Case No. D59/03

Salaries tax – salaries tax is chargeable in respect of income arising in or derived from Hong Kong from any employment – source of income – the place where the services were performed is irrelevant – statutory 60 day grace period – the test to apply – 'totality of facts' test – the 'three factors' test as provided in the Departmental Interpretation and Practice Notes No 10 (Revised) ('DIPN 10 (Revised)') – onus of proof on the taxpayer – the taxpayer failed to prove that his employment was a non-Hong Kong source employment – time basis assessment not applicable – validity of determination – sections 8(1), 8(1A), 8(1B), 63, 64(4), 66(1) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Anna Chow Suk Han (chairman), Peter R Griffiths and Peter Sit Kien Ping.

Date of hearing: 28 May 2003.
Date of decision: 26 September 2003.

By letter of employment dated 17 September 1999, the taxpayer was appointed as director of human resources of Company A, which was registered as an overseas company in Hong Kong and, at all material times, maintained an office in Hong Kong ('the Hong Kong Office').

The Hong Kong Office applied for, on behalf of the taxpayer, an employment visa to take up employment with Company A in Hong Kong.

During the period from 1 December 1999 to 31 March 2000, the taxpayer was provided with quarters in Hong Kong by the Hong Kong Office.

The taxpayer objected to the salaries tax assessment for the year of assessment 1999/2000 raised on him.

The taxpayer contended that his assessable income should be apportioned between the number of days he spent within and outside Hong Kong and only that portion which related to the periods he spent within Hong Kong should be subject to tax.

There were two issues on appeal:

(a) the preliminary issue on the procedural point, that is, whether the determination was invalid because it was dated 29 November 2003 and was not served in accordance

with the provisions of section 64(4) of the IRO which requires it to be served within one month after the determination is made;

(b) the substantive issue on the source of the taxpayer's employment.

The facts appear sufficiently in the following judgment.

Held:

1. Findings on the preliminary issue – validity of the determination

(a) Section 64(4) of the IRO requires the Commissioner to transmit his determination in writing within one month after his determination of the objection.

(b) In the present case, the printed date '29 November 2003' appeared at the very end of the written determination, below and after the signature and the printed name of the Commissioner.

(c) The Board observed from other cases that the date of the determination usually appeared at the end of the written determination and after the signature and the printed name of the maker of the determination.

(d) The Board had no evidence or reason to believe that the date so appeared in the present written determination was meant to be something else.

(e) Since the date '29 November 2003' appeared at the very end of the written determination had not yet occurred, that date was an obvious error.

(f) The written determination was sent to the taxpayer together with a letter dated 29 January 2003 also by the Commissioner. By this letter the Commissioner informed the taxpayer that his objection had been considered and rejected and his determination, together with the reasons therefor and the statement of facts upon which the determination was arrived at, was enclosed in accordance with section 64(4) of the IRO.

(g) Since the written determination was sent together with the notice dated 29 January 2003, coupled with the information supplied by the Commissioner to the representative over the telephone on 27 February 2003, the Board disagreed with the representative that there was no evidence to support that the determination was made on 29 January 2003.

(h) Furthermore, there was no denial on the part of the taxpayer that the notice and the written determination were received by the representative on behalf of the taxpayer on 30 January 2003 and in response thereto the notice of appeal was served by the representative on the taxpayer's behalf on 28 February 2003 under section 66(1) of the IRO.

(i) Section 63 provides that no notice or other proceeding purporting to be in accordance with the provisions of the IRO shall be deemed to be void or be affected by reason of a mistake therein if the same is in substance and effect in conformity with or according to the intent and meaning of the IRO.

(j) The Board concurred with the Revenue's view that the making of a determination by the Commissioner came within the meaning of the term 'other proceeding' in section 63.

(k) Thus, the Board found that pursuant to the provisions of section 63 of the IRO, the validity of the written determination was not affected by the error.

2. Findings on the substantive issue

(a) Section 8(1) of the IRO is the basic charging section for salaries tax, whereby salaries tax is chargeable in respect of income arising in or derived from Hong Kong from any employment.

(b) Section 8(1A)(a) is an extension of section 8(1), which creates a liability to salaries tax additional to the basic charge under section 8(1).

(c) It has been well accepted and also confirmed in the Goepfert case that in deciding whether income arises in or is derived from Hong Kong from any employment, regard is had to the place where the income really comes to the employee, that is, where the source of income, the employment, is located and in determining the source of employment for salaries tax purposes, the place where the services were performed is irrelevant to the enquiry.

(d) It was not in dispute by the parties that if the source of the taxpayer's employment was located in Hong Kong, his entire income would be subject to salaries tax under section 8(1) of the IRO and no apportionment could be made with reference to the services rendered outside Hong Kong.

(e) On the other hand, if the source of the taxpayer's employment was located outside Hong Kong, only such part of his income derived from services

rendered in Hong Kong including leave pay attributable to such services would be subject to salaries tax under section 8(1A)(a) but no account shall be taken of services rendered in Hong Kong during the taxpayer's visits not exceeding a total of 60 days in the basis period of the year of assessment.

3. The test to apply

(a) The Board found no justification for the representative's view that the so-called 'totality of facts' test was disregarded in the Goepfert case and that factors other than the aforesaid three factors would be looked at only when the arrangements leading to the existence of the contract of employment were in doubt or the contract of employment was a sham.

(b) On the contrary, the Board was of the view that MacDougall J in the Goepfert case approved the application of the so-called 'totality of facts' test in determining the issue 'where the source of income, the employment, is located'.

(c) It was clear from the Goepfert case (see passages at page 237 therein) that MacDougall J was in favour of applying the so-called 'totality of facts' test which he thought represented the process of scrutinizing all evidence and examining all factors relevant to the case. Indeed, he did not conclude from the relevant passage of Lord Normand that only where the contract of employment was a sham, the so-called 'totality of facts' test should apply.

(d) Macdougall J expressed in that case that the Commissioner may look behind the appearances to discover the reality and was entitled to scrutinize all evidence, documentary or otherwise, that was relevant to the matter. He believed that this process might perhaps equate to the application of the so-called 'totality of facts' test.

(e) The Board was unable to reconcile the promulgation of the three factors by the Inland Revenue Department ('IRD') with the findings of Macdougall J in the Goepfert case.

(f) As expressed in all Departmental Interpretation and Practice Notes, its notes were issued for the information and guidance of taxpayers. They had no binding force and did not affect a person's right of objection or appeal to the Commissioner, the Board of Review or the Courts.

