

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D2/95

Salaries tax – diplomatic exemption – International Organisations and Diplomatic Privileges Ordinance.

Panel: Robert Wei Wen Nam QC (chairman), Winston Lo Yau Lai and Peter F Rhodes.

Date of hearing: 9 January 1995.

Date of decision: 7 April 1995.

The taxpayer claimed that his income should be exempted from salaries tax on the ground that he was a de facto official of an international organisation within the meaning of the International Organisations and Diplomatic Privileges Ordinance. The taxpayer was employed as a social worker with various organisations. He was subsequently employed by a different organisation and was entitled to salaries tax exemption. He claimed that he was entitled to exemption in respect of his previous employment with a different organisation.

Held:

As a matter of fact the taxpayer was not an official of the organisation which would have entitled him to tax exemption in respect of the year in question. Accordingly the appeal was dismissed.

Appeal dismissed

Case referred to:

D19/94, IRBRD, vol 9, 167

Tam Tai Pang for the Commissioner of Inland Revenue.

Taxpayer in absentia.

Decision:

1. This is an appeal by an individual (the Taxpayer) against his salaries tax assessment for the year of assessment 1990/91 as confirmed by the Commissioner of Inland Revenue in his determination dated 10 August 1994. He claims that his income during that year should be exempted from salaries tax on the ground that he was a de facto official of an international organisation (Organisation X).

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2. The Taxpayer was overseas and could not make himself available at the hearing of this appeal. He applied under section 68(2D) of the Inland Revenue Ordinance (the IRO) for the appeal to be heard in the absence of himself and his authorised representative, and the application was granted. Evidence was entirely documentary and consisted of the statement of facts contained in paragraph 1 of the Commissioner's determination, the appendices to the determination, the documents produced by the Commissioner's representative at the hearing, and the documents submitted by the Taxpayer through the Clerk to the Board.

3. Article 12 in the Special Legislation to the International Organisations and Diplomatic Privileges Ordinance (chapter 190) on Organisation X provides that 'officials of Organisation X shall enjoy exemption from income tax in respect of emoluments received by them as officers and servants of Organisation X'. The question for this appeal is whether or not the Taxpayer was an 'official' of Organisation X within the meaning of Article 12.

4. Since about January 1990 Organisation Y had been under an agreement (the Organisation Y agreement) with Organisation X to act as the implementing agency for a project to provide legal assistance to some asylum seekers who were 'unaccompanied minors' and 'vulnerable persons' in the determination of their status claims. Under the auspices of Organisation X, an Organisation Y team (the project team) comprising professional social workers, interpreters and administrative staff gathered information from the asylum seekers and made reports on individual cases which were then used by Organisation X to facilitate the determination of status. The Organisation Y agreement continued until the end of June 1991.

5. Except that the recruitment of the project co-ordinator and senior case workers had to be mutually agreed between Organisation Y and Organisation X, Organisation Y had full autonomy over the employment and termination of employment of staff for the project team. Staff were recruited, remunerated and supervised directly by Organisation Y.

6. Organisation X has declined to state that the Organisation Y staff for the project team were officials of Organisation X.

7. During 1990/91 the Taxpayer was a staff member for the project team. On 12 April 1990 he entered into a contract of employment with Organisation Y (the Organisation Y contract) which contained, inter alia, the following terms and conditions:

'This letter governs your terms of employment and conditions of service with Organisation Y.

APPOINTMENT:

You are appointed as social worker in Organisation Y Unaccompanied Minors Project from 23 April 1990 to 22 September 1990.

PROBATION:

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There will be a six-month probation period from 23 April 1990 to 22 September 1990. Upon the successful completion of the probation period, a joint evaluation between you and your supervisor will be held to decide on your further employment with the agency.

WORKING RELATIONSHIP:

You are accountable to the senior social worker/project co-ordinator.

DUTIES:

- (1) To work in a centre as specified;
- (2) To work with unaccompanied children under 16 years of age and other vulnerable individuals through an interview or interviews with them and any accompanying adult to obtain information relevant to some status and durable solution;
- (3) Other vulnerable individuals may be referred to the social worker for assessment of maturity or ability to articulate their asylum claim in order to determine their ability to undergo the normal status determination procedure. A recommendation will be made to the project co-ordinator.
- (4) To liaise with other agencies and center/management, in the centres, to obtain relevant information and promote good working relationships;
- (5) To arrange for assessment by other experts, for example, medical opinion, psychological assessment as necessary;
- (6) To prepare accurate reports and complete social history forms;
- (7) Where there is an ongoing need for therapeutic work, the individual will be referred to the appropriate agency;
- (8) To attend staff development and co-ordination meetings;
- (9) To attend training sessions as required; and
- (10) To carry out other staff-level activities when and as instructed by the senior social worker/project co-ordinator.

