Case No. D82/01

Salaries tax – whether ' prevented' from giving the requisite notice of appeal – what are the conclusive factors in determining the location of an employment – the 60-day rule – sections 8(1)(a), 8(1A)(b)(ii), 8(1A)(c), 8(1B), 66(1A) and 68(4) of the Inland Revenue Ordinance (' IRO').

Panel: Anthony Ho Yiu Wah (chairman), Stephen Lau Man Lung and Michael Seto Chak Wah.

Date of hearing: 27 July 2001.
Date of decision: 20 September 2001.

This was an appeal, out of time, against the salaries tax assessment raised on the taxpayer for the year of assessment 1997/98.

The taxpayer' s case was that he worked full time in China during the relevant period, he did not render any services in Hong Kong during such period and had paid tax to the Chinese tax authority in respect of the income from Company B, which was a corporation incorporated in Hong Kong with a Shenzhen branch, and it would not be fair to require him to pay twice on the same income.

It was undisputed that Company B was the taxpayer' s employer up to the time when the taxpayer was transferred to work in Shenzhen. What was at issue was whether the taxpayer remained an employee of Company B after he was transferred to work in Shenzhen.

This case involved two issues: the preliminary issue of whether extension of time to appeal should be granted to the taxpayer and the substantive issue of whether the salaries tax assessment raised was excessive or incorrect.

Held:

1. Time limits were imposed and must be observed.

2. On the other hand, when imposing a time limit of one-month under section 66(1) of the IRO, the legislature obviously intended to allow a taxpayer a reasonable time of one month to consider his options regarding a possible appeal and to formulate his grounds of appeal.

3. In this case, the taxpayer did intend and had used efforts to comply with the time requirements of the IRO. The fact that the notice was eventually two days late could be due to the intervening long holidays unforeseen by the taxpayer.

4. Under section 68(4) of the IRO, in an appeal, the onus was on the taxpayer to prove that the assessment appealed against was excessive or incorrect.

5. Section 8(1) provides the basic charge for salaries tax.

6. Section 8(1A)(b)(ii) of the IRO excludes income derived from services rendered by a person who renders outside Hong Kong all the services in connection with his employment.

7. In determining whether or not a person renders all services outside Hong Kong, 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.

8. Section 8(1A)(c) excludes income derived by a person from services rendered by him outside Hong Kong where he has paid tax of substantially the same nature as Hong Kong salaries tax in the territory where the relevant services are rendered.

9. The general rule established as a result of a series of Board of Review decisions and confirmed by the decision in CIR v Goepfert was that it was necessary to distinguish between a source of income that was fundamentally a Hong Kong employment and a source that was fundamentally an employment outside Hong Kong. In making this distinction, the place where services were rendered was irrelevant in deciding whether or not the source was a Hong Kong employment.

10. The fact that the taxpayer reported to an executive director stationed in China was not conclusive factor in determining the location of an employment.

11. Once it was decided that the taxpayer held a single continuous employment with Company B terminated in December 1997, it was quite clear that the taxpayer' s employment was a Hong Kong employment, that is, his employment income arose in or was derived from Hong Kong, having regard to the following factors:

    (a) the contract of employment was entered into in Hong Kong;

    (b) his employer was a corporation incorporated in and with its principal place of business in Hong Kong;

(c) the remuneration was paid to him in Hong Kong; and

(d) his remuneration was paid by the employer which was a Hong Kong company or establishment.

12. The taxpayer claimed that after his transfer to Shenzhen in July 1997, he did not render any services in Hong Kong.

13. It was, however, undisputed that he rendered services to his employer in Hong Kong during 1 April 1997 to 30 June 1997.

14. Therefore, he cannot be said to have rendered outside Hong Kong all the services in connection with his single employment with Company B during the period from 1 April 1997 to 29 December 1997 and the exemption provision under section 8(1A)(b)(ii) was therefore not applicable.

15. Since the taxpayer had rendered services in Hong Kong in connection with his employment with Company B, he could only be exempted from salaries tax under section 8(1B) if such services were rendered during visits not exceeding a total of 60 days in the basis period for the year of assessment.

16. But in the present case, irrespective of whether his stay in Hong Kong could be regarded as visits, since the taxpayer was present in Hong Kong for a total of 196 days during the basis period from 1 April 1997 to 29 December 1997, the 60-day rule was not applicable to the taxpayer's case either. The exemption provision under section 8(1B) was therefore not applicable.

17. As the taxpayer had failed to produce credible evidence to show that he did not pay tax in China on his income derived from Company B, he could not avail himself of the exclusion afforded under section 8(1A)(c) of the IRO.

Appeal dismissed.

