Case No. D47/01

Salaries tax – whether 'prevented' from giving the requisite notice of appeal – what are conclusive factors in determining the location of an employment – the 60-day rule – sections 8(1)(a), 8(1A)(b)(ii), 66(1A) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Anthony Ho Yiu Wah (chairman), Thong Keng Yee and Stephen Yam Chi Ming.

Date of hearing: 23 March 2001.
Date of decision: 22 June 2001.

This was an appeal, out of time, against the salaries tax assessment raised on the taxpayer for the year of assessment 1997/98. The taxpayer claimed that after his assignment to work to Japan from 1 June 1997 onwards, his employment income should not be subject to salaries tax in Hong Kong.

Held:

1. The jurisdiction of the Board to extend time for lodging an appeal was governed by section 66(1A) of the IRO.

2. The Board must be satisfied that the taxpayer 'was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a)': D9/79, IRBRD, vol 1, 354 and D3/91, IRBRD, vol 5, 537.

3. Whichever date was counted, there was nothing to 'prevent' the taxpayer from filing the necessary notice of appeal. The application for extension of time was therefore dismissed.

4. Under section 68(4) of the IRO, in an appeal, the onus is on the taxpayer to prove that the assessment appealed against is excessive or incorrect.

5. Section 8(1)(a) provides the basic charge for salaries tax. Section 8(1A)(b)(ii) of the IRO excludes income derived from services rendered by a person who renders outside Hong Kong all the services in connection with his employment.

6. The general rule established as a result of a series of Board of Review decisions, and confirmed by the decision in CIR v Goepfert (1987) 2 HKTC 210, is that it is necessary to distinguish between a source of income that is fundamentally a Hong Kong employment and a source that is fundamentally an employment outside Hong Kong. In making this distinction the place where services are rendered is irrelevant in deciding whether or not the source is a Hong Kong employment.

7. The need to render services outside Hong Kong and the reporting to the group's regional office in Malaysia were not conclusive factors in determining the location of an employment: see D40/90, IRBRD, vol 5, 306.

8. In the present case, it was quite clear that the taxpayer's employment was a Hong Kong employment, that is, his employment income arose in or was derived from Hong Kong, having regard to:

   (a) the contract of employment which was entered into in Hong Kong;

   (b) his employer which was a corporation incorporated in and with its business address in Hong Kong; and

   (c) the remuneration which was paid to him in Hong Kong.

9. The taxpayer was based in Hong Kong and had rendered services in Hong Kong during the two months, April and May 1997. He had also attended meetings in Hong Kong during the period of his assignment to Japan after 1 June 1997. Therefore, the taxpayer could not be said to have rendered outside Hong Kong all the services in connection with his single employment with Company C-HK. The exemption provision under section 8(1A)(b)(ii) was therefore not applicable.

10. On the basis that the taxpayer had rendered services in Hong Kong in connection with his employment with Company C-HK, he could only be exempted from salaries tax under section 8(1B) if such services were rendered during visits not exceeding a total of 60 days in the basis period for the year of assessment 1997/98. In the present case, irrespective of whether the taxpayer's stay in Hong Kong could be regarded as visits, since he was present in Hong Kong for a total of 82 days during the basis period from 1 April 1997 to 31 March 1998, the 60-day rule was not applicable to the taxpayer's case either.

11. The taxpayer had not paid tax on any of his income from services rendered in Japan. Accordingly, irrespective of the other conditions laid down in the legislation, he could not benefit from the section 8(1A)(c) exemption.

Appeal dismissed.

Cases referred to:

D9/79, IRBRD, vol 1, 354
D3/91, IRBRD, vol 5,537
CIR v Goepfert (1987) 2 HKTC 210
Bennet v Marshall 22 TC 73
D40/90, IRBRD, vol 5, 306

Cheung Mei Fan for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The appeal

1. This is an appeal by Mr A ('the Taxpayer') against the determination of the Commissioner of Inland Revenue dated 29 June 2000. In that determination, the Commissioner overruled the Taxpayer's objection and confirmed the salaries tax assessment for the year of assessment 1997/98 on the Taxpayer of an assessable income of $979,776 with the tax payable thereon of $132,269.

2. The assessable income in question included the employment income of the Taxpayer during the whole year of assessment 1997/98. The Taxpayer's case is that after his assignment to work to Japan from 1 June 1997 onwards, his employment income should not be subject to salaries tax (in Hong Kong).

The issues

3. There were two issues before the Board:

(a) whether extension of time should be granted to the Taxpayer for the purposes of this appeal; and

(b) whether the salaries tax assessment for the year of assessment 1997/98 raised on the Taxpayer was excessive or incorrect.

Extension of time

4. The determination was issued by the Commissioner on 29 June 2000. It was sent on the same day by registered post to the Taxpayer' s correspondence address. No notice of appeal was received by this Board until 3 January 2001. Thus, the appeal was late by more than six months.

