INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D11/97

Salaries tax – source – working in China – whether income arising in or derived from Hong Kong – section 8(1A) – section 8(1B) – 60 days rule.

Panel: Benjamin Yu SC (chairman), Victor R P Hughes and Archie William Parnell Jr.

Date of hearing: 24 March 1997.
Date of decision: 23 April 1997.

The taxpayer was recruited by his employer in Hong Kong. During the relevant year of assessment, the taxpayer was required by his employer to work in factories outside Hong Kong. His main duty was to ensure that the products were up to standard; but his duties included following instructions given in Hong Kong and he reported back to his employer in Hong Kong on the quality of the products. During the relevant year of assessment, the taxpayer's home was in Hong Kong. During the period from 1 April 1992 to 19 January 1993, the taxpayer came back to Hong Kong on 33 occasions spending a total 105 days in Hong Kong, on the basis of reckoning part of a day as 1 day.

On the question of whether the taxpayer's income from his employment during the relevant year of assessment was income which arose in Hong Kong.

Held:

1. The words 'income arising in or derived from Hong Kong' in section 8(1) mean something wider than merely income derived from services rendered in Hong Kong.

2. On the facts, the income has a Hong Kong source and is prima facie chargeable under section 8(1).

3. A taxpayer can rely on section 8(1A) if he renders all the services in connection with his employment outside Hong Kong. This does not apply in the present case as the taxpayer did render part of his services to his employer in Hong Kong.

4. For the purpose of the 60 days rule under section 8(1B), part of a day should be counted as 1 day, and the taxpayer having spent over 60 days in Hong Kong during the relevant year of assessment, cannot rely on section 8(1B) to claim exemption from salaries tax.

Appeal dismissed.

Cases referred to:

CIR v George Andrew Geopfert [1987] 2 HKTC 210
Pickles v Foulsham 9 TC 261
Bennet v Marshall 22 TC 73
Bray v Colenbrander and Harvey v Breyfogle 34 TC 138
D29/89, IRBRD, vol 4, 340
D12/94, IRBRD, vol 9, 131
CIR v So Chak Kwong, Jack 2 HKTC 174

Tam Tai Pang for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The Appeal

1. This is an appeal by a Taxpayer against a determination by the Commissioner of Inland Revenue dated 3 May 1996. Under that determination, the Taxpayer was liable to pay salaries tax in the sum of $27,002 on the basis of a net chargeable income of $145,611 for the year of assessment 1992/93 ('the relevant year of assessment'). The Taxpayer's case is that his income was derived from services rendered outside Hong Kong and is exempt from salaries tax. The Taxpayer also complains of what he contends to be factual inaccuracies in the determination. To the facts we now turn.

The Facts

2. We heard oral evidence from the Taxpayer himself. His evidence was given in a straightforward manner and we have no hesitation in accepting his evidence on the primary facts. On the basis of the Taxpayer's evidence and the documentary evidence produced by the parties, we find the relevant facts as follows:

(1) The Taxpayer was employed since 1 July 1989 by Company A. Company A is and was a Hong Kong company with offices at District B.

(2) The Taxpayer was recruited by Company A in Hong Kong. The employment contract was negotiated in Hong Kong.

(3) However, for long periods of time, and in particular, during the relevant year of assessment, the Taxpayer was required by Company A to work in factories in Country C.

(4) The nature and scope of the Taxpayer's duties were the subject of some controversy. In the determination, the Taxpayer was described as a 'factory manager' and was said to be required to report the 'production progress' in Country C to Company A. The Taxpayer, however, maintained before us that he was but a technician, and he had no duty to report on production progress. Whilst we note that the Taxpayer himself used the term 'factory manager' in his tax return to describe the capacity in which he was employed, and that the same term was used by Company A to refer to the Taxpayer in its letter of 29 September 1994 to the Commissioner, we accept that this was only a title given to the Taxpayer, and did not reflect his real duties. We accept the Taxpayer's evidence that his main duty in the factory in Country C was to ensure that the products were up to standard. We are also satisfied on the evidence that the Taxpayer was not required to report on the production progress, but we do find that as part of his duties to Company A, the Taxpayer was required to follow instructions from Hong Kong, that sometimes those instructions were given in Hong Kong, and that he reported back to his employer in Hong Kong on the quality of the products.

(5) During the relevant year of assessment, the Taxpayer's home was in Hong Kong. Whenever the Taxpayer had leave from the factory in Country C, he would return to Hong Kong. During some of these trips to Hong Kong, the Taxpayer would bring with him actual samples from the production as evidence to show to his employer that he had performed his duties in Country C. Also during these trips, the Taxpayer would collect his salary and obtain reimbursement of his travelling expenses.

