

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D143/98

Salaries Tax – employment – source of income – sections 8(1), 8(1A) and 8(1B) of the Inland Revenue Ordinance.

Panel: Ronny Wong Fook Hum SC (chairman), William Cheng Chuk Man and Herman Fung Man Hei.

Date of hearing: 15 December 1998.

Date of decision: 7 January 1999.

The taxpayer was an employee of Company A for 10 months in the tax year concerned and out of which he was seconded to Company B in Country D for 2 months. For the remaining 2 months of the tax year the taxpayer was an employee of another Company C and was assigned by Company C to work in its China office on an on-off basis. In the tax year concerned the taxpayer was present in Hong Kong for 279 days. The taxpayer maintained that the income derived from his secondment to Company B and that from his employment with Company C should not be assessable to salaries tax because he rendered all services in Country D and China respectively.

Held:

- (1) What has to be decided is whether the income arose in or derived from Hong Kong from a source of employment or not. For this purpose what has to be considered is from which place the income really comes to the employee. The expression income arising in or derived from Hong Kong is referable to the locality of the source of income. What is important therefore is not the place where the duties of the employee are performed but the place where payment for the employment is made.
- (2) The taxpayer did not render all the services in connection with his employment with either Company A/Company B or Company C outside Hong Kong.
- (3) During the year in question, the taxpayer was in Hong Kong for no less than 279 days. The exemption under section 8(1B) clearly did not apply.

Appeal dismissed.

Case referred to:

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CIR v Goepfert 2 HKTC 210

Cheung Mei Fan for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Background

1. By letter dated 16 March 1995 from Company A to the Taxpayer [‘Company A’s Appointment Letter’], Company A offered to the Taxpayer employment as its assistant controller on the following terms and conditions:

- (a) Job assignment : Graded as a department head (Grade A) reporting directly to the resident controller.
- (b) Salary : \$30,000 gross per month.

2. By a letter dated 3 August 1995 from Company B to Company A [‘the Secondment Letter’], Company B confirmed their agreement to accept the Taxpayer on secondment to their company on the following terms:

- (a) Period of secondment : 14 August 1995 to 13 December 1995.
- (b) Salary : ‘We agree on the per diem cost of \$1627.4 and will pay directly to [Company A] upon receiving the monthly invoice.’

3. Payment slips for the months of August, September and October indicate that Company A continued to credit \$30,000 per month into the Taxpayer’s account.

4. By letter dated 5 February 1996 [‘Company C’s Appointment Letter’], Company C offered the Taxpayer the post of senior finance accountant on the following terms and conditions:

- (a) Remuneration:

‘From the date of commencement of your employment, the company shall pay you a monthly base salary of \$28,000...at the end of each completed month of service.’

‘During your short-term assignment (which is expected to last less than 6 months) in China, a monthly hardship allowance of \$4,200 (equivalent to

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15%) of your current month's salary will be paid to you for each calendar month spent in China.'

(b) Probation period:

'Your probation period is three (3) months during which either party shall be entitled to terminate this agreement by giving seven (7) days notice.'

5. By letter dated 9 May 1996, Company C gave the Taxpayer 7 days' salary in lieu of notice terminating his employment with effect from 9 May 1996.

6. Disputes ensued between Company C and the Taxpayer pertaining to his entitlements to end of year payment; hardship allowance and wages in lieu, Company C rejected the Taxpayer's claim for hardship allowance in these terms:

'Your employment commenced with [Company C] on 5 February 1996. During the month of February you spent a business trip of 9 days duration between 7 February to 15 February in China. The remainder of the month was based in Hong Kong. It was clearly indicated to you by your supervisor in February that the hardship allowance would not commence until you were more permanently assigned to China starting 1 March 1996.'

7. On 31 December 1996, after the Taxpayer had failed to submit a tax return for the year of assessment 1995/96 tax return, the assessor raised on him assessment in the sum of \$44,768 pursuant to section 59(3) of the Inland Revenue Ordinance. The Taxpayer objected to that assessment on, inter alia, the following grounds:

- (a) The income derived from his secondment to Company B should not be assessable to salaries tax because he rendered all services in Country D.
- (b) The income derived from his employment with Company C should not be assessable to salaries tax because he rendered all serves in China.
- (c) He should be entitled to dependant parent allowances for his parents and mother-in-law.
- (d) He should be allowed a deduction of charitable donations in the sum of \$20,000.

