INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D87/00

Salaries tax – employment – place of performance – source of income – 60 days limit – whether liable to salaries tax – totality of facts test – when income could be apportioned for determination of salaries tax – sections 8(1) and 8(1A) of the Inland Revenue Ordinance (' IRO').

Panel: Mathew Ho Chi Ming (chairman), Philip Kan Siu Lun and Dianthus Tong Lau Mui Sum.

Date of hearing: 14 August 2000.
Date of decision: 10 November 2000.

The taxpayer objected to the additional salaries tax assessment for the year of assessment 1995/96 and the salaries tax assessment for the years of assessment 1996/97 and 1997/98 raised on him. The taxpayer claimed that his income should be apportioned according to the time he stayed in and outside Hong Kong and only that portion relating to services rendered in Hong Kong should be assessable to salaries tax. The main issue in this appeal was whether the taxpayer' s claim was reasonable and should be allowed.

Held:

1. According to section 8(1) of the IRO (' the basic charge provision'), income arising in or derived from Hong Kong from any office or employment of profit is liable to salaries tax.

2. In addition to the basic charge provision in section 8(1), it has been decided that there is an additional charging provision found in section 8(1A)(a) of the IRO which creates a liability to tax: CIR v Goepfert 2 HKTC 210.

3. If the taxpayer' s income is chargeable to salaries tax under section 8(1), then the whole of his income is subject to tax. If section 8(1) is not applicable, then the additional charging provision in section 8(1A)(a) bites and only that part of the taxpayer' s income relating to the services rendered in Hong Kong is subject to salaries tax.

4. If only the additional charging provision in section 8(1A)(a) applies, then the total income of the taxpayer is apportioned in accordance with the number of days when

he was in Hong Kong since physical presence in Hong Kong constituted services rendered in Hong Kong.

5. When considering the additional charge under section 8(1A)(a), the place of performance is of prime concern.

6. The Goepfert decision has been used to support the proposition that the place of performance of the services (from which the income arose) was not relevant in considering whether the income arose in or was derived from Hong Kong from any office or employment under the basic charge provision in section 8(1).

7. The Board approved of the totality of facts test, as laid down by the Goepfert decision, when deciding the locality of an employment or income from any office or employment which one considers whether the basic charge provision under section 8(1) applies to a taxpayer.

8. As far as the basic charge provision under section 8(1) was concerned, the place of performance of services was not one of the relevant factors which may be considered in the totality of facts test.

9. The nature of an employee' s duties and the source of an employee' s remuneration were clearly part of the totality of facts which could be taken into consideration.

10. The function of the Revenue and the Board of Review was to apply the law. It followed that the law must be applied fairly, faithfully and transparently.

11. The Board was of the view that the revised ' Departmental Interpretation and Practice Note 10' was inaccurate and misleading to taxpayers and assessors alike. It did not properly reflect the law. The Board hoped that paragraphs (A) 1 to 6 of the revised ' Departmental Interpretation and Practice Note 10' could be revised yet again so that the totality of facts test was properly reflected.

12. The onus of proof in appealing against an assessment to the Board was on the taxpayer: section 68(4) of IRO.

13. Given the confusion in the evidence presented, the Board was unable to make any findings as to who the taxpayer' s employer during the period under appeal was.

14. Having considered the evidence and the law and bearing in mind that the burden of proof was on the taxpayer, the Board came to the conclusion that the taxpayer had failed to discharge the burden of proof to show that the tax assessments under appeal were incorrect or excessive.

15. The Board was of the view that the whole of the income under appeal was chargeable to salaries tax under the basic charging provision, section 8(1) of the IRO.

16. The law relating to source of income had always been difficult to apply.

17. The nexus of the taxpayer's employment to Hong Kong was difficult to deny. More evidence than the ones produced to the Board would be required to convince the Board that the income of the taxpayer had not arisen or was not derived from Hong Kong from any office or employment of profit.

Obiter

It would have been nice if the IRD had drawn the attention of the Board to the revised 'Departmental Interpretation and Practice Note 10' even if they were disadvantageous to its case. Deliberately omitting important sources of the law in representing the current state of law in hearings before this Board will only cast suspicion on the Revenue's case.

Appeal dismissed.

Cases referred to:

CIR v Geopfert 2 HKTC 210
D40/90, IRBRD, vol 5, 306
D17/90, IRBRD, vol 5, 143
D8/92, IRBRD, vol 7, 107
D25/94, IRBRD, vol 9, 184

Wong Ki Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Nature of appeal

1. Mr A (the 'Taxpayer') had objected to the additional salaries tax assessment for the year of assessment 1995/96 and the salaries tax assessments for the years of assessment 1996/97

and 1997/98 raised on him. The Taxpayer claimed that his income should be apportioned according to the time he stayed in and outside Hong Kong and only that portion relating to services rendered in Hong Kong should be assessable to salaries tax. By a Determination dated 31 March 2000, the Commissioner of Inland Revenue confirmed the various tax assessments in question (' Determination'). The Taxpayer is now appealing against this Determination.

2. At the hearing of this appeal, the Taxpayer appeared and gave oral testimony. The Taxpayer was honest and we accept his testimony.

3. A substantial portion of the facts stated in the Determination is not disputed. Company B was the Taxpayer' s representative when his tax returns for the years of assessment in question were filed and they corresponded with the Revenue. Representatives from Company B were present at the hearing of this appeal but they had not participated in the hearing except, perhaps, in the role of an observer.

