INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. BR14/75

Board of Review:

Chan Ying-hung, *Chairman*, Alexander S. K. Au, Charles A. Ching & P. B. Tata, M*embers*.

18th November 1976.

Salaries tax – airline pilot employed by company incorporated in Hong Kong – duties of taxpayer substantially performed outside Hong Kong – whether income from employment "arose in or was derived from the Colony" – Inland Revenue Ordinance, section 8(1) and (1A).

During the year of assessment 1973/74, the appellant was employed as an Aircraft Junior First Officer under a written contract with an Airline Company, incorporated, managed and controlled in Hong Kong. By virtue of the nature of his employment, the appellant had to perform duties for his employer outside Hong Kong, such duties consisting of *(inter alia)* flying an aircraft out of Hong Kong and bringing another back to Hong Kong.

The appellant's salaries were paid in Hong Kong Dollars into his bank account in Hong Kong and during the basis period, he lived in Hong Kong in premises provided by his employer and for which he received rent allowance. He was physically present in Hong Kong for 208 days during this period.

Although the appellant's salary was based on 70 flying hours per month, he would still be entitled to his basic salary even where his flying hours fell below 70 hours. If he had to fly more than 70 hours he would be paid for excess flying time at 1/70th of his basic salary per extra hour of flying time.

The appellant's net assessable income was computed at $152,860 comprising the sums of $124,154 (basic salary), $3,140 (excess flying time), $16,860 (Children Education Allowance), $9,256 (Rental value of quarters) less $550 (outgoings and expenses). His tax thereon was assessed at $22,929.

The appellant appealed to the Board against his assessment to tax on the ground that even though his employment of profit was located in Hong Kong, he should be exempt from tax chargeable under section 8(1) of the Inland Revenue Ordinance as the income received by him was not income "arising in or derived from the Colony". It was argued on his behalf that the source of income was the place where the duties of the employee were performed or where his services were rendered.

Decision: Appeal dismissed. Assessments as determined by the Commissioner confirmed.

Denis Chang for the appellant.
Frank Wong, Senior Crown Counsel, for the Commissioner of Inland Revenue.

Cases referred to:-

1. Federal Commissioner of Taxation v. French, (1957) 98 C.L.R. 398.
2. Commissioner of Taxation v. Cam & Sons Ltd., 36 State Reports, N.S.W. 544.
3. Bennet v. Marshall, (1938) 1 K.B. 591.
4. Fall v. Hitchen, (1973) W.L.R. 286.
5. Foulsham v. Pickles, (1925) A.C. 458.
6. Bray v. Colenbrander, (1953) 2 W.L.R. 927.
7. Federal Commissioner of Taxation v. Mitchum, (1965) 9 A.I.T.R. 559.
8. C.I.R. v. Humphrey, H.K.T.C. 451.

Reasons:

The Taxpayer is an employee of the Cathay Pacific Airways Ltd. (hereinafter called "CPA"), a Company incorporated, managed and controlled in Hong Kong. He was employed pursuant to a letter dated 22nd March 1967 addressed to him in Australia by CPA. By this letter CPA offered him the appointment as an Aircraft Junior First Officer upon the terms and conditions therein stated and certain "Conditions of Service for Expatriate Pilots" a copy of which was enclosed with the letter but the contents of which were not referred to at the hearing of this appeal. The Taxpayer accepted such appointment by signing the letter and returning it to CPA. According to the terms and conditions contained in this letter the Taxpayer was to serve a probationary period of 6 months and was required to arrive in Hong Kong about the 24th May 1967 so as to join a ground training course due to start on the 5th June 1967. It also provided that the Taxpayer must be in possession of a valid Pilot's Licence convertible to a Hong Kong Licence on passing a Medical Examination and the Hong Kong Aviation Law Examination.

It is common ground that by virtue of the nature of his employment the Taxpayer had to perform duties for CPA outside Hong Kong while directing flights out of or into the Colony. His salaries were paid in Hong Kong dollars into his bank account in Hong Kong. During the basis period for the year of assessment 1973/74 the Taxpayer's emoluments consisted of:-

Basic Salary ……..	$124,154.00
Excess Flying Pay …….	3,140.00
Children Education Allowance …….	16,860.00
	$144,154.00
Rental Value …….	9,256.00
	$153,410.00

From this a sum of $550.00 was deducted for outgoings and expenses, leaving a net assessable income of $152,860.00 with salaries tax thereon of $22,929.00.

