Case No. D63/89

Salaries tax – taxpayer employed by four different companies at different times – source of income – whether Hong Kong or not – section 8 of the Inland Revenue Ordinance.

Panel: T J Gregory (chairman), Colin Cohen and Francis G Martin.

Dates of hearing: 22 and 23 August 1989.
Date of decision: 24 October 1989.

The taxpayer was employed by A company which was the agent of B company. The taxpayer left the employment of A company and joined the employment of B company in Switzerland. The taxpayer was also employed by C company at the same time as he was working for B company. The taxpayer was subsequently employed by D company which took over the business of A company. The taxpayer submitted that the income which he received from A, C and D companies was taxable in Hong Kong but the income received from B company was not taxable in Hong Kong. He submitted that the B company income did not arise in nor was derived from Hong Kong.

Held:

During part of the period of employment by the taxpayer with B company, he was required to perform services in Hong Kong and his remuneration from B company was accordingly taxable. However during part of the period of his employment with B company he was separately employed by another company or companies to perform services in Hong Kong and accordingly his remuneration from B company did not refer to services in Hong Kong and was not taxable. To fully understand the relationship of the taxpayer and the services he rendered to different companies, it is necessary to study the case in detail and it is not possible to effectively summarise the facts in this headnote.

Appeal allowed in part.

Cases referred to:

CIR v Goepfert 2 HKTC 210
BR 14/75, IRBRD, vol 1, 196
Varnum v Deeble [1985] STC 308

Luk Nai Man for the Commissioner of Inland Revenue.

Tai Yiu Wah of Patrick L T Wong & Co for the taxpayer.

Decision:

1. THE NATURE OF THE APPEAL

The Taxpayer objected to the assessment to salaries tax of income received pursuant to a contract of employment in the years of assessment 1981/82 to 1985/86, both inclusive.

2. THE FACTS

The facts, which are not in dispute, are:

2.1 Year of Assessment 1981/82

2.1.1 For the first month of this particular year the Taxpayer was employed as a manager by A Company, a company incorporated in Hong Kong which, at that time, was the Hong Kong agent for B Company, a company which manufactured and sold, inter alia, semi-conductors, and which agency continued in effect until 30 April 1984.

2.1.2 For four weeks in May 1981 the Taxpayer was in Zurich, Switzerland, at the offices of B Company undertaking a training course.

2.1.3 On 25 May 1981 B Company addressed a letter to the Taxpayer from its office in Zurich offering him employment from 1 June 1981 and which letter included the following paragraph:

> 'Your [the Taxpayer's] duties and responsibilities shall consist of promoting and enhancing the sales of [B Company's] products in the Far East region, except Australia, India and the USSR by establishing and maintaining sales networks for [B Company's] product, travelling in the Far East region to visit customers and agents, administrating returns, samples, order entering, L/C's, forecasts, collection matters and by submitting trip reports, all as directed from time to time by [B Company].'

2.1.4 The Taxpayer accepted this offer of employment when he was physically offshore Hong Kong and the contract subsisted throughout the residue of this year of assessment.

2.1.5 From 1 June 1981 for the residue of this tax year the Taxpayer was also employed by C Company, a company incorporated in Hong Kong whose business was an advertising agency specializing in technical advertising.

2.1.6 The Taxpayer offered for salaries tax his earnings from A Company and C Company but not the income received by him under his agreement with B Company.

2.2 Year of Assessment 1982/83

2.2.1 Throughout this period the Taxpayer worked for C Company and his contract with B Company continued in force.

2.2.2 The Taxpayer offered for salaries tax his earnings from C Company but not the income received by him from B Company.

2.3 Year of Assessment 1983/84

2.3.1 Throughout this period the Taxpayer worked for C Company and his contract with B Company continued in force.

2.3.2 The Taxpayer offered for salaries tax his earnings from C Company but not the income received by him from B Company.

2.3.3 The Taxpayer resigned from the employment of C Company on 31 March 1984.

2.4 Year of Assessment 1984/85

2.4.1 From 1 May 1984 and for the residue of this period the Taxpayer was employed by another Hong Kong incorporated company, D Company, which had succeeded A Company as B Company's Hong Kong agent. Throughout this period his contract with B Company continued in force.

2.4.2 The Taxpayer offered for salaries tax his earnings from D Company but not the income received by him from B Company and which, in this period, was supplemented by an incentive payment.