4. Based on the facts as stated in the Determination, the documents presented to us and the oral testimony of the Taxpayer, we make the following findings of primary facts which are, as best can be presented, in almost chronological order.

Findings of primary facts

5. The Taxpayer first entered into employment with the C group of companies (' C-Group'). It is not clear just exactly which company within the C-Group was the Taxpayers' employer. Various companies belonging to the C-Group appeared in the evidence. Amongst them were the following likely candidates who might be the employer:

a. C Co Ltd, a company incorporated in Country D (' C-Country D'). It is the ultimate holding company of C Pacific Ltd (' C-Pacific'),

b. C-Pacific, a company incorporated in Hong Kong on 31 October 1986. C-Pacific is the holding company of C Motors Ltd (' C-Motors'),

c. C-Motors, also incorporated in Hong Kong.

6. Negotiations for the employment of the Taxpayer by the C-Group took place outside Hong Kong in 1987.

7. The Taxpayer was originally offered by the C-Group to work in Country E as the general manager of the automobile division of the automobile dealer company under the group. This did not happen. Instead, sometime in November 1987, he was seconded to become the general manager of Company F in Hong Kong taking care of a specific brand of automobiles.

8. By a letter dated 30 May 1988, C-Pacific wrote to the Director of Immigration to ask for a renewal of the Taxpayer' s Hong Kong residence permit. This letter confirmed that the Taxpayer ' *is employed by this Company as General Manager, Company F. His wife ..., is resident with him in Hong Kong.*'

9. In 1991, the Taxpayer was promoted to become ' director Motors B' in Hong Kong taking care of three specific brands of automobiles. We have no idea what ' motors B' meant. It is not clear to which company this position of ' director, motors B' belonged. It may relate to C-Pacific since when the Taxpayer was further promoted, the letter evidencing this further promotion (defined in the following paragraph as the Revised Appointment Letter) was addressed to the Taxpayer, director, motors B, C-Pacific.

10. By letter dated 26 March 1993 under C-Country D letterhead, the group personnel director set out the terms and conditions under which the Taxpayer was promoted to regional director, asia pacific/middle east - motors ' B' (' Revised Appointment Letter'). This letter was addressed to the Taxpayer in the capacity of director, motors B, C-Pacific and contained, among other things, the following terms:

a. ' I am writing to formally confirm your revised terms of appointment following your promotion to Regional Director, Asia Pacific/Middle East - Motors "B" with effect from 1 April.'

b. ' You will be appointed to the position of Regional Director, Asia Pacific/Middle East - Motor "B", based in Hong Kong, commencing 1 April 1993, reporting to Mr G, Director - Motor "B".'

c. ' Your salary paid in Hong Kong Dollars gross will be HK$... per annum.'

d. ' Your Country D notional salary, which is used for pension scheme purposes, will be? ... per annum ...'

e. ' You will be offered membership of the C Overseas Pension Scheme ... Benefits under this Scheme are based on your Country D notional salary ... Pensionable Service under this Scheme will apply from the date you join it. Provided you agree to join at the outset and agree to a transfer of your rights under the C Pacific Expatriate Scheme to it ...'

f. ' You will continue to be provided with fully furnished accommodation in Hong Kong.'

g. ‘ You will be covered by the Group’s International Permanent Health Insurance Policy ... You will continue to be covered by the Hong Kong BUPA Scheme.’

h. ‘ Your company car will be in line with C-Pacific’s car policy which may be amended from time to time.’

i. ‘ When travelling on Company business overseas, you will be entitled to First Class travel by air.’

j. ‘ At the end of your appointment, or in the event of your terminating for any reason, then the Company will be responsible for repatriating you under the Group’s compensation policy guidelines.’

k. ‘ Household gas, water and electricity will be paid for by the Company.’

11. The benefits under the Revised Appointment Letter were performed and received by the Taxpayer.

12. The Taxpayer’s accommodation in Hong Kong was provided through two tenancy agreements relating to an apartment (‘ Company Quarters’) from 15 January 1994 to 14 January 1998. In both tenancy agreements, a Hong Kong company of the C-Group was the tenant; C Marketing Ltd as tenant in the tenancy agreement dated 13 December 1993 and C Pacific Holdings Ltd as tenant in the tenancy agreement dated 12 February 1996.

13. The Taxpayer transferred his rights under the C Pacific expatriate scheme to the C overseas pension scheme. A summary of the C overseas pension scheme contained, among other things, the following information:

a. ‘ The C Overseas Limited Pension And Assurance Scheme was set up by C Overseas Limited to cater for expatriate Employees of the C Group serving in various overseas locations who cannot be accommodated in their base country scheme.’

b. ‘ The Scheme’s eligibility provisions are drawn up so as to permit enrolment of employees working anywhere in the world except Country D, and employed by any subsidiary or associated company of the C Group.’

A statement of the Taxpayer’s benefits under this Scheme as of October 1996 was supplied to the Taxpayer from the pensions department of C-City H under C-Country D letterhead.

