



Inland Revenue Department
Hong Kong

DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES

NO. 10 (REVISED)

THE CHARGE TO SALARIES TAX

These notes are issued for the information of taxpayers and their tax representatives. They contain the Department's interpretation and practices in relation to the law as it stood at the date of publication. Taxpayers are reminded that their right of objection against the assessment and their right of appeal to the Commissioner, the Board of Review or the Court are not affected by the application of these notes.

These notes replace those issued in December 1987.

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Commissioner of Inland Revenue

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(A) BASIC CHARGE – EMPLOYMENT

Introduction

The basic charge to Salaries Tax is imposed by section 8(1) of the Inland Revenue Ordinance (“the Ordinance”) on income “arising in or derived from Hong Kong” from any office or employment of profit. No general rules are given in the Ordinance for determining whether income “arises in or is derived from Hong Kong”. However, in deciding this question in connection with employment, it has long been accepted that it is necessary to establish the place where the employment, the source of income, is located.

2. This Departmental Interpretation & Practice Notes No. 10 (“DIPN 10”) was first issued in January 1982 and revised in December 1987 after the High Court decision in *Commissioner of Inland Revenue v. George Andrew Goepfert*, 2 HKTC 210. In the 1987 version of DIPN 10, the Department has accepted that in the great majority of cases, the question of Hong Kong or non-Hong Kong employment can be resolved by considering the three factors, namely, (a) contract of employment, (b) residence of the employer, and (c) place of payment of remuneration.

3. Since the issue of the 1987 revision of DIPN 10, the Board of Review had heard over 30 cases on the source of employment. While most Boards had taken into account the above-mentioned three factors in their decision, some Boards had expressed the view that the 1987 revision was inaccurate and misleading and the three-factor test promulgated in the Notes was contrary to the “totality of facts” test set out by MacDougall, J. in the *Goepfert* decision¹. There is indeed a need to bring the 1987 version up-to-date.

4. In this present revision, the Department does not seek to introduce a new approach in determining the source of employment. The Department still holds the view that the above-mentioned factors are the major factors in determining source of employment. This revision intends to set out in clearer terms the Department’s practices in determining the source of employment.

¹ Particularly strong criticism of the three-factor test promulgated in the 1987 version of the Notes can be found in Case No. D40/90, 5 IRBRD 306, at p.314, Case No. D87/00, 15 IRBRD 750, at p.764, Case No. D125/02, 18 IRBRD 179, at p.185.

The Goepfert decision

5. The question of where the employment or the source of income was located was decided by the High Court in 1987 in the *Goepfert* case. After referring to a number of UK cases and decisions of the Board of Review, MacDougall, J., made the following comments on the approach to resolve the issue:

- (a) “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 completely ignored.” (page 236)
- (b) “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 scrutinise all evidence, documentary or otherwise, that is relevant to this matter.” (page 237)

- (c) “If any authority be needed for this basic proposition one needs only to refer to the words of Lord Normand at page 155 of *Bray v. Colenbrander*²:

‘My Lords, in each of these appeals the Respondent entered into a contract of employment with an employer resident abroad. The contract was in each case entered into in the country of the employer’s residence and it provided for payment of the employee’s remuneration in that country. Parenthetically it should be said that there

² Reported in 34 TC 138

is no suggestion that the payment was nominal or pretended, or that the real or genuine place of payment was not the place specified in the contract. Nothing, therefore of what follows in this opinion in any way touches a case where the designated place of payment is challenged as nominal or pretended and unreal.’ ” (page 237)

- (d) “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. Appearance 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. If that is what it means then it is not an enquiry of a nature different from that to which the English cases refer, but is descriptive of the process adopted to ascertain the true answer to the question that arises under section 8(1).” (page 237)

- (e) “Having stated what I consider to be the proper test to be applied in determining for the purpose of sec. 8(1) whether income arises in or is derived from Hong Kong from employment, the position may, in my view, be summarised as follows.

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.

