Case No. D12/82

Board of Review:

Y. H. Chan, *Chairman*; W. Hume, R. S. Huthart & H. J. Dickson, *Members.*

21 September 1982.

Salaries Tax—exclusion under section 8(2)(*h*)—employee of U.K. public authority assigned to work for Hong Kong company—cost of services to Hong Kong company reimbursed by U.K. Secretary of State for Industry—whether employee in temporary service of U.K. Government receiving emoluments from that Government.

The appellant was employed by a public authority in Northern Ireland. The authority is a member of the British Electricity Supply Industry which provides consultancy services overseas through a company registered in England (BEI). The Secretary of State for Industry in the United Kingdom made available the services of BEI to a Hong Kong company for a particular project and arranged for BEI to be reimbursed for the cost of its services at no charge to the Hong Kong company. In 1979 the appellant accepted an assignment to work in Hong Kong on the project, but remained employed and paid by the public authority for the whole period of the assignment. The appellant was assessed to Salaries Tax on the whole of his emoluments received by him for the period and appealed on the grounds that he was recruited for temporary service of the United Kingdom Government on United Kingdom based terms, that his salary was paid by that Government and that his income did not arise from any profit or employment of profit in Hong Kong.

Held:

(1) The appellant was unable to demonstrate the nexus, if any, between the United Kingdom Government and his assignment to Hong Kong.

(2) The ultimate reimbursement by the Department of Trade and Industry of the appellant's employers for his salary and the period of assignment being limited to two years were not sufficient to show that he was in the temporary service of the United Kingdom receiving emoluments from that Government.

Appeal dismissed.

Wong Ho-sang for the Commissioner of Inland Revenue.
Brian Hernan for the appellant.

Reasons:

1. This is an appeal by the Taxpayer against Salaries Tax Assessments for the years of assessment 1979/80 and 1980/81.

2. Prior to his appeal to the Board of Review the Taxpayer had lodged an objection with the Commissioner of Inland Revenue. Before the Commissioner the Taxpayer raised two grounds of objection i.e.

> "A. That his salary which originates and is paid in UK is exempted from Hong Kong Salaries Tax under section 8(1)(*a*) of the Ordinance, and
> B. That his salary would also be excluded from Salaries Tax under section 8(2)(*h*) of the Ordinance as the nature of his services satisfy the requirements of this section."

3. On the objection before the Commissioner of Inland Revenue, the Commissioner had before him the following documents:—

(1) The Agreement between "BEI" and "China Light" referred to in paragraph 4 of the Commissioner's determination in which it is recited that the Secretary of State for Industry had arranged for BEI to be reimbursed for the costs of the services to be provided at no charge to China Light.

(2) Copy of a letter dated 4th January 1979 written by the Personnel Resources Manager of "NIES" to the Taxpayer whereby NIES offered the Taxpayer on overseas assignment for BEI.

(3) A "Flow Chart" purporting to show the line of movement of the Taxpayer's salaries from the Employer to the Employee's U.K. Bank.

4. All the facts stated by the Commissioner in his determination save Fact (6) are agreed by the Taxpayer and we so find. They are quoted hereunder:—

> "(1) The Taxpayer has objected to Salaries Tax Assessments raised on him for the years of assessment 1979/80 and 1980/81. The Taxpayer Claims that he should be exempted from Hong Kong Salaries Tax.
>
> (2) At all relevant times the Taxpayer has been employed by NIES (the Employer). The Employer is a public authority which generates and distributes electricity in Northern Ireland.
>
> (3) BEI is a company registered in England and formed for the purpose of providing the consultancy services overseas of the British Electricity Supply Industry. The Employer is a member of the British Electricity Supply Industry.
>
> (4) China Light is a Hong Kong company engaged in the generation and distribution of electricity. In 1978 China Light proposed to enter into an agreement for the construction of extensions to its network. The Secretary of State for Industry in the United Kingdom made available to China Light the services of BEI for the purposes of this project. Under an agreement with China Light BEI agreed to provide services, including technical advice and assistance and personnel in connection with the design, procurement, construction and commissioning of the proposed extensions. The Secretary of State for Industry arranged for BEI to be reimbursed for the costs of its services at no charge to China Light.

