Case No. D11/84

Board of Review:

H. F. G. Hobson, *Chairman*; Roland K. C. Chow & David K. P. Li, *Members.*

3 September 1984.

Salaries tax—section 8(1), (1A) & (1B) of the Inland Revenue Ordinance—income arising in or derived from Hong Kong—meaning of "visits".

The appellant was appointed representative for South East Asia and Japan of four companies, only one of which was a Hong Kong company. He was assessed to Salaries Tax for the years from 1978/79 to 1981/82. The appellant appealed on the grounds that he was employed outside Hong Kong, that in three of the years of assessment he spent less than 60 days in Hong Kong and that his salary should be apportioned between time spent in Hong Kong and time outside.

Held:

(1) The appellant's salary was income arising in or derived from Hong Kong.
(2) Section 8(1) is not subject to Section 8(1A).
(3) Apportionment could only be made if the appellant's salary was income arising or derived from outside Hong Kong.
(4) On the facts the appellant was not merely visiting Hong Kong.

Appeal allowed.

Wong Ho-sang for the Commissioner of Inland Revenue.
Barrie G. J. Barlow for the appellant.

Reasons:

In consequence of an arrangement evidenced by a letter ("B Letter") dated 28 November 1978, from BIL, a Cayman company having an address (indecipherable) in Australia, the Taxpayer was relocated to Hong Kong "as representative of B, Travelodge Australia, SPP and PHDL for South East Asia and Japan"; the Taxpayer's major role being to "locate and complete the sale of SPP assets to investors in those areas". SPP, the only Hong Kong company amongst the four entities mentioned.

The Taxpayer took up his assignment effective 1 January 1979 and held it continuously until the 30 September 1981. The Taxpayer was assessed to Salaries Tax for the four tax years 1978–1982 but appealed against the same on the grounds that:—

(*a*) the location of the Taxpayer's employment was not in Hong Kong.

(*b*) during the tax years 1978/79, 1979/80 and 1980/81 apportionment of salary was justifiable since the Taxpayer spent much of his time outside Hong Kong, and

(*c*) during the year 1981/82 the Taxpayer spent only 13 days in Hong Kong.

The Taxpayer evidently spent less than 60 days in Hong Kong during the tax years 1978/79, 1980/81 and 1981/82 and only 95 days in 1979/80.

Though Mr. Barlow, for the Taxpayer, at one stage put forward the suggestion that the real employer was B we do not think this has any foundation having regard not only to the general tenor of the B letter but also the Taxpayer's own tax returns, the Employer's returns filed by SPP and another letter by B; all of which indicated that SPP was the real employer. That the Taxpayer's salary was met out of interest income of SPP earned abroad does not alter our view (as to which we adopt the penultimate paragraph of B/R 3/74).

Mr. Barlow then contended that the services rendered by the Taxpayer were not for the benefit of SPP. The only evidence of this was that part of the Barrick letter quoted above wherein the Taxpayer was to serve as a representative not only for SPP but for others. Nevertheless his major role was to sell SPP assets. Mr. Barlow asked us to accept that the Taxpayer was unsuccessful since he received no commission which he would have done if sales had been effected and we do so accept this corrolary but not the inference that the Taxpayer did not attempt to make sales—indeed in the absence of contrary evidence we think it fair to infer, and do so infer, that the Taxpayer did try to sell SPP assets.

Mr. Wong Ho-sang (Chief Assessor — Appeals) conceded that the remuneration received by the Taxpayer was not in the nature of payment for the office of Executive Director which he held in SPP (no mention of a directorship is made in the B letter). This concession gave rise to consideration of the possibility of treatment under section 8(1B) (i.e. the 60 days visit rule—which is not available to directors) provided that we are of the view that section 8(1A)(*b*)(ii) is applicable.

Mr. Barlow further argued that even if the services were rendered for the benefit of SPP nevertheless they were largely rendered outside Hong Kong and therefore the salary should be apportioned. However in our view we have first to consider the basic charge under section 8(1) namely "all income arising in or derived from" … Hong Kong is liable to salaries tax if the source is … "an employment of profit". This leads to consideration of the totality of facts test and in that respect we are satisfied that the Taxpayer could have enforced his contract of employment against SPP (who may be said to have adopted the B letter), that the Taxpayer was employed and remunerated by SPP, that SPP bore that remuneration and that there is no evidence from which we could reasonably infer that the services which the Taxpayer performed while abroad were otherwise than for SPP or incidental to its purposes—there was certainly no evidence to suggest that those services were entirely distinguishable from those which were to constitute his major role.

We therefore hold that the Taxpayer's salary was income arising in or derived from Hong Kong.

We agree with Mr. Wong that section 8(1) is not intended to be circumscribed by section 8(1A) which reads:—

> "For the purposes of this Part, income arising in or derived from the Colony from any employment—
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> (*a*) includes, without in any way limiting the meaning of the expression and subject to paragraph (*b*), all income derived from services rendered in the Colony including leave pay attributable to such services; and
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> (*b*) excludes income derived from services rendered by a person who—
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> (i) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft; and
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> (ii) renders outside the Colony all the services in connexion with his employment."

With regard to Mr. Barlow's suggestion that the Taxpayer's salary should be apportioned on a time-in, time-out basis, it is our view that such an approach is only possible where we are satisfied that the Taxpayer's remuneration neither arose nor was derived from a source in Hong Kong and hence not caught by section 8(1) (as for example if we had concluded that Barrick was indeed the employer and the salary arose in Australia) but that the Taxpayer performed services here in consequence of which all income derived therefrom would be subject to tax under section 8(1A). Having reached the conclusion that the Taxpayer's salary is caught by section 8(1) it follows that in our opinion the case for apportionment (which in any event is an extra-legislative approach of convenience) does not arise.

The only remaining issue therefore is whether the Taxpayer could pray in aid section 8(1B) which reads:—

> "In determining whether or not all services are rendered outside the Colony for the purposes of subsection (1A) no account shall be taken of services rendered in the Colony during visits not exceeding a total of 60 days in the basis period for the year of assessment."

Mr. Barlow argued that the Taxpayer was in effect a "visitor" to Hong Kong, that the fact that he had a place of abode here would not exclude such an interpretation and that where in taxing statutes interpretation was in doubt that which was most favourable to the Taxpayer should be preferred. However we have no doubt as to the meaning of the word "visit" as used in section 8(1B): see section 8(2)(*j*) where the expression used is "who was present in the Colony" when determining liability of ship & aircraft personnel thereby indicating that "visit" is intended to have a different meaning. Nor have we any doubt that the Taxpayer was relocated here from Australia to fulfill an engagement which the B letter contemplated would be for two years, for which reasons the Taxpayer took an apartment in

Hong Kong, worked for a SPP, which had an office in Hong Kong, and obtained a Hong Kong identity card.

Accordingly we reject entirely the notion that when the Taxpayer "returned" (to use Mr. Barlow's own verb) or came here from his intermittent trips he was merely here on a visit: it would be straining the natural construction of the word "visit" to hold otherwise.

For the above reasons this appeal is disallowed.