INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D49/94

Salaries tax – employment overseas – services rendered in Hong Kong – method of calculating income arising in Hong Kong.

Panel: Kenneth Kwok Hing Wai QC (chairman), Gregory Robert Scott Crichton and Ng Yin Nam.

Date of hearing: 11 October 1994.
Date of decision: 16 November 1994

The taxpayer was employed by an overseas company and was required to work in Asia/Pacific including Hong Kong. It was agreed that the employment of the taxpayer was located outside of Hong Kong and that his income should be apportioned. The assessor sought to assess salaries tax on a time basis. The taxpayer maintained that the income should be allocated according to a formula established by the employer. The taxpayer appealed to the Board of Review.

Held:

In such circumstances the Inland Revenue Ordinance assesses to tax that part of the income which relates to services rendered in Hong Kong. The appropriate formula to follow was 'days in – days out'. The costs allocation formula used by the employer was not relevant.

Appeal dismissed.

Case referred to:

CIR v George Andrew Goepfert 2 HKTC 210

Howard Bale for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal out of time (pursuant to leave granted by the Board of Review with no objection by the representative for the Commissioner of Inland Revenue) against the determination dated 7 May 1994 by the Commissioner of Inland Revenue, confirming

the salaries tax assessments for the years of assessment 1990/91 and 1991/92, as revised by the Commissioner in his determination.

The Facts

2.1 Although the employer's returns for the 2 relevant years were submitted by Company A as the Taxpayer's employer, it was common ground at the hearing that Company A International was the employer of the Taxpayer.

2.2 The Taxpayer was employed as from 14 May 1990 as an employee of Company A International for Asia/Pacific, with Company A as his base location.

2.3 Monthly payments to the Taxpayer were credited to his bank account in Hong Kong through autopay. The transfer was arranged through Company A but charged out and reimbursed by branches of Company A International in Asia Pacific that the Taxpayer covered.

2.4 During the period from 14 May 1990 to 31 March 1991, the Taxpayer spent 118 days out of Hong Kong of which 99 days were for business purposes and 19 days for vacation.

2.5 During the period from 1 April 1991 to 31 March 1992, the Taxpayer spent 125 days out of Hong Kong of which 93 days were for business purposes and 32 days for vacation.

The Assessor's View

3. The assessor was of the view that the Taxpayer's employment was located outside Hong Kong and that the Taxpayer's income from employment should be apportioned on a time basis and only the portion attributable to his services rendered in Hong Kong should be subject to tax, and assessed salaries tax for the 2 years in question on that basis.

The Taxpayer's Contention

4. The assessor's view that the Taxpayer's employment was located outside Hong Kong was not challenged by the Taxpayer. What the Taxpayer challenged was apportionment on a time basis. The Taxpayer contended that apportionment should be in accordance with the cost allocation formulae established by the headquarter of Company A. Such formula was based on the number of branches covered with reference to the branch's size and total revenue to come up with a modulated allocation ratio. According to such formula, Company A's share was 12.8% for the period between 14 May 1990 and 31 December 1990, 11.3% for the period between 1 January 1991 and 31 December 1991, and 10.1% for the period between 1 January 1992 and 31 March 1992.

The Commissioner's Determination

5. The Commissioner rejected the Taxpayer's contention and confirmed the assessor's assessments on a time in and time out basis, subject to a revision whereby 61 days [35 Sundays, 17 Saturdays (½) and 9 holidays] were deducted from the number of days in Hong Kong for the first year in question and 73 days [39 Sundays, 23 Saturdays (½) and 11 holidays] were deducted from the number of days in Hong Kong for the second year. As the deduction of 'non-working' days was not an issue in this appeal, we express no opinion on the deduction by the Commissioner which resulted in a lower chargeable income for the Taxpayer.

Ground of Appeal

6. In his appeal, the Taxpayer contended that his income should be apportioned in accordance with Company A's costs allocation formula.

Section 8(1), (1A) & (1B)

7. Section 8 of the Inland Revenue Ordinance (the IRO), Chapter 112, provides that:

> *'(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:*
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> *(a) any office or employment of profit; and*
>
> *(b) any pension.*
>
> *(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment:*
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> *(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services;*
>
> *(b) excludes income derived from services rendered by a person who:*
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> *(i) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft; and*
>
> *(ii) renders outside Hong Kong all the services in connection with his employment; and*

(c) excludes income derived by a person form 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.'

Our Decision

8.1 It is common ground that the Taxpayer's employment was not Hong Kong employment and did not fall within the basic charge to salaries tax under section 8(1).

8.2 Subsection (1B) is inapplicable as the Taxpayer's 'visits' to Hong Kong in each of the 2 years exceeded a total of 60 days, assuming but without deciding that the Taxpayer was a 'visitor'.

8.3 Paragraph (b) of subsection (1A) is of no avail to the Taxpayer as he did not render all the services in connection with his employment outside Hong Kong.

8.4 The Taxpayer did not seek to rely on paragraph (c) of subsection (1A), and neither alleged nor tendered any evidence of the payment of any tax in any territory outside Hong Kong.

9. However, the Taxpayer did derive income from employment in respect of which he rendered services in Hong Kong. The phrase *'all income derived from services rendered in Hong Kong'* in paragraph (a) of subsection (1A) is unqualified. The services need not be for the benefit of any Hong Kong person, corporation or business. Where a person performed services both in and outside Hong Kong, an apportionment of his total income is necessary. The apportionment must be carried out on a basis or a formula which relates to the *'services rendered in Hong Kong'*. Company A's costs allocation formula may be considered by the management to be a fair allocation among branches having the benefit of the Taxpayer's services, but it has absolutely no relation with the question of the services actually rendered by the Taxpayer in Hong Kong. The Taxpayer submitted that part of his services rendered in Hong Kong was for the benefit of branches of Company A International outside Hong Kong. That, in our judgment, is irrelevant. In CIR v George Andrew Goepfert 2 HKTC 210, all the services performed by the respondent were for the benefit of companies outside Hong Kong (page 224). Macdougall J dismissed the appeal of

the Commissioner against the decision of the Board of Review excluding the respondent's emoluments attributable to the 41 days spent by the respondent outside Hong Kong. What Macdougall J said at page 238 is opposite to the appeal before us:

> *'On the other hand, if a person, whose income does not fall within the basic charge to salaries tax under section 8(1), derives income from employment in respect of which he rendered services in Hong Kong, only that income derived from the services he actually rendered in Hong Kong is chargeable to salaries tax. Again, this is subject to the "60 days rule".*
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> *Thus the respondent, who in the light of the Board's findings does not fall within the basic charge imposed under section 8(1), is only liable to pay salaries tax on the whole of the income derived from the services he actually rendered in Hong Kong. Since he rendered services outside Hong Kong for 41 days he is not liable to salaries tax in respect of the income attributable to those services. In other words his income for salaries tax purposes is apportioned on a "time in time out" basis.'*

10. For these reasons, we reject Company A's costs allocation formula as the basis for ascertaining *'all income derived from services rendered in Hong Kong'*. The Taxpayer has not discharged the onus under section 68(4) of proving that any of the assessments appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessments appealed against.