Case No. BR 15/71

Board of Review :

Chan Ying-hung, *Chairman*, J. MacKenzie, A. E. Chaney, & C. H. Wong, *Members.*

29th March 1972.

Salaries tax—income arising in or derived from the Colony from . . . any office or employment of profit—taxpayer employee of Hong Kong company—his emoluments, deposited in bank in U.S.A. by parent company of Hong Kong company, included in management fee charged to Hong Kong company—taxpayer primarily resident in Hong Kong, but carries out 40 per cent of his duties outside Hong Kong—question whether whole of his emoluments subject to Hong Kong salaries tax—Inland Revenue Ordinance, s. 8(1).

Board had jurisdiction to hear the appeal even though the notice of appeal was lodged out of time because it was sufficient if the notice complied with the spirit rather than the letter of section 66.

The appellant, primarily resident in Hong Kong, was the Technical Director of a Hong Kong Company which was the subsidiary of an American Company. His emoluments were paid by the American company to his account in a bank in the U.S.A. On a time distribution of the taxpayers functions, approximately 60 per cent of his functions were carried out in Hong Kong on account of the Hong Kong company whilst of the balance of his duties approximately 20 per cent was carried out outside Hong Kong on account of the parent American company 15 per cent on account of the Hong Kong company and 5 per cent on account of a separate enterprise. For the two years of assessment in question he was at first charged with salaries tax on the proportion of his stated annual income calculated on the basis of the number of days he spent in Hong Kong. Subsequently additional assessments were issued to charge the differences between the full annual emoluments received by the taxpayer for the two years and the amounts on which he was first assessed. The taxpayer appealed against the additional assessments.

The notice of appeal did not come into the hands of the clerk to the Board of Review until a few days after the expiry of the period of one month prescribed by section 66 of the Ordinance and this raised the question of the jurisdiction of the Board to hear the appeal. On appeal.

Decision: Appeal dismissed. Assessments confirmed.

B. M. Kelly for the Commissioner of Inland Revenue.

Cases referred to:—

1. McMillan v. Guest, 24 T.C. 190.

2. Goodwin v. Brewster, 32 T.C. 80.

3. The King v. Lincolnshire Appeal Tribunal, (1917) 1 K.B. 1.

Reasons :

The taxpayer was appointed in July 1966 by G. U. Inc. of Wisconsin, U.S.A. to be the Technical Director of its subsidiary company in Hong Kong incorporated under the name of U. Co. Ltd. In October 1968 the subsidiary company changed its name to C. Hong Kong Ltd. and the taxpayer became its Managing Director.

The returns submitted by the taxpayer for the years of assessment 1969-70 and 1970-71 declared his employer as G. U. Inc. and the nature of his employment as Managing Director.

The employer's return submitted by C. Hong Kong Ltd. for 1969-70 shows the taxpayer employed as Managing Director of that Company.

The Commissioner's written determination also contains the following statements of facts which the taxpayer accepts as correct : —

(1) The taxpayer's emoluments are deposited half-monthly in a United States Bank by G. U. Inc. The full amount is included in a Management Fee charged to C. Hong Kong Ltd. by G. U. Inc.

(2) The taxpayer is primarily located in Hong Kong.

(3) He may perform some services in other locations such as Taiwan or Japan. These services are connected with the promotion of sales. He has also represented G. U. Inc. in the establishment of manufacturing facilities in Taiwan. No separate payment is made for such services.

(4) The time distribution of the taxpayer's functions is estimated to be as follows : —

Managing Director of C. Hong Kong Limited.	60%
Market survey and sales promotion of G. U. Inc.'s products in Southeast Asia	20%
Salesman in Southeast Asia of C. Hong Kong Limited products	15%
Establishment of manufacturing facilities in Taiwan	5%

For the 2 years of assessment in question, the taxpayer was at first charged with salaries tax on the proportion of his stated annual income calculated on the basis of the number of days spent in Hong Kong.

Subsequently additional assessments were issued to charge the differences between the full annual emoluments received by the taxpayer for the two years amounting to $146,156.00 and $151,772.00 respectively and the proportions of income based on the number of days spent in Hong Kong as originally returned and taxed in the respective sums of $98,632.00 and $111,834.00. The differences, being additional income, amount to $47,524.00 and $39,938.00 and they form the subject matter of the present appeal. The following summary shows how the figures are arrived at : —

Year of Assessment	*Additional Income*	*Additional Tax*
1969-70	$47,524 ($146,156 less $ 98,632)	$7,224
1970-71	$39,938 ($151,772 less $111,834)	$5,990

The only point relied on by the taxpayer is that in the course of his employment he had to perform other duties for G.U. Inc. besides managing the business of C. Hong Kong Ltd. in Hong Kong. He therefore claimed that he should be taxed only on his income for the number of days he spent in Hong Kong. According to him if one accepts the approximate time distribution of his functions as detailed in para. 4(4) above, then his taxable income would be even less.

For the Revenue, it is argued that the source of the taxpayer's income is his office as Managing Director of a Hong Kong company and that following the case of **McMillan v. Guest**[1], the office of a company director is located where the company is located. In that case the Court was dealing with a claim under Schedule E of the Income Tax Act 1918, concerning tax "in respect of all public offices or employments of profit". The Revenue contends that there is no material difference between that and the language used in section 8(1) of the Inland Revenue Ordinance, *Cap.* 112, which charges a salaries tax on every person "in respect of his income arising in or derived from the Colony from . . . any office or employment of profit".