(6) The Taxpayer's employment was terminated by Company A with effect from 20 January 1993.

(7) During the period between 1 April 1992 and 19 January 1993, the Taxpayer came back to Hong Kong on 33 occasions. If one counts part of a day as one day, he would have spent 105 days in Hong Kong during this period.

Section 8(1)

3. Section 8(1) of the Inland Revenue Ordinance (the IRO) provides that:

'Salaries tax shall, subject to the provisions of this 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; and

(b) any pension.'

Section 8(1A) provides that:

> *'For the purposes of this Part, income arising in or derived from Hong Kong from any employment –*
>
> *(a) includes, without in any way limiting the meaning of the expression, and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services;*
>
> *(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.*

Before looking at section 8(1B) which qualifies section 8(1A), it is necessary to consider section 8(1) and 8(1A) first.'

4. By section 8(1A), the legislature has included income derived from services rendered in Hong Kong as 'income arising in or derived from Hong Kong' and thus subject to the charge of salaries tax under section 8(1). The expression 'income arising in or derived from Hong Kong' in section 8(1) must therefore mean something wider then merely income derived from services rendered in Hong Kong. Macdougall J observed in CIR v George Andrew Geopfert [1987] 2 HKTC 210 at 236 that:

> *'As a matter of statutory interpretation I am unable to escape the conclusion that, although sec. 8(1) must be construed in the light of and in conjunction with section 8(1A), section 8(1A)(a) creates a liability to tax additional to that which arises under section 8(1). It is an extension to the basic charge under section 8(1). If it were otherwise section 8(1A)(a) would be virtually otiose and section 8(1A)(b) completely unnecessary.'*

5. This, however, leaves the question of how one should construe section 8(1). In Geopfert, Macdougall J held that the correct approach to the enquiry prescribed by section 8(1) was that adopted by the English courts in the various case cited, viz Pickles v Foulsham 9 TC 261, Bennet v Marshall 22 TC 73 and Bray v Colebrander and Harvey v Breyfogle 34 TC 138. In Bennet v Marshall, Lord Greene MR said (at page 85) *'…the question which falls to be decided in any particular case appears to me to be this: is the source of the income which it is sought to charge a source out of the United Kingdom or is it not?' and (at page 92) '…the test for ascertaining the source of income is to look for the place where the income really comes to the employee.'* Thus, at page 237 of the report of Goepfert's case, Macdougall J said:

'Specifically, it is necessary to look for the place where the income really comes to the employee, that is to say, where the source of income, the employment is located. As Sir Wilfrid Greene said, regard must first be had to the contract of employment.

This does not mean that the Commissioner may not look behind the appearances to discover the reality. The Commissioner is not bound to accept as conclusive, any claim made by an employee in this connexion. He is entitled to scrutinise all evidence, documentary or otherwise, that is relevant to the matter ….

There may be no doubt therefore that in deciding the crucial issue, the Commissioner may need to look further than the external or superficial features of the employment. Appearances may be deceptive. He may need to examine other factors that point to the real locus of the source of income, the employment.

It occurs to me that sometimes when reference is made to the so called 'totality of facts' test it may be that what is meant is this very process. If that is what it means then it is not an enquiry of a nature different from that to which the English cases refer, but is descriptive of the process adopted to ascertain the true answer to the question that arises under section 8(1).'

6. It may be that for the purpose of the 'totality of facts test', the place where the work is performed is one of the relevant considerations, whereas the English approach treats this as irrelevant: see Bennett v Marshall, *ibid*, page 92 and CIR v Goepfert, *ibid*, page 236. However, this possible difference is of no moment in the present case. The facts as we attempt to summarise above point overwhelmingly to a Hong Kong source. We have no difficulty in concluding that the Taxpayer's income for the relevant year of assessment was income which arose in or was derived in Hong Kong and thus *prima facie* chargeable under section 8(1).

Section 8(1A)(b)

7. The next question we have to consider is whether section 8(1A)(b)(ii) 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). For the sake of convenience, we set them out below:

'8(1A) For the purposes 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.*
>
> *8(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.'*

8. The Taxpayer can, without invoking section 8(1B), rely on section 8(1A) if he rendered *all* the services in connection with his employment outside Hong Kong. We are not satisfied that this is the case. As we set out in paragraphs 2(4) and (5) above, we find that the Taxpayer did render part of his services to his employer in Hong Kong. It was certainly of value and no doubt convenient to Company A that the Taxpayer would from time to time return to Hong Kong to take instructions and report back on matters relevant to his scope of work. We find that the Taxpayer cannot claim exemption from tax under section 8(1A)(b) unless he can rely on section 8(1B).