(g) Having carefully considered the relevant legal authorities cited and the arguments from both parties, the Board concluded that there was nothing in

the Goepfert case or the Departmental Interpretation and Practice Notes No 10 ('DIPN 10') or DIPN 10 (Revised) to preclude the Commissioner from applying the 'totality of facts' test instead of the 'three factors' test in determining the source of the taxpayer's employment.

(h) Further, the Board found no justification for the representative to only consider the six factors referred to in DIPN 10 in applying the 'totality of facts' test.

(i) While it was its stance that there was nothing to preclude the Revenue from applying the 'totality of facts' test in this case, the Board found that the taxpayer has failed to satisfy even the 'three factors' test as provided in DIPN 10 (Revised). It is provided therein that a 'non-Hong Kong' employment exists where the following three factors are present, namely:

(i) the contract of employment was negotiated and entered into, and is enforceable outside Hong Kong;

(ii) the employer is resident outside Hong Kong; and

(iii) the employee's remuneration is paid to him outside Hong Kong.

4. The place where the contract of employment was negotiated and concluded

(a) The Board was of the opinion that the contract of employment was concluded in Hong Kong on 11 October 1999, based on the following objective facts that:

(i) a letter of employment dated 17 September 1999 was issued by Company A under its Hong Kong office address and signed by Mr I, a director of Company A stationed in Hong Kong;

(ii) Mr I was in Hong Kong on 17 September 1999; the taxpayer accepted the terms in the letter of employment on 17 September 1999;

(iii) it was a term in the letter of employment that the employment was to commence on 11 October 1999 and the offer of employment was conditional on the success of the taxpayer's work permit application and Company A receiving two satisfactory references;

(iv) a sponsor's certificate sponsoring the taxpayer's application to be allowed into HKSAR for the purpose of taking up employment with

Company A's Hong Kong office was signed by Company A's Hong Kong office on 11 October 1999.

(b) Although the offer and the acceptance of the taxpayer's contract of employment took place on 17 September 1999, the conclusion of the contract of employment was suspended until the fulfillment of the two specified events.

(c) The contract of employment could only have concluded in Hong Kong when the taxpayer's work permit was granted by the Immigration Department of Hong Kong upon or after Company A's Hong Kong office signing the sponsor's certificate and Company A's Hong Kong office would not have signed the sponsor's certificate unless the two references were received.

5. The place where the contract is enforceable

The Board found that the taxpayer's contract of employment was enforceable in Hong Kong on the basis of the following facts:

(a) The employer was Company A.

(b) Company A was incorporated in the Cayman Islands while it was also registered as an overseas company under Part XI of the Companies Ordinance Hong Kong at the material times. It had a place of business in Hong Kong.

(c) Company A was capable of suing and being sued in Hong Kong.

(d) The contract of employment bore the address of Company A's Hong Kong office.

(e) The location of the contract of employment was Hong Kong.

(f) The taxpayer's position in Company A was a director of human resources for Asia Pacific region stationed in Hong Kong.

(g) It was stated in his contract of employment that he was to report to the ' President, Asia Pacific'. The president, Asia Pacific was Mr I who was also stationed in Hong Kong.

(h) The taxpayer's place of residence at the material times was in Hong Kong.

(i) The taxpayer's salary was paid in Hong Kong dollars.

(j) A housing refund and a car allowance were provided to the taxpayer every month also in Hong Kong dollars.

(k) The taxpayer's vacation was 15 working days for each year of service in addition to the announced public holidays in Hong Kong.

(l) The taxpayer was eligible for medical benefits and insurance policy in accordance with the rules of Company A's medical scheme. The medical scheme of Company A was taken out with an insurance company which is a member of an insurance group in Hong Kong.

(m) The taxpayer participated in Company A's provident fund scheme. Company A's provident fund scheme was taken out with a provident fund scheme provider in Hong Kong with contributions made in Hong Kong and paid in Hong Kong dollars. The taxpayer joined the Mandatory Provident Fund Scheme on 1 December 2000 when MPF was launched in Hong Kong.

6. The place where the employer is resident

(a) The IRD's position on the matter as stated in DIPN 10 (Revised) was that 'in considering this matter the term "resident" will be given its ordinary meaning. In this context a corporation will be regarded as being resident outside Hong Kong if it has its central management and control outside Hong Kong'.

(b) As held in the De Beers case, a company resides, for tax purposes, where its real business is carried on and the true rule is that the real business is carried on where the central management and control actually abides. This is a well established and accepted legal principle. Thus, the question for the Board to decide was where Company A's central management and control was exercised.

(c) The taxpayer's claim that the central management and control of Company A was exercised by its holding company, Company D, in the United States of America while the day to day supervision of the taxpayer was undertaken in Company A's London office and matters requiring directors' approval were undertaken by written resolutions and instructions from Company D in the United States of America, and his assertion that Company A was centrally managed and controlled by its parent company, Company D in the United

States of America, were totally unsubstantiated. No proof of any kind had been produced.

(d) On the basis of the following facts, the Board concluded that Company A's central management and control was exercised by its Hong Kong office:

(i) Company A was registered in Hong Kong under Part XI of the Companies Ordinance. It had a place of business in Hong Kong.

(ii) The offer of the taxpayer's employment was made by Company A by Mr I, a director stationed in Hong Kong.

(iii) The contract of employment bore the address of Company A's Hong Kong office.

(iv) The Hong Kong office sponsored the taxpayer's visa application.

(v) It was a term of the employment that the taxpayer was to report to the president, Asia Pacific, who was Mr I, a director stationed in Hong Kong.

(vi) The taxpayer had responsibilities for many countries in the Asia Pacific region and had staff reporting to him from various countries and yet he was stationed in Hong Kong.

(vii) Subsequently, it was also Mr I who increased the taxpayer's salary and housing allowance.

(viii) The taxpayer's bonus was also awarded in Hong Kong.

(ix) Including the taxpayer's salaries tax return, Company A's Hong Kong office filed 263 salaries tax returns of its employees in Hong Kong.

(x) Company A had an extensive business presence in Hong Kong.

(e) The Board did not accept the Revenue's submission that the central management and control of Company A was partly in Hong Kong and it might also be resident in other country or countries, because the Board had absolutely no evidence that Company A's central management and control was also exercised elsewhere.

(f) Even if Company A's final and supreme authority were to come from its parent company, Company D in the United States of America, by reason of the Union Corporation case and De Beers case, the Board rejected the taxpayer's assertion that Company A was centrally managed and controlled by its parent company in the United States of America.

