Case No. D76/02

Salaries tax – employment – source of income – whether liable to salaries tax – whether rental value assessable – foreign marriage – sections 2, 8(1), 8(1A), 8(1B), 9(1)(b), 9(2) and 29(1)(a) of the Inland Revenue Ordinance ('IRO') – hearing in the absence of the appellant.

Panel: Ronny Wong Fook Hum SC (chairman), Melville Thomas Charles Boase and Susan Beatrice Johnson.

Date of hearing: 12 August 2002.
Dates of decisions: 29 October 2002 and 8 January 2003.

The appellant is a Malaysian citizen holding Country A's permanent residency. By letter dated 19 January 1998 ('the January 98 Letter') sent by Company C-Asia in Hong Kong ('the Company') to the appellant in Thailand, the Company offered employment to the appellant. The terms of the employment included a salary in Thai bahts which was subject to standard taxation and deductions as required under the Laws of Thailand and residential accommodation the rent of which would be paid by the Company.

In August 1998, the Company and the appellant executed in Hong Kong an 'Employment Agreement' ('the August 98 Employment Agreement'). The terms of the August 98 Employment Agreement included a salary in Thai bahts and stated that it would be the responsibility of the appellant to settle his own salaries tax. It also provided an accommodation allowance in Hong Kong dollars which would be applicable whilst the appellant was in Hong Kong. The governing law of the August 98 Employment Agreement was the laws of Hong Kong.

On 18 August 1998, the appellant applied to the Immigration Department and was given a work permit in Hong Kong. Address E ('the Flat') was given as his proposed address in this application. The appellant maintained that the Flat was merely temporary accommodation during his short visits to Hong Kong. It was like a hotel room to him.

By letter dated 9 January 2001 sent by the Company to the appellant in Hong Kong, the Company terminated the appellant's employment. In respect of the 122 days' period between 1 April 1998 and 31 July 1998, the appellant was in Hong Kong for a total of 67 days.

In his notice of objection dated 19 April 2000, he 'married' Madam G on 11 August 1996. He produced a photograph of the wedding in the 20 August 1996 edition of Newspaper H of Thailand. On 11 November 1998, he applied for registration of his marriage with the Embassy

of Malaysia. A certificate was eventually issued by that embassy on 18 June 1999. The appellant also contended that he and his wife performed the customary tea ceremony presumably on 11 August 1996 and that ceremony 'is recognised by the Malaysian laws'.

The appellant appealed against the Commissioner's determination by notice dated 21 May 2002. He gave a Bangkok address in his notice. By letter dated 24 May 2002, the appellant informed the Board that he would not be attending the hearing of his appeal. By letter dated 3 August 2002, the Revenue sent to the Bangkok address of the appellant the relevant bundles for use at hearing before the Board on 12 August 2002. The Revenue further sent to the appellant their written submission on 5 August 2002. The appellant responded on 9 August 2002. He was then in Country F and he invited the Board to disregard the Revenue's submission of 5 August 2002 on the ground that it was late.

Held:

1. Neither the Board nor the Revenue had any advance notice of the appellant's departure to Country F. The Revenue gave the appellant reasonable notice of the Revenue's contentions. Given the previous correspondence between the parties, the appellant was well aware of the issues in this appeal. Judging from the quality of the appellant's response of 9 August 2002, the Board was not persuaded that the appellant suffered any real prejudice. The Board decided therefore to proceed with the hearing of this appeal in the absence of the appellant.

2. On the appellant's own admissions, he rendered services in Hong Kong during the period between 1 April 1998 and 31 July 1998. It was wholly irrelevant for the appellant to contend that the services that he rendered were in relation to Thai clients or Thai accounts. The crux of the matter was that he rendered services in Hong Kong and within this period there was income derived from the services which he so rendered in Hong Kong. The appellant adduced no evidence to challenge the Revenue's computation that he was present in Hong Kong for 67 out of 122 days during the period between 1 April 1998 and 31 July 1998. He was therefore not entitled to the exclusion under section 8(1A)(b)(ii) and section 8(1B) of the IRO.