The Taxpayer gave evidence at the hearing of the appeal. According to his testimony, which we accept, his salary was based on 70 flying hours per month. Flying hours are calculated from the time the engine starts to the time that it is turned off. For any flying time exceeding 70 hours per month, he is paid at the rate of l/70th of his monthly salary for each hour of flying time. According to a Schedule submitted by the Taxpayer, the duties he performed during the year 1st April 1973 to 31st March 1974 consisted of:-

(1) *Work in Hong Kong*
93 hrs. 45 mins.

(2) *Work outside Hong Kong*
806 hrs. 25 mins.

(3) *Reserve Duty*
268 hrs.

(4) *Simulator Training*
23 hrs. 30 mins.

(5) *Emergency Drills*
3 hrs.

The time under "Work in Hong Kong" includes 1 hour before each flight from Hong Kong when the Taxpayer is required to report at the airport and 15 minutes after a flight when he is required to do likewise. Under this heading is also included briefing and pre-flight and post-flight inspection of the aircraft. The time under "work outside Hong Kong" includes time spent in flying the aircraft, briefing, and pre-flight and post-flight reporting and inspection at transit and destination airports.

Reserve Duty includes time during which the Taxpayer has to hold himself on call whilst on reserve duty as he is required to be available to leave his residence within 45 minutes of being called according to the CPA's Operations Manual. According to his estimate he was called upon to perform flying duties approximately one time out of ten on which he was recorded as being on reserve duty.

If reserve duty is to be assessed as "Work in Hong Kong" then 32% of his duties is executed in Hong Kong while 68% is executed outside. If on the other hand reserve duty is not to be taken as "Work in Hong Kong", then the proportions are estimated to be 13% duties executed within the Colony and 87% without.

During the basis period of the year of assessment under review, the Taxpayer was physically present in Hong Kong for 208 days.

Under cross-examination, the Taxpayer agreed that his basic salary of $124,154.00 per annum was paid to him in equal monthly sums. That represents his minimum salary. Even if an airfield were rendered unserviceable and he could not perform 70 flying hours of duty, he would still get his basic salary so that the same does not depend on flying time. Equally if he were sick, he would get paid. If he had to fly more than 70 hours in any month, he would be paid for extra flying time at 1/70 of his basic salary for every hour of extra flying time.

According to a summary submitted to us by the Taxpayer, the Taxpayer during the basis period of the year of assessment under review was on leave from 1st July 1973 to 8th August 1973 and again from 9th January 1974 to 16th February 1974, and his flying hours fell below 70 hours a month in the months of June, July, August, October, November and December 1973, and January, February and March 1974.

Also during the year in question, he lived in Hong Kong in premises taken on lease by CPA. That was his home. He had no other home. He paid the rent but received an allowance from the CPA which, however, fell short of the rent he actually paid. His flight duties consisted of flying a plane out of Hong Kong and brining back another plane to Hong Kong.

Subsequent to his joining CPA, his scale of salary was revised and he is getting annual increments of $4,000.00 per annum for flying a Boeing 707 plane. There would be an upward adjustment of 8% for flying a Tri-star. Basic salary is linked to the type of plane he flies and, with length of service, one gets increment.

When the case first came before the Commissioner on objection from the Taxpayer, the Taxpayer relied on two grounds: first that as all his services in connection with his employment were rendered outside the Colony, consequently his salary should be exempt from Tax under section 8(1A)(*b*) of the Inland Revenue Ordinance, and secondly that his salary was paid from money originating primarily from outside Hong Kong. In confirming the assessment, the Commissioner pointed out that section 8(lA)*(b)* specifically excludes from its ambits a person who is employed as commander or member of the crew of an aircraft. He further held that under section 8(1) he is only required to locate the source of the employment and consequently the Taxpayer's liability to Salaries Tax cannot be affected by the source of the employer's funds from which the Taxpayer is paid.

At the hearing of the appeal before us, Mr. Denis Chang, Counsel for the Taxpayer, argues that his client should be exempt from tax under section 8(1) because the income received by the Taxpayer was not income "arising in or derived from the Colony". The Section reads as follows:-

> "8(1). Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or

derived from the Colony from the following sources – (*a*) any office or employment of profit; and (*b*) any pension".