(g) In the Union Corporation case, it was held the formula 'where the central power and authority abides' did not demand that the court should look, and look only, to the place where the final and supreme authority is found.

(h) Similarly, it was held in the De Beers case that what was required was 'a scrutiny of the course of business and trading'.

(i) Thus, the Board found Company A was resident in Hong Kong for the purpose of this tax assessment.

7. The place of payment

It was not disputed that the payments to the taxpayer were made in Hong Kong.

8. Conclusion

(a) The Board concluded that the taxpayer had failed to prove that his employment was a non-Hong Kong source employment.

(b) Further, on the basis of the aforesaid facts so found, the Board was satisfied that the taxpayer's employment was located in Hong Kong. Time basis assessment was therefore not available to the taxpayer and the taxpayer's appeal was accordingly dismissed.

Appeal dismissed.

Cases referred to:

CIR v Goepfert 2 HKTC 210
D14/75, IRBRD, vol 1, 196
D54/89, IRBRD, vol 4, 547
D20/97, IRBRD, vol 12, 161
D128/00, IRBRD, vol 15, 972
De Beers Consolidated Mines, Limited v Howe (1906) 5 TC 198
Hong Kong Flour Mills v CIR (2002) HKRC 90-118

Bray v Colenbrander 34 TC 138
Swedish Central Railway Company, Limited v Thompson (1925) 9 TC 342
Todd v The Egyptian Delta Land and Investment Company, Limited (1928) 14 TC 119
Union Corporation, Ltd v CIR (1953) 34 TC 207
Bullock v The Unit Construction Co, Ltd (1959) 38 TC 712
CIR v So Chak Kwong, Jack 2 HKTC 174
D40/90, IRBRD, vol 5, 306
D8/92, IRBRD, vol 7, 107
D79/97, IRBRD, vol 12, 461
D25/02, IRBRD, vol 17, 520
D123/02, IRBRD, vol 18, 150

Wong Ki Fong for the Commissioner of Inland Revenue.
David H Southwood of Grant Thornton, Certified Public Accountants, for the taxpayer.

Decision:

1. The Taxpayer has objected to the salaries tax assessment for the year of assessment 1999/2000 raised on him. The Taxpayer claims that his income should be apportioned between the number of days he spent within and outside Hong Kong and only that portion which relates to the periods he spent within Hong Kong should be subject to tax.

The grounds of the appeal

2. Mr David H Southwood of Grant Thornton, certified public accountants, ('the Representative') gave notice of appeal to the Board in accordance with section 66(1) of the IRO against the determination issued by the Commissioner of Inland Revenue and the grounds for the appeal were given as follows:

(a) The determination is invalid because it was dated 29 November 2003 and was not served in accordance with the provisions of section 64(4) of the IRO which requires it to be served within one month after the determination is made.

(b) The facts upon which the determination was arrived at are incorrect and incomplete.

(c) The Commissioner has erred in his interpretation of the relevant law and in particular with regard to section 8(1A) of the IRO and has failed to follow the applicable authorities in his determination.

(d) The Commissioner has made reference to a place of residence rather than the place where the Taxpayer's employer was resident in considering the source of the Taxpayer's employment.

(e) The Commissioner has not fully considered all of the facts of the case.

3. Thus, there are two issues arising out of this appeal:

(a) the preliminary issue on the procedural point;

(b) the substantive issue on the source of the Taxpayer's employment.

The background facts

4. (a) Company A (originally known as Company B, and then as Company C) is a company incorporated in the Cayman Islands. It has been registered in Hong Kong as an overseas company under Part XI of the Companies Ordinance since 11 December 1995.

(b) Company A is a subsidiary of Company D, a company incorporated in the United States of America.

5. At the relevant times, Company A maintained an office in Hong Kong ('the Hong Kong Office') at Address E, which was subsequently moved to Address F effective from 21 September 2000. In the company's application for registration of business dated 20 December 1995, the nature of business of the Hong Kong Office was described as 'Telecommunication'. The Hong Kong Office submitted financial accounts and filed employer's returns in respect of its employees to the IRD.

6. By a letter of employment dated 17 September 1999, the Taxpayer was appointed as director of human resources, Asia Pacific of Company A. The terms of employment included, among other things, the following:

'LOCATION	Hong Kong
COMMENCEMENT	The date of commencement of your employment is October 11, 1999 and this offer is conditional on 1) the success of your work permit application …
BASIC SALARY	Your remuneration will be HK$1,386,000 per annum payable in arrears in 12 equal installments …

HOUSING REFUND	You will be provided with a housing refund of HK$50,000 per month (HK$600,000 per annum).
CAR ALLOWANCE	This allowance covers all associated expenses, including general maintenance, fuel and parking. The amount is set at HK$10,000 per month (HK$120,000 per annum).'

7. The Taxpayer applied to the Immigration Department for a visa to take up employment with Company A in Hong Kong. The Hong Kong Office was the sponsor in support of his application.

8. The Hong Kong Office filed an employer' s return for the year ended 31 March 2000 in respect of the Taxpayer showing, among other things, the following particulars:

Capacity in which employed	:	Director, Human Resources, Asia Pacific
Period of employment	:	11-10-1999 to 31-3-2000
Particulars of income -		$
Salary		638,793
Car allowance		50,000
		688,793

During the period from 1 December 1999 to 31 March 2000, the Taxpayer was provided with quarters in Hong Kong by the Hong Kong Office.

9. The Taxpayer filed his tax return for the year of assessment 1999/2000 together with a separate computation of assessable income and a travel schedule showing the dates of his arrival in and departure from Hong Kong and the number of days he spent outside Hong Kong on business during the period ended 31 March 2000. He claimed that his assessable income should be calculated with reference to the number of days he rendered services in Hong Kong as follows:

Income	:	$688,793
Number of days for the period from 11 October 1999 to 31 March 2000	:	173
Number of days where services were rendered in Hong Kong	:	109
		$
Income apportioned ($688,793 × 109/173)		433,979
Rental value [$433,979 × 10% - $(259,020 – 200,000)]*		nil
Assessable income		433,979

* Rent paid by the Taxpayer was $259,020 and rent refunded to him was $200,000.