2.5 Year of Assessment 1985/86

2.5.1 The Taxpayer continued as an employee of D Company until 31 March 1986 when he resigned and his contract with B Company continued in force until 31 March 1986 when it was terminated for the reasons stated in paragraph 2.6 below.

2.5.2 The Taxpayer offered for salaries tax his earnings from D Company but not the income received by him from B Company and which, in this period, had been supplemented by incentive payments.

2.6 Year of Assessment 1986/87

2.6.1 With effect from 1 April 1986 a Hong Kong incorporated company, E Company, which is wholly owned by the Taxpayer, became B Company's agent.

2.6.2 From May 1986 the Taxpayer has been a director of E Company.

2.7 Events subsequent to 1 April 1986

2.7.1 On 18 July 1986 the Taxpayer, accompanied by his authorized representative, called to see the Inland Revenue to discuss the Taxpayer's income from B Company during the years of assessment 1981/82 to 1985/86. At this meeting, the representative handed in a letter dated 18 July 1986, explaining that the representative felt that certain of the Taxpayer's income in the relevant years might be subject to Hong Kong salaries tax although the Taxpayer was satisfied that it was not. This letter continued that the Taxpayer was making a full voluntary disclosure to the Revenue to determine the extent, if any, to which that income may be subject to salaries tax. The letter went on to explain the background and provided a copy of the letter of 25 May 1981 from B Company to the Taxpayer, refer paragraph 2.1.3 above, and proposed that the income received by the Taxpayer from B Company be assessed to tax in the ratio the sale of B Company products in Hong Kong bore to the sales in the region other than Hong Kong.

2.7.2 In due course the assessor raised assessments for additional tax on the Taxpayer's income from B Company on an apportioned basis, the basis of apportionment being the number of days the Taxpayer spent in Hong Kong to 365 days, with the exception of the year 1981/82 when the period was 304 days because the Taxpayer's contract with B Company did not become effective until 1 June 1981.

2.7.3 The Taxpayer objected to the assessments and in due course on 26 August 1988 the Commissioner issued his determination confirming the additional assessments raised by the assessor.

2.7.4 On 23 September 1988 the Taxpayer's representative gave notice of appeal and the grounds of appeal are as follows:

2.7.4.1 The additional salaries tax assessments issued to the Taxpayer for the years of assessment 1981/82 to 1984/85 and the salaries tax assessment 1985/86 were excessive;

2.7.4.2 The Commissioner's determination was incorrect; and

2.7.4.3 The Taxpayer's employment with B Company for all years under appeal was a foreign employment and should not be and must not be subject to Hong Kong salaries tax.

3. THE CONDUCT OF THE APPEAL

3.1 The Taxpayer's submission was in the form of a written submission with copies of the annexures.

3.2 Having been duly sworn, the Taxpayer read his submission to the Board and explained the annexures. After cross-examination, the Revenue made a submission and, with benefit to an overnight adjournment, the Taxpayer produced a written reply to the Revenue's submission at the second session.

3.3 Because certain aspects which could have been relevant were not clear from the undisputed facts and the evidence, after the Taxpayer had concluded his reply the Board asked him several questions and the Revenue, although afforded the opportunity of asking additional questions with respect to the information obtained by the Board, elected not to further question the Taxpayer.

3.4 In the synopsis of the Taxpayer's evidence in paragraph 4 below, his evidence-in-chief and in reply to the Board is recorded without always distinguishing between the time the evidence was given.

4. THE CASE FOR THE TAXPAYER

4.1 The Taxpayer submitted that his remuneration from B Company from 1 June 1981 to 31 March 1986 was not chargeable to salaries tax under section 8(1A)(a) as it was regulated by section 8(1A)(b) of the Ordinance.

4.2 The Taxpayer stated that he went into the employment of A Company from school, that was in November 1979. He was employed by A Company as a sales engineer and A Company was at that time the Hong Kong agent for B Company.

4.3 Whilst in this employment he studied privately and, in due course, passed the required professional examinations and, having worked for the period normally required by the professional institution whose membership he sought, he applied for and was granted membership in May 1987.