I hasten to add, however, that the ‘60 days rule’ does not apply to the income derived from services rendered by those persons who, by the operation of section 8(1A)(b)(i) are excluded from enjoying the benefit conferred by section 8(1A)(b)(ii) as read with section 8(1B).” (page 238)

- (f) “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’.” (page 238)

6. The Department accepts the learned judge’s view and would follow the above approach. No doubt, the contract of employment is the key factor in ascertaining the location of the employment. In the course of examination, the Department may need to look further than the external or superficial features of the employment. In determining where the source of income, the employment, is located, the Department will take into account all of the relevant facts, with particular emphasis on:

- (a) where the contract of employment was negotiated and entered into, and is enforceable, whether in Hong Kong or outside Hong Kong;
- (b) where the employer is resident, whether in Hong Kong or outside Hong Kong; and
- (c) where the employee’s remuneration is paid to him, whether in Hong Kong or outside Hong Kong.

Source is a practical hard matter of fact. The Department’s practice is set out below.

Contract of employment

Written contract

7. The contract to be considered is that which is currently in force and which is the basis for the relationship of master and servant existing between the employer and employee. The fact that the contract may have been entered into many years earlier will not diminish its relevance in considering this factor. However, if certain terms in the agreement have been varied subsequently, alterations and additions to the initial agreement should also be taken into account in so far as they may affect the determination of where the source of employment is located.

8. The Department expects to be provided with a copy of the employment contract properly executed by the employer and employee. In the past, there were taxpayers claiming they had employment with entities outside Hong Kong but their employment contracts were not in writing. Having regard to the present day standard regarding parties' rights and obligations and the fact that they can sue or be sued, the Department would have difficulty in accepting that no written contract exists to record what the parties have agreed. For this reason, the Department would expect that a written contract be provided. If, as a matter of fact, a written contract does not exist, the taxpayer is nevertheless required to provide a document from his employer certifying the terms of his appointment, the effective date of the appointment, etc. The document should be signed by the parties.

Parties to the contract

9. While the Department would generally accept the parties named in the contract as the relevant parties, the Department would take steps to verify the genuineness of the relationship between the parties if warranted by circumstances. For example, if a company in its capacity as an employer, sponsors an individual to gain entry into Hong Kong to take up employment and has represented to other Government departments to that effect, this will be a factor for the Department to take into account together with other relevant facts in determining whether an employer-employee relationship exists between the sponsor and the individual.

10. In testing whether a true employer-employee relationship exists between the parties, the Department would also consider who has the legal liability to pay or control over the employee, the capacity in which the employee represents himself to third parties, whether the employee is part of the organisation of the employer, etc.

Contract negotiated and concluded

11. It would be up to the taxpayer to provide the full facts as to where and when the negotiation took place, the persons taking part in the negotiation, the matters discussed, the terms agreed, etc. If a written contract was subsequently executed, a copy of the contract needs to be provided.

12. If the employer is resident in Hong Kong, it is unlikely that a claim for non-Hong Kong employment will be accepted even if it is shown that negotiation takes place outside Hong Kong or a contract of employment is signed outside Hong Kong. The following Board of Review Decision serves to illustrate the point:

Case No. *D8/92, 7 IRBRD 107*

The taxpayer was resident in the USA when he received a written offer of employment from a company in Hong Kong. The taxpayer accepted the employment contract by signing and returning to Hong Kong the offer which he had received. The employer was a member of a multi-national group and the taxpayer's duties included responsibility not only for the Hong Kong company which employed him but also other companies within the Group in the Far East. The Board of Review decided at page 110 that:

“He was not employed by any company in the United States and he was not subject to any master and servant relation with any United States company. His master and servant relation was clearly with the company in Hong Kong with whom he entered into an employment contract. In the circumstances of this case the fact that he was physically in the United States when he received the employment contract is not material.”

The Department will adopt the same approach as set out in the above case.

Enforceability of contract

13. In a contract of employment, the parties are free to choose the governing law so far as it is bona fide, legal, not against public policy, and unambiguous. Where there is no express choice of law, the choice of law can be inferred from the terms of the contract and the general circumstances of the case. Where there is no express or implied choice of law, the contract is governed by the system of law with which the contract has its closest and most real connection (*Bank of India v. Gobindram Naraindas Sadhwant*, [1988] 2 HKLR 262).

14. From the above guideline, in determining where an employment contract is enforceable, it is necessary in certain circumstances to ascertain where the employee habitually performs his work, the business that engaged him and where that business is located. It may also be necessary to consider the place where the parties would take legal action in enforcing terms of the contract from a practical perspective, see for example, Board of Review Decisions, Case No. D20/97, 12 IRBRD 161, at page 172 and Case No. D59/03, 18 IRBRD 626, at page 651.

