Case No. D119/00

Salaries tax – taxpayer providing services outside Hong Kong – whether salary derived from a source in Hong Kong – whether exempt from salaries tax – burden on the taxpayer to prove that the assessment is incorrect – sections 8(1), 8(1A)(b), 8(1B) and 64(8) of the Inland Revenue Ordinance (' IRO').

Panel: Benjamin Yu SC (chairman), Henry Lau King Chiu and Dennis Law Shiu Ming.

Date of hearing: 22 November 2000.
Date of decision: 6 February 2001.

The taxpayer was employed by a company incorporated in Hong Kong. She stated that during the relevant years of assessment, she was required to work at the employer' s factory in Province C in China and that she would return to Hong Kong on weekends for holiday. Although she admitted that she would sometimes come to Hong Kong to deliver samples to her boss, she was not a messenger by job description. However, she did admit that she did return to Hong Kong for business meetings.

Held:

1. To determine whether income falls within section 8(1), it was necessary to decide which is the place where the income really comes to the employee: CIR v George Andrew Goepfert 2 HKTC 210; D11/97, IRBRD, vol 12, 147 and D18/98, IRBRD, vol 13, 180 considered. On balance, there was no doubt that the Taxpayer' s income was derived in Hong Kong and prima facie chargeable under section 8(1);

2. If *all* the taxpayer' s services in connection with her employment were rendered outside Hong Kong, she would be exempt from tax under section 8(1A)(b) IRO. However, on the evidence, the taxpayer had failed to discharge her burden;

3. The taxpayer further did not claim that she stayed in Hong Kong for a period exceeding 60 days, hence she was not entitled to rely on a section 8(1B) exemption.

Appeal dismissed.

Cases referred to:

CIR v George Andrew Geopfert [1987] 2 HKTC 210
D11/97, IRBRD, vol 12, 147
D18/98, IRBRD, vol 13, 180
CIR v So Chak Kwong, Jack 2 HKTC 174

Ng Yuk Chun for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The appeal

1. This is an appeal by Madam A (' the Taxpayer') against a determination by the Commissioner of Inland Revenue dated 28 April 2000. In that determination, the Commissioner overruled the Taxpayer' s objection on the salaries tax assessment of the Taxpayer for the years of assessment 1994/95 and 1996/97 (' the relevant years of assessment') showing net chargeable income of $294,120 and $416,340, with tax payable thereon of $51,024 and $75,468 respectively.

2. At the commencement of the hearing, we granted the Taxpayer leave to appeal out of time. We were satisfied that she had reasonable cause for her failure to lodge this appeal within time.

3. The Taxpayer' s case is that her income was derived from services rendered outside Hong Kong and is exempt from salaries tax. The issues in this appeal are:

(1) whether the salary which the Taxpayer received from her employer during the relevant years of assessment was derived from a source in Hong Kong and therefore chargeable to salaries tax under section 8 of the IRO, and if so,

(2) whether the income is nevertheless exempt from salaries tax by reason of either:

(a) section 8(1A)(b) – because all services were performed outside Hong Kong, or

(b) section 8(1B) – because she could invoke the ' 60-day rule' .

There is no dispute over quantum. The Taxpayer accepted that if she were liable to pay salaries tax, the amounts stated in the determination were correct. The burden of showing that the assessment is wrong is on the Taxpayer, see section 68(4) of the IRO.

The facts

4. The Taxpayer gave evidence before us. From the materials before us and from her evidence, we find the following matters proved:

(1) The Taxpayer was employed since 1988 by Company B (' the employer'). Her position was production supervisor. She was responsible for quality control at the factory run by the employer situated in Province C in the mainland.

(2) The employer is a company incorporated in Hong Kong. Its business is that of a toy manufacturer. The Taxpayer negotiated the terms of her employment with the employer in Hong Kong. She received her pay in Hong Kong dollars in Hong Kong.

(3) The Taxpayer had furnished to the assessor two tables (' the tables'), one for each relevant year of assessment, showing the dates when she departed from Hong Kong and the dates when she returned to Hong Kong, and the purposes of the visits. According to the tables, on six occasions in the year of assessment 1994/95 and four occasions in the year of assessment 1996/97, she came back to Hong Kong for the purpose of attending ' business meetings' .

