Case No. BR 13/71

Board of Review:

L. J. D'Almada Remedios, *Chairman*, Lamson Kwok, K. H. A. Gordon & Kenneth Lo, *Members.*

15th November 1971.

Salaries tax—ship's surgeon on ocean going ships owned by non-resident company—employment contract made in Hong Kong but governed by foreign law—whether income from employment "arose in or was derived from the Colony"—Inland Revenue Ordinance, s. 8(1).

The appellant, a ship's surgeon, served on various ocean going ships owned by a non-resident company. He received payment of his salary in Hong Kong currency and was assessed for salaries tax thereon for the years from 1964-65 to 1970-71. On appeal.

Decision: Appeal allowed.

Case referred to:—Bennet v. Marshall, 22 T.C. 73.

Reasons:

Until his retirement in September 1970, the appellant served as Ship's Surgeon on board various ocean going ships owned by a Dutch company incorporated in the Netherlands. It is not in issue that he was employed specifically to serve as Ship's Surgeon on board any ship to be designated by the Company for their ocean-going trade. The ships in which he served from May 1959 (the time of his employment) until his retirement operated to points as far as Australia, South America and South Africa. The appellant's emoluments were paid in Hong Kong dollars on board ship and were charged to the wages account of the ships' personnel in the books of the Company. On the average, the ships in which the appellant served returned to Hong Kong once every three months, and when they did so, they only remained for two or three days.

The appellant, therefore, contends that he is not assessable to salaries tax sought to be charged against him for the years from 1964-65 to 1970-71 inclusive as his income did not arise in or was derived from the Colony.

On the facts, as agreed, the Contract of Employment was offered and accepted in Hong Kong. The Company has a Head Office in Hong Kong which is an extension of its Head Office in the Netherlands. The contract was signed on behalf of the Company in Hong Kong by the Manager of the Company's Personnel Department for seafaring personnel. It is not disputed that the Company is a foreign or non-resident company but it is admitted that it

is assessable to Corporation Profits Tax under section 23C of the Inland Revenue Ordinance by which certain profits of a non-resident ship-owner are assessable where such ships call at the Colony. Under the contract, the appellant's rights are to be regulated by the laws of the Netherlands and the contract makes reference to the applicability of the Commercial Code of the Netherlands.

What we have to decide is whether the appellant's income from employment "arose in or was derived from the Colony".

Our main difficulty lies in determining what principles are applied in resolving the problem. There is no case law on point. Such authorities as have been referred to us relate to statutes that are differently worded. Judicial view on the meaning of "source income" are not entirely consistent. Sir Wilfred Greene, M.R., held that it was the place where the income comes to the employee; Mackinnon, L.J., held the source was the place of the contract; Romer, L.J., said the source was 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" (see **Bennet v. Marshall**[1]). The Australian cases are inclined to the view that, apart from exceptional cases, income from employment is derived where the services are performed.

Decisions on foreign statutes differently worded are seldom of value, and it is difficult to frame any fixed rule to cover all cases. The divergence of views to which we have referred have not reflected any attempt to lay down any guiding principle in resolving what we think is really a question of fact.

In a case under section 8 of the Ordinance—which is what we are concerned with—whether income arises in or is derived from the Colony may well consist of serveral factors. One must, as in most questions of fact, look to the totality of the facts for the purpose of arriving at a conclusion.

Suppose a resident of Hawaii, who is a Japanese national, while passing through Hong Kong enters into a contract here with a foreign shipping company to serve as an engineer on board one of its ships that will be plying the high seas. Coming fresh to such a situation, untrammelled by the cases, one's instinctive reaction is that his income does not arise in or is derived from the Colony. In the example we have given, the engineer is not a resident of Hong Kong. In the appeal with which we are concerned we are not told whether the appellant is a resident of the Colony. However, in our tax structure liability does not depend on residence.

It is urged on behalf of the Revenue that in considering the source of income, regard is not to be had to the place where the tasks of the employee are performed, but to the locality of the source of income. This was, in fact, so held in H.K.B.R. No. 20/69.

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[1] 22 T.C. 73.

We think locality of the source is a dominant, though not necessarily a conclusive factor. In the Board of Review case to which we have referred, it was the decisive factor. But locality of the source of income means the quarter from which it originates or the place from where the income really comes to the employee. So when regard is had to locality of source we think there is merit in Mr. Litton's submission when he says that it is where the legal liability for payment is located which, in the case under review, is not Hong Kong.

On the facts of this particular case the appellant was under a full-time foreign contract in a single employment with a non-resident company to serve on board ships engaged in international voyaging. That it is a foreign contract is evidence from the terms of the agreement itself since the appellant's rights are to be governed by foreign law. If parties to a contract specifically provide that their rights are to be regulated by the laws of a country other than the place where the contract was signed, it seems to us that although the contract was signed in Hong Kong it is of little significance. The currency in which an employee's emoluments are paid is a factor to be considered but in this day and age and particularly where the appellant expects (it is assumed) to be paid wherever the ship may be at the time of payment, it matters little if his salary was paid in U.S. dollars or any other currency. His employers are a Dutch company and it is the company in Holland that is liable for payment for services which under the contract the appellant would render outside the Colony. As such income which the appellant received originated from source that is ex-Hong Kong we do not think that what remains is sufficient to link Hong Kong in such a way that would justify us in saying that the appellant's income was derived from the Colony. In the circumstances this appeal is allowed.