Case No. D61/98

Salaries tax – time-apportioned basis – secondment overseas – whether income earned in that period assessable to tax – whether new employment – intra-group billing arrangements.

Panel: Andrew Halkyard (chairman), David Lam Tai Wai and David Wu Chung Shing.

Date of hearing: 17 June 1998.
Date of decision: 20 July 1998.

Company A employed the taxpayer as a senior accountant with effect from 17 January 1994 with a term of employment that the taxpayer will be transferred to work within the Group of Company A. Company A is a public company incorporated in Hong Kong. Its ultimate parent company is Company B, a company incorporated in Country C.

In the years of assessment 1994/95 and 1995/96, the Taxpayer claimed that his income in respect of a secondment by Company A to Country G should not be subject to salaries tax and his income referable to working for a further 24 days outside Hong Kong should not be subject to salaries tax. The assessor assessed the whole of he taxpayer's income from Company A to salaries tax.

The taxpayer objected to the assessments raised upon him on the ground that they were not made in accordance with the time-apportioned basis set out in his tax returns. He also stated that during the period of secondment to Country G, he was continuously employed outside Hong Kong and only made occasional trips back to Hong Kong for meetings and briefings. He also remarked that he was still required to spend a considerable amount of his time working outside Hong Kong.

The Commissioner rejected the taxpayer's claim and determined that all the taxpayer's employment income for the years of assessment 1994/95 and 1995/96 should be subject to salaries tax regardless of the place where his services were provided. The taxpayer appealed and argued that his income from Company A should be assessed on a time-apportioned basis.

Held:

(1) The question for this appeal is whether the taxpayer had one employment only. If the Board find the taxpayer's secondment to work in Country G did not constitute a new employment, and that the taxpayer held one employment throughout the period with Company A, then the taxpayer's appeal should be dismissed. The taxpayer has not disputed that his

employment with Company A was located in Hong Kong. The income arising therefrom would therefore be fully taxable in accordance with section 8(1)(a) of the Inland Revenue Ordinance (CIR v Goepfert (1987) 2 HKTC 210 applied).

(2) Intra-group billing arrangements for an employee's remuneration do not of themselves change the employment relationship between employer and employee (D54/89, IRBRD, vol 4, 547 and D17/90, IRBRD, vol 5, 143 applied).

(3) On the basis of the facts, the Board found that at all relevant times, the taxpayer had one employment only, and that was with Company A. It follows that all his income from Company A is liable to salaries tax. This appeal is hereby dismissed.

Appeal dismissed.

Cases referred to:

CIR v Goepfert (1987) 2 HKTC 210
D54/89, IRBRD, vol 4, 547
D17/90, IRBRD, vol 5, 143

Chan Wong Yee Hing for the Commissioner of Inland Revenue.
Taxpayer in person.

DECISION:

The Taxpayer has objected to the salaries tax assessments raised on him for the years of assessment 1994/95 and 1995/96. The Taxpayer claims that his employment income should be subject to salaries tax on a time-apportioned basis.

The facts

On the basis of the documents produced by both parties, we find the following facts.

1. By an appointment letter dated 4 November 1993, Company A employed the Taxpayer as a senior accountant (group accounting services, finance projects) with effect from 17 January 1994. His appointment letter provided, amongst other things:

   Bonus: An annual bonus will be paid if you are in Company A's service on the last day of the calendar year …

Retirement Benefits: … You will become a member of Company A's Retirement Scheme [details provided].

Inter-company Transfer: You will be transferred to work in any suitable position within the Group of Company A, if required.

2. Company A is a public company incorporated in Hong Kong. Its ultimate parent company is Company B, a company incorporated in Country C.

3. By two employer's returns of remuneration and pensions for the years ended 31 March 1995 and 1996, Company A reported that it paid the Taxpayer various emoluments including salary, annual bonus, education allowance and other allowances[1], totalling $477,489 (in 1995) and $570,768 (in 1996). During both years Company A also refunded to the Taxpayer approximately on-half the rent he paid for a residential flat in Hong Kong. In both employer's returns, Company A stated that the Taxpayer was not wholly or partly paid by an overseas concern either in Hong Kong or overseas.

