Case No. D60/06

Salaries tax – whether income arising or derived from Hong Kong.

Panel: Anthony So Chun Kung (chairman), William Cheng Chuk Man and Diana Cheung Han Chu.

Dates of hearing: 11 August and 29 September 2006.
Date of decision: 24 November 2006.

The taxpayer claimed part-exemption from salaries tax for the year of assessment 2000/01 arguing that he was under a non-Hong Kong employment and he rendered services partly in Hong Kong and thus being liable to Hong Kong tax only for such proportionate part of time he spent in Hong Kong.

The taxpayer contended that he was employed by Company C in country H. He needed to work in a number of Asian cities, including Hong Kong. He was paid, however, by Company E in Hong Kong.

Held:

1. The Board accepted that the taxpayer was employed by Company C in Country H. Even though the taxpayer was paid by Company E, there was in fact a charging-back and that the taxpayer's costs were ultimately borne and paid by Company C.

2. Furthermore, the Board found the taxpayer's employment could only be terminated by Company C in Country H in accordance with the law of Country H, and not Hong Kong law. (D40/90 considered)

3. Thus, the taxpayer's income was of non-Hong Kong source. (CIR v Geopfert followed)

Appeal allowed.

Cases referred to:

CIR v Goepfert 2 HKTC 210
D40/90, IRBRD, vol 5, 306

Taxpayer in person.
Leung Wing Chi and Chan Tak Hong for the Commissioner of Inland Revenue.

Decision:

The appeal

1. This is an appeal by Mr A ('the Taxpayer') against the determination of the Deputy Commissioner of Inland Revenue dated 19 May 2006 ('the Determination').

2. In his Determination, the Deputy Commissioner of Inland Revenue confirmed the additional salaries tax assessment of the assessor to disallow the Taxpayer's claim for partial exemption from salaries tax for the year of assessment 2000/01 of an income in the sum of HK$48,134.

Relevant facts

3. We have examined all the documents placed before us and we find the following facts relevant to this appeal:

(1) On 14 December 2000, the Taxpayer signed an offer letter ('the Letter') dated 28 November 2000, starting his employment from 18 January 2001 as the 'Financial Director, Asia Pacific reporting to [Mr N] and the Managing Director of the Asia Pacific headquarters (TBD)' and the Letter reads,

'The following documents in this offer package and are to be read, signed and returned to [Company C].

- Employee Offer Letter
- Employee Non-Compete Agreement
- Employee Invention and Non-Disclosure Agreement

After you have read the documents listed above, please sign where indicated and return originals to [Ms D] in Human Resources at [Company C].'

(2) On 10 February 2001, the Taxpayer was appointed a director of Company E. On or about 5 December 2001, the Taxpayer became a shareholder holding 1

out of 100,000 shares of Company E.

(3) Company E is a private company incorporated in Hong Kong on 12 June 1998 with business address at all material times at Address F.

(4) The Taxpayer in his capacity as Financial Director signed the Employer's Returns of Company E (R1, page 5) for the year ended 31 March 2001 and in respect of the Taxpayer (R1, page 6) gave the following particulars:

(a)	Name of employer:	Company E
(b)	Capacity in which employed:	Financial Director, Asia Pacific
(c)	Period of employment:	18/01/01 – 31/03/01
(d)	Particulars of income:	
	Salary	$167,322
(e)	Whether the employee was wholly or partly paid by an overseas concern	No

(5) In his 2000/01 tax return (R1, pages 1-4), the Taxpayer declared:

(a) Salaries income accrued to him during the year

Name of employer	Capacity employed	Period	Total amount
Company G	Financial Controller	01/04/00-15/01/01	$589,080
Company C	Financial Director, Asia Pacific	18/01/01-31/03/01	$167,322
		Grand total	$756,402

(b) Application for partial exemption of salaries income

(i)	Basis of calculation	: Time Apportionment
(ii)	No of days present in Hong Kong	: 344
(iii)	Amount of income to be excluded	: $48,134

(6) In a letter dated 30 May 2001 (B1, page 15) the Taxpayer set out his calculation of time apportionment, claiming a partial exemption of income in the sum of HK$48,134 (HK$167,322 – HK$119,188):

'During the year of assessment 2000/01, I have changed my employment on Jan 18, 2001 and am working for [Company C], a [Country H] corporation, as their Financial Director, Asia Pacific Region.

