taxpayer's entitlement to payment under the provident plan was computed according to his length of service measured from 1 January 1988 (the date when the Taxpayer was admitted to the plan) until 31 July 1992 (the cut-off date for the Taxpayer by reason of his resignation); (4) neither the employer's return nor the Taxpayer's salaries tax return referred to any termination of employment or the commencement of a new employment; (5) the employer in its correspondence with the assessor expressly stated, among other things, the following:

'(1) [The Taxpayer] was being transferred to Country A and a new contract was being signed for the new assignment … There is no cessation of employment, however, [the Taxpayer] was not necessary to work in our Hongkong office since he took the new assignment.

(2) [The Taxpayer] is employed as Store Supervisor and he is in charge of the storeroom, before he moved to China, he was also the Store Supervisor of Hongkong…;'

(6) in his resignation letter dated 16 July 1992, the Taxpayer stated among other things:

'To your concern, my two years employment contract in the plant in Country A will expire on 6 August 1992. Due to my family reasons, I shall ask your [permission] to [transfer] me back to Hong Kong office after the present working term …

I have joined this company since June 1983 as a warehouse supervisor until now. During the past nine years, I have learnt and grew together with the organization …'

8. The Taxpayer sought to explain why his participation in the provident plan was not terminated and then renewed when the first employment contract was replaced by the second employment contract. One explanation was that the employer may have been too busy. Another explanation was that to cancel and renew participation in the plan might increase the 'administration fee'. A third was that the Taxpayer himself was very busy, so much so that he even forgot about the provident fund. We find none of the explanations convincing.

9. Having considered the matter carefully, we accept the submissions of the representative for the Commissioner. We are satisfied that there was in this case only one continuous employment throughout the year ended 31 March 1991, and that the employment was located in Hong Kong. There being no provision for apportionment, the Taxpayer's income for the whole of the year of assessment 1990/91 is taxable under section 8(1) of the IRO. It follows that this appeal is dismissed and that the assessment in question, as revised, is hereby confirmed.