4. In his tax return for individuals for the years of assessment 1994/95 and 1995/96, the Taxpayer claimed that his income in respect of a secondment by Company A to Country G, which took place during the period 25 September 1994 to 7 May 1995, should not be subject to salaries tax. For the year of assessment 1995/96, the Taxpayer also claimed that his income referable to working for a further 24 days outside Hong Kong after 7 May 1995 (in total comprising five overseas trips to Country D, Country E, Country F, Country G and Country H) should not be subject to salaries tax.

5. In support of his claim in fact 4, the Taxpayer produced a letter dated 16 May 1995 from Company B (whose address was given in District I, Hong Kong). That letter, addressed to the Commissioner of Inland Revenue and signed by the manager (human resources, Asia Pacific region) stated:

"This is to certify that [the Taxpayer] was seconded from Company A and Company B during 25 September 1994 to 7 May 1995.

[The Taxpayer's] secondment to Country G was on a full time basis and he was responsible for our project in Country G. For convenience purpose, his monthly salary was still paid by Company A in Hong Kong on behalf of Company B. Thereafter, he will still be required to travel and work in Country G on a short time basis whenever necessary."

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[1] The 'other allowances', which were only paid for the year ended 31 March 1996, were described by Company A as:

"May 1995	Overseas Duty Allowances	$36,023
July 1995	Ex-gratia Bonus	$2,500"

6. The assessor assessed the whole of the Taxpayer's income from Company A to salaries tax.

7. The Taxpayer objected to the assessments raised upon him on the ground that they were not made in accordance with the time-apportioned basis set out in his tax returns. He also stated that during the period of secondment to Country G, he was continuously employed outside Hong Kong and only made occasional trips back to Hong Kong for meetings and briefings. He also remarked that he was still required to spend a considerable amount of his time working outside Hong Kong.

8. In response to enquiries by the assessor, on divers dates the Taxpayer stated:

   (a) "My original contract of appointment with [Company A] dated 4 November 1993 was negotiated and concluded in Hong Kong."

   (b) "[As per fact 5], the status of my employment had changed as from 25 September 1994 from [Company A] to Company B … As from that date I was on full time secondment to Company B, to be based in Country G,[2] not in Hong Kong."

   (c) There is a master and servant relationship between Company B2[3] and me.

   (d) The parent company, Company B, has full jurisdiction and exercises control over my work during my period of assignment. Whilst during my assignment outside Hong Kong, I am generally attached to the regional branches and representative offices in the respective regions, for example, Company B1, Company B3, Company B4, Company B5, Company B6. The above operations report their activities to and are directly controlled by Company B.

   (e) Term of my assignment … for Country G [was] on a full time basis initially, and thereafter on short-term assignment in the Asian-Pacific region whenever necessary, outside Hong Kong. I have not been assigned to work full time in Hong Kong.

   (f) My terms of secondment to Country G as from 25 September 1994 remained unchanged (that is, same as those terms of employment [with Company A]). Hence there was no need for a transfer letter supporting my posting. Please refer to [fact 5] for my terms of secondment.

   (g) [The] negotiation, conclusion and acceptance of my secondment Company B1 was in Country G [during the period 25 September 1994 to 4 October 1994 with retroactive effect to 25 September 1994].[4]

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[2] The Taxpayer produced a name card for the representative office in Country G of "Company B1" on which was printed the Taxpayer's name as well as the words "business planner".

[3] Company B2 refers to the Hong Kong branch of Company B. Its offices are in District L, Hong Kong.

(h) In further support of his claim the Taxpayer produced a job description headed 'Finance – Country G'. Although this document, dated 26 September 1994, appears to have emanated from Company B1, it is not clear who actually prepared it. Nonetheless, it stated:

Responsibilities: (1) Short Term: Responsible for the business planning and financial elements of the investment opportunity in Area J of Country G. (2) Long Term: Possible senior financial management position in Area J.