5. The Taxpayer gave sworn evidence at the hearing before the Board and contended that he was not in Hong Kong at the material time and the determination was forwarded to and received by him in Thailand in September 2000. After receipt of the determination, the Taxpayer wrote two letters both dated 17 September 2000 to the Inland Revenue Department (' IRD') objecting to the determination.

6. Subsequent to 17 September 2000, there were a couple of letters exchanged between the Taxpayer of the one part and the IRD or the Board of the other part but no appeal was lodged by the Taxpayer until 28 December 2000 and which was received by this Board on 3 January 2001.

7. The Taxpayer in his notice and statement of grounds of appeal dated 28 December 2000 requested extra time to appeal on the ground that the time delays were entirely due to the IRD ignoring repeated notifications of change of address given by him and the determination had been sent to his old address, namely, Address B.

8. From the materials submitted by the Revenue and the evidence given at the hearing, we do not find the aforesaid criticism of the IRD justified:

(a) The determination was issued to the Taxpayer on 29 June 2000. It was sent by registered post to Address B.

(b) Although the Taxpayer had claimed that the determination had been sent to an incorrect old address (see paragraph 7 above), the Taxpayer admitted under cross-examination that in his tax return filed on 12 May 2000 for the year of assessment 1999/2000, Address B was still used as his postal address. It transpired from the further evidence given by the Taxpayer that Address B was not an incorrect old address but was the address of his girl friend and when he visited Hong Kong, he sometimes stayed in Address B and sometimes not, probably depending on whether his girl friend was in Hong Kong at the material time, both the Taxpayer and his girl friend happened to be frequent travellers.

(c) To be fair to all concerned, there is insufficient evidence before us to show which party was at fault causing the initial delay in the actual receipt of the determination by the Taxpayer. Fortunately, it is not necessary for us to make a determination on this point. The Taxpayer himself admitted and it is common ground that at

least by 17 September 2000 when he wrote two letters both dated 17 September 2000 to the IRD, he had received the determination and he should by then be fully aware of the requirements and time limits of lodging an appeal to the Board of Review.

(d) It may well be that when the Taxpayer found out about the determination on or about 17 September 2000, he was unsure what to do because on the face of it, the appeal period had by then already expired. It may well be that he then wished to seek professional advice, but there was no justification for a further delay of more than three months as the notice of appeal with a request for extension of time was not submitted until 28 December 2000 and received by the Board on 3 January 2001. Thus, the appeal was late for more than five months counting from the date of issue of the determination and it was late for more than two months if time started to run from the date on which the Taxpayer had become aware of the determination.

9. The relevant statutory provision on the preliminary issue of extension of time is section 66(1A) of the IRO which provides that if the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1).

10. The jurisdiction of this Board to extend time for lodging an appeal is closely governed by section 66(1A) of the IRO. This Board must be satisfied that the Taxpayer '*was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a)*'. In D9/79, IRBRD, vol 1, 354, the Board pointed out that:

> '*The word "prevented" is opposed to a situation where an appellant is able to give notice but has failed to do so. In our view therefore neither laches nor ignorance of one's rights or of the steps to be taken is a ground upon which an extension may be granted.*'

11. In Case A112 (1991) HKRC 80-112 (D3/91, IRBRD, vol 5, 537), the taxpayer was one day late and a differently constituted Board emphasised that:

> '*The delay in filing the second notice of appeal was only one day but that is not the point. Time limits are imposed and must be observed. Anyone seeking to obtain the exercise of the discretion of a legal tribunal must demonstrate that they are "with clean hands" and that there are good reasons for the extension of time*'.

12. In the light of the aforesaid authorities, we are not prepared to extend time in favour of the Taxpayer. Even accepting that there might have been no fault on the part of the Taxpayer that the determination did not reach his hands until 17 September 2000, there was nothing to ' prevent' the Taxpayer from filing the necessary notice of appeal from that point onwards and the appeal was late for more than two months even if time only started to run from 17 September 2000. We therefore dismiss the Taxpayer' s application for extension of time. It follows that no appeal is properly before us and the assessment in question must stand.

The merits

13. We had heard evidence and arguments on the substantive issue of whether the salaries tax assessment for the year of assessment 1997/98 raised on the Taxpayer was excessive pending our decision on the preliminary issue of extension of time. Having given our decision on the preliminary issue, it is strictly unnecessary for us to express any view on the substantive appeal. But having heard the evidence and having regard to the efforts put into this case by both the Taxpayer and the Revenue, we will give a summary of our findings of facts and briefly express our views on the substantive issues.

The relevant facts

14. The relevant facts of the present appeal are as follows:

(a) Company C-Asia is a private company incorporated in Hong Kong. It later changed its name to Company C-HK on 9 January 1998. At all relevant times, it carried on a business in Hong Kong at Address D.