The proceeding

10. Prior to the hearing, we were supplied with various bundles of documents and legal authorities from both parties for the purpose of this appeal. The legal authorities cited by the Representative are as follows:

(a) CIR v Goepfert 2 HKTC 210

(b) D14/75, IRBRD, vol 1, 196

(c) D54/89, IRBRD, vol 4, 547

(d) D20/97, IRBRD, vol 12, 161

(e) D128/00, IRBRD, vol 15, 972

(f) Departmental Interpretation and Practice Notes No 10 – The Charge to Salaries Tax (issued 30 January 1982) (' DIPN 10')

(g) Departmental Interpretation and Practice Notes No 10 (Revised) – The Charge to Salaries Tax (issued 1 December 1987) (' DIPN 10 (Revised)')

(h) De Beers Consolidated Mines, Limited v Howe (1906) 5 TC 198

(i) Hong Kong Flour Mills v CIR (2002) HKRC 90-118

(j) Bray v Colenbrander 34 TC 138

(k) UK Inland Revenue Statement of Practice SP6/83

(l) Swedish Central Railway Company, Limited v Thompson (1925) 9 TC 342

(m) Todd v The Egyptian Delta Land and Investment Company, Limited (1928) 14 TC 119

(n) Union Corporation, Ltd v CIR (1953) 34 TC 207

(o) Bullock v The Unit Construction Co, Ltd (1959) 38 TC 712

Those by the Revenue are as follows:

(p) CIR v Goepfert 2 HKTC 210

(q) CIR v So Chak Kwong, Jack 2 HKTC 174

(r) D40/90, IRBRD, vol 5, 306

(s) D8/92, IRBRD, vol 7, 107

(t) D79/97, IRBRD, vol 12, 461

(u) D25/02, IRBRD, vol 17, 520

(v) De Beers Consolidated Mines, Limited v Howe (1906) 5 TC 198

(w) Swedish Central Railway Company, Limited v Thompson (1925) 9 TC 342

(x) D123/02, IRBRD, vol 18, 150

11. On the day before the hearing, we were supplied with an affidavit by the Taxpayer, sworn on 26 May 2003 in Bangkok, Thailand, setting out matters known to him in support of his appeal.

12. The Taxpayer did not attend the hearing on 28 May 2003. Neither did he call witness to give evidence on his behalf. He was represented by the Representative. Both parties provided us with lengthy and detailed written submissions at the hearing.

13. The main points of the Representative's written submission are as follows:

(a) Preliminary issue

The determination of the Commissioner was invalid because it was dated 29 November 2003 which date had not yet occurred and there was no evidence that the determination was made on 29 January 2003.

(b) Substantive issue

If the Board found that the determination was valid, the matter for the Board to consider was whether the Taxpayer had a Hong Kong source employment or a non-Hong Kong source employment.

(c) The Taxpayer's contention on the substantive issue

(i) The Taxpayer relied on the application of the 'three factors' test as set out in DIPN 10 (Revised) of the IRD issued on 1 December 1987 to establish a non-Hong Kong source employment. The Representative asserted that it was wrong on the part of the Revenue to apply the so-called 'totality of facts' test in the present case which application was at odds with the published practice of the IRD to adopt the 'three factors' test promulgated from the Goepfert case in DIPN 10 (Revised). He submitted that in the Goepfert case the 'totality of facts' test was disregarded in favour of the decisions in some English cases. He submitted that the crux of the decisions in the Goepfert case and the English cases was that the contract of employment was the key factor in determining the source of employment and in determining the source of employment, it was necessary to consider (1) whether the contract was with an employer resident abroad (2) where the contract was negotiated and concluded, and (3) the place of payment of the employee's remuneration. He asserted that in applying the 'three factors' test to the present case, the answers to the test were: the Taxpayer's contract of employment was negotiated and concluded outside Hong Kong; the contract itself was silent as to the place where it was enforceable; basing on the legal principle that a company is resident at the place where its central management and control is exercised, since the central management and control of Company A was exercised by its holding company, Company D, a company incorporated in the United States of America, Company A was not resident in Hong Kong; as to the place of payment of the Taxpayer's remuneration by Company A, the place of payment was undoubtedly in Hong Kong, but as the Taxpayer declared in his affidavit, he was given the option to be paid elsewhere. He also asked us to note the following paragraph from DIPN 10 (Revised):

> *'There will, of course, be cases where not all three factors are satisfied by a person claiming to have a non-Hong Kong employment. Such cases will continue to be considered on their merits but, generally speaking, the Department would regard the existence of an overseas contract with a non-resident employer as outweighing the payment of remuneration in Hong Kong.'*

(ii) He further submitted that only where the contract was considered nominal or pretended and unreal, factors other than those in the 'three factors' test would apply in the process of determining the source of employment. He claimed support of his view from the following passage quoted by

Macdougall J in the Goepfert case from the words of Lord Nomand at page 155 of Bray v Colenbrander:

'My Lords, in each of these appeals the Respondent entered into a contract of employment with an employer resident abroad. The contract was in each case entered into in the country of the employer's residence and it provided for payment of the employee's remuneration in that country. Parenthetically it should be said that there is no suggestion that the place of payment was nominal or pretended, or that the real or genuine place of payment was not the place specified in the contract. Nothing, therefore, of what follows in this opinion in any way touches a case where the designated place of payment is challenged as nominal or pretended and unreal.'

(iii) He asserted that it was incorrect to apply the 'totality of facts' test in the present case because the present contract of employment was neither nominal nor pretended and unreal. He continued with his submission that when the so-called 'totality of facts' test was applied prior to the promulgation of the 'three factors' test, the following six factors were taken into account by the IRD:

(1) the place where the contract, whether verbal or written, is enforceable;

(2) the exact nature of the taxpayer's duties and identification of what he is remunerated for;

(3) whether the taxpayer serves or holds office in, or has employment with, a Hong Kong company, organization or establishment in Hong Kong of a non-resident business;

(4) who remunerates the taxpayer – where the cost of this remuneration or of his service is ultimately borne;

(5) whether the remuneration or cost forms ultimately or directly part of the expenses or cost of a Hong Kong company or establishment;

(6) whether the duties performed by the taxpayer during temporary absences from the colony were incidental to his employment or office in the colony or completely distinguishable from that role.

