Case No. D46/10

Salaries tax – whether income of a non-resident under Hong Kong employment chargeable to salaries tax – whether the rental value of the place of residence provided by the employer assessable – whether deduction of certain expenses be allowed – sections 8, 9(1)(b), 12(1)(a) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Miu Liong Nelson and Mark Richard Charlton Sutherland.

Dates of hearing: 6 and 15 December 2010.
Date of decision: 28 March 2011.

The Taxpayer, a non-resident, entered into an employment contract with and provided services to Company A from 5 September 2007 to 27 June 2008.

Company A, being a company carrying on business in Hong Kong, filed an employer's return and notification which showed that the Taxpayer was on the payroll.

The Taxpayer objected to the salaries tax assessments for the years of assessment 2007/08 and 2008/09 raised on him. The Taxpayer claims that being a non-resident, his income should not be subject to salaries tax, the accommodation provided by Company A is not taxable and that he should be entitled to certain deductions.

Held:

1. Salaries tax is charged on every person in Hong Kong in respect of his source of income from his office or employment regardless of his residency.

2. The Taxpayer's entire income from his employment is assessable to tax as the source of his employment is in Hong Kong and he is not able to claim any benefit of relief pursuant to sections 8(1A)(b)(ii), 8(1B) and 8(1A)(c) of the IRO.

3. Free residence provided by the employer should be included as the Taxpayer's assessable income under section 9(1)(b).

4. None of the expenses incurred by the Taxpayer are allowable for any form of deduction as the Taxpayer has failed to provide any contemporaneous records or evidence in support.

5. In any event, the employer confirmed that the Taxpayer had been fully reimbursed for all expenses claimed. The Taxpayer should have sought reimbursement of all the business expenses necessarily incurred from the employer instead of asking the Board to consider his deduction claim for such expenses.

Appeal dismissed.

Cases referred to:

D54/94, IRBRD, vol 9, 324
Commissioner of Inland Revenue v George Andrew Goepfert 2 HKTC 210
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
D36/90, IRBRD, vol 5, 295
D34/00, IRBRD, vol 15, 345
D5/93, IRBRD, vol 8, 110
D29/06, (2006-07) IRBRD, vol 21, 554

Taxpayer was absent.
Chan Sze Wai Benjamin and Yip Chi Chuen for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by the Taxpayer in respect of his salaries tax assessments for the years of assessment 2007/08 and 2008/09 ('the Assessment'). The Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') issued a Determination in respect of the assessments dated 3 November 2009 ('the Determination').

2. Various attempts were made to serve the Determination on the Taxpayer at an address in Country B, however, these were returned unclaimed.

3. However, by a letter dated 14 February 2010 then followed by a further letter dated 24 February 2010, the Taxpayer sent out his notice of appeal and provided the Clerk to the Board of Review ('the Clerk') the relevant documentation.

4. On 29 April 2010, the Clerk gave notice to the Taxpayer that his appeal would be heard on 7 June 2010 at 9:30 a.m..

5. On 30 April 2010, the Assessor sent an email to the Taxpayer informing him of the relevant hearing date. At the same time, the Assessor sent further letters to the Taxpayer dated 26 May 2010 and 31 May 2010 respectively requesting the Taxpayer to consider

agreeing various facts and to provide various documentary evidence.

6. On 29 May 2010, the Taxpayer sent an email to the Assessor advising as follows:

> ' It appears that I have not been notified of the hearing date, and thus I will not attend.
>
> Kindly inform the Board that:
> 1. A hearing should be held in the territory where I am ordinarily resident
> 2. That I will need two months notice, properly served
> 3. Prior justification for the hearing. In my view the centre of the issue is that I have deducted expenses from the income I earned, the Board appears to suggest that [Company A] paid these expenses, which they did not, and further I [sic] that I have provided full documentation for these expenses.'

7. The Clerk wrote to the Taxpayer on the following terms on 1 June 2010:

> ' The Chairman has made the following remarks:
>
> 1. The Board has had sight of the correspondence and communications that have passed between the IRD and [the Appellant].
>
> 2. All hearings in respect of any appeals before the Board are to be heard in Hong Kong as per normal practice.
>
> 3. The Board is prepared to agree to adjourn the hearing that is due to be heard on the 7 June 2010 for a further two-month period.
>
> 4. [The Appellant] should consult [the Clerk] to provide suitable dates which are convenient for him to attend in Hong Kong and a hearing date will be fixed. In the event that he fails to do so, then hearing dates will be fixed without any further consultation.'