[Specific responsibilities were then set out which mainly related to a proposed joint venture agreement between Company B and Area J.]

Expected Start Date: 3 October 1994.

Expected Duration in Country G: Initially up to the agreement (December 1994) with possibility for long term posting into Area J as part of the key management team (2-3 years).

(i) For convenience purpose, my remuneration payment has been through Company A … However such payments … are charged back to Company B, via the inter-group debiting process every quarter.

(j) Based on mutual agreement between both Company B1 and Company A, and to the benefit of the employee, I was still in Company A's Retirement Scheme during my period of secondment. This was based on the premise that my original short term secondment was on a new project development basis and Company B1 would not require long term staff on its payroll due to the uncertainty of its new project.

(k) [Being a non-resident of Country G for the years of assessment in dispute, I did not pay tax there.]

(l) My full time secondment to Company B1 was terminated [on 7 May 1995 because] the new development project in Country G was not successful. This resulted in the initial expected secondment duration in Country G for 2 to 3 years not possible. …

Upon my cessation of secondment to Company B1 on a full time basis (after 7 May 1995), I returned to Hong Kong and continued to work for Company B operating from Hong Kong. During this time I was required to travel and work in [Country G and] other Asian countries whenever required for evaluation of new investment opportunities outside Hong Kong on short term duration.

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[4] In other correspondence with the assessor, the Taxpayer stated that [the] secondment was negotiated and agreed upon amongst the three parties, namely Company A, Company B and me.

Please note that my cessation from secondment from Company B1 after 7 May 1995 should not be of relevance to my salaries tax assessment for the year of assessment 1994/95.

(m) During the period of secondment to Country G, the Taxpayer was in Hong Kong for the following days:

Date of Arrival in Hong Kong	Date of Departure from Hong Kong	No. of days in Hong Kong	Days for briefing	Days on leave
	25-09-1994			
04-10-1994	10-10-1994	6	2	4(H/L)
01-11-1994	07-11-1994	6	2	4(H/L)
01-12-1994	05-12-1994	4	1	3(H/L)
12-01-1995	18-01-1995	7	3	4(H/L)
02-03-1995	13-03-1995	11	3	4(H/L)+4(A/L)
13-04-1995	18-04-1995	5	1	4(H/L)
07-05-1995				

H/L: Home Leave included weekends
A/L: Annual Leave

9. In response to the assessor's enquiries, the unit head (payroll) of Company A stated:

(a) There is no change in terms and conditions of employment as per the letter of appointment dated 4 November 1993 [fact 1 refers] during the years ended 31 March 1995 and 1996.

(b) [The Taxpayer] was seconded to the project of Area J in Country G from 25 September 1994 to 7 May 1995. During that period, he worked full time for the project and reported to the project managers.

(c) "When [the Taxpayer] worked in Country G during September 1994 to May 1995, he served two projects – Area J and Area K. The costs of Area K were 100% absorbed by Company B whereas for Area J, 51% was charged to Company B while the remaining 49% absorbed by Company A. For short term assignments served by him, the costs of [the Taxpayer] will be charged to the respective projects of Asia Pacific region on a time-basis."

(d) For the period he was seconded to Country G … he solely reported to the project managers in Country G and having a master servant relationship during the secondment. However, Company A will be the only company to terminate the employment with [the Taxpayer] if the circumstances was warranted.

10. On 12 February 1998 the Commissioner rejected the Taxpayer's claim that his income from Company A should be assessed on a time-apportioned basis. Therefore the Commissioner determined that all the Taxpayer's employment income for the years of assessment 1994/95 and 1995/96 should be subject to salaries tax regardless of the place where his services were provided.

11. On 11 March 1998 the Taxpayer lodged a valid appeal to the Board of Review against the Commissioner's determination. The Taxpayer argued that his income from Company A should be assessed on a time-apportioned basis.

Evidence of the Taxpayer

The Taxpayer elected to give sworn evidence before the Board. On the basis of that evidence we make the following additional findings of fact.