3. The Flat was not a hotel, hostel or boarding house. The decision of the Board in D78/90, IRBRD, vol 6, 1 indicated that the words 'any place of residence provided by the employer' in section 9(2) did **not** mean 'any place provided by the employer wholly and exclusively for use and occupied by a single employee as his residence'. The Board was therefore of the view that the Revenue was right in assessing the appellant under section 9(2).

4. The August 98 Employment Agreement differed from the January 98 Letter in several important respects. It was obvious that both the Company and the appellant intended that the provisions in the August 98 Employment Agreement should govern the relationship between the parties after 1 August 1998. It lied ill in the appellant's mouth to suggest that the August 98 Employment Agreement was merely a sham produced to support his application for a Hong Kong work permit. He received in Hong Kong the salary and accommodation allowance as prescribed by the August 98 Employment Agreement. The Board had no doubt that Hong Kong was the source of the appellant's income as from 1 August 1998 and he was well within the basic charge for salaries tax under section 8(1) of the IRO.

5. If the contract of marriage was entered into in Thailand on 11 August 1996, Thai law is the applicable law. There must therefore be satisfactory evidence to indicate that the marriage was entered into on 11 August 1996 in accordance with Thai law. Given the fact that the onus of proof rests on the appellant, he must produce evidence from an expert in Thai law to support the validity of his marriage on that date. Given the photograph in Newspaper H and the misapprehension on the part of the appellant, the Board was of the view that it would be fair to give the appellant a further opportunity to discharge his onus.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v Goepfert 2 HKTC 210
D78/90, IRBRD, vol 6, 1

Wong Kai Cheong for the Commissioner of Inland Revenue.
Taxpayer in absentia.

Decision:

Background

1. The Appellant is a Malaysian citizen holding Country A's permanent residency. He received his primary and secondary education in Country A and his tertiary education in Country B.

2. Company C-Asia is a company incorporated in Country D. At all material times Company C-Asia:

(a) was a wholly owned subsidiary of Company C-Country D.

(b) maintained a branch in Hong Kong and a representative office in Thailand.

3. By letter dated 12 January 1998 sent by the Appellant from Thailand to the then address of Company C-Asia in Hong Kong, the Appellant applied to Company C-Asia ' for a suitable post' in their organisation.

4. By an offer dated 19 January 1998 (' the January 98 Letter') sent by Company C-Asia in Hong Kong to the Appellant in Thailand, Company C-Asia offered employment to the Appellant on the following terms and conditions:

(a) ' The Position

You will be appointed as an *Associate Director* of [Company C-Asia] and you shall be based at the Representative Office of [Company C-Asia], located in Bangkok' .

(b) ' Responsibilities

Your main responsibilities will include the marketing of the Company' s and the Group' s services within the Far East Region and beyond wherever appropriate, the sourcing and placing of business and the ongoing identification of business opportunities for the Group within the Region' .

(c) ' Remuneration

Your annual salary will be *THB1,920,000* ... per annum, payable in twelve monthly installments and subject to standard taxation and deductions as required under the Laws of Thailand. It will be your responsibility to submit tax returns to the Inland Revenue Department at the end of each tax year and settle income tax payable in Thailand' .

(d) ' Accommodation Allowance

The Company will provide you with residential accommodation at a monthly rental not exceeding *THB55,000* ... per month. The rental will be paid by the Company directly to the Landloard' .

(e) ' Office Hours

Your normal working hours will be Monday to Friday, 0830hrs-1730hrs, with one hour' s break for lunch' .

(f) ' Annual Leave

After the probationary period, you will be entitled to annual leave of 20 working days in addition to the bank holidays allowable in Bangkok' .

(g) ' Notice Period

The notice period required by the Company will be 7 days for the first month, one calendar month thereafter' .