(iv) He referred us to DIPN 10 of 30 January 1982 where these six factors were found. He claimed that in applying these six factors in the 'totality of facts' test, the Taxpayer's employment remained a non-Hong Kong employment in that (1) the contract of employment was negotiated and concluded outside Hong Kong (2) based on the job description of the Taxpayer's employment and his affidavit, it was clear that the Taxpayer's duties were regional in nature and he was remunerated for services both inside and outside Hong Kong (3) the Taxpayer did not have an employment with a Hong Kong incorporated company or a Hong Kong organization. He was employed by Company A but he did not hold office in its Hong Kong office (4) the Taxpayer was remunerated by Company A and the cost was borne by Company A, a non-Hong Kong resident company albeit the same was borne by its Hong Kong office (5) the remuneration formed part of the costs of the Hong Kong office of an overseas company and not a Hong Kong company and (6) the factor as to where the duties were performed was irrelevant. He concluded that the correct test to apply was the 'three factors' test which demonstrated that the Taxpayer had a non-Hong Kong source employment; the so-called 'totality of facts' test was only applicable where the contract of employment was nominal or unpretended and unreal which was not the case here; the Commissioner erred in law in not applying the 'three factors' test and even in applying the 'totality of facts' test, he applied it incorrectly in that he ignored certain factors and relied upon irrelevant matters; and he had confused the concept of place of residence with the place where a company was resident.

14. The main points of the Revenue's written submission are:

(a) Preliminary issue

The date '29 November 2003' was a typing error which should be saved by section 63 of the IRO.

(b) Substantive issue

Following the approach of different constituted Boards of Review, it was legitimate for the Revenue to adopt the broader approach by applying the 'totality of facts' test. On the basis of the facts of this case, the answer to the 'totality of facts' test was that Hong Kong was the place where the income really came to the Taxpayer. Thus, the Taxpayer's employment was a Hong Kong source employment. His entire income was subject to salaries tax under section

8(1) and no apportionment could be made with reference to the services rendered outside Hong Kong.

The statutory provisions

15. Section 8(1) of the IRO is the basic charging section for salaries tax. Section 8(1) provides as follows:

> *'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) any pension.'*

16. Section 8(1A)(a) of the IRO creates a liability to tax additional to the basic charge in section 8(1). Section 8(1A)(b) and (c) exclude certain income from the charge to salaries tax. Section 8(1A)(a), (b) and (c) read as follows:

> *'For the purposes of this Part, income arising in or derived from Hong Kong from any employment –*
>
> *(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 –*
>
> *(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 from 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.'

17. Section 8(1B) further provides:

'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.'

18. Section 63 provides:

'No notice, assessment, certificate, or other proceeding purporting to be in accordance with the provisions of this Ordinance shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect, or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.'

19. Section 64(4) provides:

'In the event of the Commissioner failing to agree with any person assessed, who has validly objected to an assessment made upon him, as to the amount at which such person is liable to be assessed, the Commissioner shall, within 1 month after his determination of the objection, transmit in writing to the person objecting to the assessment his determination together with the reasons therefor and a statement of the facts upon which the determination was arrived at, and such person may appeal therefrom to the Board of Review as provided in section 66.'

20. Section 66(1)(a) provides:

'Any person (hereinafter referred to as the appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within

(a) 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefor and the statement of facts; or'

21. Section 68(4) provides:

> *'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

Our findings on the preliminary issue

22. We find the following facts on the preliminary issue. By a letter of 29 January 2003, the Commissioner gave notice of his determination of the objection raised by the Taxpayer dated 2 February 2001 against his salaries tax assessment for the year of assessment 1999/2000. There was enclosed with the notice, a determination together with the reasons therefor and the statement of facts upon which the determination was arrived at. The determination bore a printed date '29 November 2003' on page 9 thereof. The notice was sent to the Taxpayer care of his former tax representative ('the Former Representative') at Address G. A copy of the notice was also sent to the Former Representative. Each set of the documents was sent by registered post to the Taxpayer and the Former Representative respectively. The registered packet to the Taxpayer was received by the Former Representative on 30 January 2003. By another letter to the Taxpayer dated 26 February 2003, care of the Former Representative at Address G, the Commissioner informed the Taxpayer that the date as shown on page 9 of the determination was mistakenly printed '29 November 2003' instead of '29 January 2003', and that the notice of determination was issued to the Taxpayer on 29 January 2003 and the determination together with reasons therefor and the statements of facts was sent with the notice and thus, the written determination was transmitted to the Taxpayer together with the notice dated 29 January 2003. In a telephone conversation with the Representative on 27 February 2003, the Commissioner advised the Representative that the error in the date of the written determination was saved by section 63 of the IRO.

23. The Representative contended that there was no evidence to support that the determination was signed or made by the Commissioner on 29 January 2003 in that in his letter of 26 February 2003, the Commissioner did not say that the determination was made on 29 January 2003 and he only said that the printed date should be '29 January 2003' instead of '29 November 2003'. He contended that since section 64(4) of the IRO required the determination to be conveyed within 30 days of the determination, in the absence of evidence as to when the determination was made, the determination was invalid and should be set aside.

24. Section 64(4) of the IRO requires the Commissioner to transmit his determination in writing within one month after his determination of the objection. In the present case, the printed date '29 November 2003' appears at the very end of the written determination, below and after the signature and the printed name of the Commissioner. It is our observation from other cases that the date of the determination usually appears at the end of the written determination and after the signature and the printed name of the maker of the determination. Presently we have no evidence or reason to believe that the date so appeared in the present written determination is meant to be

something else. Since the date '29 November 2003' has not yet occurred, that date is an obvious error. The written determination was sent to the Taxpayer together with a letter dated 29 January 2003 also by the Commissioner. By this letter the Commissioner informed the Taxpayer that his objection had been considered and rejected and his determination, together with the reasons therefor and the statement of facts upon which the determination was arrived at, was enclosed in accordance with section 64(4) of the IRO. Since the written determination was sent together with the notice dated 29 January 2003, coupled with the information supplied by the Commissioner to the Representative over the telephone on 27 February 2003, we disagreed with the Representative that there is no evidence to support that the determination was made on 29 January 2003. Furthermore, there is no denial on the part of the Taxpayer that the notice and the written determination were received by the Representative on behalf of the Taxpayer on 30 January 2003 and in response thereto the notice of appeal was served by the Representative on the Taxpayer's behalf on 28 February 2003 under section 66(1) of the IRO. Section 63 provides that no notice or other proceeding purporting to be in accordance with the provisions of the IRO shall be deemed to be void or be affected by reason of a mistake therein if the same is in substance and effect in conformity with or according to the intent and meaning of the IRO. We concur with the Revenue's view that the making of a determination by the Commissioner comes within the meaning of the term 'other proceeding' in section 63. Thus, we find that pursuant to the provisions of section 63 of the IRO, the validity of the written determination is not affected by the error.