Residence of employer

15. The employer for this purpose is the person who, in the relationship of master and servant, is the true employer of the employee.

Central management and control

16. In determining the residence of a corporation, the Department will take into account where the corporation's central management and control is located. The "central management and control" test is a well-established common law principle widely adopted in many jurisdictions for determining residence of companies. Under this principle, a company resides where its real business is carried on, and the real business is carried on where the central management and control actually abides. The classic exposition is by Lord Loreburn, L.C. in *De Beers Consolidated Mines Ltd. v. Howe*, [1906] 5 TC 198 at pages 212 and 213,

“In applying the conception of residence to a Company, we ought, I think to proceed as nearly as we can upon the analogy of an individual. A Company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a Company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Chief Baron Kelly, and Baron Huddleston in the *Calcutta Jute Mills v. Nicholson* and the *Cesena Sulphur Company v. Nicholson*, now thirty years ago, involved the principle that a Company resides for purposes of Income Tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule; and the real business is carried on where the central management and control actually abides.”

17. In *Charter View Holdings (BVI) Ltd. v. Corona Investments Ltd. & Another*, [1998] 1 HKLRD 469³, the issue of whether the plaintiff was ordinarily resident in Hong Kong was before Keith J, who made the following comments at page 471:

“In *Insurance Co. of the State of Pennsylvania v. Grand Union Insurance Co. Ltd.* [1988] 2 HKLR 541, the Court of Appeal held that, for the purpose of O.23 r.1(1)(a)⁴, the ordinary residence of a limited company is to be decided by reference to where its central management and control is. However, the application of that test is not straightforward. It was considered in *Re Little Olympian Each Ways Ltd.* [1995] 1 WLR 560. Three propositions can be derived from the judgment of Lindsay J:

- (i) The mere assertion of where the company’s central management and control is unsatisfactory. What are needed are the primary facts on which that assertion is based.

³ This case was referred to in *Jade Harbour Ltd. v. Eltones Profits Ltd. & Another*, [2005] 3 HKLRD 158.

⁴ The Rules of the High Court (Cap. 4, Sub. Leg.), Order No. 23.

- (ii) All the circumstances in which the company carries on its business should be taken into account, though the weight to be applied to each factor will obviously differ from case to case. Those factors include the provisions of the company's objects clause, the place of incorporation, the place where the company's real trade and business is carried on, the place where the company's books are kept, the place where the company's administration is carried out, the place where the directors with power to disapprove of local steps or to require different ones to be taken themselves meet or are resident, the place where its chief office is or where the company secretary is to be found, and the place where most significant assets are.
- (iii) In applying the test to a non-trading company, it may be more important than would otherwise be the case to have regard to the nature of the company's corporate activities."

18. The issue of whether a company was centrally managed and controlled outside Hong Kong or in Hong Kong was critically examined in Board of Review Decision Case No. *D123/02, 18 IRBRD 150*. The Department will follow the above guiding principles in ascertaining where a limited company resides. In general, importance is attached to the place where the directors hold board meetings. In many cases, the directors meet in the country where the business operations take place, and central management and control is clearly located in that place. In other cases, the directors may exercise central management and control in one jurisdiction, while the actual business operations may take place in another. The place of board meetings, however, is significant only in so far as those meetings constitute the medium through which central management and control is exercised. The location where central management and control is exercised is a question of fact and each case must be decided on its own facts. When reaching a conclusion in accordance with case law principles, only factors which exist for genuine commercial reasons will be accepted.

Parent and subsidiary

19. In applying the "central management and control" test in the situation of a subsidiary company and its parent operating in another territory, the

Department would normally regard the subsidiary and its parent as separate legal entities, each being managed and controlled by its own board of directors. While it is normal for a parent company to exert influence and exercise power over the subsidiary company, it is not always the case that the subsidiary is resident in the same territory as the parent. Regard will be given to the degree of autonomy with which the board of directors in the subsidiary deals with such matters as to investment, production, marketing and procurement without reference to the parent. In this regard, the Department is mindful of the comments by the Board of Review in Case No. *D59/03, 18 IRBRD 626*, at page 653:

“Even if Company A’s final and supreme authority were to come from its parent company, Company D in the United States of America, we do not accept the Representative’s assertion that Company A was centrally managed and controlled by its parent company in the United States of America. In arriving at this stance we are mindful of the *Union Corporation case*⁵ where it was held the formula ‘where the central power and authority abides’ does not demand that the court should look, and look only, to the place where the final and supreme authority is found, and also the decision in *De Beers case*⁶ that what was required was ‘a scrutiny of the course of business and trading’. Thus, we find Company A was resident in Hong Kong for the purpose of this tax assessment.”

