

Case No. D54/09

Salaries tax – whether services in connection with employment rendered outside Hong Kong - sections 8(1), 8(1A), 8(1B) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Lee Lai Lan and Woo Lee Wah Cecilia.

Date of hearing: 15 December 2009.

Date of decision: 3 February 2010.

The Taxpayer was assigned by his employer Company B, to work in City D as the Acting Regional General Manager, Region E from 16 October 2006 to 31 March 2008.

The Taxpayer claimed that his income of \$1,662,736 should be fully exempted from salaries tax for the year of assessment 2007/08 as all the related services were rendered outside Hong Kong.

The Commissioner of Inland Revenue did not accept the exemption claim of the Taxpayer.

The Taxpayer objected.

Held:

1. The Taxpayer's employment with Company B was located in Hong Kong.
2. The Taxpayer's entire income should be assessable to salaries tax unless he did render all his services in connection with his employment outside Hong Kong such that he could benefit from the relief under section 8(1A)(b)(ii).
3. The Board rejected the Taxpayer's contention that in the year of assessment 2007/08, he performed no services when he was in Hong Kong:
 - The aggregate period of the Taxpayer's stay in Hong Kong of 203 days (of which 91 days were weekdays) was exceptionally long.
 - The Taxpayer's duty was to deal with the international operations and to look after the clients and external markets in 70 countries. His presence would not have been required in City D or in Region E and he must have carried out some duties in Hong Kong.

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- There had been records of telephone communications between Country H, Country F and Hong Kong through the Taxpayer's mobile phone and emails and messages sent by the Taxpayer to his Group Managing Director in Country H. The Taxpayer also had had a meeting with his members of staff in Hong Kong for which he made a business expense claim. All of which must have been work related.
- The Taxpayer failed to provide any satisfactory evidence or explanation to prove the negative that he did not do anything on behalf of Company B during the time he spent in Hong Kong.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v George Andrew Goepfert 2 HKTC 210
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
D54/97, IRBRD, vol 12, 354
D2/04, IRBRD, vol 19, 76

Taxpayer in person.

Chan Sze Wai and Yip Chi Chuen for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by Mr A ('the Taxpayer') in respect of an objection to the salaries tax assessment for the year of assessment 2007/08. By a Determination dated 6 August 2009 ('the Determination'), the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') determined that the salaries tax assessment for the year of assessment 2007/08 showing a net chargeable income of \$1,550,736 with tax payable thereon of \$228,125 was reduced to a net chargeable income of \$1,533,429 with tax payable thereon of \$225,182.

2. The issue which the Board needs to consider is whether the Taxpayer's income from his employment should be excluded from the charge to salaries tax pursuant to section 8(1A)(b)(ii) of the Inland Revenue Ordinance ('IRO').

Agreed facts

3. We now set out the relevant facts on which the parties were able to agree and therefore find these facts as agreed facts:

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- (1) [Mr A] [“the Taxpayer”] has objected to the Salaries Tax assessment for the year of assessment 2007/08 raised on him. The Taxpayer claims that he did not render any services in Hong Kong during the year, and thus his income for that year should not be chargeable to Salaries Tax.
- (2) [Company B] was incorporated as a private company in Hong Kong on 31 October 1986. At all relevant times, [Company B] engaged in the provision of medical emergency assistance services, the sale of medical kits and investment holding. It maintained a business address at [Address C], Hong Kong.
- (3) (a) The Taxpayer commenced his employment with [Company B] as General Manager, Hong Kong on 15 June 1997. He became a director of [Company B] on 6 November 1999. Since 6 February 2006, he has served in the company as the Director of Group Compliance.
- (b) By a letter dated 4 October 2006, [Company B] assigned the Taxpayer to work in [City D] as the Acting Regional General Manager, [Region E]. The assignment covered the period from 16 October 2006 to 31 March 2008 [“the Assignment Period”].
- (4) [Company B] filed an employer’s return in respect of the Taxpayer for the year ended 31 March 2008. In that return, [Company B] declared the Taxpayer’s remuneration in the amount of \$1,662,736.
- (5) In his Tax Return – Individuals for the year of assessment 2007/08, the Taxpayer declared the same income particulars as per Fact (4). However, he claimed that the income should be fully exempted from Salaries Tax as all the related services were rendered outside Hong Kong.
- (6) The Assessor did not accept the above exemption claim. He raised on the Taxpayer the following Salaries Tax assessment for the year of assessment 2007/08:

	\$
Income [Fact (4)]	1,662,736
<u>Less:</u> Retirement scheme contributions	<u>12,000</u>
	1,650,736
<u>Less:</u> Basic allowance	<u>100,000</u>
Net Chargeable Income	<u>1,550,736</u>
Tax Payable thereon	<u>228,125</u>

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- (7) The Taxpayer objected to the above assessment on the ground that his income earned for the year of assessment 2007/08 should not be chargeable to Salaries Tax. He contended that the income “does not derive from work in or relating to Hong Kong”.
- (8) In correspondence with the Assessor, the Taxpayer claimed the following:
- (a) “My employer, [Company B], is a legal entity in Hong Kong. I have been working for this company since 1997, however, since October 2006, I have been seconded to its affiliates in [Country F] and have been working in [City D] as the Regional General Manager for [Region E]. This role does not involve any responsibility or function in Hong Kong. This secondment lasted until 31st March 2008.”
 - (b) “[During the Assignment Period], all services in connection with my employment with [Company B] were rendered in the site of assignment which is [City D, Country F], as stated in the assignment contract. This period covers the entire period of salaries tax assessment for the year 2007/08.”
 - (c) “During [the Assignment Period], my direct reporting was to the Group Managing Director of [Group G] who was based in our [Country H] Corporate office at [Address I]. I also had functional responsibility to the Group Director, Sales and Marketing and ultimate responsibility to the Chairman and President of [Group G], who was based in our [City J] office, [Country K].”
 - (d) “The [Country F] company and the Hong Kong company, although have no direct relationship with each other, are both within the group of companies under [Group G] with our corporate offices in [Country H] and [City J]. There is no reporting between the [City D] position and the Hong Kong company.”
 - (e) As the Acting Regional General Manager, [Region E], the Taxpayer received instructions and directions from the corporate offices in [Country H] and [City J] via e-mail, telephone communications and face-to-face meetings in [City J], [Country H] or [City D].
 - (f) “During [the Assignment Period], I have not visited the Hong Kong office to carry out any duties including:

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- (i) Attending meetings,
 - (ii) Receiving/providing training,
 - (iii) Reporting to or receiving instructions from seniors,
 - (iv) Reporting work progress,
 - (v) Entertaining clients in any form,
 - (vi) Carrying products of any form between [City D] and Hong Kong, and
 - (vii) Performing any supporting and liaison work.”
- (9) At the Assessor’s request, the Taxpayer submitted his travel itinerary for the period from 1 April 2007 to 31 March 2008 [“the Relevant Period”].
- (10) The Assessor also requested [Company B] to supply information in respect of the Taxpayer’s employment. In reply, [Company B] stated the following:
- (a) “Our Hong Kong office working hours [are] Monday to Friday, 9:00 am to 6:30 pm. During 2007/08, [the Taxpayer] was assigned to [City D, Country F] in the capacity of Acting Regional General Manager of our [Region E]. The [City D] office working hours [are] Monday to Friday, 9:00 am to 6:00 pm.”
 - (b) “During [the Relevant Period, the Taxpayer] has no sick leave or compensatory leave taken. Please see his annual leave records as following, total 29 days:
 - 4 Apr 2007 to 12 April 2007 : 6 days
 - 16 Jul 2007 to 3 Aug 2007 : 15 days
 - 17 Oct 2007 & 18 Oct 2007 : 2 days
 - 26 Dec 2007 to 28 Dec 2007 : 3 days
 - 4 Feb 2008 to 6 Feb 2008 : 3 day[s] ”
 - (c) “As we understand, during [the Relevant Period, the Taxpayer] was back to Hong Kong for rest & recreation break only. He has not rendered any services in Hong Kong.”
 - (d) “There is no duty carried out by [the Taxpayer] in Hong Kong during [the Relevant Period].”
 - (e) When queried about the basis on which the statements referred to in Fact (10)(c) and (d) were made, [Company B] responded as follows:

