Case No. D11/13

Salaries tax – present in Hong Kong – transit days – sections 8(1), 8(2)(j) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Huen Wong (chairman), Lee Fen Brenda and Lo Pui Yin.

Date of hearing: 10 April 2013.
Date of decision: 9 July 2013.

The Appellant claimed tax exemption under section 8(2)(j). The Appellant argued that he was only present in Hong Kong for 59 days and 58 days in the years of assessment 2009/10 and 2010/11 respectively.

In computing the number of days, the Appellant did not count the Transit Days (totalling 35 days and 37 days in the years of assessment 2009/10 and 2010/11 respectively) on the ground that on these days he did not pass through the Passport Control and should not be regarded as 'present in Hong Kong'.

The Appellant accused malpractice, unfairness or dereliction of duty on the part of the IRD. The Appellant alleged that if his exemption claim failed, he should at least be granted a tax refund of $192,000 as compensation for his accommodation and travelling expenses, which were incurred outside Hong Kong with a view to satisfying the exemption rules.

Held:

1. Hong Kong International Airport is within the boundary of Hong Kong. The Appellant spent his time in the airport area after landing or before taking off, he must be 'present in Hong Kong'. It matters not whether you are in front or behind the Passport Control for the purpose of section 8(2)(j) of the IRO.

2. The Board does not find any evidence in this appeal that there has been any breach of the Basic Law in the application of the relevant provisions in the IRO or the assessment made by the IRD.

Appeal dismissed.

Case referred to:

D45/09, (2010-11) IRBRD, vol 25, 1

Taxpayer in person.
Chow Cheong Po and Ng Ching Man for the Commissioner of Inland Revenue.

Decision:

Introduction

1. Mr A ('the Appellant') objected to the salaries tax assessment for the year of assessment 2009/10 raised on him. The Appellant claimed that his employment income should be exempt from salaries tax.

2. Since 1998, the Appellant has been employed by Company B, which was a company incorporated and listed in Hong Kong. At all relevant times, Company B carried on a business of provision of international flight services.

3. Company B filed an employer's return in respect of the Appellant for the year of assessment 2009/10, which showed, *inter alia*, the following particulars:

(a)	Capacity in which employed	:	Rank C
(b)	Period of employment	:	1-4-2009 – 31-3-2010
(c)	Total income	:	$2,082,496

4. (a) In his 2009/10 Tax Return – Individuals, the Appellant declared that he was employed by Company B as 'Profession D' and reported the same income figure referred to in paragraph 3(c).

(b) The Appellant claimed tax exemption under section 8(2)(j) of the Inland Revenue Ordinance ('IRO') for the reasons that he was not present in Hong Kong for more than 60 days in the year and he planned doing the same in the year of assessment 2010/11 so as to meet the 120-day requirement for two consecutive years.

5. In correspondence with an Assessor of the Respondent ('the Assessor'), Company B provided a copy of a Crew Days in Hong Kong Report in respect of the Appellant for the year ended 31 March 2010 ('the Crew Days Report'). The report showed that the Appellant was present in Hong Kong for a total of 324 days in the year. It was stated that the report did not necessarily reflect the actual time the crew member was present in

Hong Kong during the report period as Company B did not keep track on the individual's personal travel.

6. The Assessor considered that the Appellant did not qualify for tax exemption under section 8(2)(j) of the IRO for the year of assessment 2009/10. She raised on the Appellant the following 2009/10 salaries tax assessment:

	$
Income	2,082,496
Less: Retirement scheme contributions	12,000
Net income	2,070,496
Tax at standard rate of 15% without granting any allowances	310,574
Less: Tax reduction, capped at	6,000
Tax payable thereon	304,574

7. (a) The Appellant objected to the assessment on the ground that he should be entitled to the exemption under section 8(2)(j) of the IRO since he was not present in Hong Kong for more than 60 days in the year of assessment 2009/10 and would meet the 120-day requirement as his travel pattern in the subsequent year of assessment, that is 2010/11, would be similar to that in the year of assessment 2009/10. The Appellant claimed that the Crew Days Report did not reflect accurately his whereabouts during the year.

(b) The Appellant provided, *inter alia*, his travel itinerary for the period from 1 April 2009 to 31 March 2010 showing that he was present in Hong Kong on a total of 59 days in the year.

8. In response to the Assessor's enquiries, the Appellant made assertions and provided supporting documents as follows:

(a) There were three ways he could enter or leave Hong Kong, that is with his passport, with his Hong Kong Identity Card ('HKID') or with his name verified on a stamped Company B 'General Declaration' which was then inspected by an immigration officer. He used the third way for every work flight he operated on both departure from and arrival in Hong Kong.

