Case No. D73/01

Salaries tax – employment – source of income – whether liable to salaries tax – sections 8(1), 8(1A), 8(1B) and 68(4) of the Inland Revenue Ordinance (‘IRO’) – costs – frivolous and vexatious and abuse of the process – section 68(9) of the IRO.

Panel: Kenneth Kwok Hing Wai SC (chairman), William Tsui Hing Chuen and Horace Wong Ho Ming.

Date of hearing: 20 July 2001.
Date of decision: 5 September 2001.

The taxpayer appealed against the determination of the Commissioner in respect of salaries tax assessment for four years of assessment on the ground that salaries tax should not be charged as he had been working in China during the said period.

The taxpayer had been paid by autopay in Hong Kong dollars by crediting his bank account in Hong Kong. He did not dispute that he had been in Hong Kong for 147 days, 248 days, 210 days and 262 days during the four years of assessment respectively.

Held:

1. In CIR v So Chak Kwong, Jack, it was held that the words ‘not exceeding a total of 60 days’ in section 8(1B) qualify the word ‘visits’ and not the words ‘services rendered’. Thus, section 8(1B) was not applicable because the taxpayer’s ‘visits’ exceeded 60 days, assuming that his trips to and from Hong Kong had been ‘visits’.

2. The taxpayer’s claim that he rendered all the services in connection with his employment outside Hong Kong was rejected by the Board. His claim was inconsistent with the dates and times of his trips to and from Hong Kong during working hours on days not asserted by him to be a leave day. The taxpayer has neither disputed the date nor offered any or any satisfactory explanation. Further, his claim was inconsistent with the amounts of allowances paid to him on top of his basic salary.

3. The discretion of the Board under section 68(9) to order an unsuccessful appellant to pay costs is not restricted to appeals which are obviously unsustainable. The maximum sum was increased from $100 to $1,000 in 1985 and further increased to $5,000 in 1993. $5,000 represents only a small fraction of the costs of the Board in disposing of an appeal. The Board was of the opinion that the appeal was frivolous and vexatious and an abuse of the process. The Board deprecated the taxpayer for putting forward and relying on a document which could not satisfy the Board as to its authenticity. The taxpayer was ordered to pay the sum of $3,000 as costs of the Board.

Appeal dismissed and a cost of $3,000 charged.

Cases referred to:

CIR v Goepfert 2 HKTC 210
CIR v So Chak Kwong, Jack 2 HKTC 174

Chan Tak Hong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 16 March 2001 whereby:

(a) Salaries tax assessment for the year of assessment 1993/94 under charge number 9-2729169-94-A, dated 18 February 1998, showing net chargeable income of $157,434 with tax payable thereon of $27,558 was reduced to net chargeable income of $123,434 with tax payable thereon of $19,058.

(b) Salaries tax assessment for the year of assessment 1994/95 under charge number 9-2767572-95-0, dated 12 January 1999, showing net chargeable income of $91,605 with tax payable thereon of $10,521 was confirmed.

(c) Salaries tax assessment for the year of assessment 1995/96 under charge number 9-3807967-96-A, dated 18 February 1998, showing net chargeable income of $131,848 with tax payable thereon of $18,569 was confirmed.

(d) Salaries tax assessment for the year of assessment 1996/97 under charge number 9-2081464-87-0, dated 1 May 1998, showing net chargeable income of $69,369 with tax payable thereon of $6,392 was confirmed.

2. The Taxpayer appealed on the ground that salaries tax should not be charged as he had been working in China during the four years of assessment.

3. Section 8(1), (1A) and (1B) of the IRO provides that:

'(1) Salaries tax shall, subject to the provisions of this Ordinance, be charge 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 ...

(1A) For the purpose of this Part, income arising in or derived from Hong Kong from any employment –

(a) ...

(b) excludes income derived from services rendered by a person who –

(i) ...

(ii) renders outside Hong Kong all the services in connection with his employment ...

(1B) In determining whether or not all services are rendered outside Hong Kong for the purposes of subsection (1A) no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment.'