In Mr. Chang's submission, it does not follow that because an employment of profit is located in Hong Kong, *ipso facto* income arises in or is derived from Hong Kong. He refers to a long line of decisions by different Boards of Review in which, according to his contention, too much emphasis has been placed on the situs of employment whereas there can be other deciding factors. *Prima facie* the souce of income in so far as Salaries Tax is concerned should be the place where the services of the employment are performed as distinguished from the place of employment. Source of income is not necessarily located at the situs of employment and it is wrong to read section 8(1) by "telescoping" the words "arising in or derived from the Colony" into the words "office and employment".

Mr. Chang has taken us through the following cases reported in the Inland Revenue Board of Review Decisions ("IRBRD"): BR 20/69 (IRBRD p.3); BR 13/71 *(ibid* p.55); BR 15/71 *(ibid* p.72); BR 7/73 *(ibid* p.106); and BR 3/74 *(ibid* p. 140). They come in for severe criticism in so far as they suggest that once it is established that the locus of employment is established to be Hong Kong then that is the end of the matter. Boards have consistently acted on this view notwithstanding what they proclaim in one or two cases that one must look to the totality of facts before one comes to a conclusion as to the source of income in any particular case.

The Revenue has been applying section 8(1) to cases whenever a man is employed by a Hong Kong company or a company with a Hong Kong connection such as a branch or agency. He has not seen a case in which the Revenue has departed from this simplistic approach. The burden of his appeal is that the same totality test should be applied to employees of Hong Kong or foreign companies.

Still dealing with section 8(1), Mr. Chang argues that salaries must be regarded as reward for labour and *prima facie* the source thereof must be located at the place of labour, that is to say, the place where the services are rendered. There are of course exceptions to the rule, i.e. remuneration from sinecure positions and pensions, for which no services have to be rendered in return. Whilst applying the totality test, therefore, the place of labour becomes an important – in fact a decisive – factor.

In support of his contention Mr. Chang relies most strongly on **Federal Commissioner of Taxation v. French**[1]**,** in which the Full Court of Australia held by a majority of 3 to 2 that salaries received by a taxpayer, resident in New South Wales and employed as an engineer by a Company registered there, during a period when he was sent to and worked in New Zealand were derived from a source out of Australia. Dixon C.J. who delivered the first judgment says at p.405 that he agreed with Williams J. and that "The case is one, at all events we are so treating it, where month by month by doing his work in this or that place the employee earns his salary. It would I think be impossible to say that an ordinary artisan does not earn his pay where he does his work. Doubtless Mr. French is by

[1] (1957) 98 C.L.R. 398.

no means an artisan but it is by the same reasoning that his case should be adjudged". Williams J. (with whose judgment Dixon C.J. expressed agreement) says at p.410: -

> "The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employee may be to serve and however much he stand by his contract and decline to treat it as discharged by breach ... In the present case the services which earned the remuneration of £110 were rendered in New Zealand and the whole of the reasoning of the previous decisions of this Court relating to the meaning of the word 'source' would lead to the conclusion that the source of this income was in New Zealand where the services were rendered and the income earned and not in Sydney where the salary was paid ...".

At p.413 the same learned Judge says:-

> "There is no difficulty under the Australian Act in holding that as in the case of a trade or business, so in the case of a contract of employment, the source of the income is where the duties of the employee are performed and that where they are performed in more than one place there should be apportionment".

Mr. Chang also refers to **Commissioner of Taxation v. Cam & Sons Ltd.**[2]**.** Jordan C.J. says at p.547:-

> "Now, a source may, and commonly does, consist of several factors. The character of the source may depend upon which of the factors is dominant ...".

He continues at p.548:-

> "Where income is derived from wages or salary, again the source has several factors. Personal exertion may be involved in negotiating and obtaining the contract of employment, in performing the stipulated services, and in obtaining payment of them. In the present instance, for example, in the case of all the men concerned in a very real sense, it may be said that the source of their wages consisted of the three elements of getting the job, doing it, and getting paid for it. Which of these factors is the most important element of the source in any given case depends upon the facts of the case. In the ordinary case of the employment of a seaman, such as is now under consideration, where there is nothing special either in the circumstances of the contract of employment or in the payment, and where the work is both done and paid for in the ordinary course, the important factor is the doing of the work, and the contract of employment or the payment are relatively insignificant and formal elements ...".

and finally at p.549:-

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[2] 36, State Reports, N.S.W. 544.