(b) The numbers of days of his presence in Hong Kong shown in the Crew Days Report and the Travel Itinerary were different as the former included many days on which he was off duty. In compiling the Crew Days Report, Company B assumed that he was always at home when he was not working. In fact, he was free to travel wherever he liked and he used his HKID and passport for such purposes.

(c) Copies of monthly reports entitled 'Real Time Roster' recording the date, arrival time and departure time of each duty flight of the Appellant during the period from 1 April 2009 to 31 March 2010.

9. The Assessor noticed that there were some days on which the Appellant was rostered for crews in flights arriving in or departing from Hong Kong without any immigration check records. She considered that on those days ('Transit Days'), the Appellant must be present in Hong Kong. With reference to the 2009/10 Real Time Rosters, the Assessor ascertained that the Appellant was present in Hong Kong on 94 days in the year of assessment 2009/10. The details were as follows:

Number of days in Hong Kong per the 2009/10 Travel Itinerary	59
Add: Number of Transit Days which were not counted as days in Hong Kong in the 2009/10 Travel Itinerary[Note]	35
Total number of days in Hong Kong	94

Note:
The Transit Days which were not counted as days in Hong Kong in the 2009/10 Travel Itinerary were:

Year	Month	Day		No. of days
2009	Apr			
	May			
	Jun			
	Jul			
	Aug			
	Sept		(removed)	
	Oct			
	Nov			
	Dec			
2010	Jan			
	Feb			
	Mar			
				35

10. The Assessor wrote to the Appellant stating that the Transit Days should be counted as days present in Hong Kong. As he was present in Hong Kong for more than 60 days in the year ended 31 March 2010, the Appellant did not qualify for the exemption under section 8(2)(j) of the IRO. The Assessor asked the Appellant to consider withdrawing the objection.

11. The Appellant refused to withdraw the exemption claim and asserted that:

(a) In December 2008, he called the Respondent to enquire about the 60-day rule under section 8(2)(j) of the IRO. He was told that his passport and HKID would be referred to in determining the number of days under the 60-day rule. Having done his research, he changed his lifestyle to fit the exemption rules. To reduce his number of days in Hong Kong, he spent many days in City E which cost him extra spending on hotels and transportation in the amount of $8,000 per month over the two years. Several Company B pilots were doing 'transits airside' to Country F or City E and had their tax refunded. That was the 'accepted practice' at the time.

(b) Between March 2009 and May 2011, the Appellant wrote five letters to the Respondent in relation to his exemption claim under section 8(2)(j) of the IRO. During this period, he was not informed of the change in the Respondent's policy of counting Transit Days for purposes of section 8(2)(j). He kept on paying additional travelling and accommodation costs over two full years and expected that he would get back the taxes paid.

(c) His passport was a legal document proving that he entered Hong Kong on less than 60 days during each of the two consecutive years.

(d) Airline transit passengers were not considered as onshore and they were not required to be subject to immigration clearance or hold a visa for their presence in Hong Kong. Immigration control was the most common practice anywhere in the world for tax purposes. It was not fair that he was considered as being present in Hong Kong while in transit and other transit flight passengers were not. As the word 'present' was not defined in the tax law, it would be equally reasonable to start the count only when one passed through the immigration control point ('Passport Control').

(e) The Assessor's view that he was present in Hong Kong when his plane landed in Hong Kong was not acceptable.

(f) As a minimum compensation, he should be entitled to a tax refund of $192,000 ($8,000 x 12 months x 2 years) [paragraph (11)(a)] being hotel accommodation and transportation expenses incurred in City E and Country F. He claimed that had he known the Respondent's treatment of Transit Days, he would not have incurred the expenses. His undue financial hardship was a consequence of his not being informed of the Respondent's change of policy.

12. In support of his claim that the 120-day requirement was met, the Appellant provided his travel itinerary and copies of the monthly real time rosters covering the period from 1 April 2010 to 31 March 2011.