RESPONSIBILITY:

...

Any conduct considered by the agency to be inappropriate to your position could result in immediate dismissal not subject to the normal termination clause.

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SALARY:

Your salary is \$11,015 per month.

...

LEAVE:

- (1) You are entitled to 15 working days' annual leave each calendar year. Such holidays are to be taken at such times as the agency shall consider most convenient having regard to the requirement of its business.

...

TERMINATION OF EMPLOYMENT:

Notwithstanding the employment period of time as stated in the section of appointment above, either party can give the other party one month prior notice (excluding any leave) of their wish to terminate this employment or salary in lieu of notice.

VALID WORK PERMIT:

The whole of this letter will not be effective unless you are able to submit the agency your valid work permit granted by the Hong Kong Immigration Department before the commencement of your duties.

LEGAL RELATION:

In consideration of Organisation Y's effort and expenses in putting you in this position that include the cost of head hunting, recruitment, familiarisation programme, on the job training and other related direct and indirect expenditure, both you and Organisation Y shall agree and intend to be legally bound that you shall not take up any job in Hong Kong and Macau within six months from the contract day. If there is any violation of this clause, you will pay Organisation Y a lump sum of Hong Kong Dollars equal to three months of your monthly salary (that is \$33,045) and interest incurred from the date of violation.

You are required to keep the agency informed of any change in your address, telephone number, or family status such as marriage, birth, etc'

8. On 13 December 1990, Organisation Y re-appointed the Taxpayer as a social worker in the Organisation Y Unaccompanied Minors & Vulnerable Persons Project from 1 January 1991 to 31 December 1991 at an increased salary of \$12,100 per month.

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9. In mid-1991 there was a re-structuring of the programme for the implementation of the project for the asylum seekers (see paragraph 4 above). As a result, Organisation Y ceased to be the implementing agency for the project as from 1 July 1991; instead Organisation X assumed total administration of the re-structured programme (according to a statement by the Taxpayer in his correspondence with the Revenue, which we accept). The programme both before and after the re-structuring was funded by Organisation X.

10.1 In the meantime the Taxpayer's employment with Organisation Y was terminated on 30 June 1991, and the Taxpayer was appointed by Agency S as a member of the Special Committee for Vulnerable Persons under the Project Agreement between Organisation X and Agency S as from 1 July 1991 to 30 June 1992. The Agency S contract was on, inter alia, the following terms and conditions:

'This letter governs the terms of your employment and conditions of service with Agency S as from 1 July 1991 to 30 June 1992 ...

Salary:

Your salary will be \$17,293.50 per month, and is exempt from payment of local salaries tax.

Working Hours:

... Official holidays (totalling 9 days annually) shall be set by the Organisation X chief of mission for each year.

Annual Leave:

... Whenever you want to take leave, please fill in Organisation X form GS 33 in duplicate and submit it to your immediate supervisor for prior approval ...

Sick Leave:

... For application for sick leave, please complete Organisation X form Gen/GS 34 in duplicate, and submit it through your immediate supervisor.

...

It is the responsibility of the staff member to keep Organisation X and the Agency S informed of any change in address, telephone number or family status.

10.2 The 'Duties and Responsibilities of Special Committee Member' were detailed in a separate sheet attached to the Agency S contract. All duties were to be performed under the supervision of the Organisation X chief of mission and the co-ordinator of the special committee. The duties included: the interviewing of vulnerable persons, compiling of reports on individual cases, drafting of recommendations and final recommendations,

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supervising the work of interpreters and data collection assistants, participating, at the request of the co-ordinator or the Organisation X chief of mission, in discussions on policy and principle, liaising with Organisation X legal staff and other agency staff in relation to individual cases and the carrying out of other duties as required by the chief of mission, co-ordinator or supervisors.

11. In its correspondence with the Revenue, Organisation X confirmed that the persons appointed by Agency S under the project agreement between Agency S and Organisation X are de facto officials of Organisation X. Accordingly the Revenue has granted salaries tax exemption in respect of income from such appointments. The Taxpayer's income from his appointment under the Agency S contract was therefore exempted.

12. By a letter dated 17 February 1992, Organisation X confirmed to the Taxpayer that 'your starting date with Organisation Y is being considered as your entry-on-duty date for the purpose of entitlements under your Agency S contracts'.

13. It has been held in D19/94, IRBRD, vol 9, 167, and with respect we agree, that an official of Organisation X, in the context of Article 12, means a person holding an office or position of responsibility in that organisation and that to qualify for exemption the official must have received the emoluments as an officer or servant of the organisation. We also agree that it is not the nominal relationship or the label which is decisive of the matter but the substance of the relationship objectively ascertained.