> "If the making of the contract is an insignificant factor, and the only substantial element is its performance, the place of performance is the only relevant locus of the source".

Mr. Chang concedes that if we apply the totality test and find that the whole of the income arises in or is derived from the Colony, that would be the end of the matter. If, however, we should hold that part of the income is attributable to a foreign source, then the effect of section 8(1A) will have to be considered. This section is worded as follows:-

> "8(1A). For the purposes of this Part, income arising in or derived from the Colony from any employment –
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> *(a)* includes, without in any way limiting the meaning of the expression and subject to paragraph *(b)*, all income derived from services rendered in the Colony including leave pay attributable to such services; and
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> *(b)* excludes income derived from services rendered by a person who –
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> (i) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft; and
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> (ii) renders outside the Colony all the services in connexion with his employment.".

It is contended that whether the section is a clarifying or definitive section the use of the word "includes" shows that the Legislature intends to bring within the taxing net income which may not ordinarily be chargeable under section 8(1), i.e. "income derived from services rendered in the Colony including leave pay attributable to such services". It also indicates that "services rendered" is to be regarded as an important factor and introduces a simplistic test in appropriate circumstances, namely, the test of the locality where the services are rendered. If after applying the totality test, giving due weight to the situs of services, we should rule that the whole of the income does not arise in or is not derived from the Colony, then apportionment is called for. Section 8(1) has a built-in provision for this inasmuch as one has to determine if the whole of the income arises in or is derived from the Colony. Under section 8(1A), too, one has to determine if the whole or a portion is attributable to services rendered inside or outside the Colony. He admits that apportionment is a misnomer. In fact, the exercise should be to identify what part of the income arises in or is derived from a Hong Kong source and what from a foreign source.

At one stage Mr. Chang suggested that in apportioning the income in this case one should adopt as the basis the profits of CPA as returned to the Inland Revenue Department under section 23B of the Ordinance. The ratio of CPA's profits originating from Hong Kong as they bear to its total profits was agreed for the purpose of this appeal at 32.37%.

Later, however, he abandoned this point because, as he properly points out, the profits of the employer cannot have anything to do with the tax liability of the employee. He maintains nevertheless that if part only of the Taxpayer's income is assessable as arising in or derived from the Colony, then his liability should not exceed, say, 32% of his total income which, Mr. Chang argues, is a fair basis of apportionment.

Dealing with the case of **Bennet v. Marshall**[3] an English case very much relied on by the Revenue as hereinafter appears, Mr. Chang invites us to follow the Australian authorities cited by him as our statutory provisions for charging tax on income from employment bear a closer resemblance to those in Australia than those in the United Kingdom. He calls attention to the judgment of Romer LJ. in **Bennet v. Marshall** (*supra* at p.613) where his Lordship indicates that, but for prior English decisions, he would have held that in the case of employment the locality of the source of income is the place where the employment is actually carried on by the employee, that is to say, the place where the activities of the employee are exercised just as in the case of a profession or vocation the source of income is situated at the place where the profession or vocation is exercised or carried on. In other words, if not for case law in England, Romer L.J. would have come to the same conclusion as in **French's** case.[1]

Mr. Frank Wong, Crown Counsel who appeared for the Commissioner, contends that the Taxpayer in this case is caught by section 8(1), and as during the basis period of the year of assessment under review he stayed in the Colony for more than 60 days, his liability is absolute having regard to the provisions of section 8(2)(*j*) which is to the following effect:-

> "In computing the income of any person for the purposes of subsection (1) there shall be excluded the following –
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> (*j*) income derived from services rendered as master or member of the crew of a ship or as commander or member of the crew of an aircraft by a person who was present in the Colony on not more than –
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> (i) a total of 60 days in the basis period for that year of assessment ...".

In any event, in determining whether an employee's income arises in or is derived from Hong Kong under section 8(1), there is no room to apply the situs of services test, so argues Mr. Wong.