8. On 25 August 2010, the Clerk gave notice to the Taxpayer that the appeal would be re-scheduled to be heard on 8 October 2010 at 9:30 a.m..

9. On 14 September 2010, the Clerk again wrote to the Taxpayer and stated as follows:

> ' The Board has had sight of the past emails that have passed between yourself and the Clerk. Despite being asked to put forward suitable dates, you have failed to do so. Therefore, the hearing on the 8 October 2010 will stand. However, if you do provide the Clerk with alternative dates before the end of

> November, then the Board will give consideration to refixing the dates to suit your diary.'

10. The Taxpayer then requested a further adjournment and the Clerk advised the Taxpayer that the Board had no objection to his request for an adjournment, the hearing of 8 October 2010 would be cancelled and that the appeal was re-scheduled to be heard on 6 December 2010.

11. On 7 November 2010, the Taxpayer sent a further email to the Assessor stating as follows:

> ' I maintain that I owe no taxes in HK and the crux of the argument would seem to me that the IRD has not taken into account the various expenses that I have incurred. I have offered to provide back up for these expenses.'

12. By a letter dated 8 November 2010, the Assessor advised the Taxpayer that he should submit his views to the Board in a proper way and reminded the Taxpayer as to the various deadlines set by the Board with submission of documents and authorities in respect of the appeal.

13. On 20 November 2010, the Taxpayer sent an email to the Clerk and the Assessor stating as follows:

> ' My patience is now exhausted and I will not entertain any further claims, so please close this matter on my behalf.
>
> You must understand that I earn my living as a consultant and that I have lost billings by having to deal with this matter through a department which seems to be fixated on ignoring the relevant facts of the matter.
>
> I now put you on notice that any further involvement on my part will as I have mentioned before require the IRD to accept my invoices for time take.'

14. One 27 November 2010, the Taxpayer sent a further email to the Clerk wishing to ask the Board to have this matter heard in his absence.

The hearing on 6 December 2010

15. The Board gave careful consideration to the various submissions put forward by the Taxpayer to have this matter heard in his absence and took on board the relevant submissions put to the Board by Mr Chan on behalf of the Inland Revenue Department ('IRD'). Having considered matters, the Board was of the view that it was only right and proper to give the Taxpayer a further opportunity to be given a fair hearing to deal with the various issues and as such, it was agreed to adjourn the appeal until 15 December 2010 at 5:15 p.m.. The Board made a direction that the written submissions on the substantive issues prepared by Mr Benjamin Chan be sent to the Taxpayer and that he should have the

opportunity to provide written submissions in response since he has asked that this matter be heard in his absence pursuant to section 68(2B) of the Inland Revenue Ordinance ('IRO'). This was duly done.

16. Following the Board's decision on 11 December 2010, the Clerk received a further email from the Taxpayer requesting a further adjournment until the New Year to allow him further time to provide his input to the documentation he had received from the IRD.

The hearing on 15 December 2010

17. At the hearing on 15 December 2010, the Board had regard to the submissions put forward by Mr Chan and having considered matters carefully, we were prepared to allow the Taxpayer until 10 January 2011 to respond in writing with his submissions and in turn, the Board would then consider his written submissions and hand down its decision in the normal way.

18. On 9 January 2011, the Taxpayer provided written submissions as previously directed by the Board.

Appeal out of time

19. The notice of appeal was received by the Board along with all the relevant documents on 8 March 2010. It is accepted by Mr Chan that these documents were received within one month after the Taxpayer had received the Deputy Commissioner's Determination which was on or about mid-February 2010. It is also clear that the Determination dated 3 November 2009 was not received by the Taxpayer until mid-February.

20. Mr Chan fairly points out in his correspondence to the Taxpayer and having considered all matters, he would raise no objections if the Board accepted his submissions as to the lateness of his appeal.

21. The Board having regard to all circumstances was prepared to allow the Taxpayer to appeal out of time.

The appeal to be heard in the absence of the taxpayer

22. On 6 December 2010, the Board considered an application by the Taxpayer to have his appeal heard in his absence. Having considered the application, the Board was satisfied that the appeal would proceed to be heard in his absence pursuant to section 68(2B) of the IRO.