(5) In 1979 the Taxpayer accepted an assignment to work for BEI on the project referred to in Fact (4). During the period of his assignment in Hong Kong the Taxpayer remained an employee of the Employer and was paid by the Employer.

(6) The Taxpayer commenced duty in Hong Kong on 19th February 1979 and finally left Hong Kong on 31st January 1981.

(7) During the period he was working in Hong Kong the Taxpayer continued to be paid by the Employer. His salary was paid monthly by the Employer into a bank in the United Kingdom.

(8) During the years 1979–80 and 1980–81 the Taxpayer derived the following emoluments in respect of services he rendered in Hong Kong:—

	1979–80	*1980–81*
Salary ……..	£ 9,724	£ 10,148
Expatriation premium …….	2,431	2,537
Cost of living allowance …….	1,863	1,389
	£ 14,018	£ 14,074
	=======	=======

(9) The Assessor raised assessments on the Taxpayer as follows:—

Year of Assessment 1979/80	
£ 14,018 x 10.8169 …….	$151,633
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Year of Assessment 1980/81	
£ 14,074 x 11.5485 …….	$162,534
	=======

(10) The Taxpayer objected to the assessments on grounds that—

'A. My salary which originates and is paid in the U.K. is exempted from Hong Kong Salaries Tax under section 8(1)(*a*) of the Ordinance.

B. My salary would also be excluded from Salaries Tax under section 8(2)(*h*) of the Ordinance as the nature of my services satisfy the requirements of this section.' "

5. As regards Fact (6) which was not agreed, the Taxpayer maintained that it should be stated in these terms: "The Taxpayer commenced his assignment on 19th January 1979 and completed his assignment on 31st January 1981. He commenced duty in Hong Kong on 20th February 1979 and finally left Hong Kong on 20th January 1981."

6. In our view there is no material difference whichever way it should have been stated. Seeing that the Taxpayer did not give any evidence before us on this point and the onus is on him to establish that the Commissioner is wrong, we have decided to accept the version of Fact (6) as stated by the Commissioner.

7. The objection by the Taxpayer was rejected by the Commissioner from whose written determination we have quoted in extenso. From this determination the Taxpayer has filed a notice of appeal on the grounds stated in paragraph 8 hereof.

8. In his original Notice of Appeal to the Board of Review the Taxpayer stated his grounds of appeal as follows:

> *Grounds of Appeal*
>
> "I would appeal the Commissioner's determination on the following grounds:—
>
> 1. His reasoning in paragraph 3(2) of page III on his determination overlooks certain Facts as recorded, in particular Fact (4) which indicates that ultimately the U.K. Government would pay for services provided by BEI, including personnel. BEI Limited recruited me in February, 1979 and arranged for my services to be made available to China Light at no cost to China Light or to my employer, NIEC. I would submit that, as the Secretary of State for Industry in the United Kingdom entered an agreement offering the services of persons recruited from the U.K. electricity supply industry specially for service in Hong Kong, he was himself making a commitment that we, as assignees, would provide our services on behalf of the United Kingdom Government, and therefore in the temporary service of that Government.
> 2. At a briefing session in London prior to the assignment, it was made clear to us that we had links with the Department of Industry. We were informed of the presence of Mr. M at the British Trade Commission whom we could contact if we had any serious problems in Hong Kong. In attendance at this briefing session was an Assistant Secretary from the same U.K. Government Department. BEI's accounts are audited by the Department of Industry, which is quite logical as the cost of our services is funded by the U.K. Government. I would therefore submit that my emoluments are ultimately payable by the U.K. Government.
> 3. The Commissioner does not dismiss the remainder of section 8(2)(*h*) and I believe it is substantiated by the Facts as stated by the Commissioner."

9. However, by a letter dated 2nd April 1981 addressed by the Taxpayer to the Clerk of the Board of Review, the Taxpayer abandoned the ground relating to section 8(1)(*a*) and confirmed his appeal was confined to section 8(2)(*h*) exclusively.

