Case No. BR 2/74

Board of Review :

Chan Ying-hung, *Chairman*, David B. K. Lam, B. S. McElney & G. H. P. Pritchard, *Members.*

8th November 1974.

Salaries tax—taxpayer assigned to take up post in Hong Kong company, a wholly-owned subsidiary of a foreign company—salary and other expenses paid by Hong Kong company—taxpayer claimed to have worked partly in offices of the parent company outside Hong Kong—whether taxpayer's total emoluments for the year of assessment 1972/73 arose in or were derived from the Colony and were subject to salaries tax.

The taxpayer, an employee of an American company, was assigned to Hong Kong to take up a post in its wholly-owned subsidiary, a company incorporated in Hong Kong. The taxpayer's salary and rent for quarters were paid by the Hong Kong company. In his post, the taxpayer was responsible for quality control and sales development in the Far East area and in this connection the taxpayer spent 51 out of 305 days in the offices of the parent company outside the Colony. The Commissioner being of the view that the income received by the taxpayer for the period 1/6/71 to 31/3/72 arose in or were derived from a post in Hong Kong assessed such income to salaries tax. The taxpayer objected on the ground that he was an employee of the parent company and rendered part of his services outside Hong Kong. On appeal.

Decision: Appeal dismissed. Assessment confirmed.

Appellant absent and not represented.

Benjamin Shih for the Commissioner of Inland Revenue.

Reasons :

The only issue for us to decide in this Appeal is whether the Commissioner was right in finding that the emoluments received by the taxpayer during the year of assessment 1972/73 arose in or were derived from a source in Hong Kong and consequently assessable to Salaries Tax under section 8(1) of the Inland Revenue Ordinance (Cap. 112). Before dealing with the facts, let it be observed that under section 8(1) only income from the following sources is chargeable to tax : —(*a*) any office or employment of profits; and (*b*) any pension. Income derived by a person who "renders outside the Colony all the services in connection with his employment" is excluded (Section 8(1A)(*b*)(ii)).

According to the facts stated in the Commissioner's written determination, which we accept, the taxpayer was an employee of the Division of S. I. Inc., U.S.A. (hereinafter called "the United States Company") which had a wholly-owned subsidiary company incorporated

in Hong Kong (hereinafter called "the Hong Kong Company"). On the 1st June 1971, the taxpayer was assigned to Hong Kong to take up the post of "Director" with the Hong Kong Company. These facts were notified by the Hong Kong Company to the Inland Revenue Department. In its Employer's Return for the year of assessment 1972/73 the Hong Kong Company reported the emoluments of the taxpayer for the period 1st June 1971 to 31st March 1972 at $50,499.80. The taxpayer in his Salaries Tax Return for the same year of assessment reported the same amount as his income and stated that his employer was the Division of the United States Company and described his nature of employment as "Director". Accompanying the return was a Schedule showing that the taxpayer had spent a total of 51 days out of 305 outside the Colony during the period 1st June 1971 to 31st March 1972. There is no dispute that whatever the taxpayer's position may have been, he was on the pay roll of and received his emoluments from the Hong Kong Company. Whether or not the Hong Kong Company recovered the emoluments from the United States Company is, of course, a separate matter on which we have no evidence.

By a letter dated 3rd October 1972 written by Messrs. Lowe, Bingham & Matthews, who were the tax representatives of both the Hong Kong Company and the taxpayer, to the Inland Revenue Department, it was declared that the taxpayer had a verbal contract of employment with the United States Company and that the services rendered by him included quality control and vendor development in the Far East Area.

Then on the 2nd November 1972 the Hong Kong Company advised the Department that the post of "Director" had been abolished upon the termination of the taxpayer's employment. This was followed by a letter dated the 23rd January 1973 that the taxpayer was not employed in Hong Kong but had been sent over by the New York Office of the United States Company as their representative.

Further correspondence was exchanged between the Hong Kong Company and the Inland Revenue Department in which the Hong Kong Company confirmed by giving affirmative answers to questions put to them by the Department with a view to determining whether : —

(*a*) the Hong Kong Company was a wholly owned subsidiary of the United States Company;

(*b*) all expenses including salary and rent for quarters provided for the taxpayer were paid by the Hong Kong Company and charged in their accounts; and

(*c*) the taxpayer was "transferred / assigned / or seconded" to take up a post in the Hong Kong Company.