Statement of grounds of appeal

23. The notice of appeal by the Taxpayer filed on 24 February 2010, his statement

of grounds of appeal are as follows:

‘ Statement of grounds of appeal:

The determination is in error:

1. Facts:

    a. Paragraph 3a is incorrect. I was not employed by [Company A], I was not a [manager], and I ceased providing consultancy services in May 2008

    b. Denied

    c. Paragraph 4(a), (b) (c) are denied

    d. Paragraph 5, taxpayer was not required to file a tax return> The assessment is denied

    e. Paragraph 8, this assessment is erroneous

    f. Paragraph:
        i. (a) erroneous
        ii. (b) irrelevant
        iii. (c) false in every respect
        iv. (d) irrelevant, and in any case false
        v. (12) subject to strict proof, please see my remarks concerning medical leave and thus my inability to travel
        vi. (13) Denied

2. Determination is denied

3. Reasons therefore

    a. (2), (3) erroneous

    b. (5), (6) denied

    c. (7) Denied

    d. (8) Denied

    e. (9) Denied:
        i. Documentary evidence is available
        ii. The entertainment and business expenses reimbursed by [Company A] are a small fraction of what has been incurred,

and have not been claimed as expenses for the purposes of subject assessment

iii. The entertainment and business expenses were not personal and directly related to performance of duties

iv. All claimed expenses do satisfy the conditions set forth in 12(1)(a of the Ordinance

f. (10) disagreed'

24. As can be seen, the Taxpayer does not provide any particulars or details as to why the Determination is incorrect. He asserts that the Determination is erroneous and denies various facts set out in the Determination and as such, asserts that various documentary evidence is and was available. At this stage, we would note that the Taxpayer's written submissions sent to the Board dated 9 January 2010, again, repeats many of the issues set out in his notice of appeal whereby he denies and disputes the matters raised in the Determination. He asserts that he is able to produce evidence but to this date, no documentation has been received from the Taxpayer to support his notice of appeal.

The facts

25. We have no difficulties in finding the following as facts in respect of this matter. On 13 July 2007, the Taxpayer entered into a contract ('the Contract') with Company A in respect of his appointment as a contract staff. The Contract contained various clauses which indicated that the Taxpayer's contractual relationship with Company A was one of an employment. For example,

(a) Clause 3 states 'You shall be **employed** at Career Band 4 and paid a basic salary of HK$90,000.00 ….'.

(b) Clause 5 provides 'This cash bonus is payable on the condition that you are still in [Company A's] **employment** on the date the bonus is to be paid.'

(c) Clause 30 provides 'Your **employment** is subject to the issuance of the work permit approved by the Immigration Authorities of Hong Kong Special Administrative Region ….'

Clause 28 also supports the fact that the Contract was 'governed and construed in all respects in accordance with the Laws of Hong Kong Special Administrative Region'.

26. Company A has provided confirmation to the IRD confirming that the Taxpayer 'provided services to [Company A] during his employment from 5 September 2007 to 27 June 2008 inclusive'. It also states that he had 'attended office in Hong Kong up to 27 June 2008'.

27. Company A also filed an employer's return and notification which showed that

the Taxpayer was on the payroll. The relevant returns filed by Company A were indeed correct.

28. The IRD issued the 2007/08 salaries tax return to the Taxpayer for completion on 2 May 2008. However, he failed to complete and return it to the IRD within the stipulated one-month period. The Taxpayer only submitted his return on 25 February 2009 and it was received by the IRD on 10 March 2009. Hence, it is quite clear that the Taxpayer was fully aware as to the existence of an assessment.

29. Therefore, having considered matters carefully, we have no hesitation in concluding that the facts as set out in the Determination are correct. We now set these out as follows:

> ' (1) [The Taxpayer] has objected to the salaries tax assessments for the years of assessment 2007/08 and 2008/09 raised on him. The Taxpayer claims that his income should not be subject to salaries tax and that he should be entitled to certain deductions.
>
> (2) [Company A] was a company carrying on business in Hong Kong.
>
> (3) (a) By contract dated 13 July 2007 ['the Employment Contract', 'Appendix A'], the Taxpayer was employed by [Company A] as a [contract staff] in Information Technology Department. The period of employment was from 5 September 2007 to 4 September 2008.
>
> (b) The Employment Contract was governed and construed in all respects in accordance with the Laws of Hong Kong Special Administrative Region.
>
> (4) [Company A] filed employer's returns in respect of the Taxpayer for the years of assessment 2007/08 and 2008/09 showing, among others, the following particulars:

		(i)	(ii)
(a)	Period of employment:	5-9-2007 to 31-3-2008	1-4-2008 to 27-6-2008
(b)	Particulars of income:		
	Salary	$618,000	$261,000
	Bonus	216,000	-
	Leave pay	-	40,909
	Terminal awards	-	152,000
		$834,000	$453,909
(c)	Particulars of place of residence provided:	Yes	No
	Address	[concealed]	-

Period provided	4-9-2007 to 15-10-2007	-
Rent paid to landlord by employer	$24,000	-

(5) The Taxpayer did not file his tax return for the year of assessment 2007/08 within the stipulated period. The Assessor raised on the Taxpayer the following estimated assessment for the year of assessment 2007/08:

	$
Income	917,400
Less: Basic allowance	(100,000)
Net chargeable income	817,400
Tax payable thereon	103,458

(6) The Taxpayer objected against the above assessment on the ground that it was estimated. He asserted that:

(a) "Accommodation provided by [Company A] is not taxable as it is not income but an expense incurred pursuant to performance of duties."

(b) "Number of days resident in HK was approximately 100 in this period."

(7) In his tax returns for the years of assessment 2007/08 and 2008/09, the Taxpayer declared that he did not have any income chargeable to salaries tax during the years. The Taxpayer also sought for deduction of business and travel expenses of $200,000 and $50,000 for the respective years of assessment 2007/08 and 2008/09.

(8) The Assessor raised on the Taxpayer the following salaries tax assessment for the year of assessment 2008/09:

	$
Income [Fact (4)(b)(ii)]	453,909
Less: Basic allowance	108,000
Net chargeable income	345,909
Tax payable thereon	46,804

(9) The Taxpayer objected to the above assessment on the following grounds:

(a) He was not a Hong Kong resident.

(b) The assessment did not take into account of the allowable deductions.

(10) The Taxpayer asserted that:

(a) "I dispute … that Hong Kong adopts purely territorial concept for the purposes of salary taxation. There are clear exemptions for individuals who have resided in Hong Kong for up to 60 days and up to 180 days."

(b) "…I remained resident in [Country B] for the entire period I was engaged under the terms of consultancy contract for [Company A]. I maintained a residence in [Country B], and paid taxes in [Country B], and visited Hong Kong on an as needed basis. For these reasons alone I owe no tax in Hong Kong."

(c) "Income for the period 5 September 2007 through 31 March 2009 was slightly less than 7 times 90,000 or slightly less than HK$630,000."

(d) "Housing provided by [Company A] is fully deductable (sic), thus the deduction is HK$24,000."

(e) "All other travel and subsistence expenses are fully deductable (sic):

a. Housing 6 months at 18,000 or HK$108,000
b. Travel to and from [Country B] for this period, estimated at HK$225,000
c. Local travel estimated at HK$100 per business day or HK$15,000
d. Subsistence at US$100 per day estimated at HK$160,000
e. Other expenses, including the purchase of furniture (left in HK), computer printers, hand phone accounts, etc, estimated at HK$200,000."

(f) "… I effectively derived no income from this assignment, and should you deem the income taxable, than you must deem the associated expenses as tax deductions."

(g) "…during this period I suffered a retinal detachment, and incurred substantial expenses not reimbursed, and was unable to travel for a period of one month, thus this time should be added to the time I could be expected to be non-resident in Hong Kong."

(h) "I came to Hong Kong to perform a consultancy assignment for [Company A]:

a. The assignment was short term
b. I did not move my family nor apartment. The only contribution to my expenses incurred to travelling to Hong Kong where airfares, and these only initially. This is entirely consistent with consultancy assignments
c. In no way did I establish any form of permanent residence, nor did I intend to, nor attempt to do so."

(i) "Should your provisions provide that I am liable for taxation in Hong Kong, then in the first instance you must deduct all costs associated with the derived income. In the second instance you must make allowance for taxation paid elsewhere. My records reflect that the derived income was less the costs is negligible."

(11) In response to the Assessor's enquiries, [Company A] provided the following information:

(a) The breakdown of the Taxpayer's income for the years of assessment 2007/08 and 2008/09.

