INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D54/89

Salaries tax – source of income – principles in Goepfert decision applied – Hong Kong contract of employment – section 8(1) of the Inland Revenue Ordinance.

Panel: Anthony F Neoh QC (chairman), Anthony N C Griffiths and Frank Pong Fai.

Date of hearing: 15 August 1989.
Date of decision: 25 September 1989.

The taxpayer was employed by a company in Hong Kong to perform services in Hong Kong and China. The taxpayer spent more time working in Hong Kong than in China.

Held:

The income of the taxpayer arose in and derived from Hong Kong. The test set out in CIR v Goepfert was applied.

Appeal dismissed.

Cases referred to:

CIR v George Andrew Goepfert 2 HKTC 210
Bennet v Marshall 22 TC 73
Foulsham v Pickles [1923] 4 KB 413

S McGrath for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The Taxpayer has objected to the salaries tax assessment for the year of assessment 1986/87 raised on him.

2. On 11 September 1987, the assessor raised the following 1986/87 salaries tax assessment on the Taxpayer:

Principal income	$130,000

Less: Allowances	60,000
Net chargeable income	$70,000
Tax payable thereon	$12,000

3. Upon the Taxpayer's objection, the Commissioner issued his determination on 1 February 1989 upholding the assessor. From this determination, the Taxpayer now appeals.

4. The point for the determination by this Board, is whether the income upon which the assessment appealed against is 'income arising in or derived from the Colony' in the terms of section 8 of the Inland Revenue Ordinance.

5. The facts are fully set out in the Commissioner's determination dated 1 February 1989 as supplemented by the documents appended thereto. Insofar as the facts are necessary for decision, they are:

(a) that by a letter dated 12 September 1985, the Taxpayer entered into a contract of employment with X Limited, a Panamanian company with offices in Hong Kong.

(b) that by the said letter of employment, the Taxpayer's place of employment was stated to be at 'offices of X Limited in Hong Kong, and including regular visits to the Zhuhai Special Economic Zone PRC. Official office hours:

9:00 a.m. to 6:00 p.m.	Monday to Friday and
9:00 a.m. to 1:00 p.m.	Saturday'.

(c) that the Taxpayer was employed as 'assistant to the director of project co-ordination'.

(d) that according to an itinerary and copies of travel documents supplied by the Taxpayer (appendices E & E-1 to the Commissioner's determination), the Taxpayer visited China 76 times during the year ended 31 March 1987, the year of assessment in question. On 73 of those 76 occasions, the Taxpayer returned to Hong Kong on the same day and that on the three remaining occasions, namely, 28 April, 23 June and 28 August 1987, he stayed in China for a total of five days.

6. The Taxpayer, who chose not to give evidence, did not in his submissions specifically challenge the facts stated in the Commissioner's determination, though in his written notice of appeal dated 27 February 1989, he stated, inter alia,

(a) that X Limited was an agent of Y Limited.

(b) that his employment was negotiated in Hong Kong through X Limited and the letter of employment was signed in Zhuhai, China.

(c) that actually his employer was the Y Limited, which is a company incorporated in PRC.

(d) that his salary was actually paid out of a site supervisory fund belonging to the Y Limited.

(e) that his place of work was Zhuhai, China and that he was only required to perform his duty in China.

7. By a letter dated 3 December 1987 to the assessor, the Taxpayer's employer, X Limited, stated as follows:

(a) that the 'negotiation, conclusion and acceptance of the terms and conditions of the employment took place in Hong Kong within a couple of weeks before the signing of the letter of employment.'

(b) that the Taxpayer's salary 'was actually paid out of a site supervisory fund belonging to Y Limited, a company incorporated in the People's Republic of China.'

(c) that the 'site' was situated in Zhuhai Special Economic Zone.

(d) that the fund was managed by X Limited.

(e) that X Limited 'had assisted in the recruitment of [the Taxpayer] who was in Hong Kong from time to time in order to seek advice from consultants and to attend various meetings etc in connection with the site supervision work in the Zhuhai Special Economic Zone.'

8. In answer to questions put by the Board, the Taxpayer said, inter alia,

(a) that while he was not required by his employer to be in Zhuhai, he was required to attend X Limited offices in Hong Kong.

(b) that while at X Limited offices he would have to attend meetings and consultation with consultants in connection with his work in Zhuhai.

(c) that otherwise while he was at the offices of X Limited he would do no other work than read books.

(d) that he was paid monthly by way of X Limited's cheques. These cheques would be delivered by a messenger every month to him.

9. Having considered the documents and the submissions of the Taxpayer and the representative of the Revenue, this Board makes the following findings of fact:

(a) that the Taxpayer's contract of employment with X Limited was entered into, in Hong Kong.

(b) that the Taxpayer was employed by X Limited which acted on its own account as principal rather than as agent for a third party.

(c) that while the Taxpayer was not working in Zhuhai, he was required to work at X Limited's (his employer's) offices. During this period, he was required to attend meetings and consultations with consultants in connection with his work in Zhuhai. Accordingly, the Taxpayer did perform duties pursuant to his employment in Hong Kong for the period that he was not required to work in Zhuhai.

(d) that the Taxpayer had only spent 76 days during the year of assessment in question in Zhuhai. The rest of his working time during the year of assessment was spent working for X Limited in Hong Kong.

10. Section 8(1) of the Inland Revenue Ordinance states:

> ' Salaries tax subject to the provisions of this Ordinance, is 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) any pension'.

11. The Taxpayer was in remunerative employment and therefore the question for determination is whether such remuneration was 'income arising in or derived from Hong Kong'.

12. Upon the evidence, we have no doubt that the Taxpayer's remuneration was chargeable to salaries tax in the terms of section 8(1) of the Ordinance. In coining to this conclusion, we are guided by the decision of Mr Justice MacDougall in the case of CIR v George Andrew Goepfert 2 HKTC 210. At 237 of this decision, Mr Justice MacDougall stated that 'it is necessary to look for the place where the income really comes to the employee, that is to say, where the source income, the employment, is located. As Sir Wilfrid Greene said, regard must first be had to the contract of employment'. Earlier in his

decision, at 235, the learned Judge cited Sir Wilfrid Greene, MR in Bennet v Marshall 22 TC 73, as having concluded thus:

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

13. In the instance case, the contract of employment was entered into in Hong Kong. It is a contract of employment for performance of services both in Hong Kong and in Zhuhai. On the evidence the time spent in the course of employment in Hong Kong far exceeded that spent in Zhuhai. The Taxpayer was paid by a Hong Kong employer pursuant to a contract of employment entered into, in Hong Kong. The fact that he was paid by a site supervisory fund which was set up by a third party is in our view irrelevant. How the Taxpayer's employer decides for fund itself to pay its employee's salaries is in our view not relevant to the issue before us. By the test set out in CIR v Goepfert, we are satisfied that the salary of the Taxpayer paid as a result of his employment with X Limited is 'income arising in or derived from Hong Kong' in the terms of section 8(1) of the Inland Revenue Ordinance.

14. In a careful and extremely well written submission, Miss McGrath for the Revenue, drew our attention to section 8(1A) and (1B) of the Inland Revenue Ordinance. As the Taxpayer had admitted that for the period that he was not required to perform his duties in Zhuhai, he had to attend X Limited's offices pursuant to his contract of employment, he will not be able to claim the exemptions under section 8(1A)(b) of the Ordinance. We, therefore, need not consider the question as to whether or not he was a visitor under section 8(1B) of the Ordinance.

15. In the circumstances, we must dismiss the appeal.