10. The Taxpayer did not attend and therefore did not give evidence at the hearing of the appeal, which was conducted on his behalf by his authorised agent Mr. Brian Hernen.

11. Attention should be called to a letter dated 7th May 1982 written by Mr. B. Hernen to the Commissioner of Inland Revenue, copied to the Clerk of the Board of Review, seeking the Revenue's agreement to include a number of facts without formal proof at the hearing of the Appeal which the Taxpayer sought to be argued. These facts are set out below verbatim:—

> "(*a*) That in accordance with the KESCO-BEI Agreement, the Taxpayer's salary was payable by the U.K. Government.

(*b*) That the Taxpayer is normally employed in the U.K. and was recruited in the U.K. for temporary service in Hong Kong and returned to the U.K. to resume his former employment.

(*c*) That representatives of the U.K. Government Department of Industry (D.O.I.) regularly attended meetings in the U.K. and Hong Kong to evaluate the performance of the Taxpayer's services in Hong Kong on behalf of the U.K. Government.

(*d*) That the Taxpayer's conditions of service were based on U.K. terms for normal employment in the U.K. with additional emoluments determined by the U.K. Government D.O.I.

(*e*) That the D.O.I. accounts are reviewed by the U.K. Government Public accounts Committee to ensure that payments are made only for services rendered to the U.K. Government.

(*f*) That the Central Electricity Generating Board and British Electricity International Ltd. are not registered in Hong Kong under the Business Registration Ordinance.

(*g*) That the U.K. Government only derived indirect benefit from the Taxpayer's services to the Kowloon Electricity Supply Co. in Hong Kong and received no profit from those services.

(*h*) That the Taxpayer's income did not arise in Hong Kong from any office or employment of profit."

12. To this the Assessor replied by letter dated 18th May 1982 challenging or questioning points (*a*), (*f*) and (*h*), and giving notice to the Taxpayer that he must adduce evidence to substantiate points (*c*) and (*e*), and points (*b*), (*d*) and (*g*) also if the Taxpayer intended to reply upon anything beyond what is contained in Appendex A to the Determination. i.e. the Agreement between BEI and China Light.

13. Notwithstanding this warning from the Assessor, the Taxpayer chose to refrain from adducing any evidence to explain certain points of lurking doubt which existed in the mind of the Assessor as well as in ours. We would have liked to have some assistance from the Taxpayer on his argument as to facts and details pertaining to the points on which the Assessor required some more cogent evidence and some explanation.

14. We think the most important document in this case is the letter of assignment dated 4th January 1979 whereby NIES wrote to the Taxpayer offering him an overseas assignment for BEI. It expressly states that the client is China Light and that for the purpose of the Contracts of Employment and Redundancy Payment Act (NI) 1965 (as amended) the service i.e. NIES will remain "your" (meaning "the Taxpayer's") employer throughout the period of the assignment. It further provides that the terms and conditions of the assignment are contained in the BEI Overseas Assignment Policy already provided.

15. We would very much have liked to see the last mentioned document, since it is more than probable that it would have thrown some light on the terms and conditions of the Taxpayer's assignment.

16. We have received no assistance from the Taxpayer's agent as to the legal effect of the qualifying words "For the purpose of the Contracts of Employment and Redundancy Payment Act (NI) 1965 (as amended)". We are not aware of any circumstance or documentary evidence which is in consistent with the Taxpayer's continuing to be in the employment of NIES throughout the period. We agree with the Commissioner that in the circumstances of this case,

(*a*) the Taxpayer has failed to bring himself within the conditions stipulated in section 8(2)(*h*) so as to qualify him to claim exemption from liability to salaries tax,

(*b*) the Taxpayer is not a person whose emoluments were payable by the Government of the United Kingdom notwithstanding that the Department of Trade of Industry in the United Kingdom ultimately may reimburse his employer for the salary he received, and

(*c*) the Taxpayer should not be regarded as a person in the temporary service of the United Kingdom Government receiving emoluments from that Government, and notwithstanding too that during the period of assignment the Taxpayer continued to be paid by his employer, through a bank in the United Kingdom.