Our findings on the substantive issue

25. Section 8(1) of the IRO is the basic charging section for salaries tax and section 8(1A)(a) is an extension of section 8(1), which creates a liability to salaries tax additional to the basic charge under section 8(1). Under section 8(1), salaries tax is chargeable in respect of income arising in or derived from Hong Kong from any employment. It has been well accepted and also confirmed in the Goepfert case that in deciding whether income arises in or is derived from Hong Kong from any employment, regard is had to the place where the income really comes to the employee, that is, where the source of income, the employment, is located and in determining the source of employment for salaries tax purposes, the place where the services were performed is irrelevant to the enquiry.

26. It is not in dispute by the parties that if the source of the Taxpayer's employment was located in Hong Kong, his entire income would be subject to salaries tax under section 8(1) of the IRO and no apportionment could be made with reference to the services rendered outside Hong Kong. On the other hand, if the source of the Taxpayer's employment was located outside Hong Kong, only such part of his income derived from services rendered in Hong Kong including leave pay attributable to such services would be subject to salaries tax under section 8(1A)(a) but no account shall be taken of services rendered in Hong Kong during the Taxpayer's visits not exceeding a total of 60 days in the basis period of the year of assessment.

27. In the process of determining the source of the Taxpayer's employment, the Revenue applied the so-called 'totality of facts' test while the Representative argued that the 'three factors' test should apply.

28. Thus, we have to decide firstly in determining the source of the Taxpayer's employment, whether the 'totality of facts' test or the 'three factors' test should apply; and secondly, the source of the Taxpayer's employment.

The test to apply

29. The Representative argued in favour of the 'three factors' test. He asserted that in the Goepfert case, the 'totality of facts' test was disregarded in favour of the 'three factors' test and only where the contract of employment was in doubt as being nominal, or pretended and unreal, it would then be necessary to look at additional factors to determine the question. He submitted that the crux of the decisions of the Goepfert case and the English cases was that the contract of employment was the key factor in determining the source of employment and following the decision of Lord Normand in Bray v Colenbrander, in determining the source of employment, it was necessary to consider (a) whether the contract of employment was made with an employer resident abroad (b) where the contract was negotiated and concluded and (c) the place of payment of the employee's remuneration. He claimed support of this view from DIPN 10 (Revised) where it states that as a consequence of the Goepfert decision, the IRD will accept that an employment is located outside Hong Kong where the three factors are present and that in cases where not all three factors are satisfied by a person claiming to have a non-Hong Kong employment, those cases will continue to be considered on their merits but, generally speaking, the IRD would regard the existence of an overseas contract with a non-resident employer as outweighing the payment of remuneration in Hong Kong. He further added that in the Goepfert case, relying on the caveat of Lord Normand in the case of Bray v Colenbrander, Macdougall J came to the view that it would only be necessary to look at additional factors, that is, other factors in the so-called 'totality of facts' test, when the arrangements leading to the existence of the contract of employment were in doubt or the contract of employment was a sham and since there was no suggestion that the Taxpayer's contract of employment was a sham, the Revenue should not depart from the application of the 'three factors' test.

30. We find no justification for the Representative's view that the so-called 'totality of facts' test was disregarded in the Goepfert case and that factors other than the aforesaid three factors would be looked at only when the arrangements leading to the existence of the contract of employment were in doubt or the contract of employment was a sham. On the contrary, we are of the view that MacDougall J in the Goepfert case approved the application of the so-called 'totality of facts' test in determining the issue 'where the source of income, the employment, is located'. In support of our view, we find it necessary to quote the following passages of MacDougall J at page 237 in the Goepfert case where he said:

'Specifically, it is necessary to look for the place where the income really comes to the employee, that is to say, where the source of income the employment, is located. As Sir Wilfrid Greene said, regard must first be had to the contract of employment.

This does not mean that the Commissioner may not look behind the appearances to discover the reality. The Commissioner is not bound to accept as conclusive, any claim made by an employee in this connexion. He is entitled to scrutinise all evidence, documentary or otherwise, that is relevant to this matter.

If any authority be needed for this basic proposition one needs only to refer to the words of Lord Normand at page 155 of Bray v. Colenbrander:-

"My Lords, in each of these appeals the Respondent entered into a contract of employment with an employer resident abroad. The contract was in each case entered into in the country of the employer's residence and it provided for payment of the employee's remuneration in that country. Parenthetically it should be said that there is no suggestion that the place of payment was nominal or pretended, or that the real or genuine place of payment was not the place specified in the contract. Nothing, therefore, of what follows in this opinion in any way touches a case where the designated place of payment is challenged as nominal or pretended and unreal."

There can be no doubt therefore that in deciding the crucial issue, the Commissioner may need to look further than the external or superficial features of the employment. Appearances may be deceptive. He may need to examine other factors that point to the real locus of the source of income, the employment.

It occurs to me that sometimes when reference is made to the so called "totality of facts" test it may be that what is meant is this very process. If that is what it means then it is not an enquiry of a nature different from that to which the English cases refer, but is descriptive of the process adopted to ascertain the true answer to the question that arises under section 8(1).'

It is clear from the above passages that MacDougall J was in favour of applying the so-called 'totality of facts' test which he thought represented the process of scrutinizing all evidence and examining all factors relevant to the case. Indeed, he did not conclude from the passage of Lord Normand quoted above that only where the contract of employment was a sham, the so-called 'totality of facts' test should apply.

31. As to the promulgation of the 'three factors' test by the IRD as a result of the Goepfert case, we share the view expressed by Mr Turnbull in D40/90 in this regard. He said:

> *'We have referred to this second point because of the policy adopted by the Commissioner following the Goepfert case. Apparently, the Commissioner has promulgated three tests to be studied when deciding if employment is located outside of Hong Kong. We can find no direct justification for what the Commissioner has promulgated following the Goepfert decision. Indeed by saying that if a taxpayer complies with three tests, he is not taxable in Hong Kong it would seem to us to be contrary to "the totality of facts test" set out by MacDougall J. It surely must be wrong to look at three facts only. ...'*

We, too, are unable to reconcile the promulgation of the three factors by the IRD with the findings of Macdougall J in the Goepfert case. As stated earlier, we are of the view that Macdougall J was in favour of the 'totality of facts' test in the process of determining the source of employment. He expressed in that case that the Commissioner may look behind the appearances to discover the reality and is entitled to scrutinize all evidence, documentary or otherwise, that is relevant to the matter. He believed that this process might perhaps equate to the application of the so-called 'totality of facts' test. As stated in paragraph 6 of DIPN 10 (Revised), it is expected that in greater majority of cases the question of Hong Kong or non-Hong Kong employment will be resolved by considering the three factors only. This reflects the fact that the Commissioner also considers that in some cases the question cannot be resolved by only considering the three factors. Thus, notwithstanding the IRD's general policy to accept the existence of a 'non-Hong Kong' employment where the three factors are present, the IRD also stipulates that this policy is subject to the IRD's right to look beyond those factors in appropriate cases. Furthermore, as expressed in all Departmental Interpretation and Practice Notes, its notes are issued for the information and guidance of taxpayers. They have no binding force and do not affect a person's right of objection or appeal to the Commissioner, the Board of Review or the Courts.