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- (i) “The statement[s] [are] not made on the basis of any contemporaneous records, but on the Company’s expectation of responsibility and job duty of a Regional General Manager that this duty cannot be carried out when away from the country of assignment on vacation.”
 - (ii) “[The Taxpayer] has no relevant and necessary business activities on behalf of the Company in Hong Kong during his assignment to [Country F].”
 - (iii) “[T]here were no data record available in our Office Security System that [the Taxpayer] was physically present in our Hong Kong Office during the [Relevant Period].”
- (11) Based on the information provided by the Immigration Department, the Assessor ascertained that the Taxpayer had stayed in Hong Kong for 203 days during the Relevant Period.
- (12) By comparing the travel itineraries compiled by the Taxpayer and the Assessor, the Assessor noticed the following:
- (a) In his submitted travel itinerary, the Taxpayer claimed that he had been absent from Hong Kong on quite a number of weekdays during the Relevant Period. However, according to the records of the Immigration Department, the Taxpayer was present in Hong Kong on the following whole weekdays:

Month/Year	Days in Hong Kong	No. of days
4/2007	2 (Mon)	1
5/2007	2 (Wed), 3 (Thu), 4 (Fri), 22 (Tue), 23 (Wed), 25 (Fri)	6
6/2007	11 (Mon), 12 (Tue), 13 (Wed), 14 (Thu), 15 (Fri)	5
8/2007	6 (Mon), 7 (Tue), 8 (Wed)	3
9/2007	3 (Mon), 4 (Tue), 5 (Wed), 6 (Thu), 7 (Fri), 10 (Mon), 11 (Tue), 12 (Wed), 13 (Thu), 14 (Fri), 28 (Fri)	11
10/2007	15 (Mon), 16 (Tue), 23 (Tue)	3
11/2007	6 (Tue), 7 (Wed), 8 (Thu), 9 (Fri), 12 (Mon), 13 (Tue), 22 (Thu)	7
12/2007	20 (Thu)	1
1/2008	10 (Thu), 11 (Fri), 21 (Mon), 22	5

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	(Tue), 23 (Wed)	
2/2008	11 (Mon), 12 (Tue), 13 (Wed), 14 (Thu), 15 (Fri), 18 (Mon), 19 (Tue), 20 (Wed), 21 (Thu), 22 (Fri)	10
3/2008	3 (Mon), 4 (Tue), 5 (Wed), 18 (Tue), 25 (Tue), 26 (Wed), 27 (Thu), 28 (Fri), 31 (Mon)	9
Total		61

- (b) The Taxpayer also claimed that he had spent all time in Hong Kong on the following weekdays, either for unknown reasons or reasons which the Assessor found they could not be the case:

Month/Year	Days in Hong Kong	Reason(s) for stay given by the Taxpayer	No. of days
4/2007	13 (Fri)	Annual leave ⁽¹⁾	1
5/2007	21 (Mon)	Weekend ⁽²⁾	1
8/2007	9 (Thu), 10 (Fri), 27 (Mon)	Weekend ⁽²⁾	4
	31 (Fri)	No explanation given	
9/2007	17 (Mon)	Weekend ⁽²⁾	1
10/2007	2 (Tue)	Weekend ⁽²⁾	2
	22 (Mon)	Annual leave ⁽¹⁾	
11/2007	5 (Mon)	[Country F] holiday ⁽³⁾	2
	23 (Fri)	Weekend ⁽²⁾	
12/2007	3 (Mon), 4 (Tue), 5 (Wed), 6 (Thu), 7 (Fri), 10 (Mon), 11 (Tue)	No explanation given	10
	21 (Fri), 24 (Mon), 31 (Mon)	Annual leave and [Country F] holidays ⁽¹⁾ and ⁽³⁾	