My employment contract with [Company C] was negotiated and concluded in [Country H] in 2000; and my responsibilities cover not only their operation in

Hong Kong, but also China, Taiwan, Korea, Australia and Singapore; and I have to travel intensively to look after those operations. Since I am Hong Kong resident, my office thus is in [Company E] and my salary is paid through the Hong Kong office. As such, I would like to apply for time apportionment for any income arising from my employment with [Company C], with details as follows:

Salary from Jan 18, 2001 to March 31, 2001	HKD167,322
Total Number of days between Jan 18 to Mar 31	73 days
No. of days outside Hong Kong	21 days
No. of days in Hong Kong	52 days

Salary subject to Year of Assessment 2000/01 = HKD167,322 x (52/73) days
= HKD119,188

No. of days outside Hong Kong

[Country Q]	Jan-31	Feb-01	2 days
[Country J]	Feb-05	Feb-09	4 days
[Country H]	Feb-11	Feb-18	7 days
[Country O]	Feb-28	Mar-03	3 days
[Country O]	Mar-14	Mar-16	2 days
[Country Q]	Mar-18	Mar-21	3 days
			21 days '

(7) The assessor did not accept that the Taxpayer had a non-Hong Kong employment with [Company C] and on 13 June 2003 (B1, pages 45-46) raised on the Taxpayer the following 2000/01 additional salaries tax assessment ('the Additional Assessment') to disallow his claim for partial exemption of income:

Additional net chargeable income	HK$48,134
Additional tax payable thereon	HK$8,183

(8) The Taxpayer by his objection dated 4 July 2003 (R1, page 13) claimed that his was a non-Hong Kong employment and accordingly eligible to partial exemption to salaries tax:

'(a) Details of the employer and contract of employment

i. My employer is [Company C], an electronic touch screen manufacturers, with its principal address at [Address I].

ii. I visited [Company C] in November 2000 for inal [sic] interview.

My employment contract was negotiated and concluded during this visit to [Country H]. The formal agreement was signed in Dec 2000. It is enforceable in [Country H], same as the Non-Compete and Non-Disclosure agreements that I signed with [Company C] in relation to this employment.

(b) Nature of duties performed

i. My position with [Company C] is Financial Director, Asia Pacific Region. My responsibilities is [sic] to oversee he [sic] finance and operational activities of their operations in Asia Pacific, which include Hong Kong, China, Taiwan, Korea, Australia, Singapore and Japan. As I am a Hong Kong resident, my office is in [Company C's] Hong Kong office. I carry out my responsibilities for countries other than Hong Kong through email, phone call, and intensive travel to look after those operations.

ii. I dual report to the Director of finance of [Company C] and the Business Manager in [Country J].

(c) Details of the payment of remuneration

My salary is paid to my bank account in Hong Kong through [Company E]. [Company E] charges back all my costs, including salary and benefits, and traveling expenses, to [Company C]. [Company C] bear all costs and do not re-charge back to [Company E].

I would interpret my employment contract is negotiated, entered into, and enforceable in [Country H], the place of residence of the employer is [Country H], and [Company C] bears all my costs from this employment that it would be a non-Hong Kong employment and meet the partial exemption criteria.'

(9) The Taxpayer also provided copies of the Non-Compete and Non-Disclosure agreements (B1, pages 18-24) that he mentioned in his objection (fact (8)(a)(ii) above).

(10) On 8 March 2005, the Revenue wrote (B1, pages 32-33) to Company C in Country H for information or documents regarding the Taxpayer's employment, seeking details of the employer, contract of employment and payment of remuneration thereof.

(11) On 11 May 2005, Ms K of Company C replied (B1, page 34) saying that they

have no employee record on the Taxpayer.

(12) By a letter dated 3 August 2005 (bundle B1, pages 27-28), the assessor requested Company E to show, inter alia, charge back (Fact (8)(c)) by providing evidence including notifications issued by Company C, bank statements and passbooks of Company E which showed the Company C's remittances, etc.