14. The Taxpayer' s salary was paid by a Hong Kong company of the C-Group. The Taxpayer cannot remember exactly which Hong Kong company. Company B had not (in their letter dated 26 November 1999 to the Revenue) commented on the sub-paragraph on the statement of facts upon which the Determination was to be made which stated that the Taxpayer' s income was paid by C-Motors to the Taxpayer in Hong Kong' (in paragraph 1(5)(b) of the Determination). However, C-Pacific could have been the payer of the Taxpayer' s salary when one looks at the employer' s returns of remuneration and the Taxpayer' s own tax returns hereinafter mentioned.

15. There was an increase in the Taxpayer' s salary on 1 January 1994. This was confirmed by a letter from C-Country D dated 20 December 1993. Increases in the Taxpayer' s salaries on 1 April 1995, 1996 and 1997 and his bonuses were confirmed by letters from C Motors International Ltd in City H. We do not know how C Motors International Ltd is related to C-Country D or its standing within the C-Group.

16. By a letter dated 15 February 1995, C-Pacific wrote to the Director of Immigration enclosing the application for right to land for the Taxpayer and certified that the Taxpayer ' *who is under our employment in the capacity of Regional Director C Motors International, Asia Pacific and Middle East, has been staying in Hong Kong over seven years. He came to Hong Kong with his dependents in 1987 and joined our company with effect from 1 December in the same year*.'

17. Company B produced a letter dated 5 December 1996 written by C-Country D addressed to the Revenue (' First C-Country D Confirmation Letter') to confirm that the Taxpayer' s employment contract was negotiated and concluded when he was in Country D in 1987 and that this contract was enforceable under Country D laws. In this same letter, it was stated that ' throughout (the Taxpayer' s) employment with the C-Group, (he) has reported to the management of (C-Country D) in Country D which has jurisdiction and exercises control over his work.'

18. The Taxpayer also produced to this Board just prior to the hearing a second letter from C-Country D dated 7 August 2000 (' Second C-Country D Confirmation Letter') stating that: ' (the Taxpayer) was employed by (C-Country D) as an International Manager from November 1987 until December 1997 and as such was expected to operate in locations as directed by (C-Country D).....(he) was requested to go to Hong Kong as General Manager, Company F. Subsequently he was promoted to Director, Motors "B" then Regional Director, Middle East and Asia Pacific. The employment contracts were negotiated in City H and throughout his employment he was an employee of (C-Country D) until he was made redundant by (C-Country D) in December 1997.'

19. By a letter dated 7 July 1997, C-Motors wrote to the Immigration Department and confirmed that the Taxpayer ' and his family arrived in Hong Kong on 2 December 1987 and have been employed in Hong Kong since that date and have been continuously resident' .

20. By a letter dated 25 November 1997 under C-Country D letterhead, the group human resources director confirmed that the Taxpayer' s position would be redundant as from 31 December 1997 (' Redundancy Letter') and the following were (inter alia) stated therein:

a. ' You will receive $... as compensation for loss of office.'

b. ' All other benefits will cease on 31 December 1997.'

c. ' The Company will continue to pay rent on your Hong Kong property until 30 June 1998 or until you find other employment in Hong Kong.'

d. ' You will be offered relocation under the C Policy in the event that you relocate to Country D.'

The Taxpayer accepted the terms of his departure from the C-Group.

21. In the directors' reports of C-Motors, the Taxpayer was stated as one of its directors covering the period from 19 February 1993 to 31 December 1997.

22. Five employer' s returns of remuneration and pensions (' Employer' s Return') were produced to us at the hearing. The Employer' s Returns for the year of assessment ended 31 March 1994 and 1995 were filed by C-Pacific; while the ones for 1996, 1997 and 1998 were filed by C-Motors. Aside from the obvious different employer of the Taxpayer in these two sets of Employer' s Returns, the Employer' s Return for 31 March 1996 (the first year of assessment out of the three years of assessment under appeal) stated that the employer was ' C-Motors (true employer: C-Pacific)' . The following is a summary of the information contained in these Employer' s Returns:

Year ended 31 March	**1994**	**1995**	**1996**	**1997**	**1998**
Employer	C-Pacific	C-Pacific	C-Motors (true employer : C-Pacific)	C-Motors	C-Motors
Capacity in which employed	Director – Motors B	Director – Motors B	Regional Director – Asia Pacific/	Director - Motors B	Regional Director

			Middle East		
Period of employment	1-4-1993 to 31-3-1994	1-4-1994 to 31-3-1995	1-4-1995 to 31-3-1996	1-4-1996 to 31-3-1997	1-4-1997 to 31-12-1997
Salaries	1,269,230.00	1,661,544.00	1,846,153.80	1,975,384.56	1,555,615.35
Bonus	477,200.00	754,462.00	369,846.15	364,615.38	1,563,846.15
Other reward	94,150.00	109,560.00	---	---	---
Education allowance	---	---	105,200.00	129,580.00	288,537.00
Total	1,840,580.00	2,525,566.00	2,321,199.95	2,469,579.94	3,407,998.50

23. In these five Employer's Returns, we further note that the manner in which the 'Quarters provided' section of all five returns was filled was inconsistent. Quarters were stated to be provided for the years of assessment 1993/94 and 1994/95. No quarters were stated to be provided for the subsequent three years of assessment ('0' represented that no quarters were provided. '1' meant that quarters were provided by the Taxpayer). However, for the years of assessment 1995/96 and 1997/98, particulars of the Company Quarters was provided despite the '0' answer.