Establishing employer’s residence

20. In support of claims that the employer is centrally managed and controlled outside Hong Kong, the Department would require information of the identities and capacities of the persons (in the employer’s organisation) who are responsible for the central management and control, the specific tasks undertaken by these persons and where they are located while exercising management and control, etc. Documentary proof may be required. The Department will generally accept certified copies of directors’ reports and minutes of meetings for the purpose.

⁵ *Union Corporation Ltd. v. CIR*, [1953] 34 TC 207

⁶ *De Beers Consolidated Mines Limited v. Howe*, [1906] 5 TC 198

Place of payment of remuneration

21. In Board of Review Decision Case No. *D20/97, 12 IRBRD 161*, the Board had the following observation at page 173:

“ . . . it would seem to be absurdly simple and inappropriate in this age of electronic banking to reach our decision on the basis that the place of payment determined the source of employment income in this case. Surely source of employment, which should be determined as a ‘hard practical matter of fact’, should not depend in the final analysis upon the place from where an employee is actually paid. Accordingly, we decided to look more broadly, from a practical perspective, at where the Taxpayer’s employment was located.”

22. The significance of the place of payment for the present purpose was considered by Deputy High Court Judge To in *Lee Hung Kwong v. Commissioner of Inland Revenue, 6 HKTC 543*. The learned judge pointed out that:

“In *Bray and Colenbrander; Harvey and Breyfogle*⁷, after reviewing the earlier authorities, Lord Normand concluded . . . :

‘The House of Lords . . . in *Foulsham v Pickles*⁸ 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.’

Thus, where the source of income is from an employment, the locality of the source of income is the place where the contract for payment is deemed to have a locality. By “contract for payment”, Lord Normand must mean the contract of employment based on which the employee earned his payment and not necessarily the place where the payments are made. The place of payment is of

⁷ Reported in 34 TC 138

⁸ Reported in 9 TC 261

course an important indicator of the locality of the contract and is prima facie the locality of the contract. But it is not conclusive: see for example *Bennett v Marshall*⁹. If an employee enters into a contract of employment in Hong Kong with an employer resident in Hong Kong but had his salary paid into his Swiss bank account, it can hardly be doubted that the locality of his contract is in Hong Kong. His income is from a Hong Kong source. In most cases, the place of payment is the locality of the contract. That must be why Lord Normand said that the two *may* mean the same thing, but not that the two mean the same thing.” (paragraph 24)

23. The Department will readily follow the above approach. Payment of the remuneration made outside Hong Kong, when viewed on its own, should not be a determinative factor in ascertaining the source of employment. Other facts have to be considered as well. Remuneration here is not restricted to the monthly salary but includes all perquisites and benefits in kind which are included in the definition of income. In support of claims that salaries are paid outside Hong Kong, the Department would require the taxpayer to provide details of bank accounts and documentary proof of such payments.

Look further than the external or superficial features

24. If a person claims that his employment with an employer resident in Hong Kong has been changed to a related company of the employer, which is resident outside Hong Kong, and there is little apparent change in the terms of employment, the Department will look deeper than the external or superficial features of the employment. Similarly, attention will be given to cases where locally-engaged employees claim that they hold offshore contracts of employment. These examples are not meant to be exhaustive.

Summing up

25. In summary, if the source of employment is located in Hong Kong, any income derived from that employment falls within the basic charge to Salaries Tax under section 8(1), irrespective of where the employee renders his services (subject to the exclusion referred to in (C) below). Thus, once income is caught by section 8(1) there can be no claim for the so-called time

⁹ Reported in 22 TC 73

apportionment. However, if a non-Hong Kong employment exists then any income derived from that employment falls outside the basic charge and liability to Salaries Tax can only arise under section 8(1A), which brings to charge income derived from services actually rendered in Hong Kong. In the latter cases, it will be necessary to apportion the total income, usually on a time-in time-out basis.