4.4 He resigned from A Company on 30 April 1981 and underwent a four weeks training course with B Company in Zurich where he was also interviewed in connection with his eventual appointment as a 'regional sales consultant' for B Company. The Taxpayer referred the Board to a summary of his training with B Company, the content of which was not challenged by the Revenue. Subsequently he received the letter of 25 May 1981 from B Company's Zurich office and, in due course, when outside of Hong Kong he accepted the offer contained in B Company's letter. That the Taxpayer accepted the offer of employment offshore Hong Kong was not challenged by the Revenue.

4.5 B Company provided the Taxpayer with a complete office set-up in its Manila factory. The B Company operation in Manila included a semi-conductor laboratory and a team of supporting engineers. The Taxpayer produced the chart showing the operational organization of B Company's Manila factory (although this was dated September 1987 and there was no evidence that the organizational chart was or was not applicable throughout the relevant period).

4.6 The Taxpayer was intensively trained by B Company both in Switzerland and the Philippines at various times between May 1981 and February 1987, the courses were recorded in a summary, refer paragraph 4.4 above. This training enabled him to discharge highly technical duties at B Company's Manila factory where B Company's laboratory and supporting teams were located. The Board accepts all of this training as having taken place and, indeed, the Revenue did not challenge this evidence.

4.7 During the relevant period B Company did not have an office in Hong Kong and it did not have any laboratory in Hong Kong. The Taxpayer stated that he is a Hong Kong resident and the duties which he assumed under the letter of 25 May 1981 did not require him to spend all of his time promoting B Company. He provided his services when they were called upon B Company. In this respect the Taxpayer stated that he would assist B Company's customers when they were planning an installation and he would make follow-up visits, programmed to take place after the installation was expected to have been completed, and that, essentially, his role was that of a trouble shooter. If there were problems with a B Company product he would go to Manila and supervise examination and testing and thereafter not only report to Zurich but also endeavour to resolve any problems associated with the product with the customer. Additionally, he visited other countries in the Far East to conduct B Company product application seminars.

4.8 The work the Taxpayer performed for B Company could not be performed from a private residence. The work he did with respect to B Company products was highly technical and required highly specialized equipment and laboratory conditions which were not available in Hong Kong but were available at the B

Company's Manila factory. The Board was referred to a sample of a report by the Taxpayer to his superior in B Company on a test of certain B Company products annexed to his submission, and was asked to accept that the type of testing demonstrated required specialist equipment which would not be kept by someone in his home. The Board accepts this evidence.

4.9 The Taxpayer, expressing some reluctance, was critical of the letter written by his representative to the Revenue on 18 July 1986, refer paragraph 2.7.1 above. He stated that the letter was prepared in haste and that the true facts were reflected by his representative's letter of 21 February 1987, in which it was stated that 'whilst [the Taxpayer] was in Hong Kong, he was not required to work at all for [B Company]'. The Taxpayer pointed out that A Company and D Company were B Company's agents in Hong Kong and were required to deal with any customer related problems in Hong Kong and that if he, personally, dealt with any problems with B Company products within Hong Kong he did that in his capacity as an employee of A Company, initially, and D Company, subsequently, as opposed to pursuant to his personal appointment with B Company.

4.10 Under a vigorous cross-examination by the representative of the Revenue the Taxpayer was not shaken in his evidence:

4.10.1 He was insistent that his appointment by B Company related to offshore services, there being no need for him to provide services directly for B Company in Hong Kong by virtue of the fact that they were independently represented in Hong Kong by an agent, as indeed they were in other Far East countries, and that in Hong Kong the primary responsibility for customer problems was that of the agents.

4.10.2 When questioned about his provision of services to B Company the Taxpayer explained that many of his services were provided on the basis of a programme developed to accommodate a customer's need, but that in extraordinary cases he would be contacted from Manila and go to Manila. He also explained that, and notwithstanding the terminology used in his appointment letter, refer paragraph 2.1.3 above, most of the services he provided for B Company were of a technical nature and that his services to B Company's agents in the region was the provision of the technical assistance.

4.11 Under questioning from the Board the Taxpayer stated that there was no relationship between his income from B Company and sales in Hong Kong. He was also questioned as to the incentive payments which he had received in the calendar years 1984 and 1985: he explained that these arose as a result of the preparation of sales targets for each area in the region and that if a target was met or exceeded B Company paid an incentive which was calculated by reference to sales.