Year of assessment 2007/08

Date of payment	Salary ($)	Discretionary bonus ($)
21-9-2007	78,000	-
23-10-2007	90,000	-
22-11-2007	90,000	-
18-12-2007	90,000	-
23-1-2008	90,000	-
21-2-2008	90,000	216,000
19-3-2008	90,000	-
	618,000	216,000

Year of assessment 2008/09

Date of payment	Salary ($)	Annual leave ($)	Contract gratuity ($)
23-4-2008	90,000	-	-

22-5-2008	90,000	-	-
27-6-2008	81,000	40,909	152,000
	261,000	40,909	152,000

(b) All payments were credited directly to the Taxpayer's account with [Company A].

(c) The Taxpayer was not required to entertain external clients in discharging his duties. He needed to have close contact with clients within [Company A] and might occasionally be involved in some social events. If any cost was incurred, it would be reimbursed on an actual receipt basis.

(d) Flight ticket for business trip was paid by [Company A] directly. Accommodation, transportation and other expenses incurred during business trip, if any were reimbursed on an actual receipt basis. Such reimbursement would not be reported in the employer's return as part of the employee's remuneration.

(12) According to the record provided by the Immigration Department, the Taxpayer was present in Hong Kong for the following number of days:

Period	Total number of days
5-9-2007 to 31-3-2008	158
1-4-2008 to 27-6-2008	88

The Taxpayer's arrival and departure records as compiled by the Assessor are at Appendices B and B1.

(13) The Assessor now considers that the salaries tax assessment for the year of assessment 2007/08 should be revised as follows:

	$
Income [Fact (4)(b)(i)]	834,000
Rental value [Note]	16,360
	850,360
Less: Basic allowance	100,000
Net chargeable income	750,360
Tax payable thereon	92,061

Note

Period of residence provided 5-9-2007 to 15-10-2007 [Fact (4)(c)(i)]	41 days

Number of days from 5-9-2007 to 31-3-2008	209 days
Rental value $834,000 x 41/209 x 10%	$16,360'

The issues

30. We accept Mr Chan's written submissions that there are two issues that we need to consider in respect of the appeal:

(1) Whether the Taxpayer being a resident and taxpayer in Country B, should be chargeable to salaries tax in respect of his employment income from Company A for the relevant years; and

(2) If the Taxpayer is so chargeable,

(a) whether the rental value of the place of residence provided by Company A should not be included as his assessable income;

(b) whether he should be allowed deduction of the following expenses:

(i) housing expenses of $108,000 ($18,000 x 6 months);

(ii) travelling expenses between Hong Kong and Country B, estimated at $225,000;

(iii) local travelling expenses, estimated at $15,000 ($100 per business day);

(iv) subsistence expenses, estimated at $160,000 (US$100 per day);

(v) expenses on furniture, computer printers, mobile phone, etc., estimated at $200,000; and

(vi) entertainment and business expenses not reimbursed by Company A.

The law

31. The charge of salaries tax is governed by section 8 of the IRO which provides, inter alia, the following:

'*(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) …..

(1A) For the purposes 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.

(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.'

32. As can be seen, Hong Kong adopts a territorial basis for levying salaries tax. D54/94, IRBRD, vol 9, 324 clearly shows that tax is charged on every person in Hong Kong in respect of his source of income from his office or employment regardless of his residency. Hence, the residency has no bearing upon the chargeability of a taxpayer in respect of Hong Kong salaries tax.

33. It is also clear in determining whether income has a Hong Kong source or any statutory wording 'arising in or derived from Hong Kong', one should look to see where the source of the income and where the employment is located. If a taxpayer's source of employment is in Hong Kong, his entire income from his employment shall be assessable to tax although he might have rendered some of his services outside Hong Kong during the relevant year of assessment. See the Commissioner of Inland Revenue v George Andrew Goepfert 2 HKTC 210 ('Goepfert')where Macdougall J said at 238 as follows:

'*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, subject only to the so called*

'60 days rule' that operates when the taxpayer can claim relief by way of exemption under section 8(1A)(b) as read with section 8(1B). Thus, once income is caught by section 8(1) there is no provision for apportionment.'