5. In respect of the 122 days' period between 1 April 1998 and 31 July 1998, the Appellant was in Hong Kong for a total of 67 days.

6. In August 1998, Company C-Asia and the Appellant executed in Hong Kong an ' Employment Agreement' (' the August 98 Employment Agreement') containing the following terms and conditions:

(a) ' Term of Employment

[Company C-Asia] shall employ the [Appellant] and the [Appellant] shall serve [Company C-Asia] as Associate Director of [Company C-Asia] and ... such employment shall be commencing on 01-Aug-98 ...' .

(b) ' Accommodation Allowances

[Company C-Asia] will provide the [Appellant] with an accommodation allowance of HKD$30,000.00 per month. The above allowance is applicable whilst in Hong Kong ...' .

(c) ' Relocation Expenses

The [Appellant] will be allowed a one-off allowance of an amount of HK$25,000 for relocation expenses' .

(d) ' Probationary Period

There is no probation period' .

(e) ' Duties

During the period of his employment ... the [Appellant' s] ... duties ... shall include ... Marketing of [Company C-Asia] and Group' s services; Sourcing and Placement of business; Ongoing identification of business opportunity; Reporting to management and following instructions to work on other assignments which are deemed its business position' .

(f) ' Salary

[Company C-Asia] shall pay to the [Appellant] during the continuance of his employment hereunder a gross salary at the rate of BHT3,877,200 per annum ... payable in twelve monthly instalments ... It will be the responsibility of the [Appellant] to settle his own salary tax' .

(g) ' Annual Leave

The [Appellant] will be entitled to annual leave of 20 working days, in addition to the bank holidays allowable in Hong Kong ...' .

(h) ' Expenses

[Company C-Asia] shall pay or reimburse the [Appellant] for all the travelling, hotel and other out-of-pocket expenses reasonably incurred by him or about the discharge of his duties under this Agreement' .

(i) ' Governing Law

This Agreement has been executed and delivered in accordance with Hong Kong SAR law and its validity, interpretation, performance and enforcement shall be governed by the laws of the Hong Kong SAR' .

7. By an application dated 18 August 1998, the Appellant applied to the Immigration Department for a work permit in Hong Kong. Address E (' the Flat') was given as his proposed address in this application.

8. By letter dated 9 January 2001 sent by Company C-Asia to the Appellant in Hong Kong, Company C-Asia terminated the Appellant' s employment. The severance was apparently not an amicable one.

9. We are concerned with four issues:

(a) In respect of the period between 1 April 1998 and 31 July 1998: Whether the Appellant's income from his employment with Company C-Asia during that period should be subjected to Hong Kong salaries tax.

(b) In respect of the period between 1 April 1998 and 31 July 1998: Whether the Appellant should be assessed on the basis of 'rental value' pursuant to section 9(1)(b) and 9(2) of the IRO in respect of the accommodation provided to the Appellant by Company C-Asia in the Flat during that period.

(c) In respect of the period between 1 August 1998 and 31 March 1999: Whether the whole or merely part of the Appellant's earnings from Company C-Asia should be assessed to Hong Kong salaries tax.

(d) In respect of the year of assessment 1998/99: Whether the Appellant should be granted married person's allowance for that year.

10. The Appellant appealed against the Commissioner's determination by notice dated 21 May 2002. He gave a Bangkok address in his notice to this Board. By letter dated 24 May 2002, he informed this Board that he would not be attending the hearing of his appeal. By letter dated 3 August 2002, the Respondent sent to the Bangkok address of the Appellant the relevant bundles for use at hearing before us scheduled on 12 August 2002. The Respondent further sent to the Appellant their written submissions on 5 August 2002. The Appellant responded on 9 August 2002. He was then in Country F and he invited this Board to disregard the Revenue's submission of 5 August 2002 on the ground that it was late. We do not accept this submission of the Appellant. Neither this Board nor the Revenue had any advance notice of the Appellant's departure to Country F. The Revenue gave him reasonable notice of the Revenue's contentions. Given the previous correspondence between the parties, the Appellant is well aware of the issues in this appeal. Judging from the quality of the Appellant's response of 9 August 2002, we are not persuaded that he suffered any real prejudice. We decide therefore to proceed with the hearing of this appeal in the absence of the Appellant.