4.12 The Taxpayer also confirmed to the Board that the record of his days in Hong Kong in the relevant period was correct, these being:

Period	Number of Days in the Period	Number of Days in Hong Kong
1-6-1981 to 31-3-1982	304	244
1-4-1982 to 31-3-1983	365	299
1-4-1983 to 31-3-1984	365	311
1-4-1984 to 31-3-1985	365	309
1-4-1985 to 31-3-1986	365	305

4.13 The Taxpayer also told the Board that C Company was owned by a friend who knew of his agreement with B Company as did D Company when he was employed by them.

5. SUBMISSION BY THE REVENUE

The Revenue's submission was also in writing and may be summarized as follows:

5.1 The relevant statutory provisions concerning tax charged and income from an employment are set out in section 8(1A) and (1B) of the Ordinance.

5.2 The interpretation of this section has been the subject matter of several appeals to the Board and appeals by way of case stated to the courts.

5.3 The representative then referred the Board to CIR v Goepfert 2 HKTC 210.

5.3.1 The headnote reads:

> 'The taxpayer was an employee of an American multinational corporation with its head office in New York. In 1987 the employer transferred the taxpayer to Hong Kong where he was assigned to a group company. The function of that company and the taxpayer was to assist other group companies in Asia (other than Hong Kong). In the year ended 31 March 1982 the taxpayer spent 41 days outside Hong Kong in fulfilment of his duties and he claimed that emoluments attributable to that period should be excluded from charge by virtue of section 8(1) and section 8(1A). The Board of Review upheld the taxpayer's claim. The Commissioner appealed.
>
> Held:

> The location of the taxpayer's employment was outside Hong Kong. He was therefore liable to salaries tax only on the income derived from services he actually rendered in Hong Kong. He was not liable to salaries tax in respect of the income attributable to the 41 days service rendered outside Hong Kong.'

5.3.2 The Revenue's representative then referred to passages in the judgment of Macdougall J namely:

5.3.2.1 At pages 227 and 228, the following quotation from the Board decision in BR 14/75:

> 'It appears to us that so far as salaries tax is concerned the taxing scheme in Hong Kong is that so long as income arises in or is derived from an employment in Hong Kong tax is assessable under section 8(1). Income for services rendered in the Colony is included as such income by section 8(1A)(a). As to services rendered outside the Colony, if all the services are rendered abroad, then the income derived therefrom is exempted from tax under section 8(1A)(b). It must follow from this that if part of the services is rendered in Hong Kong then section 8(1A)(b) will not apply subject to the proviso that in determining whether all the services are rendered outside the Colony no account shall be taken of services rendered in the Colony during a period of less than 60 days in any one year (section 8(1B)).'

5.3.2.2 At page 236:

> 'As a matter of statutory interpretation I am unable to escape the conclusion that, although section 8(1) must be construed in the light of and in conjunction with section 8(1A), section 8(1A)(a) creates a liability to tax additional to that which arises under section 8(1). It is an extension to the basic charge under section 8(1). If it were otherwise section 8(1A)(a) would be virtually otiose and section 8(1A)(b) completely unnecessary.'

5.3.2.3 At pages 236 and 237:

> 'In this connexion the Commissioner's own departmental practice is illuminating. Appendix 10 of the Inland Revenue Department interpretation and practice note relating to the charge to salaries tax states:
>
> > "If the income from employment does not come within the basic charge, because it does not 'arise in' or 'derive from' a source in the Colony, then consideration will need to be given as to

whether liability arises under the extension to the basic charge by the provisions of section 8(1A). Sub-section (a) of section 8(1A) does not in any way limit the charge in section 8(1); it extends the charge by specifically including as income arising in or derived from the Colony, all income derived from services rendered in the Colony including leave pay attributable to such services. It should be noted that this sub-section relates only to employments; it does not apply to offices of profit."'

5.3.2.4 At page 238:

'Having stated what I consider to be the proper test to be applied in determining for the purpose of section 8(1) whether income arises in or is derived from Hong Kong from employment, the position may, in my view, be summarized as follows.

If during a year of assessment a person's income falls within the basic charge to salaries tax under section 8(1), his entire salary is subject to salaries tax wherever his services may have been rendered, subject only to the so called "60 days rule" that operates when the taxpayer can claim relief by way of exemption under section 8(1A)(b) as read with section 8(1B). Thus, once income is caught by section 8(1) there is no provision for apportionment.'

5.3.2.5 At page 238:

'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. Again, this is subject to the "60 days rule".'

The representative stated that it was the final paragraph of this extract upon which the Commissioner had reached his determination.