In the first place he draws attention to the distinction between a "contract of service" and a "contract for service". Reward for labour would fall into the first category, and a profession the second. Section 8 applies to income from a "contract of service" whilst section 14 applies to income from a "contract for service". In this respect, the Ordinance differs materially from the Australian statutes which do not distinguish between the two

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[3] (1938) 1 K.B. 591.

kinds of remuneration. The case of **Fall v. Hitchen**[4] was cited by Mr. Wong for the proposition that the expression "contract of service" is co-terminus with the expression "employment" so that emoluments arising from a "contract of service" would be emoluments arising from an "employment". That being so, the principles laid down in **Bennet v. Marshall**[3] apply and material factors to be considered as regards the source of income from an employment are the contract and the place of payment and not the place where the services are performed. He lays particular emphasis on the following passage of the judgment of Sir Wilfred Greene, M.R. at p.603:-

> "Employment arises from a contract of employment and, therefore, there is what there is not in the other cases (of trade and profession), some definite contract to which to look when inquiring into the source of the income which is sought to charge. I should have thought, therefore, that in the case of employment the contract is the first thing which must be looked at to find out the answer to the question raised in any particular case of employment: Is it or is it not income derived from a source out of the United Kingdom?".

In the same case, after referring to **Foulsham v. Pickles**[5] the Master of the Rolls continues to say at p.604 of his judgment:-

> "In my opinion, if there is one thing that the case did it was entirely to negative the proposition that the locality of the employment depended on the place where the employment was in fact carried on".

Mr. Wong also refers to **Bray v. Colenbrander**[6] in which the House of Lords approves the decision in **Bennet v. Marshall**[3]**.**

Dealing with the Australian cases cited by Mr. Chang, Mr. Wong's submission is that these cases were so decided because under the Income Tax law in Australia a resident is taxed upon his income derived from all sources except certain exempt income. It makes no distinction between contracts of service and contracts for service. In any event in a later case **Federal Commissioner of Taxation v. Mitchum**[7] the Full Court held that no rule of law was laid down by **French's** case[1] and that in each case the relative weight to be given to the various factors which can be taken into consideration must be determined as a matter of fact. That being the position, Mr. Wong invites us to follow the dissenting judgement in **French's** case of McTiernan J. who holds that where one works is not necessarily the test for determining the source of his income and that the rule enunciated for guidance in **Bennet v. Marshall**[3] is not peculiar to the legislation in England but can be safely acted on in the case before him.

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1 (1957) 98 C.L.R. 398.
3 (1938) 1 K.B. 591.
4 (1973) W.L.R. 286.
5 (1925) A.C. 458.
6 (1953) 2 W.L.R. 927.
7 (1965) 9 A.I.T.R. 559.

Mr. Wong then proceeds to deal with some of the Board of Review decisions referred to by Mr. Chang. The gravamen of his argument is that in none of them have the real principles stated in **Bennet v. Marshall**[3] been analysed although at least in one case (BR 20/69 IRBRD p.3 & p.4) the Board did reject the situs of services test in these words:-

> "The expression "income arising in or derived from the Colony" is referable to the locality of the source of income; in other words not the place where the duties of the employee are performed but the place where the payment for the employment is made. The section does not say: "income arising in or derived from *services rendered* in the Colony". If it was so intended it would have said so as it does in section 13B (now Section 8(1A))".

Further, Mr. Wong makes a point of the fact that the Inland Revenue Ordinance was first enacted in 1947, 10 years after **Bennet v. Marshall**[3] was decided, but, notwithstanding this, the Legislature did not see fit to include the expression "services rendered" in the charging section for Salaries Tax i.e. section 8(1). This should lend support to his argument that the situs of employment and situs of services are irrelevant in determining the source of income. Support is also to be found in the absence of any reference to "services rendered" in section 9(1) which gives instances of what the expression "income from office or employment" includes.

Developing his argument further, he submits that if section 8(1) is to be construed as if situs of services rendered were included, then it would be redundant to have section 8(1A). Put in another way, unless such a test is excluded from section 8(1), it would be objectless and unnecessary to have section 8(1A) which according to him extends the scope of section 8(1) so as to render chargeable, among other things, the income of a commander or member of the crew of an aircraft who renders all his services outside the Colony, section 8(1) not being wide enough to embrace such a case.

On the point of the totality test to be applied in construing section 8(1), Mr. Wong's comment is that the main difference between his approach and Mr. Chang's is that Mr. Chang maintains that reward for services equates employment so that situs of services is an important if not the decisive factor, whereas in his (Mr. Wong's) submission situs of employment (which is more extensive than and includes situs of services) is irrelevant to the determination of the source of income, but, if it is, then the test to be applied is a test involving many factors. Throughout their decisions, the Boards of Review have applied one test and that is the all factors test of situs of employment. He cites by way of example Case No. BR 13/71 (IRBRD p.55 at p.56) where the Board says:-

> "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 several factors. One must, as in most questions of fact, look to the totality of the facts for the purpose of arriving at a conclusion".