13. On the same basis as referred to in paragraph (9), the Assessor counted the number of days of the Appellant's presence in Hong Kong in the year of assessment 2010/11 as follows:

Number of days in Hong Kong per travel itinerary	58
Add: Number of Transit Days which were not counted as days in Hong Kong in travel itinerary[Note]	37
Total number of days in Hong Kong	95

Note:

The Transit Days which were not counted as days in Hong Kong in the travel itinerary were:

Year	Month	Day		No. of days
2010	Apr			
	May			
	Jun			
	Jul			
	Aug			
	Sept		(removed)	
	Oct			
	Nov			
	Dec			
2011	Jan			
	Feb			
	Mar			
				37

14. The Appellant did not make any exemption claim under section 8(2)(j) of the IRO for the year of assessment 2008/09.

Should Transit Days be counted as days on which the Appellant was present in Hong Kong as provided in section 8(2)(j) of the IRO?

15. If the answer to the question is affirmative, the Appellant would have been present in Hong Kong during the year of assessment 2009/10 for 94 days. He would be liable to pay salaries tax as assessed.

16. The Respondent referred the Board to the following provisions and authorities:

(a) Section 8(1)

‘ *Salaries tax shall, subject to the provisions of [the IRO], be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources-*

(a) any office or employment of profit . . .’

(b) Section 8(2)

‘ *In computing the income of any person for the purposes of subsection (1) there shall be excluded the following-*

. . .

(j) income derived from services rendered as master or member of the crew of a ship or as commander or member of the crew of an aircraft by a person who was present in Hong Kong on not more than-

(i) a total of 60 days in the basis period for that year of assessment; and

(ii) a total of 120 days falling partly within each of the basis periods for 2 consecutive years of assessment, one of which is that year of assessment;’

(c) Board of Review Decision: D45/09, (2010-11) IRBRD, vol 25, 1

In this case, the Board ruled that an aircraft crew member who landed in Hong Kong and completed the transit procedures without passing through Passport Control before departing for City E, was present in Hong Kong at the relevant time. Given the definition of ‘Hong Kong’ in the Interpretation and General Clauses Ordinance (Chapter 1, Laws of Hong Kong) and giving the word ‘present’ its ordinary meaning, the Board held that once the taxpayer landed in Hong Kong, he was indeed ‘present in Hong Kong’ as provided for in section 8(2)(j) of the IRO. The Board also commented that at the time of transit in Hong Kong, the taxpayer was neither present in City E nor was he in any ‘no man’s land’, and the only conclusion was that he must be ‘present in Hong Kong’.

17. In his objection to the Respondent's assessment, the Appellant argued that he was only present in Hong Kong for 59 days in the year of assessment 2009/10 and 58 days in the year of assessment 2010/11. In computing the number of days, the Appellant did not count the Transit Days (totalling 35 days and 37 days in the years of assessment 2009/10 and 2010/11 respectively) on the ground that on these days he did not pass through the Passport Control and should not be regarded as 'present in Hong Kong'. The Respondent did not accept the Appellant's claim.

18. This Board accepts the Respondent's argument that Hong Kong International Airport is within the boundary of Hong Kong. As such, the Appellant spent his time in the airport area after landing or before taking off, he must be 'present in Hong Kong' even though he did not pass through the Passport Control. This Board takes note that the ordinary meaning of 'present' is 'being here'. One is either in Hong Kong or one is not. It matters not whether you are in front or behind the Passport Control for the purpose of section 8(2)(j) of the IRO. As the present case is not distinguishable from D45/09, this Board will follow its previous decision.

Should the Appellant be granted a tax refund?

19. The Appellant alleged that, if his exemption claim failed, he should at least be granted a tax refund of $192,000 as compensation for his accommodation and travelling expenses, which were incurred outside Hong Kong with a view to satisfying the exemption rules. He claimed that the money he spent was the result of the Respondent's failure to inform him of the change in assessment practice about the 'day counting' method despite he sent five letters to the Respondent.

Basic law

20. The Appellant based his claim for a refund on several grounds. He first referred the Board to a number of articles in the Basic Law including Article 4 relating to safeguarding the rights and freedom of the residents of Hong Kong SAR; Article 48 relating to the Chief Executive's powers and functions including handling petitions and complaints; and Article 99 relating to public servants' being dedicated to their duties.

Complaints against the Respondent

21. The Appellant made six allegations relating to the Respondent's malpractice and unfairness in the present case:

(i) The relevant Departmental Interpretation and Practice Notes on 60/120 rule issued by the Respondent were misleading. They mentioned 'taxes will be exempted' as opposed to 'may be exempted' prompting the Appellant to embark upon costly arrangements by going to City E with to view to gaining tax exemptions;

(ii) The said notes gave four examples on how the exemptions worked but none mentioned aircrew or transit days;

(iii) Prior to 2009, the practice of determining aircrew's presence in Hong Kong was by the proof of their passports and Hong Kong Identity Card records. The practice was not to count transit days;

(iv) The Board of Review Decision D45/09 was made in January 2010, ten months after the Appellant had started his City E arrangements. Further, despite that the Appellant had started correspondence and telephone conversations with the Respondent, the latter did not bring his attention to this case in a timely fashion so that he could have stopped the said arrangements 14 months earlier;

(v) The Respondent failed to reply to the Appellant's enquiry about how he could have applied for exemption. There were letters to the Respondent left unanswered; and

(vi) In the past, the Board had reminded the Respondent to ensure better communication so that section 8(2)(j) could be enforced properly.

