Case No. D47/97

Salaries tax – section 8(1A)(1B) – services rendered outside Hong Kong – whether liable to salaries tax.

Panel: Audrey Eu Yuet Mee SC (chairman), Edward Chow Kam Wah and David Wu Chung Shing.

Date of hearing: 11 July 1997.
Date of decision: 10 September 1997.

Appeal dismissed.

Cases referred to:

CIR v George Andrew Goepfert 2 HKTC 210
CIR v So Chak Kwong, Jack 2 HKTC 174
D12/94, IRBRD, vol 9, 131

Tsui Siu Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

THE APPEAL

1. The Taxpayer appeals against the determination of the Commissioner dated 27 September 1996 in respect of the salaries tax assessment raised on him for the year of assessment 1994/95. The Taxpayer claims that he should not be assessed to salaries tax because he performed his services out of Hong Kong.

THE FACTS

2. The following facts are not in dispute.

3. The Taxpayer was employed by Company A under a contract dated 19 July 1993 to work as the general manager of Company B, China. His renumeration and benefits were provided for under the contract.

4. During the relevant year, the Taxpayer was in Hong Kong for the dates shown on page 12 of the IRD bundle. According to the Inland Revenue which counts each part day, the Taxpayer was in Hong Kong for 188 days. According to the Taxpayer who counts the complete days, he was in Hong Kong for 104 days.

5. The employer's return filed by the employer showed that his income for the year was $793,000.

6. Initially, the Taxpayer submitted a letter from his employer which certified that the Taxpayer was required to work extensively in China and no service was required in Hong Kong. On further inquiries from the Inland Revenue, the employer submitted another letter which stated as follows:

> 'Being appointed as the general manager of a cotton mill operated by the Group, the Taxpayer was required to station in the cotton mill in PRC and oversee the operations of the factory which include the overall production, planning, material sourcing and export sales matters etc.
>
> In addition to his duties in PRC, the Taxpayer was also required to travel frequently to Hong Kong to visit the raw material suppliers and customers for sales follow-up. All these matters are solely connected to the cotton mill's import and export business. The Taxpayer is only required to report to the Board of Directors and attend progress meeting when necessary.'

7. The Taxpayer accepts that he worked in Hong Kong. But he claims that his work in Hong Kong was performed for the factory in China.

THE LAW

8. The law in this area is well established even though it often seems illogical and unfair to a taxpayer.

9. The basic charge provision is section 8 of the Inland Revenue Ordinance. This provides that salaries tax shall be charged on every person in respect of his income arising in or derived from Hong Kong from his employment. If a taxpayer's source of employment is located in Hong Kong, his entire income from this employment is assessable to tax even if he rendered part of his service outside Hong Kong. CIR v George Andrew Goepfert 2 HKTC 210.

10. Even if the source of employment is located in Hong Kong, section 8(1A) provides that income arising in or derived from Hong Kong excludes income derived from services rendered by a person who renders outside Hong Kong ***all*** the services in connection with his employment. But even if a person performs ***some*** services in Hong Kong, he does not have to pay tax if he visited Hong Kong for less than 60 days in the tax year (section 8 (1B)). It is important to point out that this 60 days exclusion does not mean 60 working days but only 60 days of visits. Therefore, if the taxpayer was physically present for more

than 60 days, he will have to pay tax even if he worked on one (or less) of those days. Conversely no tax is payable if he worked all the time during his stay in Hong Kong provided the visits do not exceed 60 days. CIR v So Chak Kwong, Jack 2 HKTC 174 is the relevant authority where Mortimer J said:

> *'The Board of Review was persuaded that section 8(1B) was ambiguous and capable of two interpretations. I disagree. In this regard this Section is clear and unambiguous. The words "not exceeding a total of 60 days" qualify the word "visits" and not the words "services rendered". Were it otherwise the Section would be expressed differently. In order to take the benefit of the Section therefore a Taxpayer must not render services during visits which exceed a total of 60 days in the relevant period.'*

11. As to the calculation of the 60 days, there is authority to say that even part of a day will count as a day. D12/94. This may lead to the absurd result in some cases of more than 365 days in a year. But for this case, even on the calculation of the Taxpayer, the visits exceeded 60 days.

12. We should add that in the determination, the Commissioner found that section 8 (1B) did not apply. She said that the Taxpayer's home was in Hong Kong and he could not be regarded as making 'visits' during his stay in Hong Kong. Again, fortunately for our purpose, we do not have to decide this point for reasons that will be apparent later.

REASONS

13. The Taxpayer's employer was a Hong Kong company. The contract and the pay was in Hong Kong. There is no doubt that the employment was sourced in Hong Kong. He admitted that he performed work in Hong Kong but argued that this was work for the factory in China. Indeed, his position as the general manager of the factory required part of his services to be performed in Hong Kong. But his position as the general manager was by virtue of his employment contract with the employer. At all times, he had only one employer and one employment contract. All the services he rendered, whether in Hong Kong or in China or elsewhere were in respect of this one employment with the same employer. In the circumstances, he had not rendered ***all*** his services outside Hong Kong. And he cannot rely on section 8 (1B) because even if his stay in Hong Kong is regarded as 'visits', such visits exceeded 60 days.

14. While we sympathize with the frustration of the Taxpayer, we have to apply the law as it is and we accordingly dismiss the appeal.