Month/Year	Days in Hong Kong	Reason(s) for stay given by the Taxpayer	No. of days
1/2008	7 (Mon), 8 (Tue), 9 (Wed)	[Country F] holidays ⁽³⁾	3
2/2008	25 (Mon), 26 (Tue), 27 (Wed), 28 (Thu), 29 (Fri)	Weekend and [Country F] holidays ⁽²⁾ and ⁽³⁾	5
3/2008	17 (Mon)	Weekend ⁽²⁾	1
Total			30

- Note: (1) The Taxpayer did not take annual leave on the relevant dates [Fact (10)(b)].
(2) The relevant days were not Saturday or Sunday.
(3) Save for 25 February 2008, which was the Monday following [Holiday T] of 23 February 2008 on

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Saturday, the relevant days were not [Country F] public holidays [Fact (16)(b), infra].

- (13) The Assessor wrote to the Taxpayer inviting him to comment on the findings referred to in Fact (12), and requesting him to adduce further evidence to account for his weekdays' presence in Hong Kong during the Relevant Period.
- (14) In reply to the Assessor's above letter, the Taxpayer stated the following:
- (a) "During my time working at our [City D] office, since I was there alone without family, I worked through weekends and public holidays and then use this time to exchange for 'rest and recreation' days ['R&R Days'] in Hong Kong with my family."
- (b) During the Relevant Period, the Taxpayer claimed that he had worked in [City D] office on 37 weekends and 2 public holidays, the details of which were as follows:

Day of working	Nature of day	Accumulated no. of working days
15-4-2007	Weekend	1
21-4-2007	Weekend	2
22-4-2007	Weekend	3
1-5-2007	[Country F] holiday [Note]	4
9-5-2007	[Country F] holiday [Note]	5
12-5-2007	Weekend	6
13-5-2007	Weekend	7
2-6-2007	Weekend	8
3-6-2007	Weekend	9
17-6-2007	Weekend	10
23-6-2007	Weekend	11

Day of working	Nature of day	Accumulated no. of working days
24-6-2007	Weekend	12
7-7-2007	Weekend	13
8-7-2007	Weekend	14
12-8-2007	Weekend	15
18-8-2007	Weekend	16
19-8-2007	Weekend	17
25-8-2007	Weekend	18
22-9-2007	Weekend	19
23-9-2007	Weekend	20

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6-10-2007	Weekend	21
7-10-2007	Weekend	22
20-10-2007	Weekend	23
27-10-2007	Weekend	24
28-10-2007	Weekend	25
17-11-2007	Weekend	26
18-11-2007	Weekend	27
25-11-2007	Weekend	28
15-12-2007	Weekend	29
16-12-2007	Weekend	30
13-1-2008	Weekend	31
26-1-2008	Weekend	32
27-1-2008	Weekend	33
2-2-2008	Weekend	34
3-2-2008	Weekend	35
9-2-2008	Weekend	36
8-3-2008	Weekend	37
9-3-2008	Weekend	38
22-3-2008	Weekend	39
Note : Fact (16)(b)(i), infra		

- (c) “The role of the Regional General Manager is an ‘in-country’ one. It is extremely difficult, if not impossible, to conduct the full function of the position outside of the country of responsibility.”
- (d) “During the period of my assignment to [City D], there were a number of conditions that affected my travel schedule:
- 1) Direct flights from Hong Kong to [City D] were limited to one flight every Monday (early morning), Wednesday, and Friday. These flights are operated by [Airline P] and code share with [Airline Q].
 - 2) Direct flights from [City D] to Hong Kong are limited to one flight every Tuesday, Thursday and Saturday. These flights are operated by [Airline P] and code share with [Airline Q].
 - 3) Flights between Hong Kong and [City D] were very often full.
 - 4) The application for business visa to [Country F] must be submitted from outside of [Country F].”