Cases referred to:

D9/79, IRBRD, vol 1, 354
D3/91, IRBRD, vol 5, 537
D140/00, IRBRD, vol 16, 29
CIR v Goepfert (1987) 2 HKTC 210
Bennet v Marshall 22 TC 73

D40/90, IRBRD, vol 5, 306

Ngan Man Kuen for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The appeal

1. This is an appeal by Mr A ('the Taxpayer') against the determination of the Commissioner of Inland Revenue dated 29 March 2001. In that determination, the Commissioner overruled the Taxpayer's objection and confirmed the revised assessment on the Taxpayer of a net chargeable income of $339,570 with the tax payable thereon of $51,402.

2. In arriving at the net chargeable income of $339,570, the assessor took the view that the Taxpayer's income from Company B during the period from 1 April 1997 to 29 December 1997 in the sum of $466,570 was subject to salaries tax.

3. The Taxpayer's case is that he worked full time in China during the relevant period, he did not render any services in Hong Kong during such period and had paid tax to the Chinese tax authority in respect of the income from Company B and it would not be fair to require him to pay tax twice on the same income.

The issues

4. There were two issues before the Board:

(a) whether extension of time should be granted to the Taxpayer for the purposes of this appeal; and

(b) whether the salaries tax assessment for the year of assessment 1997/98 raised on the Taxpayer was excessive or incorrect for the reasons advanced by the Taxpayer.

Extension of time

5. The determination was issued by the Commissioner on 29 March 2001. It was sent on the same day by registered post to the Taxpayer's correspondence address and was delivered to the said address on 30 March 2001. The Taxpayer filed a notice of appeal dated 29 April 2001 which was received by the Board on 4 May 2001.

6. The Inland Revenue Department (' IRD') took the view that the deadline for filing a valid appeal should be on 2 May 2001 (30 April 2001 and 1 May 2001 both being public holidays) and thus the appeal received by the Board on 4 May 2001 was late for two days.

7. The Taxpayer gave sworn evidence at the hearing before the Board and from his evidence, it transpired that his office was in China at the material time. The notice of appeal was therefore prepared by him in China and after the notice had been prepared, the Taxpayer instructed his secretary to arrange for the notice of appeal to be couriered to his brother in Hong Kong with a request that his brother would hand deliver the same to the Board soonest possible.

8. When asked why he chose such an indirect method of delivery of the notice of appeal, the Taxpayer gave the following explanation:

(a) although eventually he did return to Hong Kong on 29 April 2001, he was not sure originally whether he would make such a trip, so immediately after the notice of appeal was prepared, he gave instructions to his secretary to courier the same; and

(b) to ensure safe receipt of the notice of appeal by the Board of Review, he arranged to have it hand delivered by his brother because he had doubts about the efficiency of the postal services in China especially because of the long Labour Day holidays in May.

9. The evidence submitted by the Revenue revealed that between 31 March and 5 May 2001, the Taxpayer had been shuttling between Hong Kong and mainland China on no less than eight occasions. Indeed, at the hearing, the representative of the Revenue reiterated time and again that the Taxpayer was in Hong Kong on 2 May 2001 (he arrived at Hong Kong on 1 May 2001 and departed on 3 May 2001) and it was therefore within his power to file the notice of appeal on time (2 May 2001 being the deadline) instead of filing it on 4 May 2001.

10. The representative of the Revenue further reminded us that under section 66(1A) of the IRO, extension of time should only be given if the Board is satisfied that the appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal within the prescribed one-month period.

11. We have also been reminded of a number of previous Board decisions to the effect that extensions should not be granted too easily. In D9/79, IRBRD, vol 1, 354, the Board pointed out that:

' The word "prevented" is opposed to a situation where an appellant is able to give notice but has failed to do so. In our view therefore neither laches nor

> *ignorance of one's rights or of the steps to be taken is a ground upon which an extension may be granted.'*

In Case A112 (1991) HKRC 80-112 (D3/91, IRBRD, vol 5, 537), the taxpayer was one day late and a differently constituted Board emphasised that:

> *' The delay in filing the second notice of appeal was only one day but that is not the point. Time limits are imposed and must be observed. Anyone seeking to obtain the exercise of the discretion of a legal tribunal must demonstrate that they are "with clean hands" and that there are good reasons for the extension of time.'*

12. We share the sentiments expressed in the aforesaid Board decisions that ' time limits are imposed and must be observed' . But on the other hand, when imposing a time limit of one-month under section 66(1), the legislature obviously intends to allow a taxpayer a reasonable time of one month to consider his options regarding a possible appeal and to formulate his grounds of appeal (see D140/00, IRBRD, vol 16, 29). If two weeks after he receives the Commissioner' s determination, a taxpayer is hospitalized for a period of two weeks, then theoretically he would not be ' prevented' from giving the notice of appeal within time since he would have a two-day period after his discharge from hospital before expiry of the one-month deadline. But it would be unthinkable for a tribunal to deny extension to such an appellant. Similarly, in this case, the Taxpayer has been absent from Hong Kong for a substantial part of the relevant month and it would be too harsh not to grant him an extension although he was in Hong Kong on 2 May 2001 and was in a position to file the notice of appeal in time. In our view, when instructing his secretary on 29 April 2001 to courier the notice of appeal to Hong Kong followed by hand delivery to the Board, the Taxpayer did intend and had used efforts to comply with the time requirements of the IRO. The fact that the notice was eventually two days late could be due to the intervening long holidays not foreseen by the Taxpayer. We therefore allow the late notice of appeal.

