INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D11/03

Salaries tax – whether or not the appellant rendered outside Hong Kong all the services in connection with his employment with the employer – section 8(1A)(b)(ii) and 8(1B) of the Inland Revenue Ordinance ('IRO') – meaning of the word 'days' in section 8(1B) of the IRO.

Panel: Ronny Wong Fook Hum SC (chairman), Kenneth Ku Shu Kay and David Wu Chung Shing.

Date of hearing: 10 April 2003.
Date of decision: 9 May 2003.

The appellant was offered a job as 'Senior Accountant - stationed in PRC' by the employer. The appellant commenced work on 3 July 2000 and his employment with the employer was however terminated on 30 November 2000. The appellant was in Hong Kong for 71 days during the period of employment.

The issues before the Board are: (1) Did the appellant render outside Hong Kong all the services in connection with his employment with the employer with the result that his income is outside the tax net by virtue of section 8(1A)(b)(ii) of the IRO? and (2) If the appellant did render services in Hong Kong, should such services be disregarded under section 8(1B) of the IRO on the basis that his visits did not exceed 'a total of 60 days in the basis period for the year of assessment'?

On the first issue, the appellant says that the services that he rendered in Hong Kong were all 'passive' services which should be disregarded. On the second issue, the appellant maintains that given the relative ease on the part of the Revenue in obtaining the time that he came into and went out of Hong Kong, fractions of a day should not count as whole days.

Held:

1. The Board rejected the argument on 'passive' services. The question is whether the services in question were services 'in connection with his employment'. The Board had no doubt that the services were all in connection with his employment as the senior accountant of the employer.

2. The second issue turns on the proper construction of the word 'days' in section 8(1B) of the IRO. A long line of cases before the Board has consistently held that fractions of a day should count as whole days. The construction that fractions of a

day should count as whole days has the merit of certainty. The alternative construction would impose an intolerable burden on the Revenue in adding up minutes if not seconds. That could not have been the legislative intent (D20/00, IRBRD, vol 15, 297 followed).

Appeal dismissed.

Case referred to:

D20/00, IRBRD, vol 15, 297

Chan Siu Ying for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. By letter dated 5 June 2000, the Appellant was offered the job of 'Senior Accountant - stationed in PRC' by the Employer. His working hours were from 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:30 p.m. Monday to Saturday.

2. The Appellant commenced work on 3 July 2000. His employment with the Employer was however terminated on 30 November 2000.

3. The Appellant was in Hong Kong for 71 days during the period between 3 July 2000 and 30 November 2000. Those 71 days include Saturdays and Sundays. For some of the 71 days, he spent less than 24 hours in Hong Kong. The 71 days also include visits during the week. The Appellant accepts that those visits were for the purposes of bringing back PRC documents such as profits tax returns and salaries tax returns for the signatures of his boss; collecting cheques for remittance settlements; interviewing applicants and attending Mandatory Provident Fund introductory seminar.

4. There are two issues before us:

(a) Did the Appellant render outside Hong Kong all the services in connection with his employment with the Employer with the result that his income is outside the tax net by virtue of section 8(1A)(b)(ii) of the IRO?

(b) If he did render services in Hong Kong, should such services be disregarded under section 8(1B) of the IRO on the basis that his visits did not exceed 'a total of 60 days in the basis period for the year of assessment'?

5. In relation to the first issue, the Appellant says that the services that he rendered in Hong Kong were all 'passive' services. He had to come to Hong Kong in order to accommodate his boss and the candidates that he interviewed. He contends that such 'passive' services should be disregarded. We reject this argument. The question is whether the services in question were services 'in connection with his employment'. We have no doubt that the services referred to in paragraph 3 above were all in connection with his employment as the senior accountant of the Employer.

6. The second issue turns on the proper construction of the word 'days' in section 8(1B) of the IRO. A long line of cases (see for instance D20/00, IRBRD, vol 15, 297) before this Board has consistently held that fractions of a day should count as whole days. The Appellant maintains that those cases are out of date given the relative ease on the part of the Revenue in obtaining the time that he came into and went out of Hong Kong. We do not accept this argument. The construction that fractions of a day should count as whole days has the merit of certainty. The alternative construction would impose an intolerable burden on the Revenue in adding up minutes if not seconds. That could not have been the legislative intent.

7. For these reasons, we dismiss the Appellant's appeal and confirm the assessment.