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- (e) “[My successor for the position of Regional General Manager of Region E] joined the company in February 2008 to go through an intense 2 months of orientation, starting from one month in [City D] followed by one month in our Corporate offices. This allows me the opportunity to take extended absence from the office in February 2008 to be with my family in Hong Kong.”
- (15) Based on his above assertions, the Taxpayer compiled a schedule to account for his presence in Hong Kong referred to in Fact (12). In that schedule, the Taxpayer attributed his relevant presence to the following reasons:

(a) Annual leave (9 days)

2 April 2007, 13 April 2007, 20 December 2007, 21 December 2007, 11 February 2008, 12 February 2008, 13 February 2008, 14 February 2008 and 15 February 2008.

(b) [Country F] holidays (12 days)

2 May 2007, 12 June 2007, 5 November 2007, 24 December 2007, 31 December 2007, 7 January 2008, 8 January 2008, 9 January 2008, 10 January 2008, 11 January 2008, 25 February 2008 and 26 February 2008.

(c) R&R Days (39 days)

Date of R&R Day	Accumulated no. of R&R Days
21-5-2007	1
22-5-2007	2
23-5-2007	3
25-5-2007	4
11-6-2007	5
6-8-2007	6
7-8-2007	7
8-8-2007	8
9-8-2007	9
10-8-2007	10
3-9-2007	11
4-9-2007	12
5-9-2007	13
6-9-2007	14
7-9-2007	15
10-9-2007	16

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11-9-2007	17
Date of R&R Day	Accumulated no. of R&R Days
12-9-2007	18
13-9-2007	19
14-9-2007	20
3-12-2007	21
4-12-2007	22
5-12-2007	23
6-12-2007	24
7-12-2007	25
18-2-2008	26
19-2-2008	27
20-2-2008	28
21-2-2008	29
22-2-2008	30
27-2-2008	31
28-2-2008	32
29-2-2008	33
3-3-2008	34
4-3-2008	35
25-3-2008	36
26-3-2008	37
27-3-2008	38
28-3-2008	39

(d) Stopover and/or waiting for flight to overseas (26 days)

3 May 2007, 4 May 2007, 13 June 2007, 14 June 2007, 15 June 2007, 27 August 2007, 31 August 2007, 17 September 2007, 28 September 2007, 2 October 2007, 15 October 2007, 16 October 2007, 22 October 2007, 23 October 2007, 13 November 2007, 22 November 2007, 23 November 2007, 10 December 2007, 11 December 2007, 21 January 2008, 22 January 2008, 23 January 2008, 5 March 2008, 17 March 2008, 18 March 2008 and 31 March 2008.

(e) Application for renewal of [Country F] visa (5 days)

6 November 2007, 7 November 2007, 8 November 2007, 9 November 2007 and 12 November 2007.

(16) The Assessor has since ascertained the following matters:

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- (a) [Company B] submitted a revised employer's return for the year ended 31 March 2008 in respect of the Taxpayer. In that return, [Company B] declared the Taxpayer's total remuneration in the amount of \$1,645,429.
- (b) (i) According to the information from the homepage of the Consulate General of [Country F] in the Hong Kong Special Administrative Region, the [Country F] public holidays include:

Month	Dates of holidays	Name of holidays
January	01, 02, 03, 04, 05	[Holiday R]
	07	[Holiday S]
February	23	[Holiday T]
March	08	[Holiday U]
May	01	[Holiday V]
	09	[Holiday W]
June	12	[Holiday X]
November	04	[Holiday Y]