12. Further to the Taxpayer's comment at fact 8(e), the nature of his secondment was temporary, but with a view to permanency if conditions permitted. In this regard, the Taxpayer reiterated that at all times the terms and conditions of his employment with Company A (fact 1 refers) remained the same; however, if the job became permanent, he would expect revisions to enhance those terms and conditions.

13. When asked if there was any evidence of his claim that he had a master/servant relationship with Company B, the Taxpayer accepted that he had no written agreement formally documenting this relationship. However, he stated that his claim was confirmed by Company A's response at fact 9(d). The Taxpayer also referred to his job description at fact 8(h).

14. The Taxpayer agreed that his employment with Company A did not terminate on the date of his secondment to Country G on 25 September 1994, nor was he re-employed by Company A upon the conclusion of the secondment on 7 May 1995. He simply said that he was 'repatriated back to work for Company A'.

15. The Taxpayer agreed that he was not on the payroll of Company B.

16. The Taxpayer's remuneration for the years ended 31 March 1995 and 1996 (such as salary, bonuses, allowances, rental refund etc) was paid totally in accordance with the terms of the employment agreement described at fact 1. When asked whether he would receive a bonus in accordance with that agreement if not in the service of Company A, the Taxpayer stated that he did not know.[5]

17. The nature of the job for which the Taxpayer was seconded to Country G was only advertised internally within Company B. The Taxpayer does not know if anyone, other than himself, was considered for this job. After expressing interest in the job,

[5] Company A paid a bonus of $35,679 to the Taxpayer in December 1994 for the calendar year 1994. It will be recalled that the relevant term of employment states: Bonus: An annual bonus will be paid if you are in Company A's service on the last day of the calendar year … (emphasis added)

the Taxpayer was flown to Country G where he had discussions with the project managers working for Company B1 in Country G.

Contentions of the Taxpayer

18. The Taxpayer disputed the statement by Company A at fact 3 that he was not paid wholly or partly by an overseas concern. During the secondment period he claims that all of his staff costs paid by Company A were recovered from overseas concerns. In other words, the Taxpayer contends that Company A had not paid him any remuneration out of its own resources whilst he was on overseas secondment and thus Company A was not responsible for his remuneration.

19. The Taxpayer then noted that it is always possible but impractical to ask Company B to start a new contract whenever it requires expertise outside Hong Kong for a short term. Also, it would be unfair to him if Company A was to terminate the employment and re-employ him after his temporary employment with Company B came to an end because he would not be treated as being employed continuously. As a result he may lose retirement and other statutory benefits specified under the Employment Ordinance. From the perspective of Company B, the Taxpayer stated that it is definitely not practical if payroll accounts are to be set up and all employment formalities are to be followed for all temporary staff from Company A that were deployed to work overseas purely for Company B.

20. Finally, the Taxpayer focused upon the fact that the Commissioner had denied his claim on the basis that there was no separate employment contract signed between him and Company B in respect of his overseas secondment. In this regard, Taxpayer contends that the Commissioner is focusing upon form, not substance. In urging us to consider the substance of his claim, the Taxpayer argued that terminating his employment with Company A and then concluding a separate contract with Company B would be a waste of resources of every party involved. He also argued that, in any event, the absence of a formal separate contract of employment did not mean that his employment whilst in Country G was of a Hong Kong source.

21. In summary, the Taxpayer claimed that Company A did not pay him his full year salary; rather Company A (with whom he had a master/servant relationship) paid him through Company A.

Contentions of the Commissioner

22. Given our view of the facts of this appeal, it is not necessary for us to consider in detail the contentions of the Commissioner's representative, Mrs Jennifer CHAN. Suffice to say that Mrs Chan's submission was straightforward and to the point. She argued that:

- There was no new employment during the period 25 September 1994 to 7 May 1995; and

- If we rejected the first argument, then any new employment was located in Hong Kong.