24. In his tax returns for the years of assessment 1995/96 to 1997/98 ('Tax Returns'), the Taxpayer declared that his employer was C-Pacific and that his position was regional director - asia pacific. Except for the year of assessment 1994/95, this conflicted with the Employer's Returns. We note that the Taxpayer also declared that the Company Quarters, was provided to him by his employer or its associated corporation which was C-Country D.

25. In his Tax Returns, the Taxpayer reported his full income but claimed that only that portion of his income attributable to services rendered in Hong Kong should be assessed to salaries tax. He apportioned his income by reference to the number of days he rendered services in Hong Kong as follows:

		$
(i)	Year of assessment 1995/96	
	Income attributable to services in Hong Kong ($2,321,200 x 238/366)	1,509,414
	Add: Rental value (10% x $1,509,414)	150,941
	Total income	1,660,355

(ii)	Year of assessment 1996/97	
	Income attributable to services in Hong Kong ($2,469,579 x 241/365)	1,630,598
	Add: Rental value (10% x $1,630,598)	163,059
	Total income	1,793,657
(iii)	Year of assessment 1997/98	
	Salaries	1,555,615
	Bonus	1,563,846
	Education allowance	288,537
		3,407,998
	Add: Rental value (10% x $3,407,998)	340,800
	Total income	3,748,798

26. In the Tax Returns for the years of assessment 1995/96 and 1996/97, travel schedules were attached detailing the Taxpayer' s travels outside Hong Kong as set out below. No such travel schedule was attached to the Tax Return for year of assessment 1997/98 but Company B supplied a schedule showing similar calculations. The Revenue has not challenged the accuracy of these schedules which are accepted by us.

	1995/96	**1996/97**	**1997/98**
No of days in period	366	365	275
No of days where services were rendered outside Hong Kong	120	115	not in evidence
No of days where services were rendered in Hong Kong	224	226	170
No of days outside Hong Kong on vacation	22	24	not in evidence
Leave days attributable to Hong Kong services	14	15	17
Total no of days attributable to Hong Kong services	238	241	187

Issue

27. The issue for us to decide is whether, for the three years of assessment under appeal, the Taxpayer was entitled to apportion his income by reference to those services rendered inside Hong Kong (which are liable to salaries tax) and those rendered outside Hong Kong (which are not liable to salaries tax).

Parties' cases

28. The essence of the Taxpayer's case is as follows.

The Taxpayer was recruited by C-Country D in Country D, which seconded him to work in one of its subsidiaries in Hong Kong. The Taxpayer's employment contract with C-Country D was negotiated, concluded and signed in Country D. C-Country D is a Country D company with its central management and control located in Country D. Thus the Taxpayer's employment with C-Country D should be non-Hong Kong sourced and only his income attributable to Hong Kong services should be subject to Hong Kong salaries tax.

29. The essence of the Revenue's case is that the source of the Taxpayer's income is located in Hong Kong. Hong Kong is the place where the income really comes to the Taxpayer.

The Law

30. Income arising in or derived from Hong Kong from any office or employment of profit is liable to salaries tax. This basic charge for salaries tax is found in section 8(1) of the IRO as follows:

> ' *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.'*

31. In addition to this basic charge, the High Court in CIR v Goepfert 2 HKTC 210 decided that there is an additional charging provision found in section 8(1A)(a) of the IRO which creates a liability to tax in addition to the basic charge in section 8(1). Section 8(1A)(a) reads as follows:

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

> *(a) 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 including leave pay attributable to such services; '*

32. At page 238, Macdougall J in the Goepfert case set out the difference between the two charging provisions in the basic charge Sections 8(1) and the additional charge in section 8(1A)(a):

> *' 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 ...*
>
> *On the other hand, 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. Again, this is subject to the "60 days rule".'*

This is the distinction which lies at the heart of this appeal and the issue upon which we must decide. If the Taxpayer' s income is chargeable to salaries tax under section 8(1), then the whole of his income is subject to tax. If section 8(1) is not applicable, then the additional charging provision in section 8(1A)(a) bites and only that part of the Taxpayer' s income relating to the services rendered in Hong Kong is subject to salaries tax. In this appeal, if only the additional charging provision applies, then the total income of the Taxpayer is apportioned in accordance with the number of days when he was in Hong Kong since his physical presence in Hong Kong constituted services rendered in Hong Kong. This conforms to logic. When considering the additional charge under section 8(1A)(a), the place of performance is of prime concern. This is contrasted with the opposite position (of the place of performance) that the law has taken in respect of the basic charge under section 8(1).

33. The Goepfert decision has been used to support the proposition that the place of performance of the services (from which the income arose) was not relevant in considering whether the income arose in or was derived from Hong Kong from any office or employment under the basic charge in section 8(1). Macdougall J stated at page 236 that: *' It follows that the place where the services are rendered is not relevant to the enquiry under section 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be ignored.'* .

