Case No. BR 3/74

Board of Review :

L. J. D'Almada Remedios, *Chairman*, Peter P. L. Li, N. J. Gillanders, & Mrs. Susan Yuen, *Members.*

5th September 1974.

Salaries tax—income arising in or derived from the Colony . . . from any office or employment of profit—taxpayer employed by a foreign company registered in Hong Kong under the Companies Ordinance (Cap. 32) and registered under the Business Registration Ordinance (Cap. 310)—under the terms of employment taxpayer required to travel outside Hong Kong to direct and supervise all Service Personnel of the company in the Far East—salary paid in Hong Kong out of funds remitted to Hong Kong from abroad—whether income arose in or derived from the Colony.

The appellant's employment was with a branch of a foreign company carrying on business in Hong Kong. He was remunerated for services he rendered to the company in Hong Kong. His contract also required him when necessary to render services outside Hong Kong. The appellant claimed that he was not caught by section 8 of the Ordinance as his salary emanated from a source outside the Colony on the ground that expenses required for the operation of the local company (including the appellant's salary) were remitted from abroad. On appeal.

Decision: Appeal dismissed.

Reasons :

W is a company incorporated outside Hong Kong. It carries on business in Hong Kong. It is registered with the Business Registration department. The company is also registered locally under the Companies Ordinance. (We will hereafter, for convenience, refer to the Hong Kong Office as "W (HK)".) There appears to be some dispute as to where the head office of the company is located but for the purposes of this appeal it is immaterial.

The Appellant is an employee of W. He is the Service Representative of a Division of the company. The terms of his employment require him to provide direction and supervision in service activities to all Service Personnel in the Far East. In the course of his employment it is necessary for him, from time to time, to travel to designated places outside the Colony. The Appellant's contention is that his salary emanates from a source outside the Colony for which reason he appeals against the assessment for salaries tax (year of assessment 1972/73) on the ground that no allowance has been made for the period he has spent on services rendered outside the Colony during the basis period.

The principal facts are not disputed. The Appellant's employment was negotiated in Hong Kong and the offer and acceptance finalized with W (HK). It was, initially, a verbal contract but as the Appellant wanted something in writing regarding his contract, the terms of the Appellant's employment were set out in a letter dated the 3rd of December, 1971 from W (HK). This letter is signed by an Area Director. It states, *inter alia*, that the Appellant will continue reporting to the Area Director when required and will assist the Area Director in any way necessary. The Appellant is not eligible for home leave benefits which only apply to employees in the expatriate classification. The letter refers to the Appellant remaining on the "payroll as a local national employee" which, as submitted by the Revenue, is suggestive of the Appellant being an employee of the Hong Kong Branch as distinguished form an employee of the head office in Geneva or employee of the Tokyo Branch or Manila Branch or any associated company in New York. The Appellant's salary is paid monthly by W (HK) with cheques drawn by the Hong Kong establishment in their account with the First National City Bank.

The Appellant's case rests on the footing that W is divided into Divisions and that all funds required for the operation of the various divisions of W (HK) are remitted to the company in Hong Kong from the computer centre for the W Group of companies in U.S.A. As such W (HK) has no local funds of its own, distributors are billed through W in U.S.A. The system is that the Appellant, as the person in charge of his division, like various other members of other divisions concerned with their own affairs, will work out an estimate based on a projected expenditure for the coming month. This is processed for approval through the financial director and supervisor of W (HK). The tele-computer centre of W in the United States is then notified of what the expected expenditure will be and funds are then remitted in accordance with the estimate. If the funds remitted are not wholly absorbed, the balance is retained by W (HK) and carried forward for the next month. The allocation of funds for each Division relates to all items of estimated expenditure including salary. As W (HK) operates on remittances of funds from abroad out of which the Appellant's salary is paid, it is contended by the Appellant that his income is not derived from Hong Kong but from a source outside the Colony since the branch office in Hong Kong has no local funds of its own.

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 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.

W carries on business in Hong Kong. It is chargeable to tax in respect of profits arising in or derived from the Colony. It earns assessable income and files profits tax returns. A foreign corporation that has established a place of business in the Colony is regarded no differently, for tax and other purpose, as any other company carrying on business here. It is required to be registered under the Companies Ordinance and its rights and liabilities are governed as if it were a company incorporated in Hong Kong. The Appellant works in Hong Kong. He entered into employment in Hong Kong. The returns

filed by the Hong Kong Branch of W refer to the Appellant as employee. As W (HK) earns assessable profits, it is reasonable to assume that salaries paid by W (HK) to the Appellant are charged against the production of Hong Kong profits. It would seem, therefore, that the Appellant is remunerated for services he renders to the Hong Kong Branch although his contract also requires him to render services outside the geographical area of the Colony.

In the circumstances, can it be said that the Appellant's salary does not arise in or is derived from the Colony? We think not. In our view, it makes no material difference that funds required for the operation of W (HK) are supplied from a source outside the Colony. What we have been told by the Appellant in regard to the manner in which finance is supplied, is really the means by which W (HK) is enabled to conduct its business here. The position *vis-a-vis* W (HK) and the Appellant is not affected by the business arrangements which the head office may have with the local branch establishment. If a company carries on business in Hong Kong by having its capital or revenue remitted from elsewhere, the employees of the company do not, on that account, become exempt from salaries tax. There is every reason to assume that the funds when remitted become appropriated to the account of W (HK) which is under a legal obligation to pay and has been paying the Appellant's salary. One does not have to trace the source from which a company derives the means to pay an employee's salary if on the facts it is clear that his employment is with and his income paid by a company carrying on business in Hong Kong.

For the reasons given and having regard to all the circumstances of the case, we are of the view that the Appellant's salary arises in and is derived from the Colony. Accordingly, the appeal must be dismissed and the assessment confirmed.