34. In Lee Hung Kwong v Commissioner of Inland Reveue [2005] 4 HKLRD 80, Deputy Judge To (as he then was) concurred with the view put forward by Macdougall J in Goepfert and said at 89F-90A as follows:

'*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 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).'*

35. Section 12(1)(a) of the IRO provides as follows:

'*(1) In ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person-*

(a) all outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income;'

36. Therefore, the authorities with regard to the production of expenses are clear and unequivocal. In D36/90, IRBRD, vol 5, 295, the Board summarized the legal principles for construing section 12(1)(a) and stated as follows:

(1) *'It is generally accepted that the United Kingdom principles and tests relating to the words "wholly, exclusively and necessarily in the performance of the said duties" (that is, the duties of the office or*

employment) are applicable to claims for deductions under section 12(l)(a). (See, for instance, D25/87.) In Lomax v Newton 34 TC 558 at 562, Vaisey J stated: "The words are stringent and exacting; compliance with each and every one of them is obligatory if the benefit of the rule is to be claimed successfully."'

(2) *'As for the proof of expenses, the Taxpayer is faced with the task of proving that she incurred certain specific expenses and the extent to which they were incurred in the performance of her duties. In the Australian decisions cited in D25/87, emphasis was laid on the requirement of contemporaneous records and details of the expenses incurred, and in relation to entertainment expenses, the need to show with reasonable precision when, where, upon whom the sums concerned were spent, and the person or persons entertained in the process. We would adopt the same approach.'*

(3) *'It has been held that the words "in the performance of the duties" mean "in the course of the performance of the duties and not before or after the performance" (Ricket[t]s v Colquhoun [1926] AC 1, 4 and 6; CIR v Humphrey [1 HKTC 451 (R2/21-57)]). Furthermore, there is a distinction between expenses incurred in the course of producing income and those incurred for the purpose of producing income; while the former are deductible, the latter are not (CIR v Burns 1 HKTC 1181 at 1189).'*

(4) *'On the word "necessarily", Donovan LJ had this to say in Brown v Bullock 40 TC 1 at 10:*

> *" … The test is not whether the employer imposes the expense but whether the duties do, in the sense that, irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay. This result follows, in my opinion, from the decision of the House of Lords in [Ricketts] …"'*

37. In D34/00, IRBRD, vol 15, 345, again, the Board refused to allow deduction of the per diem expenses which are mere estimates on the part of the taxpayer.

38. As can be seen from the relevant authorities, the Board and the Courts have rejected expense claims that were of a private or domestic nature. For example, in Humphrey, the Court held that certain travelling expenses were not deductible because the travels between home and the office were 'of a private or personal nature'.

39. In D54/94, the Board held that the food, laundry and medical expenses incurred by the taxpayer whilst working in Hong Kong were not deductible.

40. It is also clear and not uncommon that an employer would reimburse the

business expenses necessarily incurred by its employee for performance of his duties.

41. In D5/93, IRBRD, vol 8, 110, the Board stated as follows:

> '*The Taxpayer was entitled to claim reimbursement from his employer of all entertainment expenses which were legitimately incurred by him in the performance of his duties. In fact he did claim some expenses and the same were duly reimbursed to him. What he now seeks to do is to obtain a tax benefit in respect of certain other expenses which apparently he never sought to recover from his employer. No explanation has been given to us regarding this. We find it strange that the Taxpayer would seek to obtain a comparatively small tax benefit by claiming the deduction of such alleged entertainment expenses when he has failed to claim the full benefit of the same from his employer. It does not seem sensible to us that if the Taxpayer could have recovered such expenses from his employer he would not have done so. No one is better qualified to adjudicate on the validity of business expenses than the employer. The Taxpayer was entitled to recover 100% of all entertainment expenses which he incurred in performing his duties. In the absence of an adequate explanation we must assume that the Taxpayer would have done so. Accordingly we are not able to find as a fact that the additional entertainment expenses which the Taxpayer claims were incurred by him in the performance of his duties were in fact so incurred.'*

42. In D29/06, (2006-07) IRBRD, vol 21, 554, again, the Board stated as follows:

> '*… the Taxpayer could and indeed should first seek reimbursement of transportation expense incurred in performing his official duties from his employer, Company C; instead of asking this Board to consider such expense as his employment expense for tax deduction purpose.'*

43. Section 68(4) of the IRO provides the burden of proof and provides as follows:

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

Discussion

44. We have no hesitation in accepting the submissions put forward by Mr Chan in respect of this matter.

45. Dealing with the relevant submissions, we would comment as follows:

(A) 'Should the Taxpayer's income from [Company A] be assessable to Salaries Tax?' and

(B) 'Can the Taxpayer benefit from the relief under section 8(1A)(b)(ii) and (1B)?'

