

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. BR 19/74

Board of Review :

L. J. D'Almada Remedios, *Chairman*, W. I. Cheung, R. Beynon, & E. J. V. Hutt, *Members*.

27th June 1975.

Salaries tax—appellant employed by Hong Kong company to render services outside Hong Kong—appellant appointed director and chairman of company without additional remuneration—appellant not liable to salaries tax under section 8(1A)(b) of the Inland Revenue Ordinance, Cap. 112.

The appellant who was associated with a world-wide business organization based in London became the employee of a Hong Kong company which was being taken over by the organization. After the completion of the take-over the appellant was appointed a director and chairman of the Hong Kong company with retrospective effect as from the date he became an employee of the company. He continued to receive the same salary and was not paid any fees as a director. The appellant's work was to coordinate business for the company with its international clients and for the year of assessment 1972/73 the appellant was in Hong Kong for 5 days. On being assessed for salaries tax on the remuneration he received from the Hong Kong company the appellant appealed on the ground that he was not remunerated for the office which he held as a director but for services rendered by him outside Hong Kong as an employee of the company. On appeal.

Decision: Appeal allowed.

A. A. Iles for the appellant.

Benjamin Shih for the Commissioner of Inland Revenue.

Case referred to:—

1. Lee v. Lee's Air Farming Ltd., (1960) 3 All E.R. 420.

Reasons :

Mr. L. J. D'Almada Remedios (Chairman) :

On the evidence before us we find the following facts : —

1. The U.K. company is a world wide organization carrying on an advertising business. The Appellant has been associated with this company for 15 years.

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2. B. Limited was a local company also carrying on an advertising business. In July 1971 the U.K. company acquired “de facto” control of B. Limited as a result of take-over negotiations. The take-over was completed in September 1971.
3. From July 1971, the Appellant worked for B. Limited at a salary of US\$6,000 per annum. When the take-over was completed the Appellant continued with the same salary from the new company (hereinafter called “the H.K. Company”).
4. On the 24th of January 1972, the Appellant accepted appointment to the executive post of “Chairman” of the H.K. Company. His remuneration was stated to be retrospective as from the 1st of July 1971 at the rate of US\$6,000 per annum.
5. By a resolution dated the 25th of January 1972, the Appellant and another were also appointed as additional directors. The Appellant was also appointed chairman of the Board of Directors effective from the 25th of January 1972.
6. The appointment of the Appellant as “Chairman” and additional director did not entail any increase of the Appellant’s remuneration and he continued with a salary of US\$6,000 per annum for the year of assessment 1972/73 (which is the year of assessment to which this appeal relates).
7. There was no Ordinary Resolution of the Company authorizing the payment of directors fees to the Appellant as required by Article 11 of the H.K. Company’s Articles of Association.
8. For the year of assessment 1972/73 (with which we are concerned) the Appellant was not in Hong Kong except between the 18th October 1972 to the 23rd October 1972 which is 5 days.

What we have to decide is whether the Appellant is liable to Salaries Tax having regard to the provisions of section 8(1A)(b)(ii).

The facts which we have set out above and the evidence of the Appellant have not been challenged nor put in issue by the Assessor. The Appellant’s evidence is that he is highly experienced in the advertising business and has been an advertising executive for 19 years. He has been associated with the U.K. group of companies (of which the H.K. Company is a subsidiary) for 15 years. He has never been the managing director of the H.K. Company although he has held that position with some of the other companies in the group. He stated that he has worked for the H.K. Company since July 1971 and that his work is to co-ordinate business for the Company with almost all of its international clients. His work involves contacts with head offices of prospective and existing clients. In acquiring and promoting the business he must make out what he refers to as “submissions” to clients by producing advertising campaigns through different media, such as television, periodicals, etc., for clients’ approval. His duties would be to make contacts with and present these

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campaigns and submit them to regional managers in different areas. His evidence is that he is employed by the H.K. Company to do this work for which he receives his remuneration; that although he was appointed a director of the H.K. Company in January 1972, his salary has remained unchanged and he has received no additional salary or fee consequent upon his appointment. He says that his remuneration is not related to his function as a director but as an employee of the Company and that he received no directors fees as such. When questioned by the Board regarding the letter from the managing director to him dated the 24th of January 1972, confirming the agreement in which he is to assume the executive office of "Chairman of the Company", he stated that the appellation was to give him status in his relationship with clients as a person holding a senior executive position but that his salary was not the result of nor increased by such appointment.