(b) Company C-HK is a subsidiary of Company C-UK, a United Kingdom company. Company C-HK was one of a number of worldwide companies of the group called ' Company C International' .

(c) By a letter dated 1 February 1997 bearing the name of ' Company C International' and Address D (' the February Letter'), Mr E, the operations director, offered the Taxpayer the position of operations manager at the Hong Kong office. Mr E was in charge of Company C-HK during the period from February 1997 to March 1998.

(d) On 7 February 1997, the Taxpayer accepted the aforesaid job offer by signing a document in Hong Kong known as ' Acknowledgement of principal terms and conditions of service' (' the Acknowledgement Letter').

(e) By another letter dated 1 June 1997 bearing the name of 'Company C International' and Address D ('the June Letter'), Mr E offered to the Taxpayer the position as business development manager at the Japan office at 1,400,000 JYN per month. Company C-HK's name appeared at the foot of the letter.

(f) By a further letter dated 7 August 1997 ('the August Letter'), Mr E reconfirmed with the Taxpayer regarding his transfer to Japan for a term of one year commencing from 1 July 1997. It was stated in the letter that the Taxpayer would return to Company C-HK under the same terms and conditions upon the completion of his assignment.

(g) To assist the Taxpayer in obtaining a Japan visa, Mr E issued two letters dated 7 August 1997 and 27 November 1997 bearing the name of Company C-HK which confirmed that the Appellant was assigned from Company C-HK to supervise the implementation of a new software by a client of the group in Japan. It was also mentioned in the November letter that the Taxpayer would return to Hong Kong following his assignment.

(h) Prior to 1 June 1997, the Taxpayer was employed as operations manager in Hong Kong. After 1 June 1997, the Taxpayer moved to Japan to conduct a liaison and market development role. He ceased to have any responsibility for staff or customers of the Hong Kong operation but he did return to Hong Kong a number of times mostly for holidays or for obtaining visas for Japan. He did, however, attend a conference in Hong Kong in September 1997 at which he conducted presentations on progress and opportunities in Japan. Originally, the Taxpayer reported to Mr E. After moving to Japan, he reported to the regional office of the group in Malaysia.

(i) Despite the posting of the Taxpayer to Japan since 1 June 1997, it is common ground that the Taxpayer held a single continuous employment throughout the year of assessment 1997/98. It is the contention of the Taxpayer that during the relevant period, he was employed by Company C-UK (see paragraph 15 below) whereas it is the contention of the Revenue that the Taxpayer was employed by Company C-HK.

(j) Throughout the period from 1 April 1997 to 31 March 1998, the Taxpayer's remuneration was approved by Mr E and was paid in Hong Kong dollars into his bank account maintained in Hong Kong. The Taxpayer's remuneration was borne by and charged in Company C-HK's accounts.

(k) During the three years of assessment 1996/97 to 1998/99, Company C-HK reported the remuneration of the Taxpayer in the capacity as his employer. In

the employer' s returns and the notification, it was stated that the Taxpayer was neither wholly nor partly paid by any overseas concern either in Hong Kong or overseas.

(l) During the period from 1 April 1997 to 31 March 1998, the Taxpayer was present in Hong Kong for a total of 82 days.

(m) The Taxpayer did not pay any tax in Japan in respect of his income during the period from 1 June 1997 to 31 March 1998.

The Taxpayer' s contentions

15. It is the Taxpayer' s contention that at all relevant times, he held an employment with Company C-UK instead of Company C-HK. He was initially assigned to work in Company C-HK and was later transferred to the representative office in Japan. He further argued that since he no longer held any responsibilities with Company C-HK and did not render any services for Company C-HK as from 1 June 1997, his income as from 1 June 1997 onwards should not be subject to salaries tax (in Hong Kong).

16. In support of his aforesaid contention, the Taxpayer relied on the fact that on the Acknowledgement Letter signed by him when he accepted the employment offer (referred to in paragraph 14(d) above), the name and address of Company C-UK was printed. The Taxpayer further submitted that he was employed on Company C' s terms and conditions of service and agreed to abide by the rules in the Company C staff handbook and that ' Company C' in the aforesaid context meant Company C-UK.

17. Upon cross-examination and in answer to questions from this Board, however, the Taxpayer admitted that the Acknowledgement Letter was simply a document prepared by making a copy of the form from the Company C staff handbook and completing the blanks thereof and furthermore, the Company C staff handbook in question was the staff handbook for use in Hong Kong. The Taxpayer further admitted that the handbook was actually prepared by the Taxpayer himself and because of time constraints, he used the Company C-UK handbook as precedent and modified it to comply with Hong Kong conditions. In the circumstances, we do not accept that the appearance of the name and address of Company C-UK on the Acknowledgement Letter would be sufficient to support the Taxpayer' s contention that his employer was Company C-UK in the face of other evidence favouring Company C-HK to be his employer. Indeed, in answer to a follow-up question, the Taxpayer admitted that he was employed on terms and conditions set out in a Hong Kong handbook.