11. The Appellant laid considerable emphasis on his strained relationship with Company C-Asia after the termination of his employment. We have borne this firmly in mind in assessing the correspondence passing between the Revenue and Company C-Asia.

The first issue: is the Appellant liable for Hong Kong salaries tax in respect of his earnings for the period between 1 April 1998 and 31 July 1998?

12. The Appellant says he is not so liable because during that period 'I am not an employee in the Hong Kong office yet' (see objection of the Appellant dated 19 April 2000).

13. The Revenue accepts that the source of the Appellant' s employment income during this period was located outside Hong Kong. The Revenue however says that the Appellant is liable to pay Hong Kong salaries tax by virtue of section 8(1A)(a) of the IRO and the Appellant is not entitled to the exemption under section 8(1A)(b) of the IRO.

14. Section 8(1)(a) of the IRO provides that:

> *' Salaries tax shall, subject to the provisions of this Ordinance, he charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from ... any office or employment of profit ...'* .

15. Section 8(1A)(a) of the IRO provides that:

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

16. Section 8(1A)(b)(ii) of the IRO provides that:

> *' For the purposes of this Part, income arising in or derived from Hong Kong from any employment excludes income derived from services rendered by a person who renders outside Hong Kong all the services in connection with his employment'* .

17. Section 8(1B) of the IRO provides that:

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

18. These provisions were considered by Macdougall J (as he then was) in Commissioner of Inland Revenue v Goepfert 2 HKTC 210. In that case, his Lordship pointed out that:

(a) Although section 8(1) of the IRO 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) (see page 236).

(b) 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 (see page 238).

(c) 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. This case is subject to the '60 days rule'.

19. In respect of this period, the Revenue accepts that the Appellant's case does not fall within the basic charge under section 8(1). The Revenue contends that his case comes within the extended charge under section 8(1A)(a). We therefore have to consider two questions:

(a) Was there 'income derived from services rendered in Hong Kong'?

(b) If so, should such services be taken into account in the light of the visits made by the Appellant to Hong Kong in the basis period for the year of assessment?

20. On the Appellant's own admissions, he rendered services in Hong Kong during the period between 1 April 1998 and 31 July 1998. He said this in his 9 August 2002 submission to this Board: 'When I said that I rendered services both in and outside of Hong Kong, I was referring to my physical presence and not the nature of work. I have already clarified previously that I was merely getting to know colleagues as I am new to the organisation, ***making reports to bosses in Hong Kong and following up on Thai and other deals*** and reading up some of the previous cases undertaken by the company' (emphasis supplied). This reflects what he stated in his notice of appeal dated 21 May 2002. It is wholly irrelevant for the Appellant to contend that the services that he rendered were in relation to Thai clients or Thai accounts. The crux of the matter is that he rendered services in Hong Kong and within this period there was income derived from the services which he so rendered in Hong Kong.

21. The Appellant adduced no evidence to challenge the Revenue's computation that he was present in Hong Kong for 67 out of 122 days during the period between 1 April 1998 and 31 July 1998. He is therefore not entitled to the exclusion under section 8(1A)(b)(ii) and section 8(1B) of the IRO.

22. His total income for the period between 1 April 1998 and 31 July 1998 converted from Thai bahts to Hong Kong dollars amounted to $164,773.35. On the basis of his 67 out of

122 days stay in Hong Kong, the income apportioned amounted to $90,490. He is rightly assessed in respect of such income.

The second issue: should the Appellant be assessed on the basis of rental value?