On these facts, the Commissioner came to the conclusion that the taxpayer held a post with the Hong Kong Company. He pointed out that although the taxpayer had spent a total of 51 days out of 305 outside the Colony during the year ended 31st March 1972, no details had been furnished as regards the places he had visited nor the purposes of his visits. He

held, therefore, that even if the taxpayer had rendered services during his temporary absences from the Colony, such services could have been only incidental to the exercise of his employment in the Colony in the service of a Hong Kong Company, which carried on business in Hong Kong. He considered the taxpayer's total emoluments were from a source within the Colony and his entire income was assessable to Salaries Tax under section 8(1) as income arising in or derived from the Colony.

The appeal to us was heard in the absence of the taxpayer in pursuance of the provisions of section 68(2D) of the Inland Revenue Ordinance. The only additional evidence submitted to us by the taxpayer consisted of certain correspondence exchanged between him and his tax representatives Messrs. Lowe, Bingham & Matthews whose retainer was withdrawn after the filing of the notice of appeal. The purpose of introducing this correspondence is to show that, according to Messrs. Lowe Bingham & Matthews, who also represented the Hong Kong Company, embarrassing consequences could arise for the Hong Kong Company since they had claimed the emoluments paid by them to the taxpayer as a deduction against their taxable profits. If, therefore, it was established that the taxpayer was in fact not an employee of the Company then the Inland Revenue Department could take the attitude that a deduction not incurred in the production of income had been incorrectly deducted and the Company could then be further assessed for tax which would amount to considerably more than what has been over-charged to the taxpayer.

The correspondence also includes the taxpayer's written instructions to his former tax representatives in which he emphasized that his position as Director entailed control of the entire Far East and that the United States Company had offices in Taiwan, Japan and Korea where a greater volume of business was done than in Hong Kong.

Another piece of additional evidence introduced by the taxpayer was a letter dated the 15th March 1971 written by Mr. L., who is apparently a very senior officer of the United States Company, to Mr. Y., the Manager of the Hong Kong Company purporting to show that the taxpayer had been appointed for the purpose of enlarging the United States Company's purchases of soft goods in the Far East and that his functions were limited to the K. Division although it was not intended that he should interfere in any way in running the Hong Kong Office.

We do not think the additional correspondence referred to in the above paragraphs advances the taxpayer's case at all. In the first place, it is our view that any embarrassment which may be caused to the Hong Kong Company is not a matter relevant to the taxpayer's liability. In the second place, the taxpayer's claim that he had not been employed by the Hong Kong Company but by the United States Company had been made by the taxpayer himself in his Salaries Tax Return and the Hong Kong Company had made clear in letters addressed by their tax representatives to the Inland Revenue Department that the taxpayer had a verbal contract of employment with the United States Company and was not employed in Hong Kong but sent over by the United States Company as their representative.

Considering the evidence before us as a whole, we have come to the same conclusion as the Commissioner that the taxpayer held a post with the Hong Kong Company. In our opinion, it matters not whether he was sent to the Hong Kong Company on assignment, transfer or secondment. Strictly speaking, it would have been quite sufficient for the Revenue to establish that the taxpayer received income which arose or were derived from a post in Hong Kong without specifically proving that he was employed by the Hong Kong Company. This much at least the Revenue has certainly succeeded in doing.

With regard to the bare statement made by the taxpayer that a greater volume of business was done in Taiwan, Japan and Korea than in Hong Kong, this has not been supported by facts and details. The only occasion on which the taxpayer condescended to particulars was when he said in the Schedule which accompanied his Salaries Tax Return that he had spent a total of 51 days out of 305 outside of Hong Kong during the material period.

Although the lack of details was one of the reasons given by the Commissioner for his decision, and the taxpayer has had every opportunity of furnishing this Board with the relevant details, we have been left completely in the dark as to whether the taxpayer performed any work outside Hong Kong, and, if so, the nature and details thereof. This really disposes of the argument that the taxpayer had been sent over to look after the whole of the Far East and not just Hong Kong, and makes it unnecessary for us to consider the hypothetical question whether the services during his absences from the Colony, if rendered by him at all, were incidental to his office of employment in Hong Kong.

For these reasons, we are of the opinion that the taxpayer has failed to discharge the onus of satisfying us that the assessment appealed against is excessive or incorrect and the appeal is, therefore, dismissed. It follows that the assessment as determined by the Commissioner is confirmed.