

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D162/01

Salaries tax – whether services rendered outside Hong Kong – section 8(1), (1A) and (1B) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Dora Lo Lai Yee and Jason Yuen King Yuk.

Date of hearing: 25 January 2002.

Date of decision: 5 March 2002.

The appellant was employed by a company in Hong Kong. He claimed that he was not liable for salaries tax as he had been working in China during the relevant year of assessment.

Held:

1. Immigration records showed that the appellant was in Hong Kong for 120 days during the relevant year and thus he was not exempted under section 8(1B).
2. Taking into account the letter from his employer, the Board found that the appellant did also work in Hong Kong then and was not exempted under section 8(1A).

Appeal dismissed.

Cases referred to:

CIR v Goepfert 2 HKTC 210

CIR v So Chak Kwong, Jack 2 HKTC 174

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

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Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 3 October 2001 whereby:
 - (a) The salaries tax assessment for the year of assessment 1997/98 under charge number 9-1788140-98-6 dated 21 December 1998, showing assessable income of \$91,300 was confirmed. To give effect to the Tax Exemption (1997 Tax Year) Order, the tax payable under that charge was reduced from \$7,460 to \$6,714.
 - (b) The additional salaries tax assessment for the year of assessment 1997/98 under charge number 9-1835740-98-0 dated 5 January 1999, showing additional assessable income of \$100,000 was confirmed. To give effect to the Tax Exemption (1997 Tax Year) Order, the tax payable under that charge was reduced from \$20,000 to \$18,000.
2. The Appellant appealed on the ground that salaries tax should not be charged as he had been working in China during the relevant year of assessment.
3. By letter dated 16 November 2001, the Appellant said that as he was very busy at work he was unable to decide when he could come back to Hong Kong and applied to have the appeal heard in his absence under section 68(2D) of the IRO.
4. Miss Cheung Mei-fan who represented the Respondent at the hearing of the appeal had no objection to the application.
5. We acceded to the Appellant's application and proceeded under section 68(2D) in the Appellant's absence.
6. The Appellant did not submit any documentary evidence and did not submit any written submission.
7. Under cover of a letter dated 15 January 2002, Miss Cheung Mei-fan sent the Appellant a copy of the Respondent's documents, authorities and written submission.
8. Miss Cheung Mei-fan had nothing to add at the hearing of the appeal.
9. Section 8(1), (1A) and (1B) of the IRO provides that:

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- ‘ (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 or employment of profit ...*
- (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) *...*
- (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.’*

10. The Appellant’s then employer was a company incorporated in and carried on business in Hong Kong. The Appellant’s employment contract was signed in Hong Kong.

11. In our decision, the location and source of the Appellant’s employment was in Hong Kong. His entire income from the employment is caught by the charge under section 8(1) of the IRO, and there is no provision for apportionment, CIR v Goepfert 2 HKTC 210 at page 238.

12. His employment commenced on 23 April 1997. According to the records of the Immigration Department, the Appellant was in Hong Kong for 120 days from 23 April 1997 to 31 March 1998.

13. In CIR v So Chak Kwong, Jack 2 HKTC 174, it was held that the words ‘not exceeding a total of 60 days’ in section 8(1B) qualify the word ‘visits’ and not the words ‘services rendered’. Thus, section 8(1B) is not applicable in this case because the Appellant’s ‘visits’ exceeded 60 days, assuming that his trips to and from Hong Kong were ‘visits’.

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14. The Appellant appealed on the ground that he did not render any service in Hong Kong between 23 April 1997 and 17 July 1997. Effectively what he was asserting was that he rendered all the services in connection with his employment outside Hong Kong, and contended that his income was thus excluded by section 8(1A).

15. Whether the Appellant had rendered any service in Hong Kong between 23 April 1997 and 17 July 1997 is a question of fact. We do not accept his claim and find against him on this factual issue.

- (a) His claim was contradicted by his former employer. His former employer's tax representatives wrote to the Revenue stating that the Appellant was on probation during this period, and that he had to work in the Hong Kong office to get familiar with the business operations and the work flow between Hong Kong and the PRC factory.
- (b) At the very least, there is no legitimate basis for us to prefer the Appellant's assertion in writing to his former employer's assertion in writing.
- (c) The Appellant accepted that he had to report to the office. We find it odd that his former employer required him merely to report. In our view, it is more probable that what he did was more than mere reporting and that he did what the former employer said he did, that is, to acquaint himself with the former employer's mode of operation. After all, he was paid \$26,000 a month.

16. There is no evidence of any payment of tax within the meaning of section 8(1A)(c) of the IRO.

17. For the reasons given above, the Appellant has failed to discharge the onus under section 68(4) of proving that any of the assessments appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessments as reduced by the Commissioner on the amounts of tax payable.