(13) By another letter dated 3 August 2005 (B1, pages 30-31), the Assessor supplied the Taxpayer with a copy of Company C's reply at Fact 11 and requested the Taxpayer to provide, inter alia, confirmation from Company C in support of his claim of employment with Company C since 18 January 2001.

(14) Nothing eventful follows, the Acting Deputy Commissioner on 19 May 2006 issued his determination confirming the additional assessment. The Taxpayer appealed.

(15) In support of his claim that he was employed by Company C, the Taxpayer submitted a letter addressed to the Clerk of the Board of Review dated 20 June 2006 (B1, pages 48-49) written by a Mr L of Company C, which says:

'We hereby confirm that [Mr A] is employed by [Company M] (formerly named as [Company C] whose address is [Address I in Country H].

[Mr A's] negotiated the terms of his employment with [Company C] in [Country H] and these terms were verbally accepted and concluded by [Mr A] when he was in [Country H]. [Company C] in [Country H] then issued an offer letter on November 28, 2000 to evidence the verbal agreement that [Mr A] and [Company C] in [Country H] have previously negotiated and concluded during their meetings in [Country H]. The Director of Finance, [Mr N] brought the offer letter to Hong Kong to [Mr A] during his business trip since [Mr A] was unable to go to [Country H] to sign the offer letter. The terms of employment are enforceable in [Country H].

Since January 18, 2001, [Mr A] has been required to work in Hong Kong and during his period of assignment in Hong Kong, [Mr A] remains an employee of [Company C] in [Country H]. In addition, [Company C] in [Country H] has sole jurisdiction and exercises control over [Mr A's] work throughout the period.

We further confirm that [Mr A's] remuneration is paid to him in Hong Kong into his bank account for the sake of administrative convenience. However, all

the costs incurred have been charged back to the [Company C] in [Country H] and [Company C] in [Country H] has the ultimate contractual liability to pay for [Mr A's] remuneration.

[Mr A] is participating in the Hong Kong Mandatory Provident Fund ("MPF") in Hong Kong since [Mr A] is not qualified as an exempt person under the Mandatory Provident Fund Ordinance, he is required to participate in the MPF in Hong Kong and the employer contribution is charged back to [Company C] in [Country H] since [Mr A] is an employee of [Company C] in [Country H].

In addition, we would like to rectify the error inadvertently made in our reply to the Inland Revenue Department indicating that there was no employee records of [Mr A]. Please note that we have communicated this message to your Department through our tax representatives. We would appreciate if the Board could accept this letter as a confirmation of [Mr A's] employment status. During all the time, [Mr A] remains an employee of [Company C] (currently [Company M]) in [Country H].'

(16) The Taxpayer further submitted a letter addressed to the Commissioner of Inland Revenue ('CIR') dated 8 August 2006 (A2, page 13) written by Mr N of Company C, which says:

'…[Mr A] visited [Country H] in November 2000 for interview, and I negotiated the terms of employment with him during his visits. [Mr A] verbally accepted the terms offered by [Company C] and concluded the employment with [Company C] on November 28, 2000 when he was in [Country H]. [Company C] afterwards issued an offer letter dated November 28, 2000 to [Mr A] to evidence the verbal agreement that we have agreed upon. I brought the offer letter (printed in plan paper) to Hong Kong during my business trip in December 2000 as he was not able to visit [Country H] to sign the offer letter.

During his period of assignment in Hong Kong, [Mr A] remains an employee of [Company C] in [Country H]. He reports to me until I move to my current position (currently he reports to the Finance Manager of [Company M] in [Country H]) and the Asia Pacific Business Development Manager who stations in [Country J]. His remuneration is paid to him in Hong Kong into his bank account for administrative convenience. However, all the costs incurred are charged back to the [Company C] in [Country H] and [Company C] in [Country H] has the ultimate contractual liability to pay for [Mr A's] remuneration.'

(17) The Taxpayer on 11 August 2006 submitted a transaction report (A3, page 2) showing the booking of his total cost for the year ended 31 December 2001 by Company E into the accounts of Company C.