5.4 The representative, relying on the Goepfert case, submitted that the fact that a person was employed by a foreign corporation does not mean that his income from that employment must not be subject to Hong Kong salaries tax. If certain income is derived from services rendered in Hong Kong that income is not subject to the exclusion provisions under section 8(1A)(a) and (b) and is chargeable to salaries tax by virtue of the provisions of section 8(1) and section 8(1A).

5.5 The representative then went on to review the grounds of appeal, refer paragraphs 2.7.4.1 to 2.7.4.3 above. It was submitted that the first two grounds were too general and vague and could not be dealt with intelligently. The only substantial ground was the third ground which the Revenue submitted must fail if their interpretation of section 8(1A)(a) and (b) of the Ordinance was accepted.

5.6 The Revenue then proceeded to deal with the Taxpayer's contention that he did not render any services in Hong Kong in relation to his employment by B Company. The Revenue submitted that the Taxpayer's contention was not supported by the following evidence:

5.6.1 Hong Kong was not excluded from the territory referred to in the appointment letter of 25 May 1981.

5.6.2 Instructions from B Company might come at any time and the Taxpayer was waiting for these directions whilst in Hong Kong. The representative's letter of 18 July 1986, refer paragraph 2.7.1 above, stated that the Taxpayer worked at his own home and his liaison with B Company was mainly by telephone. The Revenue stated that there was more than adequate time in which the Taxpayer could have instructed his representative whereby allegations that the content of this letter was in error was not credible.

5.7 The Revenue then submitted that if the Board accepted that part of the Taxpayer's income from B Company was derived from services in Hong Kong the Board then had to consider on what basis should the income be computed. In the representative's letter of 18 July 1986 it was suggested that the income should be apportioned in the ratio Hong Kong sales bore to Far East regional sales excluding Hong Kong. The Revenue submitted that that was not a sound basis for the following reasons:

5.7.1 There was no direct relationship between the Taxpayer's sale promotion effort or 'consultancy services' and B Company sales in the Far East region. The Taxpayer did not know the exact transaction value of the sales which were the result of his efforts.

5.7.2 The Taxpayer's contractual duties were not confined to the promotion of sales. He was also required to perform other duties such as the administration of returns, samples, order entering etc, all as particularized in his engagement letter, refer the passage quoted in paragraph 2.1.3 above.

5.7.3 The letter did not specify the amount of income to be attributable to services rendered by the Taxpayer outside of Hong Kong.

5.8 The Revenue then referred to <u>Varnum v Deeble</u> [1985] ST 308.

5.8.1 This case was the authority for the proposition that where an employee's contract did not specify which part of his remuneration was with respect to duties performed outside UK, then for the purposes of the application of the relevant legislation, his emoluments attributable to such duties were limited to his contractual remuneration for the days on which those duties were performed with the total remuneration being apportioned on a time basis under the Apportionment Act 1870.

5.8.2 The Revenue then referred to paragraph 2 of schedule 7 of the 1977 Finance Act dealing with emoluments attributable to duties performed outside the United Kingdom. Section 8(1A)(a) of the Ordinance refers to the assessability of 'income for services rendered in Hong Kong'. The Revenue submitted that whilst the wording is different the spirit or intent is the same. The Revenue then drew the Board's attention to the provisions of the 1886 Apportionment Ordinance and quoted sections 3 and 7.

5.9 The Revenue concluded by submitting that the principle developed in the Deeble case should be followed, that is, the time basis apportionment method be adopted by the assessor and confirmed by the Commissioner and confirmed by the Board.

6. REPLY OF THE TAXPAYER

With benefit of the overnight adjournment the Taxpayer was able to produce a reply in written form as follows:

6.1 The Revenue accepted that on occasions when the Taxpayer was outside of Hong Kong in each of the relevant years they were spent in countries in the region or Switzerland, conduct consistent with the terms of his employment with B Company.

6.2 The Revenue also accepted that throughout the relevant period he had employment in Hong Kong, initially with A Company, then with C Company and ultimately with D Company. His role with B Company was separated from those employments and, essentially, his role with B Company was that of a trouble shooter.