A statutory declaration by a director of S. Limited who are the Secretaries of the H.K. Company, was introduced in evidence by consent. The salient points deposed to are, *inter alia* :

- (a) that no directors fees in favour of the Appellant have been voted or paid or received;
- (b) that no Directors' Meetings have been held since the 1st of July 1971, and that proceedings pertaining to Directors have been conducted by way of resolutions in accordance with clause 20 of the Articles of Association signed by directors;
- (c) that none of such resolutions have been signed by the Appellant;
- (d) that the Appellant was never appointed Managing Director of the H.K. Company; and
- (e) that the Appellant did not act as Chairman in any of General Meetings of the H.K. Company nor did he attend any such meetings.

No issue was taken on the contents of the Statutory Declaration by the Assessor who also informed the Board that the deponent was not required to attend for cross-examination. The Appellant confirmed the statements made in the declaration.

We find, on the evidence, that what the Appellant received from the H.K. Company are emoluments paid to him as an employee of the Company for the services he renders as stated by him in his testimony. Accepting, as we do, the Appellant's evidence we are unable to justify a conclusion that the whole or part of the remuneration he has received is attributable to or derived from the office which he held as a director. He became entitled to the remuneration for the services he performed before his appointment as a director; the salary he received was not increased when he was made a director. Prior to his becoming a director he was an employee of the H.K. Company. The fact that he continued to serve the H.K. Company with the same pay after he was made a director is consistent with the inference that what he received was paid to him as an employee of the H.K. Company. As

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he received nothing additional upon his being made a director, it follows as a corollary that his appointment did not attract a director's fee. It is clear that a director can be a servant of a company and receive remuneration in that capacity and not qua a director : see **Lee v. Lee's Air Farming Ltd.**¹. A director has no right to any payment for his services on the board except in accordance with the Articles. The unchallenged evidence is that he received no directors fees and that there was no Ordinary Resolution of the Company to sanction the payment of such fees to him as required by Article 11 of the Company's Articles of Association. On the facts as we see them the Appellant's appointment as an officer of the H.K. Company seems to us in keeping with the modern trend of having in the board a highly-respected employee to enhance the status of the man concerned either within the company or in his dealings with other companies or customers. Indeed, on the evidence the Appellant did not even appear to have rendered duties, intermittent or otherwise, to be performed at meetings of the board which make it unlikely, in view of his absences from the Colony, that what he received from the Company were allied to or form part of directors fees, for services rendered in that capacity.

It is hardly necessary to say that a holder of an office is not liable to Salaries Tax unless he is remunerated for the office which he holds. In the case we are concerned with we find that the Appellant was not remunerated for the office which he held as a director but for services he rendered as an employee of the H.K. Company. This being so, the Appellant is not liable to Salaries Tax by virtue of the provisions of section 8(1A)(b)(ii) of the Inland Revenue Ordinance.

The Assessor has thought fit to base his case and justify the assessment solely on the ground that as the Appellant was employed by a Hong Kong company and received payment for such employment, he is liable to Salaries Tax notwithstanding that the Appellant renders outside the Colony all the services in connection with his employment. Having regard to the amendment of the Ordinance as found in the section to which we have referred we do not agree with that submission. The assessment is, therefore, annulled.

Mr. W. I. Cheung (*Member*) :

I agree with Chairman and have nothing to add.

Mr. R. Beynon (*Member*) :

I also agree that the assessment should be set aside.

Mr. E. J. V. Hutt (*Member*) :

I was not impressed by the testimony of the Appellant which I found unconvincing in some respects but, as his evidence was neither disputed, challenged nor put in issue, I agree that in the result the assessment should be annulled.

¹ (1960) 3 All E.R. 420.