He further quotes the following passage from Case No. BR 3/74 (IRBRD p.141 and p.142): -

> "To determine whether a person's emolument arises in or is derived from the Colony one must necessarily look to the broad spectrum of all the relevant facts. The *'modus operandi'* of W's (the employer's) business and financial set-up is a factor which has been put to us for consideration but it must be viewed in conjunction with and not in isolation to other facts for the purpose of resolving the issue".

On this aspect of the case, Mr. Wong's stand is that if the "totality test" advocated by Mr. Chang is the same as what he, Mr. Wong, describes as the "all factors test" then they mean one and the same thing and are, therefore, equally acceptable to him.

It follows from this that if he fails in his argument that situs of employment is irrelevant in determining the source under section 8(1), then all factors will have to be taken into consideration. He particularly stresses that CPA is a limited company established, managed and controlled in Hong Kong; it is taxed under section 23B of the Ordinance on a proportion of its global profits; it files an employer's return in respect of the Taxpayer's emoluments; the contract of service with the Taxpayer is one enforceable in Hong Kong, he has quarters provided for him in Hong Kong; payment of salary is made in Hong Kong in Hong Kong currency; the Taxpayer is paid even if he flies less than 70 hours in any one month; he is under Hong Kong employment; and is entitled to home leave on full pay and children's education allowance. In short, there can be no better example of a case in which income arises in or is derived from Hong Kong.

Finally on the point of apportionment, Mr. Wong's submission is that the duty of the Revenue is to determine the whole of the income arising in or derived from Hong Kong and to allow or disallow deductions therefrom, the balance representing the assessable income. There is no question of apportionment under the Ordinance.

It is not at issue that the source of income is always a matter of fact. Having examined the authorities cited to us by both sides, we have come to the view and find as a fact that the whole of the Taxpayer's income in this case arose in or was derived from a source in Hong Kong, the source being his contract of employment. It is impossible to attribute any part of the Taxpayer's income to any part of his employment. It seems to us to be unrealistic to say that it is derived exclusively from flying. Surely his periods of training, rest, recuperation and leave all contribute inseparably towards earning of his income under his contract of employment. The fact that under the contract the Taxpayer gets paid in many instances in return for no actual services is also an important element. We have in mind children's education allowances, rent allowance, leave pay, and payment for flying under 70 flying hours per month. Suffice it to say that in arriving at our conclusion, we have taken cognizance of all the facts placed before us, as to which happily there is no dispute.

In our opinion, there is no difference between the "totality test" and the "all factors test" and this is the one we should apply in ascertaining the source of income derived from

employment. Although at first glance, the Australian cases seem to suggest that one single test prevails, and that is the test of the situs of services, the more closely one examines them, the more one is convinced that they do not really differ from the English cases which seem to point to a test involving more than one factor.

Let us now examine these authorities against the background of our taxing statute. To begin with, under section 8(1) of the Ordinance which was first enacted in 1947, Salaries Tax on income arising in or derived from the Colony from any office or employment of profit is chargeable against all persons whether resident or not in the Colony.

By Ordinance No. 36 of 1955, section 13B was added to the Ordinance which introduced for the first time the expression "services rendered". It read thus:-

> "In this Part 'income arising in or derived from the Colony' shall, without in any way limiting the meaning of the expression, include all income derived from services rendered in the Colony".

This section was repealed by Ordinance No. 2 of 1971 and re-enacted by incorporating the same in section 8(1A)(*a*) with the addition of the words "including leave pay" after the word "Colony".

By the same Ordinance, the following amendments were also made:-

(1) Section 8(1A) was added. Subsections *(a)* and *(b)* thereof deal with services rendered in and out of the Colony respectively.

(2) Section 8(2)(*j*) was added whereby it is provided that in computing the income chargeable to Salaries Tax there shall be excluded "income derived from services "rendered as master or member of the crew of a ship or as commander or member of the crew of an aircraft by a person who was present in the Colony on not more than (i) a total of sixty days in the basis period for that year of assessment ...".