(B) EXTENSION OF CHARGE – EMPLOYMENT

26. In general, the Department would accept that a non-Hong Kong employment exists if the contract of employment was negotiated, entered into and enforceable outside Hong Kong with an employer who is resident outside Hong Kong and the employee's remuneration is paid to him outside Hong Kong. Typically, the taxpayer holds an employment in his home country and is assigned by his employer to take up duties outside his home country. The taxpayer is required by his employer to be based in Hong Kong and to travel outside Hong Kong to perform some of the duties. During the period of his assignment outside his home country, the employer-employee relationship with his home country employer still subsists so that at the end of the assignment, the taxpayer will be re-located to his home country and continue to work for his home-country employer.

27. General statements made by taxpayers or their representatives that they hold overseas employments with an overseas entity will not normally be accepted at their face value. The information required in support of claims will be the same as that set out in the foregoing paragraphs under (A) BASIC CHARGE – EMPLOYMENT. A non-Hong Kong employment accepted by the Department is subject to review periodically. The Appendix provides some examples of Hong Kong and non-Hong Kong employments.

28. Where a non-Hong Kong employment exists, consideration will be given to the liability arising under the extension to the basic charge contained in section 8(1A). Subsection (a) of section 8(1A) extends the charge by specifically including as income arising in or derived from Hong Kong, all income derived from services rendered in Hong Kong, including leave pay attributable to such services. This subsection relates only to employments; it does not apply to office of profit (see (D) below).

29. For the purposes of quantifying the amount of income derived from services rendered in Hong Kong, the Department will usually look at the number of days an employee spent in Hong Kong and apportion his remuneration including leave pay on a time-in time-out basis. In exceptional circumstances where the application of this basis would be inappropriate a different approach may be adopted. For instance, if an employee can establish that the rate of remuneration for the services he renders outside Hong Kong is substantially greater than the rate he receives in Hong Kong, the apportionment can be made on the basis of the actual remuneration attributable to the services rendered in Hong Kong.

30. In order to arrive at the amount of income derived from services rendered in Hong Kong, an employee should include in his Salaries Tax Return, apart from remuneration received locally, all other remuneration related to his employment, for example, receipts from his overseas parent company or head office.

(C) EXCLUSION FROM CHARGE - EMPLOYMENT

31. Subsection (b) of section 8(1A) excludes from the charge to Salaries Tax income from services rendered by persons (other than Government employees and ship and air crew) who in the basis period of a year of assessment render all their services outside Hong Kong. For the purposes of this exclusion, services rendered during visits to Hong Kong not exceeding a total of 60 days in the basis period of a year of assessment are to be ignored [section 8(1B)]. In other words, a person who renders services in Hong Kong during visits for not more than a total of 60 days in the basis period of a year of assessment will have no liability to Salaries Tax.

32. Thus, an employee deriving income from a Hong Kong employment, who is posted to, say, Singapore or Tokyo to represent his firm and in the basis period of a year of assessment renders all his services there, will be wholly exempt from Salaries Tax. However, if he visits Hong Kong for 61 days or more and, during the visits, renders some services here he will be liable on the whole of his income derived in a year. Similarly, an employee deriving income from a non-Hong Kong employment will not be liable if he is here to carry out short assignments during visits to Hong Kong which do not exceed a

total of 60 days in the basis period of a year of assessment. On the other hand, if his visits exceed 60 days he will be liable under the extended charge of section 8(1A)(a) on that part of his income which is derived from services rendered in Hong Kong including leave pay attributable to such services.

33. The exclusion under section 8(1A)(b) only refers to visits, e.g. a person may be chargeable even though he spent 60 days or less in the basis period of a year of assessment in Hong Kong if this is the start or finish of a long period of residence in Hong Kong or his presence does not constitute a “visit”.

(D) DIRECTORS’ FEES

34. Fees paid to persons who hold the office of director of a corporation whose central management and control are exercised in Hong Kong, are income arising in or derived from Hong Kong and chargeable to Salaries Tax under the basic charge of section 8(1) irrespective of where the person resides. This is because the office of director of a corporation is located in a place where the central management and control of the corporation is exercised (see *McMillan v. Guest*, 24 TC 190). Thus, if an office is located in Hong Kong, any fees derived from the office can be said to arise in Hong Kong. Neither the extension to the basic charge under section 8(1A), nor the exclusion under section 8(1A)(b) or (c), has any application to directors’ fees. They apply only to income from employment. This issue was before the Board of Review in Case No. *DI23/02*, 18 IRBRD 150 in which the Board found that the office of director held by the taxpayer was located in Hong Kong. In this case, the Board found that part of the superior and directing authority of the company was exercised in Hong Kong.