(18) During the adjournment of the hearing, the Taxpayer furnished further information and materials to the CIR as follows:

(i) On 8 September 2006, a letter (A4, page 2) issued by Ms K of Country H confirming that the Taxpayer has been their employee:

'[Mr A] was hired by [Company C] on January 18, 2001. [Company C] was acquired by [Company M] on February 3, 2001 and became [Company M]. At the time of the acquisition, [Mr A] then became a [Company M] employee.

In May of 2005, [Company M] received a request from the Inland Revenue Department asking for employment verification for [Mr A]. On May 11, 2005, in response to that request, a letter was sent indicating that we were unable to comply with the request for information on [Mr A] since our records indicated we did not have an employee by that name. We were unaware that [Mr A] was listed in our system as [Another name], not [Mr A]. We would like to apologize for any inconvenience this has caused and want to assure you that [Mr A] has been employed by [Company M] since February 3, 2001.'

(ii) On 20 September 2006, a reconciliation of the monthly salary breakdown of Company E with the charging back of Taxpayer's cost onto Company C accounts for year ended 31 December 2001 (A5, pages 001-003).

(iii) On 25 September 2006, bundle (A6, pages 1-74) of proofs relating to recharge of his cost by Company E to Company C.

The law

4. Insofar as this appeal is concerned, the relevant sections of the Inland Revenue Ordinance ['IRO'] are sections 8(1), 8(1A)(a) and 68(4).

5. Section 8(1) of the IRO is the basic charging section to salaries tax, providing 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.'

6. Section 8(1A)(a) of the IRO extends the basic charge under section 8(1), providing 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;'

7. Section 68(4) of the IRO provides that:

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

The applicable legal principles

8. Macdougall J in CIR v Goepfert [2HKTC 210] at page 238 said:

'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.

…

On the other hand, if a person, whose income does not fall within the basic charge to salaries tax under section 8(1), derives income from employment in respect of which he rendered services in Hong Kong, only that income derived from the services he actually rendered in Hong Kong is chargeable to salaries tax…'

9. In determining whether an income arises in or is derived from Hong Kong from any

employment, Macdougall J in Goepfert decision said:

> *'(at page 236)… It follows that the place where the services are rendered is not relevant to the enquiry under section 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be completely ignored.'*
>
> *'(at page 237)… 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 scrutinize all evidence, documentary or otherwise, that is relevant to this matter.*
>
> …
>
> *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).'*

The Taxpayer' s case

10. The Taxpayer claims for part-exemption from salaries tax for the year of assessment 2000/01, arguing that his is a non-Hong Kong employment and that any income derived from his non-Hong Kong employment necessarily falls outside the basic charge under section 8(1) of the IRO and that liability to salaries tax can only arise under section 8(1A)(a) which brings to charge only income derived from services he has actually rendered in Hong Kong. At the material period, he had rendered services partly in Hong Kong, accordingly he claims for part-exemption, submitting to Hong Kong tax only for such proportionate part of time he spent in Hong Kong.

The Revenue's case

11. The Revenue argues that the Taxpayer's employment is in fact of Hong Kong source.

12. The Revenue says that the Taxpayer was paid by Company E in Hong Kong. In fact, Company E filed an Employer's Return in Hong Kong reporting the Taxpayer as its employee. Taxpayer's business cards also show him as Financial Director of Company E. In addition, the Taxpayer was enrolled as employee under the Mandatory Provident Fund ('MPF') Schemes of Company E in Hong Kong.

13. The Revenue says that the Taxpayer has produced no evidence showing he had paid any federal income taxes over his employment with Company C, or he had been exempted thereof. Further, the Employment Offer Letter was on a plain paper and the Non-Compete Agreement and Non-Disclosure Agreement referred to in the Employment Offer Letter were not signed by the company representative of Company C. As such, the Taxpayer has failed to adduce solid evidence to show that he was really an employee of Company C in Country H.

14. The Revenue further says that the Taxpayer has not produced any convincing evidence showing that his costs were in fact charged back to and accordingly borne by Company C in Country H. The Revenue says that, in the absence of source documents like ledgers and vouchers, emails and debit notes issued by Company E to Company C, summaries and breakdowns, and the ledger account of Company C and reconciliation thereon as produced by the Taxpayer under cover of his letter of 20 September 2006 are all self-serving and carry no weight.