46. The Taxpayer had only one employment with Company A and the source of the Taxpayer's employment was in Hong Kong. We are also of the view that the Taxpayer was not able to claim any benefit of relief pursuant to sections 8(1A)(b)(ii) and (1B) of the IRO which does not come within any of the criteria provided and indeed, the Taxpayer does not claim that he rendered services to Company A outside Hong Kong during the relevant years. On the contrary, he confirms that he came to Hong Kong to perform a consultant assignment for Company A. It is clear and unequivocal that he stayed in Hong Kong for more than 60 days in each relevant year. Therefore, the Taxpayer's income is assessable to salaries tax. We are also of the view that the Taxpayer was not in a position to claim any relief pursuant to section 8(1A)(c). He adduced no evidence to show that any part of the income in question was derived from services rendered in any territory outside Hong Kong during each relevant year of assessment.

'Is the rental value of the residence provided by [Company A] liable to tax?'

47. Again, we can answer this question quickly. It is unequivocal and clear that Company A was obliged to provide the Taxpayer with 'suitable accommodation for up to the first six weeks of his employment'. Company A did so by renting a serviced apartment and provided it rent-free to the Taxpayer. In the circumstances, it is accepted that the renting of an apartment being a free residence provided by Company A should be included as the Taxpayer's assessable income under section 9(1)(b) of the IRO.

'Should the Appellant be allowed deduction of his claimed expenses?'

48. Again, we have no hesitation in accepting that none of the expenses incurred by the Taxpayer are allowable for any form of deduction.

(a) Housing expenses

Again the Taxpayer has not adduced any contemporaneous records or evidence of such expenses. We accept that these expenses were indistinguishable from the hotel accommodation expenses and these expenses were not incurred in the course of the Taxpayer's performance of his duties.

(b) Travelling expenses between Hong Kong and Country B

Clearly, these are not deductable. Again, the Taxpayer has not adduced any contemporaneous records or evidence in respect of such expenses. These are mere estimates and given the fact that the Taxpayer was a resident in Country B, it is quite clear that he may very well have gone back to Country B for home leave or private visits. As confirmed by Company A, the travelling, accommodation and other expenses regarding the Taxpayer's business trips were either paid by or reimbursable from Company A. If the Taxpayer did claim such expenses

against Company A, these in turn were fully reimbursed to him and as such, they cannot be deductible.

(c) Local travelling expenses

Again, the Taxpayer has failed to provide any contemporaneous records or evidence to support that these should be deductible and indeed, these were just a mere estimate. Hence, we have no hesitation in rejecting these claims.

(d) Subsistence Expenses

Again, we repeat the various issues we set out above. No contemporaneous records or documentary evidence were provided. The Taxpayer provided a mere estimate which we might well view as speculation. As such, these were also not incurred in the course of the Taxpayer's performance of duties.

(e) Expenses on furniture and printer

Again, we repeat what is said above. No contemporaneous records or evidence was produced to the Board to support these expenses. They were clearly a mere estimate and again we accept that these were probably of a private or domestic nature.

(f) Entertainment and business expenses are not reimbursed by Company A

Again, such expenses are clearly not deductible for the following reasons:

(i) The Taxpayer has not adduced any contemporaneous records and evidence for such expenses and indeed, he has not even stated the exact sums he required to be deducted.

(ii) Notwithstanding his assertion that these expenses did not include those duly reimbursed by Company A, he has not shown any evidence to support such an assertion.

(iii) In any event, Company A has confirmed that the Taxpayer had been provided full reimbursement for all expenses claimed. In any event, as we have previously shown above, in D5/93 and D29/96, we accept Mr Chan's submissions that 'no one is better qualified to adjudicate on the validity of business expenses than the employer'. If these expenses were proper expenses, then the Taxpayer should have sought reimbursement from Company A instead of asking the Board to consider his deduction claim for

such expenses.

Conclusions

49. Hence, after giving very careful consideration to all submissions provided to us by the parties, we have come to the conclusion that the Taxpayer's appeal must be dismissed.