Case No. D79/05

Salaries tax – income from an employment of profit in Hong Kong – exclusion where services all rendered and performed outside Hong Kong – section 8(1A)(b) of the Inland Revenue Ordinance ('IRO').

Panel: Benjamin Yu SC (chairman), Shirley Conway and Roger Leung Wai Man.

Date of hearing: 14 November 2005.
Date of decision: 28 March 2006.

The taxpayer, Mr A objected the salaries tax charged on him for the year of assessment 1997/98 on ground that he rendered and performed all his employment services outside Hong Kong.

Mr A did return to Hong Kong during weekends yet it was purely for personal, social or holiday purposes.

Mr A denied that he was required to attend informal meetings in Hong Kong with his supervisor.

Held:

1. Mr A and his direct supervisor, Mr E are truthful witnesses and their evidence was cogent and reliable.

2. In the light of the job nature of Mr A and Mr E's regular travelling to the mainland to monitor the progress of work with Mr A, it is inherently likely that Mr A did not have to report to Mr E on work in Hong Kong and that he did not do so.

Appeal allowed.

Case referred to:

Commissioner of Inland Revenue v Geopfert 2 HKTC 210

Taxpayer in person.
Chow Cheong Po for the Commissioner of Inland Revenue.

Decision:

Introduction

1. Mr A is dissatisfied with the determination by the Acting Deputy Commissioner dated 26 July 2005. The effect of that determination is that Mr A had to pay salaries tax of $120,577 in respect of net chargeable income of $893,170 that Mr A derived from his employment during the year of assessment 1997/98. Mr A says that during the relevant year of assessment, he rendered and performed all his services outside Hong Kong and should therefore not be liable to pay salaries tax.

Was the income derived from Hong Kong?

2. Section 8(1) of the Inland Revenue Ordinance ('IRO') is the charging provision for salaries tax. It provides that:

> *'Salaries tax shall, subject to the provisions of this Ordinance, be charged 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; and*
>
> *(b) any pension.'*

3. There is no real dispute in this case that the income in question was derived from an employment of profit in Hong Kong. The facts, which are not in dispute, disclose that the taxpayer was employed by Company B, a Hong Kong company, which later changed its name to Company C. Although Mr A had his job interview in Country D, the employment contract was signed in Hong Kong. As a result of his taking up this employment, his family relocated to Hong Kong.

4. In line with authorities such as Commissioner of Inland Revenue v Geopfert 2 HKTC 210, we have no difficulty in finding that the income comes within the charging provision of section 8(1).

Did the taxpayer perform all his services outside Hong Kong?

5. The real bone of contention is whether Mr A can satisfy us that he comes within the exclusion contained in section 8(1A)(b), that is, that he provided all the services in connection with his employment outside Hong Kong. That section reads:

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

6. Mr A gave evidence before us. He also called Mr E, the general manager of Company C.

The evidence

7. Mr A's evidence was to the effect that during the year of assessment 1997/98 he was the project manager for two projects in City F and City G. His direct superior was Mr E, who had an office in City G as well as one in Hong Kong.

8. Mr A was required to report to Mr E on work, but, according to him, this would take place in City G. His evidence was that Mr E would stay there for 3 to 4 days a week.

9. Mr A would return to Hong Kong during weekends. According to him, he did not have to perform any work in Hong Kong and his stays in Hong Kong were purely for personal or holiday purposes. On occasions, he did call into Company C's office in Hong Kong, but those visits were social in nature. He was asked in cross-examination about a letter from the senior personnel officer of Company C to the Inland Revenue Department which stated that Mr A was sometimes required to attend informal meetings in Hong Kong with his supervisor. Mr A denied that this was so.

10. Mr E gave evidence which supported Mr A's case. He confirmed that Mr A performed all his services outside Hong Kong. He agreed that Mr A had to report to him on work, but this was not done on a daily basis. He told the Board that the nature of the work was such that 'no news was good news'. It would not make sense for him to discuss work with Mr A in Hong Kong, as he would not have the necessary information with which to discuss issues. Hong Kong was, according to him, a management office and not an operation office. When asked about the statement made by the senior personnel officer to the Inland Revenue Department, he admitted that the personnel department had asked him about the situation. He only told personnel that Mr A had casual stop overs at the Hong Kong office.

Finding

11. We find Mr A and Mr E to be truthful witnesses. We find their evidence cogent and reliable. In light of the job nature of Mr A and the fact that Mr E regularly travelled to the mainland to monitor progress of work, we find it inherently likely that Mr A did not have to report to Mr E on work in Hong Kong and that he did not do so.

12. In the circumstances, we are satisfied that Mr A has discharged the burden on him of proving that the assessment is wrong. We accordingly allow the appeal and set aside the assessment.