The hearing

11 August 2006

15. The Taxpayer attended the hearing on 11 August 2006 in person and elected to give evidence under oath.

16. While addressing the requisition (R1, pages 16-18) of the assessor dated 13 July 2006, the Taxpayer indicated that given time, he would (a) obtain and produce the ratification of his employment record directly from the human resources department of Company C in Country H, and (b) prepare the reconciliation of Company E's account to show actual charge back of his salary and allowances onto Company C in Country H.

17. With no objection from the Revenue, we adjourned the hearing to allow time to the Taxpayer to arrange for further evidence.

29 September 2006

18. Before the adjourned hearing on 29 September 2006, the Taxpayer submitted to the Board (a) a letter of ratification of his employment record issued directly by the Custodian of Records of his employer (A4), and (b) reconciliation reports and extracts of ledgers showing the charging back of his costs onto Company C in Country H (A5 and A6). At the hearing on 29 September 2006, he submitted a Declaration of Trust (A7) dated 5 December 2001 showing his one share in Company E was held by him as Trustee for Company C in Country O.

19. The Taxpayer attended the adjourned hearing on 29 September 2006. He advanced two arguments, firstly that he was employed directly by Company C in Country H, and secondly, that he was in fact paid by Company C in Country H. Both arguments turn on finding of facts and evidence.

The issue

20. The issue for this Board to decide, as correctly submitted by the Revenue, is whether the Taxpayer's source of income, the employment, for the period from 18 January 2001 to 31 March 2001 was located in Hong Kong or outside Hong Kong. If his employment was located outside Hong Kong, the Taxpayer's claim for part-exemption will succeed; if it was located inside Hong Kong, his claim will fail.

Analysis and findings

21. In our analysis and finding, we will adopt the subtitles used by the Revenue in its closing submission.

Who is the employer?

22. The Revenue argues that because the Taxpayer (i) was paid by Company E, (ii) joined MPF scheme as employee of Company E in Hong Kong, (iii) signed an Employer's Return for Company E in reporting himself as employee of Company E, and (iv) presented himself on his business card as the Financial Director Asia Pacific of Company E, the Taxpayer's employer should be Company E and not Company C. The Revenue argues that the Employment Offer Letter issued by Company C did not specify that the position of Financial Director Asia Pacific for the Taxpayer had to be one with Company C. Furthermore, it was issued on plain paper and not on Company C letterhead. The Revenue therefore says that the Taxpayer's employment was not with Company C in Country H, but with Company E in Hong Kong.

23. In its reasoning above, the Revenue focuses mainly on the superficial appearance of the Taxpayer's employment. That was not convincing at all. As Macdougall J in Goefert decision said, 'Appearances may be deceptive.' We have to examine what exactly the Taxpayer was employed to do and what he should actually do as the Financial Director Asia Pacific in order to identify 'the real locus of the source of income, the employment.'

24. We find what the Taxpayer was employed to do in the email dated 23 November 2000 sent by Mr N, the then Director of Finance of Company C, to all senior executives of Company C stating,

> '…the role of the APAC Financial Director at [Company C]…is similar to [Mr P's] in Europe, is responsible for providing the full range of finance leadership for the APAC region, including, but not exclusively, Korea, Taiwan, Hong Kong, China and Singapore. The finance and administrative staffs in each of those locations will take direction from this position. We should look to this position to coordinate or do all financial reporting, statutory reporting, financial analysis, recruiting, training, business controls, legal structures and financial management support for the region. Given the strategic nature of the region and the critical importance of the job, I want to make sure (the Taxpayer) is the right person for [Company C] and [Company C] is the right company for (the Taxpayer). Please be frank with (the Taxpayer); I' ve asked him to be the same with you. Based on inputs from you and (the Taxpayer) a decision regarding (the Taxpayer) assuming this position will be made on Tuesday afternoon (28 November 2000), …'

25. According to Mr N' s email of 23 November 2000, the job clearly requires the Taxpayer to take control of all finance and administrative staffs in all locations of the APAC region, not exclusively Hong Kong. It is also clear from Mr N' s email that the decision on the employment would be made only after the conclusion of a two days interview in Country H on Tuesday afternoon, 28 November 2000. The only rational inference to be drawn is that the job was so strategically important to Company C that it extends beyond the territorial limit of Hong Kong to that of the entire Asian Region, raising its importance to similar posting for its Europe Region, and that probably explains why Company C arranged an interview of two days in 15 sessions (A1, 003) with its senior executives in Country H to confirm the appointment.

