Case No. BR 6/72

Board of Review :

L. J. D'Almada Remedios, *Chairman*, A. Zimmern, A. E. Chaney & A. G. Hutchinson, *Members.*

23rd May 1973.

Salaries tax—income arising in or derived from the Colony from … any office or employment of profit—employee of Hong Kong company—taxpayer's emoluments deposited in bank in U.S.A. by parent company of Hong Kong company—taxpayer's claim that while appointed by necessity as resident director of Hong Kong company, his actual responsibility lies in carrying out professional duties outside Hong Kong—Inland Revenue Ordinance, s. 8(1).

The appellant, an architect, was appointed as Executive Director of a Hong Kong subsidiary of an American company. The appellant's salary was credited to his bank account in the U.S.A. While nominally carrying out the duties of director of the Hong Kong company the appellant spent a large proportion of the time in question in carrying out professional duties on account of the company outside Hong Kong. The appellant appealed against the Commissioner's assessment of salaries tax on the whole of his income during the time in question. On appeal.

Decision: Appeal dismissed and assessment confirmed.

Reasons:

The issue raised in this Appeal is whether the Appellant is liable to Salaries Tax for the whole of his emoluments earned during the Year of Assessment 1970-71 or only for that part of it proportionate to the days he spent in Hong Kong during the basis period.

The facts show that an American company of architects, engineers and planners with offices in various parts of the United States intended to work towards the establishment of an international operation to include the Far East. For that purpose, Hong Kong was to be the principal base. It is clear that with this objective in mind the company entered into discussions with the Appellant for his employment. The Appellant is an authorised architect in Hong Kong. He joined the American company in January 1967. By March 1967, the American company had set up and incorporated a company in Hong Kong known as L. A. D. (Hong Kong) Limited to carry on the business of Architecture and Engineering. The Appellant was appointed Executive Director of the Hong Kong Company (which we will hereafter refer to as "the Company') and was responsible for its management in the Colony. The Company's returns for tax purpose were signed by the Appellant. It shows that he is employed by the Company as a director. The Appellant's duties include the preparation and supervision of projects in Hong Kong and over a wide area of Asia. He is required to travel

outside Hong Kong frequently and for the year of assessment with which we are concerned he spent 254 out of 365 days of the year in the Colony. He, therefore, claims that he ought not to be assessed for salaries tax for the whole of his income, but only for the period during which he remained in the Colony. He further claims that the salary paid to him is not by virtue of his being a director of the Company, but for the services he renders in his capacity as an architect and that it was only because the Companies Ordinance requires a resident director that he was appointed to fill the post.

The appendices to the Commissioner's Determination (being letters from the U.S. company, L. A. D. Co., which were admitted in evidence by consent) confirm the Appellant's contention that the salary he receives is for the professional duties he performs as an architect and not by virtue of his being a director. The Appellant says that as he is paid for his professional architectural services he could resign the post of director without prejudice to his remuneration and this is confirmed in one of the letters from the U.S. Company, L. A. D. Co.

We have been urged by the Revenue to deduce from the evidence contained in the appendices produced that the Appellant's salary is earned by reason of his being a director. We do not find ourselves justified in drawing that inference. It is obvious to us that the value of the Appellant to the Company lies in his professional capabilities as an architect, which is the basis of his employment and for which he is remunerated. It is consistent with the circumstances of this case that his appointment as a director was to fill the gap required by the Companies Ordinance and as a measure of expediency and convenience. But although it can be said that Appellant's qualification as an architect and the services he can render in that capacity attracts his remuneration, the fact that he has been appointed as a director is equally consistent with his position in the Company being such that he is required to discharge a dual function: (*a*) that of a project architect, and (*b*) that of a director. It is not disputed, and it is part of the agreed facts, that he is responsible for the management of the Company in the Colony. The remuneration, therefore, entails and includes such duties as he must discharge or are expected of a director. Whilst we do not agree with the Revenue's contention that his salary is paid because he is a director, it is our view, however, that his salary includes such duties of a secondary nature, which as director he must undertake in the management of the Company.

The salary the Appellant receives is credited to his bank account in the United States. If his emoluments "arise in or are derived from the Colony" the fact that his income is credited to his account abroad would not exempt him from liability. The notion that an employee is not assessable to tax for the period during which he renders services outside the Colony is also a common misconception. For the purpose of determining liability all the facts must be looked at. On the facts of this case we would say that his income arises in and is derived from Hong Kong. We do not see how it could be otherwise. Here we have a Hong Kong company. The Appellant, who is an architect in Hong Kong, is appointed a director of the company. The company carries on business in Hong Kong. The Appellant serves the company. He also manages the company. He is remunerated by the company. Frequently he may have to travel abroad as part of the services he performs for the company.

When a combination of all the facts are considered, we are unable to say that his income is not derived from Hong Kong notwithstanding that from time to time or ever so often he may be required to attend to the business interests of the Company outside Hong Kong. Even if the bulk of the Appellant's work relates to projects in other places, this feature in itself would not exclude chargeability to tax, but is merely a factor to be considered together with all the other circumstances of the case in deciding whether his income is derived from Hong Kong. That the Appellant's income is so derived having regard to the facts of this case, we have no doubt and, accordingly, this assessment is confirmed subject to such allowances as the Appellant may be entitled to claim under the Ordinance.