22. The Appellant submitted that his appeal was in fact not so much about tax exemptions or transit days. It was more about dereliction of duty and how he should be treated as a resident in Hong Kong under the Basic Law.

23. The Respondent replied that the Appellant's case should be divided into parts. The first was the correctness of the assessment and the second was his complaints and grievances.

24. On the first part, the Respondent made its submissions along the lines of those mentioned in paragraphs 3 and 4 above which have already been dealt with by this Board in paragraph 5.

25. Regarding the six complaints lodged by the Appellant, the Respondent first submitted that since there had not been any policy on transit days as such prior to 2009, there could not have been any change of policy or practice.

26. As for the relevant Departmental Interpretation and Practice Notes, there was indeed no mention of transit days. However, there was a mention of a taxpayer's physical presence in Hong Kong being counted for tax purpose in the context of 'within Hong Kong waters'. The Respondent produced some internal assessment guidelines showing that a seafarer's physical presence in Hong Kong at some point in time on a day whether ashore or not would be considered to be 'present in Hong Kong'.

27. The Respondent also produced a document titled 'Employment Income and Deductions Assessing Guidelines'. This document dealt with, *inter alia*, time basis and exemption claims which included section 8(2)(j) exemptions. The June 2006 edition of this document showed that there was no mention of transit days. In the May 2010 edition, however, a special section was included to deal with transit days and the 60/120 days rule. The Respondent submitted that it was the result of the D45/09 decision.

28. The Respondent further submitted that having made enquires with the assessing officers, it was confirmed that the working procedures in making enquiries with the employer whenever a taxpayer claiming section 8(2)(j) exemptions and counting transit days as days being present in Hong Kong had been the practice prior to 2009. There had not been any change in this regard.

29. Dealing with the allegations of the unanswered letters from the Appellant, the Respondent submitted that the first letter from the Appellant simply requested specific exemption. There was no mention of treatment of transit days. The second letter dated May 2010 was attached to a completed tax return. Although the Appellant enquired about documents required for tax exemption, it did not mention transit days either. The letter was passed on to the assessor for normal processing. The Respondent admitted that it would have been handled better if a reply was sent to the Appellant at the time. However, even if the Respondent took note of the Appellant's enquiry, by May 2010, the tax year 2009/10 had already gone past.

30. Regarding its failure to notify the Appellant of the D45/09 decision, the Respondent submitted that since none of the correspondence made specific enquiries about transit days, the Respondent was not in a position to send any notification to the Appellant. In any event, the said decision did not contradict the previous practice of the Respondent.

Conclusion

31. The Board has considered the evidence adduced and submission made by both parties. As mentioned in paragraph 18 above, the Board cannot distinguish this appeal from its previous decision D45/09 in which the interpretation of section 8(2)(j) of the IRO and the legal effect of transit days have been analysed in great detail. The Board finds that the assessment in question is correct. In fact, the Appellant did not seem to challenge its correctness but rather based his appeal on malpractice or dereliction of duty on the part of the Respondent.

32. Whilst the Board understands the Appellant's grievances and frustration; in particular, his predicament in trying to obtain his tax exemptions, it should be noted that ignorance of the law is no defence. Further, the Board is not in position to deal with complaints of the nature lodged by the Appellant. Suffice to say that the Board does not find any evidence in this appeal that there has been any breach of the Basic Law in the application of the relevant provisions in the IRO or the assessment made by the Respondent. Perhaps, the Respondent should ensure that unless there were special circumstances in any

particular case, all taxpayers should be treated in the same way under section 8(2)(j) of the IRO. In this case, there were allegations that certain colleagues of the Appellant's had been treated differently. This message of ensuring consistent tax treatments was also given by the Board in the D45/09 case.

33. According to section 68(4) of the IRO, the onus of proving that the tax assessments in question were excessive or incorrect falls on the Appellant. This Board finds that the Appellant has failed to discharge his burden of proof and this appeal is dismissed.