Section 8(1B)

9. Can the Taxpayer pray in aid section 8(1B)? Here, the Taxpayer meets a number of obstacles. Firstly, the Commissioner contends that since the Taxpayer's home was in Hong Kong, section 8(1B) does not apply to him at all because the time that he stayed in Hong Kong during the relevant year of assessment cannot be regarded as 'visits'. Secondly, the Commissioner argues that the Taxpayer had stayed in Hong Kong for over 60 days during the relevant year of assessment and thus does not qualify under section 8(1B). We shall deal with these contentions below.

Whether the period of stay in Hong Kong constituted visits

10. It is not in dispute that the Taxpayer's home was in Hong Kong during the relevant year of assessment. Can his return to Hong Kong be termed 'visits' under section 8(1B)? The Commissioner says no and relies on the decision of this Board in D29/89. Paragraph 5.1 of that decision reads:

> *'We find as a fact that the Taxpayer was not 'visiting' Hong Kong when he came here from China. In no sense could China be said to be his normal place of residence even though, as we were told by the Taxpayer, he had six months visas. Indeed the very fact of a visa tends to rule out China as his normal place of residence. Although we know very little of the Taxpayer's background it would seem that he was a bachelor, he holds a Hong Kong identity card, he was living in Tsuen Wan at the time he received the employment letter and we note also that he had a residential address in Wanchai during the relevant*

> *period and was still there when he lodged his notice of appeal. All of which is consistent with his home or normal residence being in Hong Kong. His accommodation in China, provided by the employer, was at the site and without evidence to the contrary we assume it provided merely for the bare essentials of accommodation and therefore unlikely to qualify as a residence in the normal sense of that term.'*

We have also cited to us the dictionary meanings of the word 'visit', one of which is 'an excursion to a place for the purpose of sight-seeing; a short or temporary stay at a place'. For reasons which will appear, we do not find it necessary to decide the point. We have, however, some reservations on the approach urged upon us by the Commissioner. The meaning of a word must of course be construed in its context. The context of section 8(1B) is that the person is *ex hypothesi* outside the jurisdiction for most of the year and the word 'visit' may not be inapposite to describe a period of a short stay. It seems to us somewhat precarious to hang on that single word an intention, not otherwise expressed, on the part of the legislature to exclude from the beneficial application of section 8(1B) all persons who have their home in Hong Kong.

The 60 days rule

11. The Commissioner has produced evidence of the Taxpayer's dates of arrival in Hong Kong and the dates of his departure from Hong Kong during the period between 1 April 1992 and 19 January 1993. If one includes both the arrival and the departure dates in the calculation, the Taxpayer was in Hong Kong for 105 days during that period. The Commissioner relies on D12/94 and D29/89 as authorities for the proposition that part of a day should be counted as 1 day for the purpose of section 8(1B). We have found the reasoning in those cases persuasive and, with respect, we follow them. In D29/89, it was said that:

> *'…the Inland Revenue Ordinance contains no definition of day, we are of the opinion that any part of a day counts as a 'day' for the purpose of section 8(1B). To limit the meaning in the context of section 8(1B) to the elapse of a period of 24 hours from midnight to the following midnight would result in treating the 60 days as 'clear' days (excluding the day of arrival and day of departure). If that had been intended then we think the draughtsman would have said so: we therefore find this suggestion unacceptable.'*

And in D12/94, the Board expressed their reason thus:

> *'If part days are ignored then in the case of a person who, say, visits each weekend throughout the year spending only one night in Hong Kong on each occasion, thereby covering a total of 104 part days, none of those visits would count towards the 60 days limit. Indeed that limit would only be reached if he spent two or more nights in Hong Kong during each visit to make a total 112 nights, or 164 days represented by 60 separate complete days and 104 separate*

part days, which is a far cry from the 60 days mentioned in subsection (1B). It is inconceivable that the legislature intended any such result.'

12. We are of the view that the Taxpayer cannot rely on section 8(1B) because his period of stay in Hong Kong during the relevant year of assessment exceeded 60 days. It does not matter whether the period he actually provided services in Hong Kong exceeded 60 days. In CIR v So Chak Kwong, Jack 2 HKTC 174, Mortimer J held that the words 'not exceeding at total of 60 days' qualify the word 'visits' and not the words 'services rendered'.

Conclusion

13. For the reasons given above, we find that the Taxpayer has failed to discharge the burden of showing that the assessment made in the determination was excessive or incorrect. We accordingly dismiss this appeal.