6.3 In Hong Kong he neither had the technical facilities or support staff to provide any services for B Company. His services were only required when a problem arose with an offshore customer when he went offshore to deal with the problem. In addition part of his duties was to develop new markets in the region which he could only achieve through being physically in the overseas countries. His physical presence was very important as he had to explain and elaborate on the functions of the product and to conduct demonstrations. It was

also important for after-sales service that he was physically present to give advice and to conduct experiments within the customers' own factories.

6.4 The Revenue had submitted that his claim was not tenable on the basis that:

6.4.1 Hong Kong was not excluded from his appointment;

6.4.2 There were inconsistencies in the correspondence addressed to the Inland Revenue by his advisers; and

6.4.3 He only worked for B Company's Hong Kong agent, D Company, from 1 May 1984 prior to which the Revenue had assumed he had also rendered services for B Company in Hong Kong.

6.5 To deal with these submissions:

6.5.1 Paragraph 6.4.1 above: B Company had an agent in Hong Kong from 1981 to 1984 and he was not required to render any services for B Company within Hong Kong. This was dealt with by the agent.

6.5.2 Paragraph 6.4.2 above: the correspondence did not reflect the correct situation.

6.5.3 Paragraph 6.4.3 above: prior to his employment by D Company, B Company had an agent in Hong Kong and after employment by D Company all B Company's customers' requirements were dealt with by D Company and if he was involved it was in his capacity as a D Company employee.

6.6 The Taxpayer also submitted that if the Board did not agree with him with respect to those arguments he claimed the right to an apportionment so that income derived from services rendered overseas was not liable to salaries tax in Hong Kong. He submitted that section 3 of the Apportionment Ordinance applies only to 'periodic payments in the nature of income'. Part of his income was by way of incentive and as these were paid on a random basis and were not periodic payments the Apportionment Ordinance cannot apply.

6.7 He concluded by stating that the Revenue accepted that during the relevant period the percentage of sales in Hong Kong gradually declined in comparison to sales outside the region. Incentive fees were first paid in October 1984 whereby the only logical conclusion to be drawn was that the improvement in the percentage of overseas sales was attributable to the Taxpayer's performance which could only be achieved by rendering the services offshore whereby, in the worst case scenario, the incentive receipts be accepted as attributable to non-Hong Kong services and removed from the assessments.

7. REASONS FOR THE DECISION

7.1 It is for the taxpayer to satisfy the Board that an assessment is incorrect, not for the Revenue to satisfy the Board that the assessment was correct.

7.2 When correspondence is exchanged between representatives of a taxpayer and the Revenue the Board is entitled to assume that the representatives have been fully and properly instructed by the taxpayer whereby the content of correspondence between those representatives and the Revenue is to be assumed to reflect the true situation. Accordingly, when a taxpayer alleges that the true position has not been properly reported by his professional advisers it is incumbent on the Board to be satisfied that such allegation is properly supported. This is particularly so when a taxpayer appears in person: if a representative is to be said to have made one or more mistakes he should say so under oath and his evidence would be tested by cross-examination. By electing not to bring his previously duly appointed representative either to argue the case or as a witness to support a taxpayer's evidence a taxpayer has the ability to make unlimited allegations as to error and provide boundless alternative explanations. At this appeal the Taxpayer was hesitant about criticizing his representative and stated that it was embarrassing for him to have to do so but, nevertheless, he did allege that the information provided by them to the Revenue was incorrect. However, nothing turns on this aspect of his evidence.

7.3 Save as stated in paragraph 7.2 above, the Board was impressed by the Taxpayer: his evidence was not rendered suspect by cross-examination and throughout the conduct of the appeal he impressed the Board as a man of integrity and, accordingly, the Board accepts him as a truthful witness.

7.3.1 The Board accepts that between November 1979 and 30 April 1981 the Taxpayer was working for A Company, B Company's Hong Kong agent, and that during this period he was studying and, no doubt, his studies covered the type of engineering relating to B Company's products.

7.3.2 On whose initiative it was is not relevant, but the Board accepts that the Taxpayer was resigning from A Company on 30 April 1981 and in May 1981 he went to Switzerland to undergo a B Company course. It appears obvious to the Board that B Company had singled the Taxpayer out as someone who was of value to them and, no doubt, the Taxpayer realized that he could increase his earning power by leaving A Company, accept employment with a friend, the friend who owned C Company, and have two sources of income.

7.3.3 It is not in dispute that:

7.3.3.1 The B Company engagement was offered to the Taxpayer by a non-resident company and accepted by the Taxpayer outside of Hong Kong whereby the

Board is satisfied that the employment agreement itself is not a Hong Kong agreement.