The merits

13. We had heard evidence and arguments on the substantive issue of whether the Taxpayer' s income from Company B during the period from 1 April 1997 to 29 December 1997 was subject to salaries tax pending our decision on the preliminary issue of extension of time. Having given our decision on the preliminary issue, we shall now deal with the substantive appeal.

The relevant facts

14. The relevant facts of the present appeal are as follows:

(a) On 1 April 1995, Company C entered into a contract for services with Company B. The contract provided, inter alia, that Company C shall provide services to

Company B with such services performed directly and personally by the Taxpayer.

(b) At the relevant times, the Taxpayer was the sole proprietor of Company C.

(c) Company B was a corporation incorporated in Hong Kong. Its head office was in Hong Kong and it had branch offices in Macau and Shenzhen at the material times.

(d) The remuneration (of the Taxpayer) was paid by Company B to Company C's bank account with Bank D in Hong Kong.

(e) In its employer's returns for the years ended 31 March 1996 and 31 March 1997, Company B reported that the Taxpayer was its employee and he was employed in the capacity of assistant general manager.

(f) On 3 July 1997, Company B issued a letter to the Taxpayer setting out the terms of his employment for the post of general manager of designer development department (PRC) with effect from 1 July 1997. This letter is hereinafter referred to as 'the July Letter'.

(g) On 23 August 1997, Company B wrote to the Taxpayer again notifying him of the transfer to the post of general manager, Shenzhen with effect from August 1997. The terms of the letter were accepted by the Taxpayer on 15 September 1997. This letter is hereinafter referred to as 'the August Letter'.

(h) Both the July Letter and the August Letter were written on the stationery of the Hong Kong head office of Company B and there was no evidence that they were issued by the Shenzhen branch of Company B.

(i) On 29 December 1997, Company C issued an invoice to Company B (addressed to the Hong Kong head office of Company B and not to its Shenzhen branch) demanding for payment of 'one month consultant fee in lieu of termination notice' in the amount of $42,000.

(j) On 7 January 1998, Company C acknowledged receipt of the sum of $42,000 by signing a final termination payment memorandum to Company B.

(k) By an employer's notification, Company B reported the emoluments of the Taxpayer for the period from 1 April 1997 to the date of termination of employment on 29 December 1997.

(l) According to the arrival/departure records supplied by the Immigration Department, the Taxpayer was present in Hong Kong for the following number of days during the period from 1 April 1997 to 31 March 1998:

Period	Days in Hong Kong
1-4-1997 – 30-6-1997	85
1-7-1997 – 29-12-1997	111
8-1-1998 – 31-3-1998	49

(m) The Taxpayer submitted copies of two individual income tax withholding returns in support of his claim that he had paid tax in China for the months form August to November 1997. However, there were blank spaces in the copy document submitted and it was not shown the amount of tax purportedly withheld and it did not bear the chop of the tax department acknowledging receipt of tax paid. According to the Taxpayer, ' all the records of this tax payment should be kept at Company B (Shenzhen) and you (the IRD) could request to get a copy' .

(n) In response to a specific question by the IRD whether it had filed any individual income tax withholding return in respect of the Taxpayer during the period from July 1997 to August 1997 and whether tax had been withheld or deducted from the Taxpayer' s payroll and paid over to the Chinese tax authority, Company B gave a clear and unequivocal reply on 12 July 2001 that no such individual income tax withholding return had been filed and no such tax had been paid.

The law

15. Section 68(4) of the IRO provides that *'the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant'*.

16. (a) Section 8(1) of the IRO 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 following sources –*

(i) any office or employment of profit; and

(ii) ...'

(b) Section 8(1A)(b)(ii) excludes income derived from services rendered by a person who renders outside Hong Kong **all** the services in connection with his employment.

(c) In determining whether or not a person renders all services outside Hong Kong, 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.

(d) Section 8(1A)(c) excludes income derived by a person from services rendered by him outside Hong Kong where he has paid tax of substantially the same nature as Hong Kong salaries tax in the territory where the relevant services are rendered.

