

Based on the foregoing the Appeal by the Tax Payer is dismissed on Grounds of Appeal (1) and (3) but remitted to the Commissioner to re-assess the tax liability on Ground of Appeal (2) accepting the Tax Payer's submission that the year end exchange rate should be used.

Case No. D2/84

Board of Review:

H. F. G. Hobson, *Chairman*; D. J. McIntosh & D. A. L. Wright,
Members.

7 May 1984.

Salaries tax—income arising in or derived from Hong Kong—location or source of employment—“Totality of Facts” test.

The appellant was employed by a division of an American Corporation and carried out duties both in Hong Kong and elsewhere. The appellant was assessed to Salaries Tax on the whole of her salary for the years 1980/81 and 1981/82. The appellant appealed on the grounds that part of her time outside Hong Kong was spent on duties performed on behalf of the New York Head Office of the Corporation.

Held:

The whole of the appellant's remuneration arose in and was derived from Hong Kong.

Appeal dismissed.

Lee Kowk-leung for the Commissioner of Inland Revenue.
Appellant in person.

Reasons:

In this case the taxpayer objected to salaries tax assessment for 1980/81 and 1981/82 because she considered that a portion of her income did not arise in nor was it derived from Hong Kong on the grounds that it was attributable to time spent abroad at the behest of her employers' New York Head Office.

In essence the Deputy Commissioner by his Determination of 6 September 1983, relying on the “Totality of Facts” test (to be found in the Inland Revenue Practice Note No. 10 a copy of which is attached), concluded that the location or source of the taxpayer's employment was Hong Kong, and consequently the performance of duties carried out abroad in virtue of that employment did not of

itself justify the time apportionment treatment extended by the Department to persons whose source of employment is abroad but who spend time (in excess of 60 days in any fiscal year) in Hong Kong.

In 1980 the taxpayer was employed by a division of "AMC" which the taxpayer and Miss M, her immediate supervisor, explained is a limited liability corporation established in the U.S.A. with its Head Office in New York and many branches throughout the world.

AMC is a non-profit service organization owned and supported by 30 department stores in the U.S.A.

In Hong Kong, AMC has 2 distinct divisions, separately run, viz
—AMC—Hong Kong (herein "AMC-HK"), and
—AMC Far East Operations (Regional) (Herein "AMC-FEO")

Neither the taxpayer nor Mr. Lee Kwok-leung (Senior Assessor, Appeals) who conducted the case for the Inland Revenue Department (IRD), was able to say whether AMC was registered as a foreign corporation under Part XI of the Companies Ordinance as having established a "place of business" in Hong Kong but in any event AMC does have a place of business in Tsim Sha Tsui Centre, Hong Kong. In May 1969 AMC registered itself under the Business Registration Ordinance, presumably because "it was carrying on business" in Hong Kong. The original Business Registration application form simply refers to AMC "without qualification as to any division or divisions".

AMC-FEO is the centre for AMC Far East activities and is responsible to AMC, New York, for co-ordinating and overseeing branch activities in the Far East, keeping abreast of the application of the quota system as it affects any given area and generally liaising with manufacturers. AMC-FEO also acts as paymaster for all AMC personnel located in the Far East including Hong Kong.

The taxpayer was engaged in Hong Kong by AMC-FEO in July 1980 as a Regional Co-ordinator (since re-named "Far East Market Manager") and her job is described as follows:—

Quote

In an assigned geographical region (in this case the Far East) under the direction of a Regional Director of Merchandise, to provide product development and merchandise liaison to the AMC organization and merchandise service to representatives of Shareholder Stores and to designated Affiliate Stores for specified

merchandise segments by evaluating and reporting on resources and by providing field assistance on product development and store buying projects.

Unquote

The taxpayer says her two main objectives in her capacity of Regional Market Manager are:—

Quote

- (1) To provide product development in my assigned area i.e.—Total Far East—with an end objective of increasing shipments from all our Far East Offices.
- (2) To give merchandise service to Buyers from our Shareholder Stores regarding Junior Apparel, which is my speciality. This is achieved by reporting on resources and providing field assistance on product development and store buying projects in all AMC Offices throughout Asia.

Unquote

To reach these objectives she needs to travel abroad for the reasons she set out in a written submission, the first two of which read as follows:—

Quote

- (A) Travel to all the cities in the Far East as I must gain first hand knowledge on the resources capabilities, price structure, quota restrictions, production lead times, strength and shortcomings of each of the Far East Markets. To Fully understand these details are vital in evaluating such information and recommending what action/country/resources to Buyers, in order to meet their objectives.
- (B) In many cases, field assistance to a local office(s) is necessary to implement these objectives. The subsequent placing of orders to that particular Far East Office is in no way connected to AMC-Hong Kong.

Unquote

The taxpayer's case can reasonably be summarized as follows:—

1. The fact that her employment was arranged in Hong Kong is immaterial, she could just as easily have been engaged in New York as are other AMC-FEO employees. However we hold

that the place of engagement is material to the issue of determining whether her income arises in or is derived from Hong Kong, though we do not consider that it is conclusive on that point as it may be out-weighed by other considerations.