7.3.3.2 The Taxpayer resigned from C Company with effect from 30 April 1984 and from 1 May 1984 he was employed by a new B Company agent, D Company; and

7.3.3.3 E Company, a company wholly owned by the Taxpayer, became the B Company's Hong Kong agent with effect from 1 April 1986 and that the agreement between B Company and the Taxpayer was terminated by mutual agreement with effect from 31 March 1986.

7.4 From the facts and the evidence the Board is satisfied that the true position is as follows:

7.4.1 The Taxpayer's appointment with B Company did not exclude Hong Kong as an area in which he was to provide services to B Company.

7.4.2 The Taxpayer said that his duties were to assist B Company's agents in the region and, of course, B Company had an agent in Hong Kong throughout the relevant period, initially, A Company and, subsequently, D Company. The Board is unable to accept the Taxpayer's contention that whilst A Company was B Company's agent B Company only required him to perform services in Hong Kong: if that had been the case B Company would have excluded Hong Kong from the area referred to in the relevant paragraph of his employment letter, refer paragraph 2.1.3 above. The logical conclusion to be drawn is that B Company had recognized the Taxpayer's value to B Company and knowing that he was to cease being employed by A Company needed a means by which it could ensure that he would be available to assist the Hong Kong agent in the same way B Company required him to assist the overseas agents.

7.4.3 The Board accepts that the position changed on 1 May 1984 when the Taxpayer took employment with D Company. From the time of his employment with D Company, B Company would hardly expect to have to pay an employee of D Company to perform services which he would be obliged to perform as an employee of D Company.

7.5 The Board is unable to accede to the Taxpayer's submission as to the incentive payments. That expression is no more than another name for a performance or achievement bonus and the Board finds that these receipts are to be treated as income from the Taxpayers's employment whereby effect has to be given to section 9(1)(a) of the Ordinance.

7.6 In reaching its decision the Board has split the years of assessment into two groups:

7.6.1 The period between 1 May 1981 and 30 April 1984, the period when the Taxpayer was employed by C Company; and

7.6.2 The period from 1 May 1984 to 31 March 1986 when the Taxpayer was employed by D Company.

7.7 As to the period 1 May 1981 to 30 April 1984:

There was no evidence to corroborate that of the Taxpayer to the effect that he did not fulfill the duties he accepted by his letter of appointment for B Company in Hong Kong during the period he was employed by C Company whereby the Taxpayer has failed to satisfy the Board that none of the remuneration he received from B Company during this period related to services to be rendered to A Company or to A Company's Hong Kong customers for B Company's product. For this period the Board accepts that it is bound by the decision of Macdougall J in CIR v Goepfert and as the relevant assessments with respect to the emoluments of the Taxpayer from B Company during the period he was with C Company were apportioned on the principles laid down in that case the Board is obliged to confirm the relevant assessments.

7.8 As to the period from 1 May 1984 to 31 March 1986 each of the two relevant years of assessment have to be examined separately:

7.8.1 The year of assessment 1984/85:

For the first month of this year the Taxpayer continued to be employed by C Company and it was only from 1 May 1984 that he was employed by D Company. For the eleven months of this year of assessment during which the Taxpayer was employed by D Company the Board accepts that there would be no need for B Company to employ him to render services in Hong Kong. Factually, D Company, the agent from 1 May 1984 had on its payroll an individual who B Company regarded as their regional trouble shooter and that as an employee of D Company he was obliged to do that which he had been able to do for A Company in Hong Kong between 1 May 1981 and 30 April 1984.

7.8.2 The year of assessment 1985/86:

For the year of assessment 1985/86 the Board accepts that the position which arose when the Taxpayer was employed by D Company from 1 May 1984 subsisted and continued throughout this particular year of assessment.

8. DECISION

For the reasons given the Board finds that:

8.1 The assessments in respect of the years of assessment 1981/82, 1982/83 and 1983/84 are correct and are upheld.

8.2 That the assessments in respect of the year 1984/85 should be reopened and that salaries tax on the monthly fee paid by B Company to the Taxpayer for the month of April and one-twelfth of the incentive payments received from B Company during this period be taxed and that the assessment in respect of the balance be ordered cancelled.

8.3 That the assessment in respect of the year 1985/86 was incorrect and is ordered to be cancelled.