Case No. D12/94

Salaries tax – taxpayer performing services outside of Hong Kong but visiting Hong Kong – whether part of a day comprises a complete day for tax purposes – section 8(1B) of the Inland Revenue Ordinance.

Panel: Howard F G Hobson (chairman), Barry J Buttifant and Rowdget W Young.

Date of hearing: 11 April 1994.
Date of decision: 23 May 1994

The taxpayer was employed in Hong Kong to perform services in China. It was accepted that the source of the income of the taxpayer was Hong Kong and that during his visits to Hong Kong he performed services in Hong Kong. The question to be decided was whether or not part of a day comprises a day for salaries tax purposes.

Held:

Part days should be included in the calculation of days spent in Hong Kong for salaries tax purposes. Likewise 'non-working days' should be included in the calculation once it has been ascertained that the taxpayer has performed services during visits to Hong Kong.

Appeal dismissed.

Cases referred to:

D29/89, IRBRD, vol 4, 340
CIR v SO Chak-kwong Jack 2 HKTC 174

Chan Wong Yee Hing, Jennifer for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The Taxpayer was employed by Company A as a quality controller. His duty was to go to factories in China to inspect production. He returned to Hong Kong from time to time for several days and would report upon his previous trip and prepare for the next

one. This appeal is concerned with his objection to a salaries tax assessment made in relation to his employment from 1 April 1991 to 29 February 1992 (the relevant period).

During the relevant period the Taxpayer made six visits to Hong Kong. Central to this appeal is determining the aggregate length of those visits. The relevant provisions of the Inland Revenue Ordinance read, in truncated form, as follows:

8. Charge of Salaries Tax

(1) Salaries tax shall …, 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; …

(1A) … income arising in or derived from Hong Kong from any employment:

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

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

(c) excludes income derived by a person from services rendered by him in any territory outside Hong Kong where:

(i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and

(ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.

(1B) In determining whether or not all services are rendered outside Hong Kong for the purpose 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.

The above brief recital of the agreed facts is sufficient for the purposes of this decision because the Taxpayer did not dispute that his income was sourced in Hong Kong nor did he deny that some of the services he undertook in furtherance of his employment were carried out in Hong Kong nor is there any suggestion that he had paid tax in China: before us he did suggest that the money he spent on food while in China was equivalent to tax but we do not think that suggestion deserves any serious attention. Consequently the provisions of subsections (b)(ii) and (c) of section 8(1A) need not concern us. It is therefore

the interpretation of section 8(1B) which is in issue. The following is a list of the dates (taken from the Taxpayer's Home Visit permit) of the six Hong Kong visits:

Date of Arrival at Hong Kong from China	**Date of Departure from Hong Kong to China**	**No of Days in Hong Kong**	
		IRD	**Taxpayer**
27-6-1991	29-6-1991	3	1
30-6-1991	4-7-1991	5	3
8-8-1991	12-8-1991	5	3
12-8-1991	2-9-1991	21	20
28-11-1991	8-12-1991	11	9
30-1-1992	29-2-1992*	31	30
	Total:	76	66

* Being the last day of the employment. The actual date of departure is 8 March 1992.

It will be seen that the assessor's calculation in the third column includes both the day the Taxpayer arrived in Hong Kong and the day he left Hong Kong. Conversely, the Taxpayer's calculation in the fourth column excludes the entry and exit days.

The Revenue finds support for including the arrival and departure days in the following obiter dicta passage taken from D29/89, IRBRD, vol 4, 340:

> '… 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. It is possible that section 71(1) of the Interpretation and General Clauses Ordinance, Chapter 1, may apply in computing the period however as we were not addressed upon the point we make no comment.'

Section 71(1) in material part reads:

> '(1) In computing time for the purposes of any Ordinance:

(a) a period of days from the happening of any event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;'

In addition to arguing that the entry and exit days (part-days) should not be taken into account when calculating the aggregate of his visits, the Taxpayer submits that though he resigned his employment with effect from 29 February 1992 he was not required to work for the last fourteen days which constituted his vacation leave nor for the four public holidays of Chinese New Year, which fell in February, thus the 66 days in the fourth column should be further reduced by 18 days making 48 days.

Conclusion

The quoted passage from D29/89 is obiter dicta and at best of persuasive value only. However we believe that the decision in D29/89 is correct for the additional following reason.

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 (IB). It is inconceivable that the legislature intended any such result.

At the Board's request the Commissioner's representative gave us her view of section 71(1) of Chapter 1, namely, first that section is not itself a definition of the word 'day', secondly section 8(1B) of the IRO is not concerned with the happening of 'any event or the doing of any act or thing' it simply lays down a period of time. We agree with this reasoning and accept that section 71(1) has no bearing on the calculation of the 60 days in section 8(1B). We therefore accept the Revenue's calculation and find as a matter of fact that the total of the Taxpayer's visits during the relevant period exceeded 60 days.

The remaining question is whether as submitted by the Taxpayer, the period of his leave and Chinese New Year, together covering 18 days, should be subtracted from the Revenue's 76 days which would then reduce the total below 60 days. The point he seems to be making is that those 18 days were not, for him, working days, that is to say he was not rendering services in Hong Kong.

This proposition brings us to consider the judgment in CIR v SO Chak-kwong Jack 2 HKTC 174. In that case the salaried taxpayer, who was seconded to work in the UK, was assessed to salaries tax on his total emoluments for the period 1 April 1981 to 31 March 1982. He invoked section 8(1B). It was conceded that he visited Hong Kong several times and spent a total of 108 days of which only 28 days were spent rendering services in

connection with his employment. The Board found for the taxpayer. The Commissioner appealed and the court found for Commissioner in the following words:

> 'The Board of Review was persuaded that section 8(1B) was ambiguous and capable of two interpretations. I disagree. In this regard this section is clear and unambiguous. The words "not exceeding a total of 60 days" qualify the word "visits" and not the words "services rendered". Were it otherwise the section would be expressed differently. In order to take the benefit of the section therefore a taxpayer must not render services during visits which exceed a total of 60 days in the relevant period.'

In the instant case, the Taxpayer's visits exceeded 60 days in the aggregate and he did render services during some if not all of those visits, it follows that the benefit of section 8(1B) is not available to him, and we so find. Consequently this appeal fails.