

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D101/01

Salaries tax – non-attendance at hearing – section 68(2D) and 68(2B) of the Inland Revenue Ordinance (‘IRO’) – employment – source of income – section 68(4) of the IRO – whether liable to salaries tax – onus of proof.

Panel: Ronny Wong Fook Hum SC (chairman), Samuel Chan Yin Sum and Ng Ching Wo.

Date of hearing: 19 October 2001.

Date of decision: 14 November 2001.

The appellant was employed by Company A during the period between 1 April 1997 and 24 September 1997. The appellant was in Hong Kong for a total of 149 days during this period of employment. The appellant commenced employment with Company B on 4 November 1997. Between 4 November 1997 and 31 March 1998, the appellant was in Hong Kong for a total of 90 days.

The issue is whether the appellant is assessable to salaries tax in respect of his earnings from Companies A and B. The appellant contends that he is not so assessable as he rendered outside Hong Kong all the services in connection with his two employments. The appellant explained that he traveled all around in PRC and Taiwan and Hong Kong for first hand information and sources to the company.

The appellant was informed by notice dated 27 August 2001 of the hearing date of 19 October 2001 for his appeal. By e-mail message dated 16 October 2001, the appellant pointed out that he would not be able to attend the hearing.

Held:

1. The Board considered that the e-mail of 16 October 2001 did not contain any application and was not within the seven days’ period under section 68(2D) of the IRO. The Board has no alternative but to dismiss his appeal under section 68(2B) of the IRO.
2. Under section 68(4) of the IRO, the onus of proving that the assessment is incorrect rests on the appellant. The appellant’s own admission that he traveled all around PRC and Taiwan and Hong Kong for first hand information and sources to the

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company is consistent with the information furnished by Companies A and B to the assessor that the appellant rendered services to Companies A and B in Hong Kong. The Board is not satisfied that there is any error in the assessment.

Appeal dismissed.

Yeung Siu Fai for the Commissioner of Inland Revenue.
Taxpayer in absentia.

Decision:

Preliminary point

1. This is the Appellant's appeal against the Commissioner's determination dated 31 May 2001.
2. The Appellant lodged his appeal by notice dated 14 June 2001. By letter dated 3 August 2001, he explained to this Board that '... I do not stay or come back Hong Kong every two months for one or half a day only... But most likely, I'll not attend. There must not be any penalty towards my absence...'.

3. By notice dated 27 August 2001, the Appellant was informed of the hearing date for his appeal. His attention was drawn to the provisions of section 68(2D) of the IRO.
4. By e-mail message dated 16 October 2001, the Appellant pointed out that '... as I have already mailed your department as well as the tax department on the same day about one month ago, I would not be able to attend this meeting. I hereby would like to confirm again that I cannot and will not be in Hong Kong and attend this meeting'.
5. Section 68(2B) of the IRO provides:

' If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorized representative the Board may –

(a) if satisfied that the appellant's failure to attend was due to sickness or other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;

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(b) *proceed to hear the appeal under subsection (2D); or*

(c) *dismiss the appeal.*'

6. Section 68(2D) of the IRO further provides that:

' The Board may, if satisfied that on appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable on the application of the appellant made by notice in writing addressed to the clerk to the Board and received by him at least 7 days prior to the date fixed for the hearing of the appeal, proceed to hear the appeal in the absence of the appellant or his authorized representative.'

7. Mr Yeung for the Respondent submitted that the 16 October 2001 e-mail from the Appellant is not an application sent to the clerk of this Board seven days prior to the hearing of this appeal for the purpose of section 68(2D). It follows that the only available course open to this Board under section 68(2B) is to dismiss the appeal.

8. We agree with the submission of Mr Yeung. The e-mail of 16 October 2001 does not contain any application and is not within the seven days' period. It is difficult to spell out an application from the letter of 3 August 2001 as the Appellant did not state that his non-attendance was a matter of certainty. We have no alternative but to dismiss his appeal.

The substantive appeal

9. We would however state our views on the substantive appeal should we be wrong on the preliminary point.

10. During the period between 1 April 1997 and 24 September 1997, the Appellant was employed by Company A. He was in Hong Kong for a total of 149 days during this period of employment.

11. The Appellant commenced employment with Company B on 4 November 1997. Between 4 November 1997 and 31 March 1998, the Appellant was in Hong Kong for a total of 90 days.

12. The issue between the parties is whether the Appellant is assessable to salaries tax in respect of his earnings from Companies A and B. The Appellant contends that he is not so assessable as he rendered outside Hong Kong all the services in connection with his two employments.

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13. The Appellant explained to the Respondent that:

- ‘ 1/. I was responsible to [Mr C], Procurement Director at [Company B] and he was located Monday afternoon to Saturday afternoon weekly at the factory in China. I was also responsible to [Mr D], [Department E’s] Manager at [Company A] and he was located Monday to Saturday weekly at factory of Shenzhen.
- 2/. I reported my work in PRC to the company by telephone, contacting related persons and staying at the factories in PRC at unstable office hours.
- 3/. I received instructions and directions from my supervisors in PRC and over telephones and faxes and emails.
- 4/. My office hours at the China offices:

[Company B]	Mon-Sun: 9:00 a.m. to 10:00 p.m.
[Company A]	Mon-Sat: 8:15 a.m. to 6:30 p.m.

(My working hours of two jobs are not constant and normal due to my jobs nature reasons).
- 5/. My two jobs mainly responsible in purchasing, sourcing and traveling for factories visiting/auditing. I traveled **all around in PRC and Taiwan and Hong Kong for first hand information and sources to the company...**
- 6/. ...
- 7/. My uplines/supervisors were located in PRC. I did not require to attend meetings and or anything related my job progresses in HK office. I did not have set up in Hong Kong office, I mean table and chair of my own’.

14. In correspondence with the assessor, Company A informed the assessor that the Appellant was an assistant supervisor of Department E. He worked in China for only one day during the period from 1 April 1997 to 24 September 1997. The Appellant rendered service to Company A in Hong Kong for the same period.

15. Company B informed the assessor that the Appellant was employed as senior buyer for the period between 4 November 1997 and 31 July 1998. He was responsible for liaison with the suppliers or the vendors and he stayed half and half of his time in Hong Kong and Mainland China.

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16. Under section 68(4) of the IRO, the onus of proving that the assessment is incorrect rests on the Appellant.
17. His own admission highlighted in paragraph 13 above is consistent with the information furnished by Companies A and B to the assessor. We are not satisfied that there is any error in the assessment.
18. For these reasons, we dismiss the Appellant's appeal.