Section 8(1A)(*b*) is, with respect to the Legislature, couched in somewhat clumsy but nevertheless unambiguous language. We think it can be paraphrased to mean that income derived by any person from services rendered by him shall not be included as income arising in or derived from the Colony from any employment unless he is (1) a Government servant or commander or member of the crew of an aircraft and (2) renders all the services in connection with his employment outside the Colony. This means in effect that any one who renders services partly outside Hong Kong is liable to be charged Salaries Tax.

To complete the list of tax exemptions or limitations material to the present case, perhaps we should also included section 8(1B) which enjoins that:-

> "In determining whether or not all services are rendered outside the Colony for the purposes of subsection (1A) no account shall be taken of services rendered in the Colony during visits not exceeding a total of sixty days in the basis period for the year of assessment".

In the face of these statutory provisions, the first question that arises is whether the Taxpayer's income arose in or was derived from the Colony and therefore taxable under section 8(1). To answer that, we must determine at the outset whether situs of employment or situs of services is a determining factor.

As far as we are aware, this point has never come up for determination by a superior tribunal and in the absence of any binding authority, we are of the view that section 8(1) does not predicate that the situs of services should be the only or decisive test in determining the source of income as advocated by Mr. Chang on the one hand; nor do we think that the situs of employment and the situs of services are totally irrelevant to any such inquiry as contended by Mr. Wong. As we have indicated, we think the correct approach is the "totality test" or "all factors test". It is true that in the course of previous decisions of different Boards of Review, there does seem to have been an over-emphasis on the importance of a local post or appointment or some connection with a local employer. It is, however, equally true that instances are not lacking in which the source of income was ascertained by taking into consideration the totality or the whole spectrum of facts. As these decisions are not binding on us and no two cases are alike, we do not propose to go into the details of such decisions.

It appears to us that so far as Salaries Tax is concerned the taxing scheme in Hong Kong is that so long as income arises in or is derived from an employment in Hong Kong tax is assessable under section 8(1). Income for services rendered in the Colony is included as such income by section 8(1A)(*a*). As to services rendered outside the Colony, if *all* the services are rendered abroad, then the income derived therefrom is exempt from tax under section 8(1A)(*b*). It must follow from this that if part of the services is rendered in Hong Kong then s. 8(1A)(*b*) will not apply subject to the proviso that in determining whether *all* the services are rendered outside the Colony no account shall be taken of services rendered in the Colony during a period of less than 60 days in any one year (Section 8(1B)). In the case of a commander or a member of the crew of an aircraft, if he was physically present in the Colony for less than 60 days during the basis period of any year of assessment, then income derived from services rendered by him shall be excluded in computing his assessable income. (Section 8(2)(*j*)).

In our opinion, section 8(lA)(*a*) is an inclusive section just as section 9(1) has also been held by the Full Court of Hong Kong to be an inclusive section (see **C.I.R. v. Humphrey**[8]**,** per Blair-Kerr J. as he then was). What he says there appears to us to be apposite to the inquiry we are making:-

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[8] H.K.T.C. 451 at 465.

> "Clearly, the Tax contemplated (by section 8(1)) is not merely a tax on the salary of, but a tax on the income of, the office or employment of profit. It is common ground that the respondent holds an office or employment of profit. The question for decision is whether the $559.30 was income arising from such office or employment of profit.
>
> I do not find section 9(1) of much assistance in reaching a conclusion. The section is an "inclusive" one. The legislature has enumerated several of the more common kinds of income; but the section does not purport to define income; and it is perhaps not surprising that no attempt had been made to enumerate all the different kinds of payments which might appropriately be described as 'income'".

We see no reason for interpreting in a different way section 8(1A)(*a*) which uses the same word "include" as in section 9(1). That being so, services rendered within the Colony" in just one example of many sources of income from an office or employment. In our view section 8(1) and section 8(1A) construed together have the effect of making income generated from services rendered wholly or partly inside the Colony chargeable to tax. That being our view, we do not think that the place where a man works is more than just one of the factors we can look to in locating the source of his income. It is certainly not the only factor.

As to section 8(2)(*j*), it is no longer necessary for us to decide whether or not it is a computing section relevant to quantum only once we have decided that the Taxpayer's income was derived wholly from his contract of employment in Hong Kong. In any case he stayed in Hong Kong for 208 days during the year of assessment under review.