The law

18. Section 68(4) of the IRO provides that '*the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant*'.

19. (a) Section 8(1) of the IRO provides that '*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 following sources–*

(i) any office or employment of profit; and

(ii) …'.

(b) Section 8(1A)(a) extends the basic charge under section 8(1)(a) to cover employment income from services rendered in Hong Kong including leave pay attributable to such services.

(c) Section 8(1A)(b)(ii) excludes income derived from services rendered by a person who renders outside Hong Kong **all** the services in connection with his employment.

(d) In determining whether or not a person renders all services 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.

(e) Section 8(1A)(c) excludes income derived by a person from services rendered by him outside Hong Kong where he has paid tax of substantially the same nature as Hong Kong salaries tax in the territory where the relevant services are rendered.

20. The general rule established as a result of a series of Board of Review decisions, and confirmed by the decision in CIR v Goepfert (1987) 2 HKTC 210, is that it is necessary to distinguish between a source of income that is fundamentally a Hong Kong employment and a source that is fundamentally an employment outside Hong Kong. In making this distinction the place where services are rendered is irrelevant in deciding whether or not the source is a Hong Kong employment.

21. We also reminded ourselves of the judgment of the Court of Appeal in Bennet v Marshall 22 TC 73, and in particular, the words of Sir Wilfrid Greene, MR, who said:

> ' *The House of Lords …in Foulsham v Pickles 9TC 261 have definitely decided that, in the case of an employment, the locality of the source of income is not the place where the activities of the employee are exercised but the place either where the contract for payment is deemed to have a locality or where the payments for the employment are made, which may mean the same thing.'*

22. The need to render services outside Hong Kong and the reporting to the group's regional office in Malaysia are not conclusive factors in determining the location of an employment. This proposition is supported by the Board of Review decision D40/90, IRBRD, vol 5, 306.

> ' *We accept the submission by the Taxpayer that his terms of employment and the manner in which he performed his services were substantially different from other employees of the employer in Hong Kong. We accept that he was required to travel extensively outside of Hong Kong and perform services outside of Hong Kong. We likewise accept that for operational purposes the Taxpayer reported to senior staff in USA in the course of performing his services as internal auditor.*
>
> *However, none of the foregoing affects the real source of his income or the place of his employment. In so far as he was performing services overseas, we are to disregard such facts (the Goepfert decision). To whom he reported within the multi-national group of companies does not affect the nature or place of his employment. He was as a matter of fact employed by a company in Hong Kong. If those to whom he reported in practice wished to terminate his services, they could only do so through his employer in Hong Kong.'*

Analysis of the case

23. In the present case, it is quite clear that the Taxpayer's employment was a Hong Kong employment, that is, his employment income arose in or was derived from Hong Kong, having regard to the following factors:

(a) the contract of employment was entered into in Hong Kong;

(b) his employer was a corporation incorporated in and with its business address in Hong Kong (in this connection, we do not accept the contention of the Taxpayer that his employer was Company C-UK instead of Company C-HK for reasons stated in paragraph 17 above); and

(c) the remuneration was paid to him in Hong Kong.

24. The Taxpayer was based in Hong Kong and had rendered services in Hong Kong during the two months April and May 1997. He had also attended meetings in Hong Kong during the period of his assignment to Japan after 1 June 1997. It follows that the Taxpayer cannot be said to have rendered outside Hong Kong all the services in connection with his single employment with Company C-HK. In the circumstances, the exemption provision under section 8(1A)(b)(ii) is not applicable.

25. On the basis that the Taxpayer had rendered services in Hong Kong in connection with his employment with Company C-HK, he can only be exempted from salaries tax under section 8(1B) if such services were rendered during visits not exceeding a total of 60 days in the basis period for the year of assessment 1997/98. In the present case, irrespective of whether the Taxpayer' s stay in Hong Kong could be regarded as visits, since he was present in Hong Kong for a total of 82 days during the basis period from 1 April 1997 to 31 March 1998, the 60-day rule is not applicable to the Taxpayer' s case either.

26. Finally, the Taxpayer has not paid tax on any of his income from services rendered in Japan. Accordingly, irrespective of the other conditions laid down in the legislation, he cannot benefit from the section 8(1A)(c) exemption.

Conclusion

27. Having considered all the evidence and the facts before us, we are of the view that the Taxpayer has failed to provide sufficient evidence to convince us that the assessment raised on him was excessive or incorrect. Hence, if it had been necessary for us to adjudicate on the issue, we would have dismissed the appeal on merits and would have confirmed the assessment.