Case No. BR 7/73

Board of Review :

L. J. D'Almada Remedios, *Chairman,* B. A. Bernacchi, Q.C., G. E. Fowle & R. S. Huthart, *Members.*

12th December 1973.

Salaries tax—income arising in or derived from the Colony from … and office or employment of profit—taxpayer employee of American company temporarily resident in Hong Kong—his emoluments paid by the American company into his bank account in the U.S.A.—employee not employed by, or responsible to, the Hong Kong subsidiary of the American company—question whether the whole of the income of the employee liable for Hong Kong salaries tax—Inland Revenue Ordinance s. 8(1).

The appellant, an employee of an American company, was stationed temporarily with the Australasian Area Headquarters of the company in Hong Kong. He was not employed by, or responsible to, the Hong Kong subsidiary of the American company; and his emoluments were paid by the American company to his bank account in the U.S.A. during a period of 137 days. The appellant was resident in Hong Kong for 108 days. He appealed against an assessment of salaries tax payable on the whole of his income during the period of 137 days in question. On appeal.

Decision: Appeal allowed.

Reasons :

The Appellant is an employee of a foreign corporation known as R. Company, whose place of business is in North Carolina, U.S.A. We will refer to this company as the "U.S. Company".

The U.S. Company has various subsidiaries in different parts of the world, of which R. (HK) Limited is one. We will refer to this company as the "H.K. Company". The U.S. Company has an Australasian Area Headquarters at present also in Hong Kong. We will refer to the Headquarters as the A.A. HQ.

The Appellant is not an employee of the H.K. Company.

The Appellant entered into employment with the U.S. Company in the United States. His salary was paid in U.S. dollars in America by the U.S. Company. He worked in the United States as an assistant to the Advertising Manager for sales promotion.

It is part of the general set-up to the U.S. Company to have an A.A. HQ. responsible to or as part of the international division of the Company. It looks after the affairs of the U.S.

Company abroad and co-ordinates the work of its subsidiaries. The A.A. HQ. includes India, Australia, Guam, Korea and Hong Kong.

The A.A. HQ. is not a division or part of the H.K. Company. It is an operational section of the U.S. Company. It has no separate legal identity of its own and it is part of a departmental function of the U.S. Company.

On the 27th June 1971, the U.S. Company posted the Appellant to its A.A. HQ. and he was responsible for advertising media and sales promotion for the Australasian area. His duties do not include responsibility for advertisements of H.K. Company. That company has its own advertising manager who was not responsible to the Appellant.

The H.K. Company does not act for and is not the A.A. HQ. of the U.S. Company although obvious confusion has arisen because the address for A.A. HQ. in the Colony is one of the addresses also of the H.K. Company. Further confusion has arisen as a result of the form of the A.A. HQ. letterheads.

When the Appellant was assigned to Hong Kong he remained an employee of the U.S. Company and during his stay until he left the Colony in August 1972 his duties differed very little from the duties he performed while he was in the United States. Basically, he did the same job but performing it in closer proximity to the area covered by his work, despite the rather peculiar wording of the return dated May 29th, 1972.

The H.K. Company had no authority or control over the Appellant who was answerable to the international division manger of the U.S. Company.

A management charge is payable by the H.K. Company to the U.S. Company for services performed by the parent company. This charge includes an administrative charge and expenses incurred solely by the area headquarters itself. The manner in which these charges are apportioned to places covered by the Australasian area does not suggest any difference or distinction for the period after the Appellant left the Colony and returned to the United States.

While in Hong Kong the Appellant resided in a flat of which he was the tenant. However, the rent for the flat was paid by the U.S. Company.

During the period of 137 days from the 1st of April 1972 to the 15th of August 1972, the Appellant was present in the Colony for only 108 days.

We reach these findings of fact, on the documents produced by both the Appellant and the Commissioner, the evidence of a witness Mr. Thompson and the findings of facts, by the Commissioner so far as they have been admitted by the Appellant or we ourselves agree with them. We have also borne in mind that under the Inland Revenue Ordinance the onus is cast on the Appellant to show the Commissioner's decision was wrong.

Having regard to out findings on the facts, the Appellant is not caught by section 8(1) of the Inland Revenue Ordinance. The Appellant was not connected with the H.K. Company; he was not an employee of that company and he received no income from that company. Apart from his not being in "employment" with the H.K. Company—much less in an "employment of profit" which is essential before liability can arise under that section—his income as such, did not arise nor was it derived from the Colony. The Commissioner has quite correctly stated: "… it is necessary to decide whether the taxpayer, at the pertinent time, derived income from an office or employment with the parent company in the U.S.A., or from an office or post of employment with the Hong Kong subsidiary company".

It is clear from the Commissioner's determination that his conclusion was arrived at on the premise that the Appellant was the assistant manager of the Australasian Area Headquarters which he regarded as part of the organization of the H.K. Company. The material before the Commissioner was of a limited nature and he did not have the benefit of the evidence adduced before the Board. Our decision must be based on the findings we have made on the evidence. Indeed, the Commissioner's representative concedes that this case turns on a question of fact : was the Appellant's income derived from the H.K. Company or the U.S. Company.

For the reasons we have given and based on our findings, this appeal is, therefore, allowed. The Appellant is not taxable on the whole of his income, but only on that part of it derived from services rendered in the Colony by virtue of section 8(1A)(*a*) of the Ordinance.