26. Employment Offer Letter was in fact issued on 28 November 2000 (as mentioned in Mr N' s email of 23 November 2000) in the following terms:

> 'The following documents in this offer package and are to be read, signed and returned to [Company C]
>
> - Employee Offer Letter
> - Employee Non-Compete Agreement
> - Employee Invention and Non-Disclosure Agreement
>
> After you have read the documents listed above, please sign where indicated and return originals to [Ms D] in Human Resources at [Company C]."

27. Plain and literal reading of the above contemporaneous events and documents convince us that an employment was in fact offered to the Taxpayer after his interview in Country H, and that the Employer Offer Letter, the Employee Non-Compete Agreement and the Employee Invention and Non-Disclosure Agreement were all package documents to be read, signed and returned as one to the Human Resources at Company C in Country H. We are therefore satisfied that the Taxpayer was employed by Company C in Country H.

28. We take note that the Appellant has not produced proof of payment of Country H federal income taxes over his employment with Company C. But it is never a test under section 8(1) of the IRO that a taxpayer must show he has paid foreign income tax before he could claim that his income was of non-Hong Kong source. Even assuming the Taxpayer defaulted in paying Country H tax, the Taxpayer might have violated Country H tax law, but not Hong Kong.

29. We also take note that the Non-Compete Agreement and Non-Disclosure Agreement ('the 2 Agreements') as produced were signed by the Taxpayer, but not by Company C's representative, but that alone could not constitute evidence that the Taxpayer was not employed by Company C. Offer of employment was issued by the Finance Director of Company C specifying acceptance to be made by the Taxpayer by signing and returning of three documents, that is, the Employment Offer Letter and the 2 Agreements, which the Taxpayer did on 14 December 2006, and by such acceptance a binding contract of employment between the Taxpayer and Company C was constituted, whether or not the 2 Agreements as returned by the Taxpayer were signed by Company C representative could not change such a fact.

Where the employment contract was negotiated, concluded and enforceable?

30. We take note of the Revenue's submission that the Taxpayer did attend several video conferences with various personnel of Company C in the office of Company E before his trip to Country H. But the employment was in fact offered to the Taxpayer in the Country H. We are satisfied that the employment contract between the Taxpayer and Company C is therefore enforceable in accordance with the terms as stipulated in the 2 Agreements, that is, the laws of the Country H.

31. We also take note that the Employment Offer Letter was printed on a plain paper and not on Company C's letterhead. We also take note that the Employment Offer Letter was accepted by the Appellant in Hong Kong. However, we accept the Taxpayer's testimony that the employment was in fact agreed upon verbally at the close of the interview on 28 November 2000, and that the parties in fact intended the employment to be a Country H employment enforceable in the Country H.

Who bore the Taxpayer's remuneration?

32. It is common ground that the Taxpayer's remuneration was paid in Hong Kong

dollars by Company E. However, the Taxpayer argued that his costs were in fact charged back by Company E to Company C. To support his charge-back contention, the Taxpayer submitted (i) on 11 August 2006, a transaction report (fact (17) above), (ii) on 20 September 2006, a reconciliation report (fact (18)(ii) above), and (iii) on 25 September 2006, emails, debit notes, summaries and breakdowns, ledger accounts of Company C etc (fact (18)(iii) above). The Taxpayer has been trying his best to collate and adduce evidence to show that his costs were in fact charged-back to the accounts of Company C and from the materials so far adduced by the Taxpayer, we are satisfied that there was in fact charging-back and that the Taxpayer's costs were in fact ultimately borne and paid by Company C.