32. Having carefully considered the relevant legal authorities cited to us and the arguments from both parties in this connection, we conclude that there is nothing in the Goepfert case or DIPN 10 or DIPN 10 (Revised) to preclude the Commissioner from applying the 'totality of facts' test instead of the 'three factors' test in determining the source of the Taxpayer's employment. Further, we find no justification for the Representative to only consider the six factors referred to in DIPN 10 in applying the 'totality of facts' test.

33. While it is our stance that there is nothing to preclude the Revenue from applying the 'totality of facts' test in this case, we find that the Taxpayer has failed to satisfy even the 'three factors' test as provided in DIPN 10 (Revised). It is provided therein that a 'non-Hong Kong' employment exists where the following three factors are present, namely:

(a) the contract of employment was negotiated and entered into, and is enforceable outside Hong Kong;

(b) the employer is resident outside Hong Kong; and

(c) the employee's remuneration is paid to him outside Hong Kong.

34. The Representative submitted that the answers to the 'three factors' test in the present case were (a) the contract of employment was negotiated and concluded outside Hong Kong (b) Company A was not a company incorporated in Hong Kong nor resident in Hong Kong and (c) the place of payment of the Taxpayer's salary was in Hong Kong.

35. The Taxpayer stated the followings in his affidavit. He was headhunted for the position with Company A group by an international headhunting agency via their London office and following their approach, he negotiated directly with Mr H who was the senior vice president for human resources based in Company A's London office. The negotiations were mainly undertaken through telephone but he also met Mr H in various locations in Asia, mainly in Singapore. Those negotiations involved the exact job description and the responsibilities involved in the position as well as the terms of remuneration. He was offered the job of director of human resources – Asia Pacific in the Company A's group reporting to the senior vice president for human resources, Mr H. He was to be normally based in Hong Kong but had a regional role with responsibility for 12 countries in the Asia Pacific region. After he accepted the post, Mr H instructed Company A to issue him a letter of employment. The letter of employment was issued by Company A on 17 September 1999 and was signed by Mr F and was couriered to him in Thailand. He signed this letter in Thailand and then returned it to Mr H in the United Kingdom. He was responsible for dealing with other countries in the Asia Pacific region and he had staff from various countries reporting to him. It was a term of his employment that he would obtain a Hong Kong employment visa as otherwise he could not legally move to Hong Kong. Thus Company A's Hong Kong office applied for on his behalf an employment visa. He was advised that a job description was produced by the Revenue, the document at page 34 of the Revenue's bundle of documents. He did not believe that that job description represented the duties and job description which he agreed with Mr H since his job description had not been reduced to writing until a later date. A more accurate description of his duties was contained in the job description attached as appendix G of the statement of facts in the Board's bundle of documents which was issued after his promotion with effect from 1 February 2001. His duties did not change significantly after his promotion. Throughout his employment his main responsibilities were to ensure that consistent terms and conditions were applied by the Company A's group throughout the Asia Pacific region and his duties were regional and the same within and outside Hong Kong. Throughout his employment he reported to Mr H until Mr H was replaced by Ms J, a US national based in London, in September 2001. When he left Company A in 2001, all negotiations associated with his departure were carried out between him and Ms J and no one in the Hong Kong Office was involved. His

remuneration was paid into a bank account in Hong Kong for his convenience only as he was offered to be paid in Bermuda or elsewhere.

The place where the contract of employment was negotiated and concluded

36. The Representative asserted that the contract of employment was negotiated and concluded outside Hong Kong because as set out in the Taxpayer's affidavit, the Taxpayer negotiated his contract of employment with Company A while he was living in Thailand and all the negotiations took place outside Hong Kong either by telephone or by meetings with Mr H who was also resident outside Hong Kong and the contract was concluded when the Taxpayer signed the contract and returned it to Mr H in the United Kingdom.

37. Apart from what the Taxpayer said in his affidavit, in the course of investigation by the Revenue, the finance controller of Company A's Hong Kong office supplied the information that the negotiations were carried out by the staff of the group's head office outside Hong Kong and the contract was signed by Mr I outside Hong Kong [A1 – Appendix 7 – Company A's letter of 29 June 2001]; the contract was prepared by Company A's office in the United Kingdom but issued on Hong Kong office paper and the Taxpayer agreed and signed the contract at Company A's office in the United Kingdom [R1 – pages 70 and 71 – Company A's letter of 9 August 2001]; and Mr I was located in Hong Kong and at the material time, he was outside Hong Kong and signed the Taxpayer's contract on behalf of Mr H [R1 – page 75 – Company A's letter of 17 June 2002].

38. The contents of the Taxpayer's affidavit and the information given by the finance controller on his behalf are mostly self-serving. There are also inconsistencies in the information as to where Mr I or the Taxpayer signed the contract of employment. Neither the Taxpayer nor the finance controller was available at the hearing to clarify the inconsistencies or to answer any queries which we might have. Thus, it will be unsafe for us to accept on these basis that the contract of employment was negotiated and concluded outside Hong Kong. On the other hand, we have before us the objective facts that a letter of employment dated 17 September 1999 was issued by Company A under its Hong Kong office address and signed by Mr I, a director of Company A stationed in Hong Kong; Mr I was in Hong Kong on 17 September 1999; the Taxpayer accepted the terms in the letter of employment on 17 September 1999; it was a term in the letter of employment that the employment was to commence on 11 October 1999 and the offer of employment was conditional on the success of the Taxpayer's work permit application and Company A receiving two satisfactory references; a sponsor's certificate sponsoring the Taxpayer's application to be allowed into HKSAR for the purpose of taking up employment with Company A's Hong Kong office was signed by Company A's Hong Kong office on 11 October 1999. Following from the aforesaid objective facts, we are of the opinion that the contract of employment was concluded in Hong Kong on 11 October 1999. Although the offer and the acceptance of the Taxpayer's contract of employment took place on 17 September 1999, the conclusion of the contract of employment was suspended until the fulfillment of the two specified events. The contract of employment could only have concluded in Hong Kong when the

Taxpayer's work permit was granted by the Immigration Department of Hong Kong upon or after Company A's Hong Kong office signing the sponsor's certificate and Company A's Hong Kong office would not have signed the sponsor's certificate unless the two references were received.