17. We are very much in the dark as to the nexus if any between the U.K. Government in general and the D.O.I. in particular with the assignment of the Taxpayer. The paragraph of the said letter of assignment under the heading "Reabsorption Arrangements" and provision in the said letter that BEI have the right to terminate the assignment at any time if they consider its continuance will be prejudical to the client, the ESI, BEI or the Taxpayer or his family suggest that the only conclusion to be drawn is that the employer of the Taxpayer during the period of assignment was either the BEI or NIES.

18. Article 7.1.5. of BEI's agreement with China Lights states that BEI personnel who are on assignment to China Light shall be subject to the control and direction of China Light. In fact in the course of his submission to us Mr. B. Hernen whilst he was seeking to eliminate the different organizations or corporations from the role of employer gave us the impression at one point that he was contending that China Light was the Employer of the Taxpayer during the relevant period. Whatever the correct inference may be from the facts and documents before us, we agree with the Commissioner's finding that at all relevant times the Taxpayer was employed by NIES. Putting it in a negative way, there is insufficient evidence for the Commissioner or for us to hold that the Taxpayer was during the relevant period in the temporary service of the United Kingdom Government.

19. In his submission to us Mr. Hernen stated that for the Taxpayer to be excluded form tax under section 8(2)(*h*) of the Inland Revenue Ordinance, the Commissioner must be satisfied on 2 matters of fact and must hold 3 opinions. The 2 matters of fact are (1) that the Taxpayer's emoluments were payable and paid by the Untied Kingdom Government, and (2) that the Taxpayer while working in Hong Kong was in the temporary service of the U.K.

Government. Any person who succeeds in establishing the 2 facts above referred to must succeed in showing that in the opinion of the Commissioner:—

(i) The Taxpayer was serving in Hong Kong on United Kingdom based terms.

(ii) The Taxpayer was normally employed in the United Kingdom but was liable for overseas duty.

(iii) The Taxpayer was recruited in the United Kingdom specially for service in Hong Kong.

Mr. Hernen further contended that from Fact (5) and Appendix A of the Commissioner's Determination, it is implicit that the Commissioner is of the opinion that the Taxpayer was serving in H.K. on U.K. based terms and that he is normally employed and was recruited for service in Hong Kong.

20. We refer to Fact (5) of the Determination quoted in the early part of this decision. We have not been persuaded that the Commissioner thereby implicitly held the opinion, among other things, that the Taxpayer was recruited for service in Hong Kong. Such an interpretation by implication would contradict what the Commissioner has expressly stated in paragraph 3(2) of the "Reasons Therefor" in his Determination. After quoting the relevant section, the Commissioner was at pains to say that he did not accept the Taxpayer's argument that because the Department of Trade and Industry in the United Kingdom ultimately may in effect reimburse the Taxpayer's employer for the salary the Taxpayer received and because the terms of the Taxpayer's assignment in Hong Kong was two years then he should be regarded as a person in the temporary service of the Government of the United Kingdom receiving emoluments from that Government.

21. From the Commissioner's Determination as a whole it is quite clear that his opinion was against the Taxpayer on all relevant points, and his opinion is shared by us.

22. In the course of his submission, Mr. Hernen referred to some passages from Chitty on Contract and the differences between contracts of service and contracts for services. The differences between these two types of contract are relevant only to determining the source of income under section 8(1) i.e. whether the emoluments arise in or are derived from Hong Kong. There are many decisions reported in the Hong Kong Inland Revenue Board of Review decisions, on this point, which is no longer material to our decision, as the Taxpayer no longer relies on the application of section 8(1). Suffice it to say that in all previous cases, different Boards have adopted the "all factors test" or the "totality test" so that in determining the source of income, the contract that gave rise to it is just but one factor. We need refer only to the Board's decision in B/R 74/75 reported in H.K. I.R.B. Decisions p. 196.

23. Having considered all the facts and documents before us and the submissions of both parties, we are of the opinion that the Taxpayer has failed to discharge the onus of proving that the assessments appealed against are wrong or excessive. It follows, therefore, that the appeal is dismissed and the assessments are hereby confirmed.