4. Company A was operated by Company B, a private company incorporated in Hong Kong, both at the same business address in District C. The Taxpayer was employed by Company A by May 1989 at the latest and he had been paid by autopay in Hong Kong dollars by crediting his bank account in Hong Kong.

5. In our decision, the location and source of the Taxpayer's employment was in Hong Kong. His entire income from the employment is caught by the charge under section 8(1) of the IRO, and there is no provision for apportionment, CIR v Goepfert 2 HKTC 210 at page 238.

6. The Taxpayer did not dispute that he had been in Hong Kong for 147 days, 248 days, 210 days and 262 days during the years of assessment 1993/94, 1994/95, 1995/96 and 1996/97 respectively.

7. In CIR v So Chak Kwong, Jack 2 HKTC 174, it was held that the words 'not exceeding a total of 60 days' in section 8(1B) qualify the word 'visits' and not the words 'services rendered'. Thus, section 8(1B) is not applicable in this case because the Taxpayer's 'visits' exceeded 60 days, assuming that his trips to and from Hong Kong were 'visits'.

8. The Taxpayer claimed that he rendered **all** (emphasis added by us) the services in connection with his employment outside Hong Kong, and contended that his income was thus excluded by section 8(1A). We reject his claim and find against him on this factual issue.

(a) His claim is inconsistent with the dates and times of his trips to and from Hong Kong during working hours on days not asserted by him or by one Ms D in Company B's employ to be a leave day. These trips were detailed in fact (12) of the determination and in the following table. The Taxpayer has neither disputed the data nor offered any or any satisfactory explanation.

	1993/94 (Number of days)	**1994/95** (Number of days)	**1995/96** (Number of days)	**1996/97** (Number of days)
Arrival before 5 p.m. (Monday to Friday)	13	14	36	48
Departure after 10 a.m. (Monday to Friday)	29	28	35	32
In Hong Kong for whole day (Monday to Friday)	2	19	0	2
In Hong Kong for whole day (Saturday)	10	11	6	15
Departure and arrival on same day (between 10 a.m. and 5 p.m.)	0	0	7	10
In Hong Kong on days claimed to have worked overtime	5	8	1	6

(b) His claim is also inconsistent with the dates and times of his trips to and from Hong Kong during the four years of assessment and the amounts of allowances paid to him on top of his basis salary. We will deal with the two most outstanding months, December 1994 and August 1996, by way of examples. According to the Taxpayer, 30% of his basic salary would be paid to him as an allowance for working in China and he might also be paid an overtime allowance.

(i) His basis salary for December 1994 was $13,800 and his allowance was $3,421.3 (24.79%). However, he had been outside Hong Kong for no more than five days and he had at most two days when he could have worked overtime outside Hong Kong. He could not possibly have earned the $3,421.3 allowance if **all** the services in connection with his employment was rendered outside Hong Kong.

Depart HK	Arrive HK	Period outside HK
29-11 10:00 Tue	1-12 12:56 Thu	1 day
9-12 12:40 Fri	10-12 18:48 Sat	2 days
12-12 09:52 Mon	13-12 17:18 Tue	2 days
4-1 08:23 Wed		

(ii) His basis salary for August 1996 was $15,800 and his allowance was $8,848 (56%). However, he had been making daily trips in and out of Hong Kong from 3 to 30 August and the only day when he could have worked overtime outside Hong Kong was 1 August. He could not possibly have earned the $8,848 allowance if **all** the services in connection with his employment was rendered outside Hong Kong.