We realize there are wide differences in the scheme of income tax in the United Kingdom and in Australia. Ours is again different from both and we are not prepared to say that so far as Salaries Tax is concerned our statutory provisions are closer to those of one country or the other. This notwithstanding, there is no doubt that we can look to both English and Australian cases for principles of general application with due regard to any special limitations. In our opinion, the terms "contract of service" and "contract for service" are expressions of general application and can be appropriately used to describe "employment" and "trade" respectively as the English courts have held, (see **Fall v. Hitchen**[4] at p.292 and 293). Indeed, as we understand Mr. Chang, he accepts this as an elementary principle of law but what he does not agree is that we should go on to hold as in **Bennet v. Marshall**[3] that in considering the source of income of an employment, no regard should be had to the place where the services are performed. To this extent we agree with Mr. Chang because to do otherwise would be to ignore all the special provisions contained in section 8(1A), 8(1B), and 8(2)(*j*) of the Ordinance of which there is no equivalent in the statutes in the United Kingdom. This would be over-stepping the bounds of applying general principles. For the same reason we hold that it would be wrong to disregard the situs of employment seeing that employment is expressly declared in section 8(1) to be one of the sources of income subject to Salaries Tax.

It must be remembered that **Bennet v. Marshall**[3] is a case in which the point debated was whether the taxpayer in that case should have been taxed under Schedule E of the Income Tax Act 1918 or under Case V of Schedule D of that Act as amended by the Finance Act 1922. A history of the changes made in the statutes relating to the tax chargeable under these two parts of the Act are summarized in **Bennet v. Marshall**[3] at p. 599), **Bray v. Colenbrander**[6] at p.928 et sq.) and **Fall's** case[4] (at p.294). These statutory provisions are not qualified or limited in the way as section 8(1) of the Ordinance is qualified or limited and no useful purpose would be served by comparing these statutory provisions with section 8(1) and the other sections we have mentioned which are peculiar to Hong Kong.

As to the Australian cases cited, we are of the view that **French's** case[1] so forcefully urged on us by Mr. Chang in fact does not lay down any principle of law and that it still leaves the determination of the source of income from employment as a hard matter of fact. This is made abundantly clear by the Full Court of Australia in **Federal Commissioner of Taxation v. Mitchum.**[7] To adopt the language of Barwick C.J. in his judgment in that case at p.568:-

> "We do not feel compelled or persuaded by the decision of the Court in *French's Case* to hold that in every case where work forms the consideration for wages or salary paid the source of the income constituted by the wages or salary is in the place where the work is done".

Thus in this respect English and Australian authorities at last seem to converge.

There remains the question of apportionment. There is no statutory provision for apportionment in Hong Kong. But even in the sense in which Mr. Chang uses the word, it can no longer arise in view of our finding that the whole of the assessable income arose in or was derived from Hong Kong. Should we be wrong in our decision, and the income should be apportioned, then we would say that we find as matters of fact that it is impossible to attribute any part of the taxpayer's income to any particular part of his services and that the contract of employment as an inseparable whole has given rise to his income. Consequently the only fair way of apportioning his income would be to assess his taxable income at the ratio of the number of days he was physically in Hong Kong (i.e. 208 days plus the days when he was on leave between 1st July 1973 to 8th August 1973 (i.e. 39 days) and 9th January 1974 to 16th February 1974 (39 days) making a total of 286 days) as it bears to 365 days.

At the hearing, the assessment of an employee of another airway company for the year of assessment 1957/58 was admitted by agreement at the instance of the Taxpayer with a view to showing that in that particular case the tax on the employee's basic salary was charged on the basis of the number of days he was in the Colony as it bears to the number of days in the basis period. It also purports to show that his flight pay was excluded from the assessment except to the extent of a proportional part thereof in respect of training time and pre-flight reporting time. We attach no weight to this as it merely shows what happened in one isolated case in 1957/58 since when the Ordinance has been amended several times.

The Taxpayer himself was not in Hong Kong at the time and quite frankly admits that his knowledge of the case is limited to what appears on the document. We do not have sufficient evidence before us to enable us to formulate any view on the question of apportionment or to pronounce that there has been any uniform practice on the part of the Inland Revenue Department to assess aircraft personnel in the way alleged, not that such practice would have any effect on our decision.

The result is that the appeal is dismissed and the assessment as determined by the Commissioner is hereby confirmed.