14. We are concerned with the question of whether the Taxpayer was an official of Organisation X while working under the Organisation Y contracts. It is common ground between the Taxpayer and the Revenue that he was an official of Organisation X while working under the Agency S contract.

15. We refer to the facts found in paragraph 5 above, and find as a matter of inference from those facts that Organisation Y had full autonomy over the employment and termination of employment of the Taxpayer as a social worker.

16. The Organisation Y contract (see paragraph 7 above) contains certain terms which point to Organisation Y being the employer of the Taxpayer.

- (1) The employment was expressed to be with Organisation Y.
- (2) The Taxpayer was liable to be dismissed for any conduct considered by the agency (that is, Organisation Y) to be inappropriate to his position.
- (3) Annual leave was to be taken at such times as the agency shall consider most convenient having regard to the requirement of its business.
- (4) The Taxpayer was required to submit his valid work permit to the agency.

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- (5) The Taxpayer agreed with Organisation Y not to take up any other job for the duration of the contract and to pay a lump sum to Organisation Y upon breach.
- (6) The Taxpayer was required to keep the agency informed of any change in his address, telephone number or family status.

17. From his duties under the Organisation Y contract (see paragraph 7 above), it is clear, and we find, that, while working under that contract, there was no working relationship between the Taxpayer and Organisation X or any part thereof or any officer or staff thereof. In relation to his employment under the second Organisation Y contract (see paragraph 8 above), we make the same finding because: (1) he was under the same duties and (2) all the indicators mentioned in paragraph 16 above, except the one referred to in sub-paragraph (5), were present.

18. As the Taxpayer was appointed by Organisation Y as a social worker to participate in that capacity in the project for the asylum seekers which was implemented under the auspices of Organisation X, it may be said in a loose sense that the Taxpayer was working for Organisation X, but that is not in our view sufficient to make him an official of Organisation X. Nor in our view is the fact that Organisation X agreed to consider the Taxpayer's starting date with Organisation Y as his entry-on-duty date for the purpose of entitlements under his Agency S contracts (see paragraph 12 above).

19. For all those reasons we find as a matter of fact that the Taxpayer was not an official of Organisation X within the meaning of Article 12 while working under the Organisation Y contracts. It follows that he was not entitled to tax exemption in respect of his income from his employment under those contracts.

20. That is sufficient to dispose of this appeal. However, as the Taxpayer claims that, since his work and his duties were 'essentially' the same under both the Organisation Y and the Agency S contracts, he should be granted tax exemption in respect of his income under the Organisation Y contracts as well, we consider it appropriate to compare the two contracts even though strictly we are not concerned with the Taxpayer's status vis-a-vis Organisation X under the Agency S contract.

21. A number of differences emerge from a comparison of the two contracts. We note particularly the following in the Agency S contract (see paragraph 10 above):

- (i) The Taxpayer was appointed as a member of the Special Committee for Vulnerable Persons as distinct from being appointed as a social worker under the Organisation Y contracts.
- (ii) The 'Duties and Responsibilities of Special Committee Member' were to be discharged under the supervision of the Organisation X chief of mission and the co-ordinator of the special committee.
- (iii) Those duties included the gathering of information through interviews, the compiling of reports, the drafting of recommendations and final

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recommendations, supervising the work of interpreters and data collection assistants, etc.

- (iv) As a special committee member, he was to participate, at the request of the co-ordinator of the special committee or the chief of mission of Organisation X, in discussions on policy and principle.
- (v) As a special committee member, he was to perform other duties as required by the Organisation X chief of mission, the co-ordinator or supervisors.
- (vi) He was required to complete specified Organisation X forms when applying for annual or sick leave. Official holidays would be set by the chief of mission of Organisation X. The Taxpayer was required to keep Organisation X and Agency S informed of any change in address, telephone number or family status.

22. Organisation X had assumed total administration of the asylum seekers programme after the re-structuring (see paragraph 9 above). Within that framework the Taxpayer was appointed under the Agency S contract as a Special Committee member. By the term which provided for the supervision of the chief of mission of Organisation X, a working relationship was established between the Taxpayer and Organisation X. The administrative role of Organisation X extended to such details as requiring the completion of specified Organisation X forms when applying for annual or sick leave and information on any change in address, telephone number and family status. It seems to us that during his employment under the Agency S contract, he worked within the administration of Organisation X, whereas he had worked within the administration of Organisation Y while employed under the Organisation Y contract. Clearly, the Taxpayer's work and duties under those two contracts were not 'essentially the same' as he claimed. In our view, he had no cause for complaint on that score.

23. In conclusion, the Taxpayer's income for the year of assessment 1990/91 is not exempt from salaries tax. It follows that this appeal is dismissed.