The evidence

5. The Taxpayer gave evidence that she had to work at the employer' s factory in Province C, returning only during the weekends for holiday. The tables bear this out. The Taxpayer testified that when she returned to Hong Kong, she would, on occasions, contact her boss and would have a chat with her about her personal affairs. She said that at times, her boss might bring up the subject of the quality of the products. This would happen, she told us, when there was some problem with the quality and her boss would scold her about it. She denied that these were business meetings. She testified that the words ' business meetings' which appeared in the tables were not her own words. She said that the tables were prepared by her husband and he described her chats with the boss as ' business meetings' .

6. She admitted that on occasions, she was required to bring back samples to Hong Kong. But as she pointed out in one of her letters to the assessor (dated 1 May 1998), she was not

employed as a messenger or delivery worker, this fell outside the scope of her duties. This was also accepted by Miss Ng during her submission to us.

7. We should also point out that in two of her letters, one to the assessor dated 1 May 1998 and another one to the Clerk to the Board dated 20 May 2000, the Taxpayer did state that she was, on occasions, required to attend the employer' s office for meetings or to deal with some paperwork, such as application for holidays, and accounting for operational expenses of the factory. The Taxpayer told us that these letters were not written by herself or her husband, but by some one on her behalf.

Section 8(1): Was the income derived in Hong Kong?

8. Section 8(1) of the IRO provides as follows:

> ' *Salaries tax shall, subject to the provisions of this Ordinance, 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; and*
>
> *(b) any pension.'*

9. To determine whether an income falls within section 8(1), we have to decide which is the place where the income really comes to the employee: see CIR v George Andrew Geopfert [1987] 2 HKTC 210, D11/97, IRBRD, vol 12, 147, D18/98, IRBRD, vol 13, 180.

10. We have already noted the fact that the Taxpayer was employed in Hong Kong by a Hong Kong company, and was also remunerated in Hong Kong. On these facts, we have no difficulty in finding that the Taxpayer' s income arose in or was derived in Hong Kong and thus *prima facie* chargeable under section 8(1).

Section 8(1A)

11. The next question we have to consider is whether section 8(1A)(b) applies with the effect that the income in question is nevertheless exempt from tax. To determine that question, we must construe section 8(1A)(b) together with section 8(1B). We set them out below:

> ' *For the purpose of this Part, income arising in or derived from Hong Kong from any employment: -*
>
> *(a) ...*

(b) excludes income derived from services rendered by a person who -

(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

(ii) renders outside Hong Kong all the services in connection with his employment.

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

12. The Taxpayer can, without invoking section 8(1B), rely on section 8(1A) if she rendered *all* the services in connection with her employment outside Hong Kong. Miss Ng, in her submissions, fairly accepted that if we were to accept the Taxpayer' s oral testimony in totality, we would have to find that she did render all her services outside Hong Kong. However, she urged us not to accept the Taxpayer' s evidence on account of the inconsistencies in her different accounts. We have not found this easy. On the one hand, we see some force in the contention that it would seem hardly necessary for some one employed as a production supervisor, as opposed, say, to a factory manager, to have to report back to the Hong Kong office. On the other hand, we have not found her explanation for the references to ' business meetings' in the tables convincing. Moreover, it could not have been sheer coincidence that her letters of 1 May 1998 and 20 May 2000 also contained admissions that she was on occasions required to and did attend the employer' s office for business meetings. In her evidence before us, she claimed that it was she who initiated meetings with her boss, but this is contrary to what she stated in her letter to the Clerk to the Board dated 20 May 2000. In the end, we do not feel able to rely on the Taxpayer' s oral evidence and have to find that she had failed to discharge the burden on her of proving that all her services were rendered outside Hong Kong.

Section 8(1B)

13. In CIR v So Chak Kwong, Jack 2 HKTC 174, Mortimer J held that the words ' not exceeding a total of 60 days' qualify the word ' visits' and not the words ' services rendered' . (See also D11/97, IRBRD, vol 12, 147.) The Taxpayer does not claim that she stayed in Hong Kong for a period not exceeding 60 days in either of the two relevant years of assessment. She cannot therefore rely on the section 8(1B) exemption.

14. For the reasons we have stated, we would dismiss this appeal and confirm the assessment appealed against.