34. Macdougall J also approved of the totality of facts test when deciding the locality of an employment or income from any office or employment which one considers whether the basic charge under section 8(1) applies to a taxpayer. We believe that the correct approach in identifying the source of income is the totality or all factors test. The Goepfert decision supports this (at page 237) as follows:

> ' *Specifically, it is necessary to look for the place where the income really comes to the employee, that is to say, where the source of income, the employment, is located. As Sir Wilfred Greene said, regard must first be had to the contract of employment.*
>
> *This does not mean that the Commissioner may not look behind the appearances to discover the reality. The Commissioner is not bound to accept as conclusive, any claim made by an employee in this connexion. He is entitled to scrutinize all evidence, documentary or otherwise, that is relevant to the matter.*
> .....
>
> *There can be no doubt therefore that in deciding the crucial issue, the Commissioner may need to look further than the external or superficial features of the employment. Appearances may be deceptive. He may need to examine other factors that point to the real locus of the source of income, the employment.*
>
> *It occurs to me that sometimes when reference is made to the so-called "totality of facts" test it may be that what is meant is this very process.'*

35. Then at page 238, Macdougall J stated that: ' *It seems probable that the totality of facts test has been interpreted differently by different Boards. It is only when that so-called test embraces the place where the services were rendered or otherwise introduces irrelevant matters that it becomes impermissible.*' It is looking at this passage together with the passage at page 236 quoted above that one sees the specific rejection of the place of performances of the services as relevant at all in consideration of the basic section 8(1) charge. It should therefore not be one of the factors which may be considered in the totality of facts test. While Macdougall J specifically excluded place of performance as relevant in the totality of facts test, he did not specify which were the relevant facts which could be taken into consideration. Perhaps it would have been unwise to list the relevant facts since each case will have their own peculiar set of facts and defining them would be impossible. With respect to Macdougall J, if we were to take into account the totality of facts, we fail to see why the place of performance cannot be a relevant factor. We are, however, bound by the Goepfert decision in this regard and we must disregard the place of performance as relevant when considering the basic charge under section 8(1).

36. The Revenue has not drawn our attention to Departmental Interpretation and Practice Note 10 (' DIPN 10') which was revised substantially due to the Goepfert decision. DIPN 10

concerns itself with what the Revenue would take into consideration when looking at the source of employment or salary-type income under the basic section 8(1) charge.

37. This replaced the previous DIPN 10 which had sought to list out six factors when determining whether an employment fell within section 8(1):

> ' *(1) The place where the contract, whether verbal or written, is enforceable;*
>
> *(2) The exact nature of the taxpayer' s duties and identification of what he is remunerated for;*
>
> *(3) Whether the taxpayer serves or holds office in, or has employment with, a Hong Kong company, organization or establishment in Hong Kong of a non-resident business;*
>
> *(4) Who remunerates the taxpayer - where the cost of this remuneration or of his service is ultimately borne;*
>
> *(5) Whether the remuneration or cost forms ultimately or directly part of the expenses or cost of a Hong Kong company or establishment;*
>
> *(6) Whether the duties performed by the taxpayer during temporary absences from the Colony were incidental to his employment or office in the Colony or completely distinguishable from that role.'*

The old DIPN 10 then went further under the heading ' Extension of Charge' and made it clear that the second factor in the above list of six factors was not meant to include the performance of the taxpayer' s duties:

> ' *If the income from employment does not come within the basic charge, because it does not "arise in" or "derive from" a source in the Colony, then consideration will need to be given as to whether liability arises under the extension to the basic charge by the provisions of section 8(1A). Sub-section (a) of section 8(1A) does not in any way limit the charge in section 8(1); it extends the charge by specifically including as income arising in or derived from the Colony, all income derived from services rendered in the Colony ...'*

38. The more comprehensive interpretation old DIPN 10 (akin to, but not, the totality of facts test) was replaced by a new interpretation which the Revenue thought should be applied in the light of the Goepfert decision. The new interpretation was a simpler three factors test when

considering the locality of an employment found in paragraph (A) 3 of the revised DIPN 10 as follows:

> ' *(1) The contract of employment was negotiated and entered into outside Hong Kong;*
>
> *(2) The employer is resident outside Hong Kong; and*
>
> *(3) The employee' s remuneration is paid to him outside Hong Kong.*

The revised DIPN 10 elaborated in its subsequent paragraph 5: ' W*here all three factors are not resent the Revenue will regard the existence of an overseas contract with a non-resident employer as outweighing the payment of remuneration in Hong Kong. On the other hand, where the employer is resident in Hong Kong, it is unlikely that a claim for a non-Hong Kong employment would be conceded even though the contract of employment was entered into outside Hong Kong with remuneration paid outside Hong Kong.*' And in its subsequent paragraph 6: ' *It is expected that in the greater majority of cases the questions of Hong Kong or non-Hong Kong employment will be resolved by considering only the three factors mentioned above. However, the Department must reserve the right, in appropriate cases, to look beyond those factors. As pointed out in the Goepfert decision – "There can be no doubt therefor that in deciding the crucial issue, the Commissioner may need to look further than the external or superficial features of the employment. Appearances may be deceptive. he may need to examine other factors that point to the real locus of the source of income, the employment".*'

39. DIPN 10, old or revised version, being an administrative interpretation, is not binding us. Differently constituted Boards have stated that all factors will be looked at rather than just the three factors in the revised DIPN 10. The revised DIPN contradicts the totality of facts test which was endorsed by the Goepfert decision. We agree totally with the Board in D40/90, IRBRD, vol 5, 306 when it said: ' *Apparently, the Commissioner has promulgated three tests to be studied when deciding if employment is located outside of Hong Kong. We can find no direct justification for what the Commissioner has promulgated following the Goepfert decision. Indeed by saying that if a taxpayer complies with three tests, he is not taxable in Hong Kong it would seem to us to be contrary to the "totality of facts test" set out by MacDougall J. It surely must be wrong to look at three facts only.*'

