Case No. D78/96

Salaries tax – section 8(1) – whether income arising in or derived from Hong Kong – section 8(1B) – 60 days rule.

Panel: Audrey Eu Yuet Mee QC (chairman), Peter R Griffiths and Dora Lo Lai Yee.

Date of hearing: 25 November 1996.
Date of decision: 13 December 1996.

Appeal dismissed.

Cases referred to:

CIR v So Chak Kwong Jack 2 HKTC 174
CIR v George Andrew Goepfert 2 HKTC 210

Ng Yuk Chun for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. The Taxpayer appeals against the determination of the Commissioner of Inland Revenue dated 5 March 1996 in respect of the salaries tax assessment on him for the year of assessment 1993/94. He claims that he is not liable for tax because he rendered all his service outside Hong Kong and that he only returned for personal reasons.

The Evidence

2. The Taxpayer was the only witness.

3. During the material period, he was employed by Company X (HK). As its name suggests, the employer is a Hong Kong company. It produces electronics and electrical appliances. It has a factory in Country Y. The Taxpayer was the plant manager stationed in Country Y responsible for running this factory. His main responsibility was administration of the factory, personnel and production, ensuring quality and timely production.

4. He produced the official letter of appointment. He said that there has been no major change in the terms since he was first employed. However, the employer was flexible with some of the terms such as the term relating to his holidays. According to the letter, he

was only entitled to eleven days of statutory holidays and seven days of annual leave during a year. However, he said that he enjoyed holidays in Country Y. If business was slack and orders were slow, his employer would not mind if he took time off. The employer's office in Hong Kong was only a sales office. He had no desk there. He was careful to say that his 'main' job was to be carried out in Country Y. Even after clarification, he reiterated the same answer.

5. Due to the proximity of the factory to the border and the provision of a regular ferry service, it only took the Taxpayer about an hour to get to work from Hong Kong. Not surprisingly, the Taxpayer would frequently return to Hong Kong during weekends as well as weekdays.

6. He agreed with his travel schedule produced by the Revenue. This was based on the computer print out of his arrival in and departure from Hong Kong during the material period. This showed that the Taxpayer was in Hong Kong for 264 days. Many are holidays, including what appears to be Chinese New Year Holidays in February. But there are also many clear working days wholly spent in Hong Kong. The Revenue counted 38 clear working days. If some of those days in February are discounted as factory holidays, the total will be less. The Revenue suggests that the Taxpayer performed services in Hong Kong during some of those working days.

7. Despite his claim in the letter of objection that he returned to Hong Kong solely for personal reasons, the Taxpayer accepted in his viva voce evidence that he did perform services in Hong Kong. The letter from his employer dated 21 June 1995 states:

> 'His normal working time in Country Y is from Monday to Saturday every week but he sometimes by our instruction is also required to return to Hong Kong for various business functions, such as:
>
> (1) to participate [in] various meeting held at our head offices or at our major customers' offices in Hong Kong.
>
> (2) to bring overseas customers from hotel to our Country Y facilities for various business functions.'

He confirmed, when giving evidence, that he agreed with the contents of the letter. In his own letter to the Revenue dated 24 June 1995, he also said this:

> 'Since the factory that I served has engaged in the manufacturing of electronic products, therefore I am often being invited by suppliers to go back to Hong Kong to visit exhibition of factory equipment related to electronics and electrical appliances etc.'

In his evidence, the Taxpayer reiterated that he would come to Hong Kong to meet customers usually to discuss the quality of the products.

8. He said that Company X (HK) was his only employer and to date he has not been charged with any income tax in respect of his salaries by the tax authorities in Country Y.

9. The Revenue does not challenge the Taxpayer's evidence and we accept the same.

The Law

10. The law is clear.

11. Section 8(1) of the Inland Revenue Ordinance provides that salaries tax is charged on income arising in or derived from Hong Kong. This includes the Taxpayer's income as it is paid by his employer in Hong Kong.

12. Income which falls within section 8(1) can be excluded by virtue of section 8(1A) which follows. This excludes inter alia income derived from services rendered by a person who renders outside Hong Kong all the services in connection with his employment.

13. Even if the services are not all rendered outside Hong Kong, there is still a further let out as section 8(1B) provides that 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.

14. In CIR v So Chak Kwong Jack 2 HKTC 174, it was held that the words 'not exceeding 60 days' qualify the word 'visits' and not the word 'services rendered'. We would add that the Chinese text of sub-section (1B) is even clearer. The sub-section only applies if a person visits Hong Kong for not more than 60 days. In other words, the anomaly is that a person who visits Hong Kong for 59 days working each of those 59 days gets the benefit of that exemption whereas a person who spends 61 days in Hong Kong working only on one of those days is caught. However anomalous, that is the law that we have to apply. As is held in CIR v George Andrew Goepfert 2 HKTC 210, there is no provision for apportionment.

The Decision

15. Applying the law to the evidence of the Taxpayer, the decision is clear. His income from his Hong Kong employer falls within section 8(1) as income arising in or derived from Hong Kong. He agrees that he performs some service in Hong Kong. Thus his income is not excluded by section 8(1A)(b)(ii), unless he can claim the benefit of the 60 days rule. The Revenue does not challenge that days spent in Hong Kong by the Taxpayer were 'visits'. Since he visited Hong Kong for more than 60 days during the relevant period, he cannot rely on section 8(1B) as explained in paragraph 14 above.

16. For the above reasons, the Taxpayer is liable for salaries tax. No apportionment is possible even though the services were mainly performed outside Hong Kong. Accordingly, the appeal must be dismissed.