8. In response to the assessor's enquiries regarding the Taxpayer's employment for the year ended 31 March 1996, Company A supplied the following information:

- (a) '[The Taxpayer] was under employment of [Company A] as assistant controller during the period 16 March 1995 to 17 January 1996 (with 1-17 January 1996 being the paid vacation leave).'

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- (b) 'As the accounts department in [Company B] was in need of support staff, their controller had therefore contacted us in July/August 1995 requesting for assistance. After liaising with [the Taxpayer], we then advised [Company B] that [the Taxpayer] could be released to assist in their property for a period of time.'
- (c) 'Despite the fact that the original proposal for [the Taxpayer] to second to [Company B] was from 14 August 1995 to 13 December 1995... however, while he was working in Country D, their controller found that the work could gradually be picked up by their accounting staff and there was no further need for extra support. As a result, the period of secondment was shortened and [the Taxpayer] was able to return to Hong Kong on 12 October 1995'.
- (d) 'Despite his secondment to [Company B] during the period 15 August 1995 to 12 October 1995, he was still paid by [Company A].'
- (e) '[Company A charged Company B a per diem cost because] even though the staff is seconded to our sister company, she is still under [Company A's] employment and is continued to be paid by us, the sister company is therefore required to reimburse us for the costs to cover hotel's expenses.'
- (f) '[The Taxpayer's] employment remained to be governed by the terms and conditions (1) to (12) as set out in [the Company A's Appointment Letter] for the secondment period and from 13 October 1995 to 17 January 1996'.
- (g) 'The Secondment Letter was only a confirmation of the secondment details... This letter did not construe as a letter of employment for [the Taxpayer]...'
- (h) '[The Taxpayer] had rendered services in Hong Kong in relation to employment with our hotel during the year ended 31 March 1996'.
- (i) '[The taxpayer] was required to report to our company and attend meetings in Hong Kong. He had to perform all duties as designated by the resident controller and be able to carry out the functions of the department during the resident controller's absence during the period ended 31 March 1996'.

9. In response to the assessor's enquiries regarding the Taxpayer's employment for the year ended 31 March 1996, Company C supplied the following information:

- (a) '[The Taxpayer] was assigned to work in China for two months, that is, March and April on on-off basis. He usually worked in the Hong Kong office on Monday and worked in the China offices Tuesday through Friday and returned to Hong Kong during the weekend.'

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- (b) ‘[The Taxpayer] was working in both our Hong Kong office and China offices during the year ended 31 March 1996. He was required to travel to China on an on-off basis during March and April. There was no adjustment in working hours, that is, 9:00 to 5:30 Monday to Friday.’
- (c) ‘He was employed in the capacity of senior accountant and held accounting responsibilities for Hong Kong office. As Hong Kong is the regional office, he was also required to provide accounting assistance to the China offices and other offices in the Asia Pacific region.’
- (d) ‘His primary services were rendered in Hong Kong. However, due to the urgent need in China, he was assigned to work temporary there on an on-off basis during March and April.’
- (e) ‘He was required to report to our Hong Kong management on daily basis.’
- (f) ‘His office is in Hong Kong except the business days he spent in China.’
- (g) ‘As he was a frequent traveller and spent less than 90 days in China, we did not need to file his tax return in China.’

10. According to records from the Immigration Department, the Taxpayer was present in Hong Kong for 279 days during the year ended 31 March 1996. He was not in Hong Kong between 14 August 1995 to 12 October 1995 [‘the Secondment Period’]. Details of his presence in Hong Kong are as follows:

Arriving Hong Kong	Departing Hong Kong	No. of days in Hong Kong
	14-4-1995	14 (from 1-4-1995)
17-4-1995	22-4-1995	6
23-4-1995	21-5-1995	29
21-5-1995	19-7-1995	59
20-7-1995	6-8-1995	18
7-8-1995	15-8-1995	9
12-10-1995	31-10-1995	20
1-11-1995	2-12-1995	32
3-12-1995	9-12-1995	7
10-12-1995	23-12-1995	14
25-12-1995	20-1-1996	27
21-1-1996	28-1-1996	8
29-1-1996	6-2-1996	9
15-2-1996	29-2-1996	15
8-3-1996	13-3-1996	6
19-3-1996	22-3-1996	4
30-3-1996		2
		<u>279</u>

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11. The assessor had ascertained that dependant parent allowances for the Taxpayer's parents had been granted to a person called Mr E. By letters dated 19 May 1998 and 5 June 1998, the assessor asked the Taxpayer for evidence in support of his claim for dependant parent allowances. No reply was given by the Taxpayer prior to the hearing before us.