23. The Appellant maintains that the Flat was merely temporary accommodation during his short visits to Hong Kong. It was like a hotel room to him. Furthermore, the rental paid by Company C-Asia for that flat was $34,000 per month whilst the market rate was only $18,000 per month.

24. Section 9(1)(b) of the IRO provides that income from any office or employment includes ' *the rental value of any place of residence provided rent-free by the employer ...*' .

25. Section 9(2) of the IRO provides that:

> ' *The rental value of any place of residence provided by the employer ... shall be deemed to be 10% of the income as described in subsection 1(a) derived from the employer for the period during which a place of residence is provided after deducting the outgoings, expenses and allowances provided for in section 12(1)(a) and (b) to the extent to which they are incurred during the period for which the place of residence is provided ...*' .

26. Proviso (a) to section 9(2) further provides that:

> ' *If such place of residence be a hotel, hostel or boarding house the rental value shall be deemed to be 8% of the income aforesaid where the accommodation consists of not more than 2 rooms and 4% where the accommodation consists of not more than one room*' .

27. The Flat is not a hotel, hostel or boarding house. The decision of this Board in D78/90, IRBRD, vol 6, 1 indicates that the words ' any place of residence provided by the employer' in section 9(2) do **not** mean ' any place provided by the employer wholly and exclusively for use and occupied by a single employee as his residence' .

28. We are therefore of the view that the Revenue is right in assessing the Appellant under section 9(2).

The third issue: on what basis should the Appellant be assessed for the period between 1 August 1998 and 31 March 1999?

29. The Appellant says that the August 98 Employment Agreement did not constitute a separate agreement. It was merely a document executed between him and Company C-Asia in

order to support his application for a work permit in Hong Kong. He had to negotiate with Company C-Asia on the amount of his pay as ' I would end up spending more time in Hong Kong since my fixed accommodation in Thailand was terminated' . He admits that he received his payroll in Hong Kong as ' I need to make payment of rental in Hong Kong' . He maintains that his job function was the same after his move from Thailand to Hong Kong.

30. We reject the Appellant' s contentions that his relationship with Company C-Asia after 1 August 1998 was still governed by the January 98 Letter and that the August 98 Employment Agreement was merely a document in support of his application for a work permit. The August 98 Employment Agreement differs from the January 98 Letter in several important respects.

(a) The Appellant' s salary was increased from BHT 1,920,000 per annum to BHT 3,877,200 per annum.

(b) Under the January 98 Letter, Company C-Asia provided the Appellant with residential accommodation at a monthly rent not exceeding BHT 55,000 whereas he was given an accommodation allowance of HK$30,000 per month under the August 98 Employment Agreement.

(c) The August 98 Employment Agreement made express provision of relocation expenses in favour of the Appellant.

(d) The terms of his responsibilities were widened under the August 98 Employment Agreement.

(e) The January 98 Letter expressly envisaged that the Appellant would account to the fiscal authority in Thailand whilst the August 98 Employment Agreement referred to his responsibility to settle ' his own salary tax' .

(f) The August 98 Employment Agreement made Hong Kong law the ' Governing Law' .

31. The Appellant levied criticisms against the Revenue for ' stating the obvious' . We find it difficult to see how we can avoid the obvious in adjudicating this appeal. It is obvious that both Company C-Asia and the Appellant intended that the provisions in the August 98 Employment Agreement should govern the relationship between the parties after 1 August 1998. The Appellant was no longer based in Thailand but in Hong Kong. A new set of terms was agreed between the parties to regulate his presence in Hong Kong. It lies ill in the Appellant' s mouth to suggest that the August 98 Employment Agreement was merely a sham produced to support his application for a Hong Kong work permit. He received in Hong Kong the salary and accommodation allowance as prescribed by the August 98 Employment Agreement.

32. As from 1 August 1998, we have no doubt that Hong Kong was the source of the Appellant's income. The August 98 Employment Agreement was made in Hong Kong; the Appellant was based in Hong Kong; he attended Company C-Asia's office in Hong Kong and he was paid in Hong Kong. He is well within the basic charge for salaries tax under section 8(1) of the IRO. On the authority of Commissioner of Inland Revenue v Goepfert, no question of apportionment arises.