40. The revised DIPN 10 also noted in paragraph (A) 1 therein that ' *It also follows from the judgment of the Court (in Goepfert' s case) that other factors, such as the nature of the employee' s duties and whether his remuneration forms part of the expenses of a Hong Kong Company or establishment, which the Department has previously taken into account will not often have relevance to the question of employment.*' We disagree with this statement. As part of the findings of fact by the Board appealed against in the Goepfert decision (referred to in

subsequent paragraphs hereinafter appearing), it was obvious that they had taken into consideration the nature of the employee's duties and also the costs of the employee's accommodation being borne partly by the Hong Kong company and partly deducted at the source of his salary paid by an offshore company in New York. Macdougall J had accepted these findings in reaching his decision. The nature of an employee's duties and the source of an employee's remuneration are clearly part of the totality of facts which can be taken into consideration.

41. It is not difficult to see why our attention was not drawn to the revised DIPN 10. The Revenue does not dispute that negotiations of the initial contract with the Taxpayer took place outside Hong Kong. The confirmation of the revised terms of his appointment was contained in the Revised Appointment Letter issued by C-Country D. There is a possibility of the Taxpayer's employment contract being entered into outside Hong Kong and his employer may have been C-Country D which may have been resident outside Hong Kong. If these were established facts, then the application of the revised DIPN 10 would result in the Taxpayer's employment being offshore, thus no salaries tax was chargeable (at least for that part of service not rendered in Hong Kong). It was perhaps with the revisions to DIPN 10 in mind that the Taxpayer, probably with the advice of Company B, launched this appeal to this Board. The function of the Revenue and this Board is to apply the law. It follows that the law must be applied fairly, faithfully and transparently. We are of the view that revised DIPN 10 is inaccurate and misleading to taxpayers and assessors alike. It does not properly reflect the law. We hope that paragraphs (A) 1 to 6 of the revised DIPN 10 can be revised yet again so that the totality of facts test is properly reflected.

42. Several Board cases decided just after the Goepfert decision were cited to us by the Revenue.

a. In D17/90, IRBRD, vol 5, 143, the taxpayer was employed by the Hong Kong subsidiary of an American company under a written contract. Much of the services provided by the taxpayer was rendered outside Hong Kong as part of the Asia/Pacific region internal audit and monitoring. His salary and expenses were paid by the Hong Kong subsidiary. The taxpayer argued that although his salary and expenses were paid by the Hong Kong subsidiary, this was ' internal billing' and they were ultimately charged back to the American holding company.

b. In D40/90, IRBRD, vol 5, 306, the taxpayer was also employed by the Hong Kong subsidiary of a multi-national US based group after answering advertisements in Hong Kong. He was paid in Hong Kong and his employment was accepted by him in Hong Kong. He traveled extensively outside in the performance of his services. The Board considered the Goepfert decision and said at page 313 that: ' *what the learned judge had said in his decision is that Board of Review must look at all of the relevant facts. The Board must then ignore the place where the services are rendered and decide for the*

purposes of section 8(1) of the Inland Revenue Ordinance what is the true source of income, namely where "the employment is located".'

c. In D8/92, IRBRD, vol 7, 107, the taxpayer, a US resident, was employed by the Hong Kong subsidiary of a multi-national company. He accepted his employment in the USA by signing and returning an offer of employment mailed to him. He worked for the Far East Region and not only for the Hong Kong subsidiary employer. The appeal was heard with the taxpayer being absent.

d. In D25/94, IRBRD, vol 9,184, the taxpayer reported in his tax return that he was employed by the Hong Kong subsidiary of a US company. He later contended he was, in fact, employed by the US parent. Negotiation for his employment took place in Hong Kong. The US company had under its letterhead set out the terms of the taxpayer' s employment with the Hong Kong subsidiary. The Hong Kong subsidiary confirmed that the taxpayer was employed by the Hong Kong subsidiary. The taxpayer was paid in Hong Kong dollars and in Hong Kong. The Hong Kong subsidiary had filed employer' s return in respect of the taxpayer' s income.

e. In D79/97, IRBRD, vol 12, 461, the taxpayer was employed by a non-Hong Kong company as regional director of operations. He was based mainly in Hong Kong to overseas operation in the region. He spent 229 working days in Hong Kong. His non-Hong Kong incorporated employer filed the employer' s return in respect of the taxpayer' s income. His salary was paid in Hong Kong. His medical insurance scheme was in Hong Kong. The place of enforcement of his retirement scheme (based on a HK Dollar Guaranteed Fund) was in Hong Kong. The Board assumed that the employment negotiations took place offshore. But the letter of appointment was written on the non-Hong Kong company' s Hong Kong office letterhead with Hong Kong address. The non-Hong Kong company employer was registered in Hong Kong as a foreign company under Part XI of the Companies Ordinance. The taxpayer did not appear in the appeal but did give full written submissions.