The place where the contract is enforceable

39. As to the place where the contract of employment was enforceable, the Representative conceded that the contract of employment was silent as to where it was enforceable. On the basis of the following facts found by us, we conclude that the contract of employment was enforceable in Hong Kong. The employer was Company A. Company A was incorporated in the Cayman Islands while it was also registered as an overseas company under Part XI of the Companies Ordinance Hong Kong at the material times. It had a place of business in Hong Kong. Company A was capable of suing and being sued in Hong Kong. The contract of employment bore the address of Company A's Hong Kong office. The location of the contract of employment was Hong Kong. The Taxpayer's position in Company A was a director of human resources for Asia Pacific region stationed in Hong Kong. It was stated in his contract of employment that he was to report to the 'President, Asia Pacific'. The president, Asia Pacific was Mr I who also was stationed in Hong Kong. The Taxpayer's place of residence at the material time was in Hong Kong. The Taxpayer's salary was paid in Hong Kong dollars. A housing refund and a car allowance were provided to the Taxpayer every month also in Hong Kong dollars. The Taxpayer's vacation was 15 working days for each year of service in addition to the announced public holidays in Hong Kong. The Taxpayer was eligible for medical benefits and insurance policy in accordance with the rules of Company A's medical scheme. The medical scheme of Company A was taken out with an insurance company which is a member of an insurance group in Hong Kong. The Taxpayer participated in Company A's provident fund scheme. Company A's provident fund scheme was taken out with a provident fund scheme provider in Hong Kong with contributions made in Hong Kong and paid in Hong Kong dollars. The Taxpayer joined the Mandatory Provident Fund Scheme on 1 December 2000 when MPF was launched in Hong Kong. Without going further, on the aforesaid facts alone we have no hesitation to find that the Taxpayer's contract of employment was enforceable in Hong Kong.

The place where the employer is resident

40. The Representative asserted on behalf of the Taxpayer that the correct test to the enquiry was to ascertain whether Company A was resident in Hong Kong and not whether Company A had a place of residence in Hong Kong. He accepted the IRD's position on the matter as stated in DIPN 10 (Revised). The IRD's position is that 'in considering this matter the term "resident" will be given its ordinary meaning. In this context a corporation will be regarded as being resident outside Hong Kong if it has its central management and control outside Hong Kong'. As held in the De Beers case, a company resides, for tax purposes, where its real business is carried on and the true rule is that the real business is carried on where the central management and control

actually abides. This is a well established and accepted legal principle. Thus, the question for us to decide is where Company A's central management and control was exercised.

41. The Representative claimed that as was submitted by Company A's finance controller in response to the IRD's enquires, the central management and control of Company A was exercised by its holding company, Company D, in the United States of America while the day to day supervision of the Taxpayer was undertaken in Company A's London office and matters requiring directors' approval were undertaken by written resolutions and instructions from Company D in the United States of America. He asserted that Company A was centrally managed and controlled by its parent company, Company D in the United States of America. Unfortunate for the Taxpayer, the aforesaid claim is totally unsubstantiated. No proof of any kind has been produced. On the other hand, we have the following facts before us. Company A was registered in Hong Kong under Part XI of the Companies Ordinance. It had a place of business in Hong Kong. The offer of the Taxpayer's employment was made by Company A by Mr I, a director stationed in Hong Kong. The contract of employment bore the address of Company A's Hong Kong office. The Hong Kong office sponsored the Taxpayer's visa application. It was a term of the employment that the Taxpayer was to report to the president, Asia Pacific, who was Mr I, a director stationed in Hong Kong. The Taxpayer had responsibilities for many countries in the Asia Pacific region and had staff reporting to him from various countries and yet he was stationed in Hong Kong. Subsequently, it was also Mr I who increased the Taxpayer's salary and housing allowance. The Taxpayer's bonus was also awarded in Hong Kong. Including the Taxpayer's salaries tax return, Company A's Hong Kong office filed 263 salaries tax returns of its employees in Hong Kong. Company A had an extensive business presence in Hong Kong. On the basis of these facts, we thus reach the conclusion that Company A's central management and control was exercised by its Hong Kong office. While we find this, it has not escaped our mind a job description of the Taxpayer which was produced by the finance controller during investigation where it stated that the Taxpayer reported to Mr H, senior vice president for human resources. However, we have before us a different job description attached to the Taxpayer's contract of employment and the contract of employment stated that the Taxpayer was to report to Mr I. The finance controller was not available at the hearing to explain the status of the job description produced by her. Even if we were to accept the job description produced by the finance controller (which we do not), the Taxpayer in his affidavit said that this job description was issued after his promotion with effect from 1 February 2001, which date is outside the assessment period in question. We are also aware of the Revenue's submission that the central management and control of Company A was partly in Hong Kong and Company A conducted substantial business operations and kept house in Hong Kong and that Company A did have a residence in Hong Kong although it might also be resident in other country or countries. We do not accept the Revenue's submission that the central management and control of Company A was partly in Hong Kong and it might also be resident in other country or countries, because we have absolutely no evidence that Company A's central management and control was also exercised elsewhere. Even if Company A's final and supreme authority were to come from its parent company, Company D in the United States of America, we do not accept the Representative's assertion that Company A was centrally

managed and controlled by its parent company in the United States of America. In arriving at this stance we are mindful of the Union Corporation case where it was held the formula ' where the central power and authority abides' does not demand that the court should look, and look only, to the place where the final and supreme authority is found, and also the decision in De Beers case that what was required was ' a scrutiny of the course of business and trading' . Thus, we find Company A was resident in Hong Kong for the purpose of this tax assessment.

The place of payment

42. The payments to the Taxpayer were made in Hong Kong. This fact is not disputed by the Taxpayer.

Conclusion

43. We conclude that the Taxpayer has failed to prove that his employment was a non-Hong Kong source employment. More so, on the basis of the aforesaid facts found by us, we are satisfied that the Taxpayer' s employment was located in Hong Kong. Time basis assessment is therefore not available to the Taxpayer and the Taxpayer' s appeal is accordingly dismissed.