- (ii) If the date of observance of any of the above holidays falls on Saturday or Sunday, then the following Monday will be designated as a holiday.
- (c) Among the 37 weekends on which the Taxpayer claimed to have worked in [City D] [Fact (14)(b)], he was found to have arrived at or departed from Hong Kong on the following 10 weekends:

Date	Time of arrival	Time of departure
15-4-2007	-	23 : 57
17-6-2007	-	23 : 25
12-8-2007	-	22 : 53
25-8-2007	13 : 33	-
20-10-2007	22 : 27	-
25-11-2007	-	08 : 12
13-1-2008	-	23 : 30
2-2-2008	-	08 : 03
9-2-2008	22 : 46	-
22-3-2008	22 : 23	-

- (d) According to the information from the Hong Kong Observatory, Hong Kong time is X hours ahead of [City D] time.

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(e) According to the information from [Airline P] – [Country F] Airlines, the flight time between Hong Kong and [City D] is about X hours.

(17) Taking into account all the above facts, the Assessor maintains his view that the Taxpayer should not be granted any exemption in respect of his income from [Company B]. However, given the revised employer's return referred to in Fact (16)(a), the Assessor now considers that the Taxpayer's 2007/08 Salaries Tax assessment should be revised as follows:

	\$
Income [Fact (16)(a)]	1,645,429
<u>Less</u> Retirement scheme contributions	<u>12,000</u>
:	
	1,633,429
<u>Less</u> Basic allowance	<u>100,000</u>
:	
Net Chargeable Income	<u>1,533,429</u>
Tax Payable thereon	<u>225,182</u> '

The evidence

4. The Taxpayer gave evidence before us. He confirmed that he was employed with Company B as General Manager, Hong Kong on 15 June 1997. He became a director of Company B on 6 November 1999 and since 6 February 2006, was the Director of Group Compliance. Company B provides health and security services in respect of travel including evacuation procedures.

5. Company B is part of a group which operates in over 70 countries. In approximately 2006, there was need for someone to look after the Group's operations in City D and Region E.

6. The City D operation was structured through a Country F company that was 95% owned by a BVI holding company which in turn owned Company B.

7. The Taxpayer was assigned to work in City D as the Acting Regional General Manager. He obtained a business visa for a one-year period that was subsequently renewed. He did not obtain a work permit.

8. His role in City D was to ensure the smooth operation of their activities in City D and Region E. He was a figurehead where he would meet from time to time government officials and the media.

9. He lived in a hotel which was near his office. There were some 122 people

employed in City D with 600 people within the region. He did not need to travel extensively within Region E.

10. He reported to Country H, his reporting line was to Mr L. He made it clear to us that he was allowed to go back to Hong Kong as and when he wanted to. He accepted that in the relevant year of assessment, he returned to Hong Kong on numerous occasions. He spent 203 days in Hong Kong during the relevant year of assessment of which 91 days were weekdays. He accepted that this was a substantial amount of time spent in Hong Kong over the relevant period. He confirmed that he had a verbal agreement with Mr L to allow him to spend time with his family. He had three young children and his daughter was studying for her IGCSE exams.

11. He told us that when he came to Hong Kong, he did not do any work whatsoever in Hong Kong. He may have made two or three phone calls to the City D office. He also confirmed that he sent some emails whilst he was in Hong Kong with regard to approval of various business expenses. He did receive instructions and directions via email and telecommunications during his time in Hong Kong. However, he indicated to us that these were very limited.

12. He also confirmed that he did have a meeting and a lunch on 21 February 2008 at Restaurant M with members of the Hong Kong office. He told us that this was just before Chinese New Year and since he was about to come back to Hong Kong, he felt it was a good idea to have a social lunch with his Hong Kong team. However, it is clear that he did make a claim for reimbursement as to the cost of this lunch.

13. During the course of the evidence, he made it clear that the reason for coming to Hong Kong was to be with his family, to do the relevant household chores and to assist and help his wife since she was working. However, he did employ a domestic helper.

