Case No. D44/00

Salaries tax – employment – place of service – source of income – 60 days limit – whether liable to salaries tax – section 8 of the Inland Revenue Ordinance (' IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Calvin Fung Chor Hang and Stephen Yam Chi Ming.

Date of hearing: 2 May 2000.
Date of decision: 25 July 2000.

The taxpayer was employed by Company A, which was carrying on business in Hong Kong and China, as its ' regional manager – South China' stationed in Guangdong, PRC. Although the taxpayer was responsible for the overall administration and management of the daily operation of Company A' s office in Guangdong, PRC, he was required to attend meetings in Hong Kong from time to time. The taxpayer' s remuneration was paid in Hong Kong. The taxpayer appealed against the assessment of salaries tax.

Held:

1. The contention made in the course of the appeal was at variance with the statement of Company A and the taxpayer' s own admissions made in his previous correspondence with the Inland Revenue Department. The taxpayer was deliberately lying in order to avoid liability.

2. The relevant income arose in or derived from Hong Kong from the taxpayer' s employment with Company A, which was a Hong Kong company. The contract of employment was made in Hong Kong. The taxpayer was paid in Hong Kong. His admissions made it clear that he did not render outside Hong Kong all the services in connection with his employment for the purpose of section 8(1A)(b)(ii) of the IRO.

3. The taxpayer visited Hong Kong for more than 60 days in the relevant basis period. The services that the taxpayer rendered in Hong Kong during his visits could not be ignored on the basis of section 8(1B). There was no evidence before the Board of payment of any tax in China. The taxpayer' s settlement with Company A on 10 March 1998 indicated that liability of Hong Kong tax was expressly envisaged.

Appeal dismissed and a cost of $3,500 charged.
Case referred to:

CIR v Goepfert 2 HKTC 210

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

Decision:

1. Company A is a company carrying on business in Hong Kong and China. At all material times, it maintains an office in District B, Hong Kong.

2. By letter dated 25 January 1996 addressed to the Taxpayer in Hong Kong, the Taxpayer was employed by Company A as its ' regional manager – South China' stationed in a city in Guangdong Province. The Taxpayer was paid a salary of $30,000 per month; a hardship allowance of $5,000 per month and a housing allowance of $7,000 per month. The Taxpayer ' was responsible for the overall administration and management of the daily operation of [Company A' s] office in Guangdong Province' .

3. The terms of the Taxpayer' s contract of employment were varied on 31 July 1996. His basic salary was increased to $38,000 per month. Company A further agreed to be ' responsible for all your PRC taxes during your station within China.'

4. For the period between 1 April 1996 and 31 March 1997, the Taxpayer spent a total of 121 days in Hong Kong. His wife gave birth to their child in Hong Kong in March 1997. His father also fell ill in March 1997 and passed away in Hong Kong in August 1997.

5. By letter dated 11 July 1997, the Taxpayer tendered his resignation as regional manager of Company A. The termination was not a happy one. The parties had to resolve their difference in the Labour Department. By receipt dated 10 March 1998, the Taxpayer acknowledged a sum of $67,952 from Company A. That sum was described as ' 50% of my 96-97 HK Tax' in that receipt.

6. In its correspondence with the Revenue, Company A pointed out that :

(a) the Taxpayer' s renumeration was paid in Hong Kong.

(b) The Taxpayer ' was required to attend meetings in Hong Kong between the period from 20 January 1996 to 31 August 1997' .

7. In his correspondence with the Revenue, the Taxpayer stated that :

(a) ' Since my family is in HK, out of 52 weekends, I think I came back 48 of them. 40 of them are purely on rest/pleasure issue. About 8 of them on work purpose.'

(b) ' ..I write to advise that the return to Hong Kong during Saturday and Sunday is to visit my family as a private trip (no claim for the transportation expenses). Sometimes, I may go to the office of Company A in Saturday morning or afternoon to drop down the expenses report, or to meet the management for an informal report/casual talk for half an hour. I believe less than 10% of the time is attending formal meeting which is organised by the company …Therefore if your office charge the tax based on number of days that I returned to Hong Kong attending formal meeting which is organised by the company as a business trip, I am willing to pay the Hong Kong tax on these proportion.'

The relevant provisions in the IRO (Chapter 112)

8. Section 8(1) of the IRO provides :

' (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.'

9. Section 8(1A) of the IRO provides :

' (1A) For the purpose of this Part, income arising in or derived from Hong Kong from any employment –

(a) …

(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.'

10. Section 8(1B) of the IRO provides :

' (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.'

11. The leading case of Commissioner of Inland Revenue v Goepfert 2 HKTC 210 makes it clear that :

(a) The expression ' income arising in or derived from Hong Kong' is referable to the locality of the source of income : in other words not the place where the duties of the employee are performed but the place where the payment for the employment is made. The place where the services are rendered is not relevant to the enquiry under section 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be completely ignored.

(b) If during a year of assessment a person' s income falls within the basic charge to salaries tax under section 8(1), his entire salary is subject to salaries tax wherever his services may have been rendered.

The course of the appeal

12. At the hearing before us, the Taxpayer wholly failed to advance any coherent argument as to why he should not be assessable to salaries tax. It is quite plain to us that he did not try to understand any of the materials sent to him by the Revenue prior to the hearing. The Taxpayer is a well educated person. We have no doubt that he would have grasped the applicable principle had he taken the trouble to consider those materials. With the consent of the Revenue, we invited him

to submit written submissions to us after perusal of the materials.

13. By letter dated 5 May 2000 the Taxpayer submitted further arguments in support of his appeal. He advanced for the first time a contention that ' all services in connection with [his] employment are rendered outside Hong Kong' . The contention is at variance with the statement of Company A and his own admissions summarised in paragraphs 6 and 7 above. We are of the view that the Taxpayer is deliberately lying in order to avoid liability.

14. We dismiss the Taxpayer' s appeal. The relevant income arose in or derived from Hong Kong from the Taxpayer' s employment with Company A. Company A is a Hong Kong company. The contract of employment was made in Hong Kong. The Taxpayer was paid in Hong Kong. His aforesaid admissions made it clear that he did not render outside Hong Kong all the services in connection with his employment for the purpose of section 8(1A)(b)(ii) of the IRO. He visited Hong Kong for more than 60 days in the relevant basis period. The services that he rendered in Hong Kong during his visits could not be ignored on the basis of section 8(1B). There is no evidence before us of payment of any tax in China. His settlement with Company A on 10 March 1998 indicates that liability for Hong Kong tax was expressly envisaged.

15. We are of the view that a lot of time was wasted by the failure on the part of the Taxpayer to properly consider his appeal before the scheduled date of hearing. We are dismayed by his blatant attempt to avoid liability by putting forward a false case. We consider this to be a fit case to exercise our power under section 68(9) of the IRO. We order the Taxpayer to pay costs of the Board in the sum of $3,500.