(E) SHIP AND AIRCRAFT PERSONNEL

35. The liability of ship and aircraft personnel is determined under section 8(1) and section 8(1A)(a) in the same way as other employees. However, there are important exemptions to be considered under subsection 8(2)(j) which excludes from charge income derived from services rendered by persons of this category who were present in Hong Kong on not more than 60 days in the basis period and a total of 120 days falling partly in each of the

basis periods for two consecutive years of assessment, one of which is the year of assessment being considered. The broad effect of this exclusion is to exempt from charge members of the crew of a ship or an aircraft other than those who spend a substantial portion of their time in Hong Kong (including territorial waters).

(F) EXCLUSION – TAX PAID OUTSIDE HONG KONG

36. Following the introduction of section 8(1A)(c) with effect from 1 April 1987, income derived by a person from services rendered outside Hong Kong is excluded from the charge to Salaries Tax if, in the territory where the services are rendered, the person is chargeable to and has paid tax of substantially the same nature as Salaries Tax in respect of that income. For example, if a person holding a Hong Kong employment derives income from rendering services in the Mainland on 190 consecutive days in a year and pays Individual Income Tax to a Mainland authority on that income, section 8(1A)(c) will operate to exclude that income from the charge to Salaries Tax in Hong Kong.

37. Whether a particular foreign tax is of substantially the same nature as Salaries Tax is a question of fact to be considered in each case. Whilst the Department would generally accept as sufficiently similar any tax on employment income levied on the employee by the government of the territory in which the services were rendered, the Department would not accept a tax or levy charged otherwise than by reference to the amount of employment income derived as coming within the scope of section 8(1A)(c). Neither the rate of tax levied in the foreign territory nor the assessment method under which the amount of tax paid was determined by the taxing authorities is relevant to the issue. In order to qualify under section 8(1A)(c) all that is required is chargeability to and actual payment of the foreign tax. For example, if an American citizen holding a Hong Kong employment renders services in the US on 50 days and is assessed to US income tax on his world income, including the income derived from those services, then provided he has paid some US income tax, the Department will accept that tax has been paid on the 50 days' income and section 8(1A)(c) will apply to exclude that income from the charge to tax here. On the other hand, if the level of his total world income is such that no US income tax is payable, section 8(1A)(c) cannot apply.

38. On a practical point, cases may arise where the basis period for assessment to Hong Kong Salaries Tax, the year ended 31 March, may differ from that of the foreign territory in which services are rendered. For instance, at the time the assessment to Hong Kong tax is made, the foreign tax, although chargeable, may not actually have been assessed and paid. In this situation, the taxpayer should lodge an objection against the assessment to Hong Kong tax on the foreign income on the grounds that foreign tax will in due course be paid. Upon receipt of the objection the assessor will, where justified, order that the tax in dispute be held over unconditionally. Once the foreign tax has been paid and proof thereof submitted by the taxpayer, the objection will be allowed and the Hong Kong tax will be discharged. Similarly, the likelihood that foreign tax is to be paid will be accepted as a valid reason for holding over Provisional Salaries Tax where the taxpayer can show that once foreign tax is paid his assessable income (after excluding that part subject to the foreign tax) will be less than 90% of that for the previous year.

39. There may also be a situation in which the taxpayer is not aware that he or she has a liability to foreign tax when the Hong Kong Salaries Tax assessment is received. Thus, an objection would not be raised as mentioned in the paragraph above. If the taxpayer has to pay foreign tax after the objection period has expired, he or she can still rely on section 70A to file a claim for relief under section 8(1A)(c) within 6 years after the end of the assessment or within 6 months after the date of the notice of assessment if later, for the omission in the return.

40. It should be noted that as a matter of practice section 8(1A)(c) has application to Hong Kong employments only. This is because persons holding non-Hong Kong employments will be chargeable to tax in Hong Kong only on income derived from services rendered here. Such persons are, of course, not chargeable to tax on income derived from services rendered outside Hong Kong.

Examples on Source of Employment

Example 1

Assignment to Hong Kong

The taxpayer was initially employed by Company A. He worked in the US. Due to a change of his roles and responsibilities, he entered into a new employment contract with Company B. The negotiation and conclusion processes for both employment contracts took place in the US. Company B deposited his remuneration into his bank account in the US.