Reasons for our decision

23. We agree with Mrs Chan that if we find the Taxpayer's secondment to work in Country G did not constitute a new employment, and that the Taxpayer held one employment throughout the period 1 April 1994 to 31 March 1996 with Company A, then the Taxpayer's appeal should be dismissed. In this regard, the Taxpayer has not disputed that his employment with Company A was located in Hong Kong. The income arising therefrom would therefore be fully taxable in accordance with section 8(1)(a) of the Inland Revenue Ordinance (see generally, CIR v Goepfert (1987) 2 HKTC 210).

24. In our view, there is not the slightest doubt that, at all relevant times, the Taxpayer had one employment only. And, whether tested formally or as a matter of substance, that employment was a Hong Kong employment with Company A. Our analysis is as follows.

25. We note that at fact 9(d) the head of payroll for Company A has stated that the Taxpayer had a master and servant relationship, presumably with Company B, during the so-called secondment. But there is no other evidence of this apart from the Taxpayer's unsubstantiated assertion that Company B could terminate his employment. It is also instructive that Company B have never acknowledged an employment relationship. In over view the form as well as the substance of the matter is set out in the very next statement made by Company A's payroll head: only [Company A could] terminate the employment with [the Taxpayer] if the circumstances was warranted. In other words, Company A acknowledges that Company B could not terminate the employment: presumably for the simple reason that only the employer (or master), namely, Company A, was entitled to do so.

26. We now turn to the Taxpayer's argument that he was only paid through, but not by, Company A. In the Taxpayer's view, this shows that the substance of the arrangement was that he became employed by Company B. With respect, it does nothing of the sort. Intra-group billing arrangements for an employee's remuneration do not of themselves change the employment relationship between employer and employee. Previous Board of Review decisions such as D54/89, IRBRD, vol 4, 547 and D17/90, IRBRD, vol 5, 143 also decided that such arrangements do not change the fact that the legal liability for such payments fell on the company which had entered into the employment agreement with the employee. In our view, this is precisely the case in the present appeal.

27. Turning now to the nature of the so-called secondment, the Taxpayer admitted that it was initially temporary in nature, albeit with a view to permanency if conditions permitted. In this regard, we note that none of the Taxpayer's terms and conditions of employment set out at fact 1 changed during this period. This is prima facie,

albeit not conclusive, evidence that the underlying contract of employment also had not changed. However, there are many facts before us that militate against the Taxpayer having entered into a new employment with Company B. We confine ourselves to the following observations:

- At all times Company A lodged employer's returns in respect of the Taxpayer. There is no evidence before us that it did so on behalf of Company B.
- At all times the Taxpayer continued to participate in Company A's retirement scheme.
- At all times the Taxpayer was on Company A's payroll; he was never on the payroll of Company B.
- Whilst in Country G the Taxpayer received the 1994 bonus under a term of employment with Company A that stated that it would only be paid to him if he was in service with Company A on the last day of the calendar year.
- The Taxpayer admitted that Company A not only did not terminate the employment and re-employ him after his temporary employment with Company B came to an end, but also that this would be unfair because he would not be treated as being employed continuously. If there were a termination and a re-employment the Taxpayer realised that he could lose retirement and other statutory benefits specified under the Employment Ordinance. This seems to us a classic example of the Taxpayer both wanting his cake and eating it too.
- Finally, the Taxpayer made a telling comment when asked to contrast his terms of employment under the so-called temporary secondment with the case where that secondment became permanent. Under the temporary secondment, the Taxpayer's terms and conditions changed not at all; but if it became permanent, he said that he would expect those terms and conditions to be enhanced. The implication is that the temporary secondment did not change, either in form or in substance, the underlying employment relationship between the Taxpayer and Company A. Indeed, on the facts before us, we cannot see how this could amount to the Taxpayer having a new and separate employment with Company B. Of course, subsequent events and a decision to offer the Taxpayer a substantive and permanent position in Country G could affect the analysis. But the fact remains that this simply did not happen.

28. In summary, and on the basis of the facts we have found, we conclude that at all relevant times the Taxpayer had one employment only, and that was with Company A. It follows that all his income from Company A is liable to salaries tax. This appeal is hereby dismissed.