Depart HK	Arrive HK
31-7 08:30 Wed	2-8 14:19 Fri
3-8 07:55 Sat	3-8 13:54 Sat
4-8 08:42 Sun	4-8 11:56 Sun
5-8 12:02 Mon	5-8 16:44 Mon
6-8 08:09 Tue	6-8 16:03 Tue
7-8 08:16 Wed	7-8 15:07 Wed
8-8 08:28 Thu	8-8 16:38 Thu
9-8 08:08 Fri	9-8 15:21 Fri
10-8 08:15 Sat	10-8 15:11 Sat
11-8 08:09 Sun	11-8 13:28 Sun
12-8 08:16 Mon	12-8 16:50 Mon

13-8 08:05 Tue	13-8 15:09 Tue
14-8 12:23 Wed	14-8 15:40 Wed
15-8 11:53 Thu	15-8 15:46 Thu
16-8 08:18 Fri	16-8 15:47 Fri
17-8 08:12 Sat	17-8 13:40 Sat
18-8 08:15 Sun	18-8 12:48 Sun
19-8 14:42 Mon	19-8 16:52 Mon
20-8 08:05 Tue	20-8 16:56 Tue
21-8 08:03 Wed	21-8 13:49 Wed
22-8 07:54 Thu	22-8 13:56 Thu
23-8 08:09 Fri	23-8 18:10 Fri
24-8 08:08 Sat	24-8 13:32 Sat
25-8 08:10 Sun	25-8 14:34 Sun
26-8 08:13 Mon	26-8 17:00 Mon
27-8 08:21 Tue	27-8 16:17 Tue
28-8 07:54 Wed	28-8 16:44 Wed
29-8 08:20 Thu	29-8 16:45 Thu
30-8 08:13 Fri	30-8 16:54 Fri
2-9 12:57 Mon	

(c) The Taxpayer did not impress us as a credible witness and were reject his testimony.

9. The Taxpayer produced what purported to be an employment contract dated 1 May 1989 signed by him and one Ms D purportedly on behalf of Company B (at pages 72 to 73 of bundle B1). In our decision, we are not satisfied as to the authenticity of this document and we attach no weight to it.

(a) According to this document, the Taxpayer was to be employed as ' foreman' despite the fact that in Company B' s employer' s return for the year ended 31 March 1994, the Taxpayer was still said to be employed as an electrical technician.

(b) According to clause 4 of this document, the Taxpayer was to work in China. On the Taxpayer' s own testimony, it was not until 1991 that he began to be stationed in China.

(c) Clause 14 of this document referred to the company's provident fund despite the fact that Company B did not apply for approval of a provident fund until 4 April 1990.

(d) This document was purportedly signed by one Ms D, purportedly as Company B's manager. According to Company B's employer's return for the years ended 31 March 1989 to 31 March 1992, Ms D was employed as an accounts clerk. In Company B's employer's return for the year ended 31 March 1993, Ms D reported that she was employed as 'Adm Officer'.

(e) In his notice of appeal dated 9 April 2001, the Taxpayer claimed that this document was signed because Company B started the provident fund plan in November 1989. In his testimony, the Taxpayer claimed that this document was signed between one and two years after 1989. The Taxpayer could not offer any explanation why starting the provident fund necessitated the change.

(f) The Taxpayer claimed in his testimony that this document came into existence because the company changed to a limited company. This claim is demonstrably untrue because the employment contract dated 1 September 1989 (at page 16 of bundle B1 which the Taxpayer admitted signing) was made by 'Company A (Operated By Company B)'.

10. For the reasons given above, the Taxpayer has failed to discharge the onus under section 68(4) of the IRO of proving that any of the assessments appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessments as reduced or confirmed by the Commissioner.

11. As noted in a number of Board decisions, the discretion of the Board under section 68(9) to order an unsuccessful appellant to pay costs is not expressed to be restricted to appeals which are obviously unsustainable. The maximum sum was increased from $100 to $1,000 in 1985 and further increased to $5,000 in 1993. $5,000 represents only a small fraction of the costs of the Board in disposing of an appeal.

12. We are of the opinion that this appeal is frivolous and vexatious and an abuse of the process. We deprecate the Taxpayer for putting forward and relying on a document which we are not satisfied as to its authenticity. Pursuant to section 68(9) of the IRO, we order the Taxpayer to pay the sum of $3,000 as costs of the Board, which $3,000 shall be added to the tax charged and recovered therewith.