Company B immediately assigned the taxpayer to Hong Kong to oversee the Asia Pacific operations of Group X. The Hong Kong subsidiary of Company B acted as the sponsor of the taxpayer's Hong Kong work visa. The taxpayer remained an employee of Company B throughout his Hong Kong assignment.

Companies A and B were both US resident companies of substance. They were affiliated companies of Group X, a US-based conglomerate with business operations all over the world.

On being satisfied with the above facts, the assessor accepted that the taxpayer had a non-Hong Kong employment. The taxpayer provided to the assessor a copy of his employment contract with Company B, information and documents to show that Company B was a company of substance with its management and control in the US and his remuneration was paid by Company B into his bank account in the US.

Example 2

Transfer of employment to Hong Kong and reporting lines

The taxpayer was an employee of C Inc. and he worked in the US. C Inc. was a US resident company. The taxpayer was offered an appointment with the subsidiary of C Inc. in Hong Kong. By an agreement dated 1 March 2005 signed with C (Hong Kong) Ltd, he agreed to work in the subsidiary as Marketing Director from 1 April 2005. The negotiation of the contract terms took place in the US with the human resources director of C Inc.

C (Hong Kong) Ltd was a company incorporated in Hong Kong and its operations were managed by a board of directors resident in Hong Kong. The taxpayer's employment contract dated 1 March 2005 was with C (Hong Kong) Ltd, which sponsored the taxpayer's entry into Hong Kong to take up employment.

As part of his job, the taxpayer had to travel frequently around Asia Pacific to meet with clients. The taxpayer carried a business card describing himself as Marketing Director of C (Hong Kong) Ltd, bearing a Hong Kong correspondence address and telephone number. As Marketing Director, the taxpayer had to report to the board of directors of C Inc. in the US.

On being satisfied with the above facts, the assessor was of the view that the taxpayer had a Hong Kong employment. As the taxpayer had entered into a contract of employment with C (Hong Kong) Ltd., a company resident in Hong Kong, the source of his employment was Hong Kong. As part of his duties, a taxpayer might be required to report to persons outside Hong Kong but this should not be a decisive factor.

Example 3

Salary and benefit paid in Hong Kong

The Taxpayer was an employee of E Ltd, a company resident in Italy. E Ltd sent the taxpayer to its Hong Kong buying office to take charge of the sourcing operations. The taxpayer had to travel to the Mainland and neighbouring countries in the performance of his duties. The employment agreement with E Ltd was negotiated and concluded in Italy prior to the taxpayer's arrival into Hong Kong.

The taxpayer agreed with E Ltd that he would not be tax equalised to Italy because the tax rate in Hong Kong was lower than that in Italy. The taxpayer received his salary and benefits in Hong Kong dollars. He joined the Hong Kong Mandatory Provident Fund and was covered under the Hong Kong medical scheme.

On being satisfied with the above facts, the assessor accepted that the taxpayer had a non-Hong Kong employment. Documentary proof similar to those mentioned in Example 1 was provided to the assessor.

Example 4

Place of payment and location where payment is borne

The taxpayer was residing in the UK. He was offered employment as Regional Controller of F Asia Pacific Ltd. F Asia Pacific Ltd was incorporated in the Cayman Islands. The taxpayer's employment contract was initially negotiated in the UK through a recruitment agency appointed by F Asia Pacific Ltd. The offer letter was sent to the taxpayer in the UK. The taxpayer accepted the offer and signed the contract while he was in the UK.

F Asia Pacific Ltd was the regional headquarter of a group of companies in Asia. Its office was in Hong Kong. It was managed by a board of directors in Hong Kong. The taxpayer had to travel around Asia for business. His salary was partly paid into his bank accounts in Hong Kong and the UK. F Asia Pacific Ltd recovered the taxpayer's salary cost from its subsidiaries and associates in the Asia Pacific.

On being satisfied with the above facts, the assessor was of the view that the taxpayer had a Hong Kong employment. As the taxpayer had entered into a contract of employment with F Asia Pacific Ltd., a company resident in Hong Kong, the source of his employment is Hong Kong. The assessor did not consider recovering the costs by the employer from companies outside Hong Kong was a relevant factor to be taken into account in the circumstances.