The fourth issue: married person's allowance

33. Section 29(1)(a) of the IRO provides that:

> *'An allowance ("married person's allowance") shall be granted under this section in any year of assessment if a person is, at any time during that year, married and ... the spouse of that person did not have assessable income in the year of assessment'*.

34. Section 2 of the IRO defines 'marriage' to mean:

> *'Any marriage, whether or not [recognized by the law of Hong Kong], entered into outside Hong Kong* ***according to the law of the place where it was entered into*** *and between persons having the capacity to do so'* (emphasis supplied).

35. According to the Appellant's notice of objection dated 19 April 2000, he 'married' Madam G on 11 August 1996. He produced a photograph of the wedding in the 20 August 1996 edition of Newspaper H of Thailand.

36. On 11 November 1998, he applied for registration of his marriage with the Embassy of Malaysia. A certificate was eventually issued by that embassy on 18 June 1999.

37. The Appellant contends that he and his wife performed the customary tea ceremony presumably on 11 August 1996 and that ceremony 'is recognised by the Malaysian laws'.

38. The Appellant misses the point. The relevant law is not Malaysian law or Hong Kong law. If the contract of marriage was entered into in Thailand on 11 August 1996, Thai law is the applicable law. There must therefore be satisfactory evidence to indicate that the marriage was entered into on 11 August 1996 in accordance with Thai law. Given the fact that the onus of proof rests on the Appellant, he must produce evidence from an expert in Thai law to support the validity of his marriage on that date.

39. Given the photograph in Newspaper H and the misapprehension on the part of the Appellant, we are of the view that it would be fair to give the Appellant a further opportunity to discharge his onus. In relation to this fourth issue, we direct that

(a) the Appellant do submit to the Respondent within six weeks from the date of this decision evidence from a Thai law expert acceptable to the Respondent to support his contention that his marriage was validly entered into on 11 August 1996 in accordance with Thai law;

(b) in default of any submission by the Appellant within the period stipulated above, his appeal on this fourth issue do stand dismissed;

(c) in the event of further disagreement between the parties on this issue, the matter be restored before this Board upon service of 14 days' notice by either side on the other with copy to this Board.

Conclusion

40. Save as provided in paragraph 39 above, we dismiss the Appellant's appeal on the first to third issues.

Further decision:

1. We refer to our previous decision dated 29 October 2002 in the captioned appeal and to paragraph 39 thereof.

2. By letter addressed to this Board dated 12 December 2002, the Appellant sought to re-argue his case. We did not give any leave to the Appellant for that purpose.

3. The only issue that we left open is the Appellant's claim for married person's allowance.

4. As indicated by paragraph 35 of our previous decision, the whole case of the Appellant before us was premised on the basis that he 'married' Madam G in Thailand on 11 August 1996. In support of that contention, our attention was drawn to the photograph of the wedding in the 20 August 1996 edition of Newspaper H. There is no evidence before us of any other marriage between the Appellant and Madam G. Section 2 of the IRO is directly applicable. Malaysian law has no relevance whatsoever.

5. In his letter dated 12 December 2002, the Appellant sought to invoke Malaysian law because 'I wanted the Malaysian laws to apply in this instance'. There is no evidence that he entered into any marriage contract in Malaysia. He had chosen to marry in Bangkok. That was the case that he put before us. His registration with the Malaysian authority was premised on that 'marriage'.

6. The Appellant did not comply with the directions which we outlined in paragraph 39 of our decision. The appeal in relation to the fourth issue is dismissed.

7. The Revenue signified in a letter dated 18 December 2002 that it is not adverse to considering the possible attitude of the Malaysian court. That is a matter for the Revenue. As far as this Board is concerned, the whole appeal is concluded by this further decision.