# Case No. D95/02

**Salaries tax** – employment – source of income – section 8(1), 8(1A) and 8(1B) of the Inland Revenue Ordinance ('IRO') – costs – nature of advice.

Panel: Ronny Wong Fook Hum SC (chairman), Paul Chan Mo Po and George Lo Kwan Wong.

Date of hearing: 16 September 2002.
Date of decision: 10 December 2002.

The appellant is an experienced manager of various golf courses in southern China. Under the employment agreement with Company A, a company incorporated in Hong Kong, the appellant was 'required to work in Baoan, Shenzhen and Hong Kong'. In relation to taxation, Company A 'will bear the responsibilities of paying the PRC employee tax in respect of [the appellant's] salary paid in Shenzhen for service provided to the Company. However, [the appellant is] responsible for any other personal taxation liabilities'. Remuneration due in favour of the appellant under the employment agreement was paid into an account of the appellant in Hong Kong.

According to records maintained by the Immigration Department, the appellant stayed in Hong Kong for a total of 170 days and 102 days for the two respective years of assessment in question.

Mr B accompanied the appellant at the hearing before the Board. The appellant did not challenge the fact that he rendered services in Hong Kong in connection with his employment with Company A. At the prompting of Mr B during the hearing, the appellant cast doubt on the Revenue's computation on his period of stay in Hong Kong. But the appellant did not identify any particular error nor did he put forward any alternative computation.

**Held:**

1. Given the fact that Company A is a company incorporated and carrying on business in Hong Kong, the conclusion of the employment contract in Hong Kong and the payment of the appellant's salary in Hong Kong, the appellant's income arose in or was derived from Hong Kong from his employment with Company A.

2. During the periods in question, the appellant was in Hong Kong for more than 60 days and he rendered in Hong Kong services in connection with his employment with Company A. He is not entitled to the exemption under section 8(1A)(b)(ii).

3. Judging from the 'assistance' rendered by Mr B at the hearing, the Board had little doubt that the appellant did not receive any proper guidance in the pursuit of his appeal. Bearing in mind the nature of the 'advice' which the appellant had received, the Board decided against ordering the appellant to pay some of the costs incurred in relation to the appeal.

**Appeal dismissed.**

Case referred to:

CIR v So Chak Kwong, Jack 2 HKTC 174

Tsui Nin Mei for the Commissioner of Inland Revenue.
Taxpayer in person.

**Decision:**

**Background**

1. The Appellant is an experienced manager of various golf courses in southern China.

2. By letter dated 28 July 1998 ('the Employment Letter'), Company A offered the Appellant the position of general manager of their golf club. The employment was for a period of one year commencing from 10 August 1998. The Appellant was 'required to work in Baoan, Shenzhen and Hong Kong'. In relation to taxation, Company A 'will bear responsibilities of paying the PRC employee tax in respect of your salary paid in Shenzhen for service provided to the Company. However, you are responsible for any other personal taxation liabilities'. This offer was accepted by the Appellant in Hong Kong.

3. Company A was incorporated in Hong Kong as a private company on 21 October 1998. At all relevant times, it carried on business in Hong Kong. They paid the remuneration due in favour of the Appellant under the Employment Letter into an account of the Appellant in Hong Kong.

4. The Appellant's employment with Company A was terminated on 18 August 1999.

5. The issue before us is whether the Appellant is liable for salaries tax in respect of his earnings from Company A.

**Pre-hearing correspondence**

6. In response to the assessor's inquiries:

(a) The Appellant informed the Revenue that '[he] was mainly responsible for delivery of documents in between China and Hong Kong offices for services [rendered] in Hong Kong during year ended 31 March, 2000'.

(b) Company A informed the Revenue that:

(i) '[The Appellant] was appointed as a General Manager of [Company A]. He was responsible for implementation of Board policy and management of [Company A]. In addition, he had to assist [Company A's] PRC affiliate to manage the golf club and relevant facilities in Shenzhen'.

(ii) '[The Appellant was required to report duties and progress to the Board of Directors in Hong Kong. In addition, he had to attend meetings in Hong Kong'.

7. According to records maintained by the Immigration Department, the Appellant stayed in Hong Kong for a total of 170 days between 10 August 1998 and 29 March 1999 and 102 days between 1 April 1999 and 17 August 1999.

**The hearing before us**

8. Mr B accompanied the Appellant at the hearing before us. We do not know whether the current appeal was lodged pursuant to advice given by Mr B. Judging from the 'assistance' rendered by Mr B at the hearing, we have little doubt that the Appellant did not receive any proper guidance in the pursuit of this appeal.

9. The Appellant gave sworn testimony before us. He placed considerable emphasis on his track record as manager of various popular golf courses in southern China. He seems to rest his case on an oral agreement by Company A to discharge his Hong Kong fiscal responsibility. Quite apart from the fact that this is wholly contrary to the express terms in the Employment Letter, the Appellant did not explain how such agreement could have absolved him from his liability vis-a-vis the Revenue.

10. The Appellant did not challenge the fact that he rendered services in Hong Kong in connection with his employment with Company A. Initially he made no challenge of his period of stay in Hong Kong as outlined in paragraph 7 above. When it was pointed out to him the futility of his arguments as outlined in paragraph 9 above, at the prompting of Mr B, the Appellant sought to cast doubt on the Revenue's computation. He did not identify any particular error nor did he put forward any alternative computation.

**Our decision**

11. Salaries tax is imposed by section 8(1) of the IRO on every person in respect of his income arising in or derived from Hong Kong from any employment. Section 8(1A)(b)(ii) of the IRO excludes income derived by a person who renders outside Hong Kong all the services in connection with his employment. In determining whether or not a person renders all services outside Hong Kong, section 8(1B) of the IRO 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. It was decided in the case of CIR v So Chak Kwong, Jack 2 HKTC 174 that the words 'not exceeding a total of 60 days' in section 8(1B) qualify the word 'visits' and not the words 'services rendered'. In order to enjoy the exemption accorded by section 8(1A)(b)(ii), a taxpayer must not render services during visits which exceed a total of 60 days in the relevant period. So long as a taxpayer's visits exceed a total of 60 days and he has rendered services during any of such visits, he is not entitled to the exemption.

12. Given the fact that Company A is a company incorporated and carrying on business in Hong Kong, the conclusion of the employment contract in Hong Kong and the payment of the Appellant's salary in Hong Kong, the Appellant's income arose in or was derived from Hong Kong from his employment with Company A. During the periods in question, the Appellant was in Hong Kong for more than 60 days and he rendered in Hong Kong services in connection with his employment with Company A. He is not entitled to the exemption under section 8(1A)(b)(ii). As pointed out above, his alleged agreement with Company A is totally irrelevant to his personal liability under the IRO.

13. For these reasons, we dismiss the Appellant's appeal.

14. We have considered whether we should order the Appellant to pay some of the costs incurred in relation to this appeal. We eventually decided against this course bearing in mind the nature of the 'advice' which the Appellant received.