14. He did accept that he could have received various emails, he did communicate with his colleagues and might very well have received some instructions with regard to work that was needed to be carried out.

The law

15. Sections 8(1), 8(1A) and 8(1B) provide as follows:

‘(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) *.....*
- (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.'*

16. Section 8(1) is the basic charging section whereby income arising in or derived from Hong Kong from any office or employment shall be assessable to salaries tax. Whether the income is 'arising in or derived from Hong Kong', one should look to see where the source of the income and the employment is located. If a taxpayer's source of employment is in Hong Kong, his entire income from this employment shall be assessable to tax even though he may have rendered some of his services outside Hong Kong during the relevant year of assessment. In Commissioner of Inland Revenue v George Andrew Goepfert 2 HKTC 210, Macdougall J. ('the Goepfert case') at 238 said 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.'

17. In Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80 ('the Lee Hung Kwong case'), Deputy Judge To (as he then was) concurred with the view of Macdougall J in Goepfert and said the following at pages 89F to 90A:

'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).'

18. It is also clear that if a taxpayer's income has a source in Hong Kong, he may still rely on the relief under section 8(1A)(b)(ii) if he 'renders outside Hong Kong all the services in connection with his employment'. In addition, for the purpose of such relief, 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'. In respect of a claim by the Taxpayer that he rendered outside Hong Kong all services in connection with his employment, this is a question of fact which the Board shall determine in the light of all the evidence in its totality.

19. In a particular case where a taxpayer lodges a claim for no service in Hong Kong notwithstanding his exceptionally long stay in the territory, the Board will need to call for an explanation as to why he did not have to work during the long period of stay in Hong Kong. The Board considered this matter in D54/97, IRBRD, vol 12, 354 at page 358 where the Board stated as follows:

'This is an appeal case and according to section 68(4) the burden of proof is on the Taxpayer to show that the Commissioner is wrong. In this case the Commissioner was not satisfied that "the Taxpayer rendered outside Hong Kong all the services in connection with her employment and section 8(1A)(b) is, thus, not applicable." Therefore, the Taxpayer has to prove to us that during her stays in Hong Kong she did not render any service in connection with her employment. The aggregate period of her stays in Hong Kong is exceptionally long: according to the Revenue's calculation it has a total of 251. She has to explain to us why during this long period she did not have to work at all. To prove the negative is not at all easy. We cannot accept bare assertion by the Taxpayer without looking into other evidence. We have to take into consideration all the evidence in its totality.'

20. In D2/04, IRBRD, vol 19, 76 at page 82, the Board also stated as follows:

‘Having considered the evidence and the manner in which the taxpayer responded to questions, we have come to the conclusion that he has not discharged the burden on him to show that he performed all his services outside Hong Kong during the period in question. The taxpayer was a senior executive. Part of his duty was to report to the chief executive officer, and another part of his duty was to supervise his staff. In this day and age, with the advent of telecommunication, such duties can be performed practically anywhere, and certainly when the taxpayer was in Hong Kong. We would need a great deal more than what has been adduced in evidence to be satisfied that a senior executive such as the taxpayer who spent up to 90 days including 14 whole working days in Hong Kong did not perform any of his services in Hong Kong. We need only say that we are unpersuaded that this is the case.’

21. The IRO does not define what constitutes services in the context of section 8(1A)(b)(ii). ‘Services’ is a term of wide import. In D54/97 at page 359, there, the taxpayer admitted that she *‘made calls to factory to check production progress and other matters relating to manufacturing while she was waiting in Hong Kong for a new return permit’*. She also stated that she *‘sometimes received calls from the Company’s factory in Country B either by telephone or pager in respect of urgent matters and she gave instructions to deal with them while she was in Hong Kong’*. There, the Board held that all these activities amounted to *‘rendering services in Hong Kong irrespective whether she was in Hong Kong for holidays or otherwise’*.