12. On 3 June 1998, in support of his claim for deduction of charitable donations of \$20,000, the Taxpayer submitted a receipt for \$11,800 issued by a monastery. That monastery is a charitable institution which is exempt from tax under section 88 of the Inland Revenue Ordinance.

Income from Company A and Company C

13. Section 8 of the Inland Revenue Ordinance (Chapter 112) provides:

'(1) 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 of employment of profit; and

(b) any pension.

(1A) For the purpose 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) ...

(ii) renders outside Hong Kong all the services in connection with its 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 substantially the same nature as salaries tax under this Ordinance; and

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(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 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.'*

14. Commissioner of Inland Revenue v Goepfert 2 HKTC 210 makes it clear that the first question is whether the income in question falls within the basic charge to tax under section 8(1). What has to be decided is whether the income arose in or derived from Hong Kong from a source of employment or not? For this purpose what has to be considered is from which place the income really comes to the employee. The expression income arising in or derived from Hong Kong is referable to the locality of the source of income. What is important therefore is not the place where the duties of the employee is performed but the place where the payment for the employment is made.

15. In relation to Company A/Company B:

- (a) We are of the view that the income in question arose in or derived from Hong Kong from the Taxpayer's employment with Company A. No separate contract of employment was entered between the Taxpayer and Company B. The Secondment Letter was the administrative arrangements between Company A and Company B. The Taxpayer was not a party to the same. Throughout the Secondment Period, the Taxpayer was paid in Hong Kong at the rate of \$30,000 as stipulated in Company A's Appointment Letter.
- (b) The next question is whether the income in question was derived from services rendered by the Taxpayer who rendered outside Hong Kong all the services in connection with his employment with Company A. The employment with Company A spanned between 16 March 1995 and 17 January 1996. The Secondment Period was between 14 August 1995 to 12 October 1995. There can be little doubt that the Taxpayer did not render all the services in connection with his employment with Company A outside Hong Kong.
- (c) The remaining question is whether the Taxpayer can take advantage of the exemption under section 8(1B). During the year in question, the Taxpayer was in Hong Kong for no less than 279 days. The exemption clearly does not apply.

16. In relation to Company C

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- (a) The income in question arose in or derived from Hong Kong from the Taxpayer's employment with Company C under Company C's Appointment Letter.
- (b) The Taxpayer did not render all the services in connection with this employment outside Hong Kong. He was in Hong Kong on 7 out of the 15 working days in February 1996. In March 1996 he was in Hong Kong on 4 whole working days. In his oral submissions before us, the Taxpayer admitted that the first 2 days of his employment were spent in Hong Kong trying to familiarise with his new job. He explained that the rest of his February stays in Hong Kong were part of the Chinese New Year holidays. He gave no explanation for the stay in March. Company C clearly stated that the Taxpayer 'usually worked in the Hong Kong office on Monday and worked in the China offices Tuesday through Friday...'. The exemption under section 8(1A) can have no application. On these evidence, the Taxpayer clearly did not render **all** the services in connection with this employment outside Hong Kong.
- (c) For reasons stated in paragraph 15(c) above, the exemption under section 8(1B) is inapplicable.

Dependant parents allowance

17. There is no evidence that the Taxpayer extended any support in favour of his parents to justify this allowance. To his credit, the Taxpayer did not pursue his appeal on this head.

Donation in favour of the monastery

18. The initial claim of the Taxpayer was for deduction of \$20,000. The date on the receipt furnished by the monastery is unclear. The Revenue's enquiries with the monastery revealed that the receipt was dated 12 May 1998. The date had been altered to appear as either 12 March 1996 or 12 May 1996.

19. We have no doubt that the receipt from the monastery is not related to the year in question. As there is no evidence in support of any charitable donation, we disallow any deduction in respect of the same.

Our decision

20. We dismiss the appeal and confirm the assessment.