2. Time spent abroad at the behest of AMC New York does not benefit AMC-FEO or expressed another way that the duties performed abroad by a Regional Market Manager are not merely incidental to the duties performed in Hong Kong because the territories visited do not pass back any benefit to AMC-FEO. However we do not accept that benefit to AMC-FEO is necessarily a criterion respecting the issue of where any employee derives his income but if it were then in this case we would reject the argument that no benefit is derived in Hong Kong because the very *raison d'être* of AMC-FEO is to act as a central point i.e. the carrying out of the express function is of itself beneficial to AMC-FEO.
3. Though the taxpayer, through AMC-FEO, does undertake work from which AMC-H.K. derives a benefit, the taxpayer spends a large part of her time (66 days in 1980/81—disregarding time abroad for another employer—and 99 days in 1981/82) abroad (such time having increased since the years in question) that in fairness the same time apportionment enjoyed by her colleagues should be extended to her. These other taxpayers were, we understand engaged outside Hong Kong, and evidently have been treated by IRD as foreign employees who spend part of their time in Hong Kong and enjoy some form of time apportionment. Their cases were not in issue before us so we are not in possession of the facts affecting each case and we are unable to say whether in our view the IRD assessments are correct or whether, as the taxpayer remarked, they are not taxed in other countries.

The taxpayer felt that the only explanation of the difference in treatment was due to racial discrimination, she being Chinese. We are unable to accept this. We believe that what the taxpayer attributed to discrimination is no more than a consequence of the view taken by the IRD of the source of the income of the taxpayers concerned: we do not believe the IRD would have reached a different conclusion had the taxpayer been of a different race.

The taxpayer acknowledged that her instructions to go abroad were given to her here in Hong Kong by Mr. W, (Vice president—

Far East Operations and Corporate Officer of AMC) but he is turn received his instructions from AMC -New York.

The taxpayer also said that her salary is paid not by AMC-HK but by AMC-FEO in Hong Kong dollars in Hong Kong.

The taxpayer having in fact been engaged by AMC-FEO in Hong Kong at the outset, receiving orders locally from her supervisors and being paid in Hong Kong we have no doubt that the taxpayer's basic source of income is Hong Kong. It follows that the real question that emerges is—should that salary which is paid to her here for work done outside be treated as not having been earned in Hong Kong?

To answer this question one must decide in this particular case whether the work was done in furtherance of the function of AMC-FEO or as a distinct engagement unrelated to the functions of AMC-FEO. Granted the taxpayer is indeed paid for travelling abroad but she does so in response to orders she receive from AMC-FEO, it being a function of AMC-FEO to make her services available both in Hong Kong and other places in the Far East. That those services may be ultimately for the benefit of some remoter entity such as AMC-NY or one of the 30 department stores does not alter the fact taxpayer's immediate controller is AMC-FEO. Thus the duties carried out abroad were part and parcel of her job; the execution of those duties was not an independent one, nor does the note of her employment nor of the job description suggest that it was intended to be so. Her visits abroad were done in fulfillment of AMC-FEO's responsibility as a regional centre serving AMC.

Having reached this conclusion, consideration of the aptness of the "Totality of Facts" test to establish source of income as used by IRD is somewhat academic, however the questions comprising the test were put to the taxpayer who responded as follows:—

1. Her contract of employment is enforceable in Hong Kong;
2. Her duties are that of Regional Market Manager for Hong Kong and other territories in the region;
3. She is employed with the Hong Kong branch (albeit unregistered, as such) of a foreign business;
4. She is remunerated in Hong Kong by AMC-FEO, which is a division of the said branch, though the cost of her salary is ultimately reimbursed from AMC-NY, this latter point has been held irrelevant in determining whether an employee's income is derived from the Colony; Case No. D7/82.

5. This question reads “whether the cost of his remuneration is part, directly or indirectly, of the expenses of a Hong Kong company or branch”—in as much as this question differed from 4, the taxpayer did not know the answer.
6. The taxpayer argued in a spirited way that the duties performed outside Hong Kong were not merely incidental to those performed in Hong Kong, they were independent tasks, the benefits of which were not passed back to Hong Kong. The IRD argued that the duties were incidental. As mentioned above we have concluded that the duties performed abroad were an integral part of her job.

In our opinion therefore the whole of taxpayer’s remuneration arises in and is derived from Hong Kong, accordingly her appeal is rejected.

Though we have referred to the “Totality of Facts” in Practice Note No. 10, we do not accept that they constitute an unimpeachable test of source of income: indeed it may be that they could be too favourable to those employees whose contracts are constituted abroad though performed in Hong Kong if too much stress is placed on the first question. The questions should be treated purely as guidelines and as such may not be exhaustive.

Case No. D4/84

Board of Review:

William Turnbull, *Chairman*; N. J. Gillanders & Kenneth T. C. Lo, *Members*.

23 May 1984.

S.82A Inland Revenue Ordinance—penalty assessment—tax undercharged—whether penalty assessment excessive.

The appellant filed Tax Returns out of time which grossly understated his taxable income. The Commissioner made additional assessments under Section 82A. The appellant appealed on the grounds that the additional assessments were excessive having regard to the appellant’s lack of education and ignorance of accounting practice and that the level of the assessments exceeded that of previous reported decisions.

Held:

Each case must be decided on its own facts and on the facts the additional assessments were not excessive.