In **McMillan's** case[1], the director of a limited company incorporated in England was appointed the general manager of an associated company in America. He took up residence there but remained a director of the company in England. He ceased, however, to take any part in the direction of the English company on his appointment to America. The question was whether the remuneration received by him as a director of the company in England was liable to tax. The case went up to the House of Lords where Lord Atkins says at p. 202 of the report : —

[1] 24 T.C. 190.

> "The office of director of an English company, the head seat and directing power of which is admitted to be in the United Kingdom, seems to me of necessity to be located where the company is . . . I consider it to be clear that the director of an English company is resident in the United Kingdom wherever he resides and whether or not he takes part in directing the affairs of the company, holds an office in the United Kingdom".

McMillan v. Guest (*supra*) was referred to in **Goodwin v. Brewster**[2], in which the taxpayer was at all material times an ordinary director and the Managing Director of a company resident and controlled in the United Kingdom. A few years after his initial appointment he was sent to Trinidad to supervise the company's business there. He was charged with tax under Schedule E notwithstanding that he was resident in Trinidad. His fees as an ordinary director were not in issue. As to his salaries as Managing Director, the company had been paying these to him in England, but for the year of assessment under appeal, they were paid to him in Trinidad. The Court of Appeal found that the taxpayer in fact held two separate offices in the company. Following **McMillan v. Guest** (*supra*), the Court held that the office of the taxpayer as Managing Director was situated in the United Kingdom. Jenkins, L.J., says at p. 98 : —

> "that being so, it is within the Schedule which applies to offices or employments of profit held or exercised within the United Kingdom, and if it is in truth held here it matters not that it is exercised elsewhere. Therefore I cannot think that the subsequent history of the Appellant's connection with activities in Trinidad can avail Mr. Mustoe (Counsel for the Appellant). . . The Managing Director's agreement ran its full period; the office was never vacated; it remained throughout the original office in the United Kingdom held by the Appellant, although the services he rendered to the company and the functions he performed were in fact limited locally to Trinidad".

Applying the principles laid down in the cases cited above, we hold that the taxpayer's office as Managing Director is located in Hong Kong. Consequently his emoluments for the 2 years of assessment in question represent income arising in or derived from an office in Hong Kong and as such are taxable under section 8(1) of the Ordinance.

We would like to add that in the course of the hearing of the appeal, Mr. Kelly, who appeared for the Revenue, also addressed us at our invitation as to whether we had jurisdiction to hear the appeal regard being had to the fact that the notice of appeal was addressed to the "Inland Revenue Department, *Board of Appeals,* P. O. Box 132". The notice, thus addressed, was dated the 28th August 1971, and must have been posted on the same day or soon thereafter. In any case it was delivered at the office of the Inland Revenue Department on the 31st August 1971 which was just within the statutory period of one month after the transmission to the taxpayer of the Commissioner's written determination. There was then some delay and the notice of appeal did not come to the hands of the Clerk to the Board of Review until a few days after the expiry of the period of one month. Mr. Kelly made it clear that the Revenue did not intend to rely on any technical objection which might be open to the Revenue. In any case he quite frankly conceded that in this case if the notice

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[2] 32 T.C. 80.

of appeal sufficiently complied in form with the Ordinance, then it must be regarded as having been technical deficiency in the way in which the notice was addressed, it would be a merely procedural matter which should not affect the Board's jurisdiction to hear and determine the Appeal.

We have since had the opportunity of considering the matter more closely and in our view the notice of appeal sufficiently complied with the provisions of section 66 of the Ordinance which directs that within one month after the transmission to a taxpayer of the Commissioner's written determination, he shall, if he wishes to appeal, "*give notice of appeal to the Board*". Although the same section provides that "no such notice shall be entertained unless it is given in writing to the Clerk to the Board . . .", the notice is essentially a notice to the Board. It is also relevant to note that there is no provision in the Ordinance or in any of the regulations made thereunder as to the location of the Clerk's office. Moreover, there is no requirement of personal service. Having addressed and posted the notice to the "Board of Appeal" in the way that the taxpayer did in this case, he has, in our opinion, sufficiently complied with the provisions of the Ordinance so far as to the form of the notice is concerned. Once we arrive at that conclusion, we do not think he would be held responsible for any delay by some one over whom he had no control in delivering the notice to the Clerk to the Board. As Lord Reading says in his judgment in **The King v. Lincolnshire Appeal Tribunal**[3] concerning an application to dismiss an appeal for failure to give proper notice of appeal to a tribunal under the Military Service (Regulations) Order, 1916, "it is not necessary to comply with the letter when there is compliance with the spirit of the regulation . . .". We wish to make it quite clear that our decision is confined to the circumstances of this case and conclude by again adopting the language of Lord Reading who says towards the end of this judgment: "it must not be assumed from any observation I have made it is not necessary to give the proper notices. All I am deciding is that in the present case there has been a compliance with the regulation to such an extent and in such circumstances that the application fails". Thus, other considerations may apply under different circumstances.

It follows from what we have said that in our opinion we have jurisdiction to adjudicate upon this appeal. However, having come to the conclusion that the appeal is devoid of merits, the same is dismissed and the additional assessments for the years of assessment 1969-70 and 1970-71 are hereby confirmed.

[3] (1917) 1 K.B. 1 at p. 9.