Burden of proof

22. Section 68(4) of the IRO provides as follows:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

23. The Taxpayer is obliged to show to us that he did not provide any service whatsoever in connection with his employment on each and every occasion when he came to Hong Kong during the relevant period of assessment.

Discussion

24. It is accepted from the evidence before us and by the agreed facts that the Taxpayer’s employment with Company B was indeed located in Hong Kong. Company B is a company incorporated in Hong Kong and has a place of business in Hong Kong. During the relevant period, the Taxpayer was continued to be paid his monthly salary and transport allowance as per his contract of employment in Hong Kong.

25. Following the Goepfert case and the Lee Hung Kwong case, we accept the submissions of Mr. Chan on behalf of the Deputy Commissioner that the Taxpayer’s entire income should be assessable to salaries tax irrespective of where his services might have been rendered unless he could benefit from the relief under section 8(1A)(b)(ii) as

interpreted by section 8(1B).

26. Therefore, we need to consider carefully as to whether or not the Taxpayer did render all his services in connection with his employment outside Hong Kong during the relevant period of assessment. The Taxpayer also only had one employment with Company B. In his evidence before us and in his submissions, the Taxpayer claimed that all his services were rendered outside Hong Kong during the relevant period and that his visits to Hong Kong were only to see his family. In short, the Taxpayer asserts that he performed no services when he was in Hong Kong.

27. Having considered matters carefully and having looked at all the evidence, submissions and documents before us, we reject such a contention for the following reasons:

- (a) In respect of the relevant year of assessment, the Taxpayer spent 203 days in Hong Kong. This was a very lengthy amount of time that he spent away from the office in City D. Out of the 203 days, 91 days were weekdays. The Taxpayer's duties pursuant to his terms of employment did not define particularly as to where he would perform his tasks. Indeed, he did not have a work permit in Country F and only had a business visa. It is clear that he could have worked for Company B or Company N (City D) during the relevant period of time.
- (b) His duties as Acting Regional Manager included the smooth daily operation of all units, facilitating business and management decisions and as well as being the legal representative. Those particular tasks were not confined to him sitting in front of his computer or at a trading desk. Instead, the Taxpayer was there to deal with the international operations and to look after the relationship between the clients and external markets in 70 countries. It is therefore inconceivable that during his stay in Hong Kong for 203 days, his presence would not have been required in City D or in Region E. It is therefore obvious that he must have carried out some duties in Hong Kong during the relevant period of time.
- (c) The telephone records that were submitted show he did make some calls through the mobile phone that was given to him by the City D office. There were communications between Country H, Country F and Hong Kong on that particular phone. Those messages in our view must have been work related.
- (d) From the documents that we have had sight of, there were some further emails and messages that were sent by the Taxpayer to his Group Managing Director in Country H, these were in respect of various approval of business expense claims, etc. Hence, it is clear that he must have done some services by electronic means during the time he spent

in Hong Kong.

- (e) He did have a meeting with his members of staff at Restaurant M on 21 February 2008 and in turn, made a business expense claim. We have no hesitation in coming to the conclusion that this gathering must have been work related. We reject his contention that this was just a social gathering which was to lay the foundation for his return to Hong Kong once his assignment in City D had been completed.
- (f) The Taxpayer also placed some reliance on various letters from the Group Managing Director confirming that he only returned to Hong Kong for rest and recreation. However, he did not call the authors of the letters. We attach little weight to those letters.
- (g) The Taxpayer emphasized to us that he was in Hong Kong only to look after his family and to do his various chores. However, the Taxpayer has not provided us with any satisfactory evidence or explanation to show that he did not do anything on behalf of Company B during the time he spent in Hong Kong. We were not satisfied that a senior person as the Taxpayer did not perform any services in Hong Kong.

Conclusion

28. Having considered all matters carefully and having regard to the evidence we heard and the submissions made to us, we have no hesitation in dismissing the appeal and upholding the assessment.