17. The general rule established as a result of a series of Board of Review decisions and confirmed by the decision in CIR v Goepfert (1987) 2 HKTC 210 is that it is necessary to distinguish between a source of income that is fundamentally a Hong Kong employment and a source that is fundamentally an employment outside Hong Kong. In making this distinction, the place where services are rendered is irrelevant in deciding whether or not the source is a Hong Kong employment.

18. We also reminded ourselves of the judgment of the Court of Appeal in Bennet v Marshall 22 TC 73, and in particular, the words of Sir Wilfrid Greene, MR, who said:

> *' The House of Lords ... in Foulsham v Pickle 9 TC 261 have definitely decided that, in the case of an employment, the locality of the source of income is not the place where the activities of the employee are exercised but the place either where the contract for payment is deemed to have a locality or where the payments for the employment are made, which may mean the same thing.'*

19. The fact that since July 1997 the Taxpayer became the general manager of the Shenzhen branch of Company B and reported to an executive director stationed in China are not conclusive factors in determining the location of an employment. This proposition is supported by the Board of Review decision D40/90, IRBRD, vol 5, 306.

> *' We accept the submission by the Taxpayer that his terms of employment and the manner in which he performed his services were substantially different from other employees of the employer in Hong Kong. We accept that he was required to travel extensively outside of Hong Kong and perform services outside of Hong Kong. We likewise accept that for operational purposes the Taxpayer reported to senior staff in USA in the course of performing his services as internal auditor.*
>
> *However, none of the foregoing affects the real source of his income or the place of his employment. In so far as he was performing services overseas, we are to disregard such facts (the Goepfert decision). To whom he reported within the multi-national group of companies does not affect the nature or*

place of his employment. He was as a matter of fact employed by a company in Hong Kong. If those to whom he reported in practice wished to terminate his services, they could only do so through his employer in Hong Kong.'

Analysis of the case

20. In the present case, it was undisputed that Company B (Hong Kong) was the Taxpayer's employer up to the time when the Taxpayer was transferred to work in Shenzhen. What was at issue was whether the Taxpayer remained an employee of Company B (Hong Kong) after he was transferred to work in Shenzhen. From the evidence before us, it was quite clear that the Taxpayer held only a single continuous employment with Company B. The July Letter and the August Letter signed by the parties when the Taxpayer was transferred to work in Shenzhen did nothing more than setting out changes in detailed working arrangements when an employee's posting in a large institution is changed. These two letters did not constitute a new or separate employment relationship with the Taxpayer. We note in this regard that the employment relationship started with a contract between Company C and Company B on 1 August 1995 and terminated as evidenced by a final termination payment memorandum dated 8 January 1998 between Company C and Company B.

21. Once it is decided that the Taxpayer held a single continuous employment with Company B terminated in December 1997, it is quite clear that the Taxpayer's employment was a Hong Kong employment, that is, his employment income arose in or was derived from Hong Kong, having regard to the following factors:

(a) the contract of employment was entered into in Hong Kong;

(b) his employer was a corporation incorporated in and with its principal place of business in Hong Kong;

(c) the remuneration was paid to him in Hong Kong; and

(d) his remuneration was paid by the employer which was a Hong Kong company or establishment.

22. The Taxpayer claimed that after his transfer to Shenzhen in July 1997, he did not render any services in Hong Kong. It is, however, undisputed that he rendered services to his employer in Hong Kong during 1 April 1997 to 30 June 1997. Therefore, he cannot be said to have rendered outside Hong Kong <u>all</u> the services in connection with his single employment with Company B during the period from 1 April 1997 to 29 December 1997 and the exemption provision under section 8(1A)(b)(ii) is not applicable.

23. Since the Taxpayer had rendered services in Hong Kong in connection with his employment with Company B, he can only be exempted from salaries tax under section 8(1B) if such services were rendered during visits not exceeding a total of 60 days in the basis period for the year of assessment. But in the present case, irrespective of whether his stay in Hong Kong could be regarded as visits, since the Taxpayer was present in Hong Kong for a total of 196 days during the basis period from 1 April 1997 to 29 December 1997, the exemption provision under section 8(1B) is not applicable.

24. As mentioned in paragraphs 14(m) and (n) above, the Taxpayer produced certain documents in support of his claim that he had paid tax in China in respect of his income during the period of his transfer to work in Shenzhen. However, the documents produced by him were incomplete and were rebutted by evidence adduced by the IRD showing that no tax return had been filed and no tax had been paid to the tax authorities in China. Since the Taxpayer has failed to produce credible evidence to show that he did pay tax in China on his income derived from Company B, he could not avail himself of the exclusion afforded under section 8(1A)(c) of the IRO.

Conclusion

25. Having considered all the evidence and the facts before us, we have reached the conclusion that the Taxpayer had failed to discharge the burden of proving that the assessment in question was incorrect. We therefore dismiss the appeal and confirm the assessment.