33. The Revenue might prefer to see source documents like relevant ledgers and vouchers of Company E. This Board, however, would consider materials like transaction report, reconciliation report, emails, debit notes, summaries and breakdowns, ledger accounts of Company C, etc coupled with the sworn testimony of the Taxpayer during hearing, sufficient to establish the fact of charging-back. We are therefore satisfied that the Taxpayer's remuneration was in fact paid by Company C.

Whether the control exercised over the Taxpayer's work relevant in the determination of the locality of the Taxpayer's employment?

34. The Taxpayer produced records of leave application and salary review showing that it is Company C in Country H who exercises direct control over his performance of employment. The Revenue argues that reporting to an overseas company in the performance of one's duties is not determinative of his place of his employment.

35. The Board in D40/90, IRBRD, vol 5, 306, 315 stated,

> *'… To whom he reported within the multi-national group of companies does not affect the nature or place of his employment. He was as a matter of fact employed by a company in Hong Kong. If those to whom he reported in practice wished to terminate his services, they could only do so through his employer in Hong Kong. …'*

36. In this case, it is not simply a question of reporting or control, but the substantial terms on non-competition and non-disclosure were all expressed to be governed by the law of Country H, and not other law or jurisdiction. In the circumstance, this Board cannot resist the conclusion that if those to whom the Taxpayer reported in practice wished to terminate the Taxpayer's services, it could only do so through Company C in Country H in accordance with the law of Country H, and not Hong Kong law.

Statements from Company C

37. The Taxpayer adduced a testimony (B1, 48-49) dated 20 June 2006 from Mr L, the General Manager of Company C to prove that 'during all the time, the Taxpayer remains an employee of [Company C] (currently [Company M]) in [Country H].'

38. The Revenue said that Mr L was not with Company C back in year 2000 and therefore his testimony if in absence of corroborative evidence should carry no weight.

39. The Taxpayer then adduced a testimony (A2) dated 8 August 2006 from Mr N, currently the Operations Manager and the then hiring manager, testifying that:

> '…[Mr A] visited [Country H] in November 2000 for interview, and I negotiated the terms of employment with him during his visits. [Mr A] verbally accepted the terms offered by [Company C] and concluded the employment with [Company C] on November 28, 2000 when he was in [Country H]. [Company C] afterwards issued an offer letter dated November 28, 2000 to [Mr A] to evidence the verbal agreement that we have agreed upon…
>
> During his period of assignment in Hong Kong, [Mr A] remains an employee of [Company C] in [Country H]… His remuneration is paid to him in Hong Kong into his bank account for administrative convenience. However all the costs incurred are charged back to the [Company C] in [Country H] and [Company C] in [Country H] has the ultimate contractual liability to pay for [Mr A's] remuneration.'

40. The Revenue said that Mr N's testimony was not substantiated by corroborative evidence and that as he was not available for cross examination, his testimony should also carry no weight.

41. The Taxpayer then adduced a testimony dated 6 September 2006 from Ms K, the Custodian of Records who previously on 11 May 2005 (B1, 34) denied employment record of the Taxpayer, in testifying that the Taxpayer was actually hired by Company C and therefore listed in the Company C system on January 18, 2001, and that upon Company C being acquired by Company M, been employed and listed by Company M system since February 3, 2001.

42. The Revenue again refused to accept Ms K's testimony saying that it should carry no weight.

43. This Board however admits all three testimonies respectively of Mr L, Mr N, and Ms K. We find all three testimonies were made by their respective issuers in their capacity as the executives of Company C (currently Company M) in verifying the identity of one of their fellow employees. We find all three testimonies as sufficient evidence, each in corroboration with the other, showing that the Taxpayer was in fact hired by Company C and listed in the Company C (currently Company M) system.

44. This Board also accepts the explanation given by Ms K over her previous denial of the employment record of the Taxpayer because the Company C (currently Company M) system could not detect the Chinese name of the Taxpayer since the Taxpayer was listed by his English name.

Conclusion

45. In conclusion, we find that the Taxpayer was employed by Company C in Country H and that his employment income was of non-Hong Kong source. In the result, we allow the Taxpayer's appeal and his claim for partial exemption of income (fact (6) above) and dismiss the 2000/01 additional salaries tax assessment (fact (7) above).