43. In all of the above Board cases, the taxpayers failed to convince previous and differently constituted Boards that their income did not arise in or was not derived from Hong Kong from any office or employment of profit. Section 8(1) was applied to render their total income taxable although they were all travelling outside Hong Kong to perform part of their services under their employment contracts. In all of these cases (except one), the employer was on the evidence, undisputedly, a Hong Kong company. The exceptional non-Hong Kong employer was a foreign company but it was registered in Hong Kong under Part XI of chapter 32. While we may see similar individual facts in these previous cases similar to the present appeal, it is dangerous to determine this appeal by mere comparison with individual findings of facts in previous cases.

44. In the Goepfert case, the taxpayer was sent to work in Hong Kong. About two-third of his activities were in Hong Kong and the balance were offshore. In that case, not only did the taxpayer gave oral testimony, persons from the group of companies which employed the taxpayer gave evidence and oral testimony at the hearing. The Board there had the benefit of the direct evidence from the employer on the nature of the taxpayer's job and the business organization, set-up and operation of the group. This is the only case (out of the cases referred to us) in which the Board found in favour of the Taxpayer. The Board's main findings are found at the end of the case stated at page 221 and Macdougall J summarized these findings at page 224. In deciding that, as a matter of fact, the source of the taxpayer's income was offshore, the Board gave the following reasons:

a. The taxpayer had no employment contract with the non-Hong Kong incorporated (but registered in Hong Kong as a foreign company) (called in this paragraph 'HKCo') subsidiary of the group of companies to which the taxpayer was seconded.

b. Instead he had a contract of employment with the offshore company of the group of companies in which he worked (called in this paragraph 'USCo'). The contract was entered into outside Hong Kong.

c. He was paid in US dollars in the US by the USCo. The HKCo was never responsible for his remuneration ultimately.

d. He performed his work in Hong Kong but his locality was one of convenience and had no bearing on work that he did since it was carried out exclusively for overseas companies.

e. The nature of the taxpayer's duties when performed abroad was similar or an extension of his duties in Hong Kong. The duties in Hong Kong were themselves performed exclusively for the non-Hong Kong based affiliates, not for the HKCo.

f. In carrying out his duties, the taxpayer was not under the jurisdiction of the HKCo as to the manner in which he did so, the HKCo being vested with no power in that respect, the monitoring of his time being for the purpose of billing the other group companies not for critical purposes. If any fundamental complaint as to his work were to arise, it would emanate from the offshore office to which he was ultimately responsible, not Hong Kong.

g. The HKCo took a secretarial role and the HKCo' s raison d' etre seemed to be to assist the taxpayer in carrying out his technical advice and function for the offshore group companies rather than the reverse.

h. Though part of the cost of the taxpayer' s accommodation was borne in the first instance by the HKCo the remainder was deducted from his salary at source, i.e. offshore; and that part which was borne by the HKCo was directly charged to the offshore group companies and not ultimately borne by the HKCo.

The High Court agreed with the Board' s conclusion and held that, on the evidence accepted by the Board, the taxpayer was bound to succeed. It should be noted that the Board had the benefit of substantial oral testimony from both the employee and the employer and that evidence in respect of the nature and function of the employee' s position were quite detailed. There was no suggestion that the Board' s decision was open to challenge under Edwards v. Bairstow [1956] AC 14, namely that no person acting judicially and properly instructed as to the relevant law could have come to that decision. It is evident that the High Court has not sought to impose any new tests in respect of locality of income for salaries tax purpose. Instead the totality of facts test was implicitly approved.

45. Having stated the law as we interpret it to be, we now evaluate the evidence presented to us, our findings of primary facts and attempt to apply the totality of facts test as endorsed in the Goepfert case.

46. We bear in mind that the onus of proof is on the Taxpayer. Under section 68(4) of the IRO, ' *the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant*.'

Who is employer

47. There is confusion in the evidence presented to us as to who was the employer of the Taxpayer at the relevant times. This is not helped by the long ten year period when the Taxpayer was in Hong Kong working for the C-Group (November 1987 to December 1997) during which time his duties, positions, remuneration, and perhaps even his employer, may have changed several times. Certainly the position of ' international manager' raised in the recent Second C-Country D Confirmation Letter was a position which was never raised by the Taxpayer in his correspondence with the Revenue prior to the Determination. A clear precise documentary trail of the Taxpayer' s employment, his duties and obligations and who his employer was in the C-Group was not established by the Taxpayer .

48. The written evidence were contradictory and pointed to three employers within the C-Group which could have been C-Country D in Country D and C-Pacific and C-Motors in Hong Kong. On the one hand, the following written evidence showed a Hong Kong employer: There are

the Taxpayer's own Tax Returns in which he declared that his employer was C-Pacific, a Hong Kong company. There are also the Employer's Returns of C-Motors which stated that the Taxpayer was C-Motor's employee during the periods under appeal (except for the year of assessment 1995/96 when C-Motors confusingly stated that the employer was '*C-Motors* (true employer C-Pacific)'. There are also the letters from C-Pacific in 1988 and 1995 to the Hong Kong Immigration authorities applying for permit for their employee, the Taxpayer, to stay in Hong Kong. The letter written by C-Motors to the Immigration in 1997 was more ambiguous stating that the Taxpayer was employed in Hong Kong without unequivocally stating whom the employer was. What is telling is the inability of the Taxpayer to produce the employment contract itself. His own copy is lost but certainly copies would be available from the C-Group.

49. The written evidence pointing to the possibility of C-Country D being the employer were the Revised Appointment Letters, the Redundancy Letters and the First and Second C-Country D Confirmation Letters. The assertions made in these letters from C-Country D are untested by cross-examination and clarifications of these assertions was unavailable as no one from the employer's side was called to give evidence to assist us. We are unable to make any findings as to who was the Taxpayer's employer during the period under appeal. Certainly it has not been proved to us that on, a balance of probabilities, the employer was C-Country D. The only other employers left are the two Hong Kong companies, C-Pacific and C-Motors.

Other indicias of locality

50. On the one hand, we have the following evidence (which we accept) pointing to Country D as source of employment of the Taxpayer:

a. The Taxpayer traveled to Country D to have meetings there in Country D office of the C-Group; perhaps not the monthly regular trips as the Taxpayer has recalled, but nonetheless frequent (eight times in year of assessment 1995/96, four times in year of assessment 1996/97, no evidence for year of assessment 1997/98).

b. In addition to the business trips to Country D, just under one-third of his time was spent out of Hong Kong as set out in the above mentioned travel schedules. We are unable to take into account the place of performance in deciding the locality of the Taxpayer's employment under the basic charging provision that is section 8(1). But we take the fact that the Taxpayer had to travel outside Hong Kong approximately one-third of the time as an indication of the nature of his employment as a regional director (at least for years of assessment 1995/96 and 1997/98 according to the Employer's Returns).

c. The C-Group in Country D determined the Taxpayer's remuneration and benefits annually.

d. The negotiation for the initial employment of the Taxpayer in 1987 took place outside Hong Kong. The decision to make his position redundant was taken by the C-Group in Country D.

e. The Taxpayer' s Tax Return stating that the company quarters was provided by C-Country D.

f. The Revised Appointment Letter and his Redundancy Letter were written by C-Country D and the First and Second C-Country D Confirmation Letters (but with the caveats that (i) no-one from the employer or C-Group were available as witness, (ii) the possibility C-Country D was referring to another and perhaps consecutive position of the Taxpayer, that is, international manager, and (iii) the absence of the employment contract in the written evidence).

51. On the other hand, we have the following evidence to show that the Taxpayer was employed by C-Motors or C-Pacific in Hong Kong:

a. The five employer' s remunerations filed by C-Pacific for years of assessment 1993/94 and 1994/95 and by C-Motors for years of assessment 1995/96, 1996/97 and 1997/98.

b. The Taxpayer' s own tax returns declaring C-Motors to be his employer.

c. The Taxpayer' s salary was in Hong Kong dollars and he was paid in Hong Kong.

d. Aside from the salary, other benefits pointed to Hong Kong. The Company Quarters were provided by other Hong Kong companies within the C-Group who acted as the tenants. The Taxpayer joined of the C overseas pension scheme after the Revised Appointment Letter. The C overseas pension scheme was for non-Country D employees. The Taxpayer was a member of the Hong Kong BUPA insurance scheme.

e. The Taxpayer' s paymaster was either C-Motors or C-Pacific, Hong Kong companies. Whether these Hong Kong companies charged back the Taxpayer' s remuneration to C-Country D or not is irrelevant. In any event there was no evidence before us that this charging back actually happened. The fact remains that the C-Group had seen it fit to pay the Taxpayer using its Hong Kong resident companies.

f. The entire family of the Taxpayer was physically resident in Hong Kong. This is evident from C-Pacific' s above two letters to Immigration dated 30 May 1988 and 15 February 1995 (see paragraphs 8 and 16 above) and C-Motors letter to Immigration dated 7 July 1997 (see paragraph 19 above). This is different from the place where the Taxpayer performed his services. About one-third of his services were performed outside Hong Kong and the balance two-thirds in Hong Kong. We disregard the place of performance in accordance with the Goepfert case.

52. We do not know who is the Taxpayer' s employer. We have only the barest idea of his duties and obligations. In a local role, he was taking up responsibilities for Hong Kong. In a regional role as regional director, the C-Group was obviously using Hong Kong as its regional headquarters and the Taxpayer was in charge of the region. We do not have the original employment contract from which all revisions and amendments flowed. We do not have the benefit of oral testimony from the C-Group. All these would have given us assistance in Determination of the locality of the Taxpayer' s employment.

Conclusion

53. Having considered the evidence and the law and bearing in mind that the burden of proof is on the Taxpayer, we have come to the conclusion that the Taxpayer has failed to discharge the burden of proof to show that the tax assessments under appeal were incorrect or excessive. It follows that we are of the view that the whole of the income under appeal is chargeable to salaries tax under the basic charging provision, section 8(1) of the IRO. But we sympathize with the Taxpayer. The law relating to source of income has always been difficult to apply. The revised (and in our view, erroneous) DIPN 10 has only served to add to the difficulty. (It would have been nice if the Revenue had drawn our attention to the revised DIPN 10 even if it were disadvantageous to its case. Deliberately omitting important sources of the law in representing the current state of law in hearings before this Board will only cast suspicion on the Revenue' s case.) Even if we were to accept that the employer was C-Country D at its face value and given the same evidence (or the lack of it), we doubt if we would have reached a different conclusion. The nexus of the Taxpayer' s employment to Hong Kong is difficult to deny. More evidence than the ones produced to us would be required to convince us that his income had not arisen or was not derived from Hong Kong from any office or employment of profit. The appeal is dismissed and the Determination confirmed.