Case No. D16/87

Board of Review:

Charles A. Ching, *Chairman*, N. J. Gillanders and MA Ching-yuk, *Members*.

28 July 1987.

Salaries Tax—Section 8 of the Inland Revenue Ordinance—whether an employee of a foreign company is subject to salaries tax and whether any exemption can be granted for the time spent outside Hong Kong.

The Appellant was assessed to salaries tax for the years 1981/82, 1982/83 and 1983/84. The Appellant claimed that he was not subject to salaries tax under Section 8 of the Inland Revenue Ordinance because he was employed by a foreign company. Alternatively, if he was subject to salaries tax, only 40% of his income was assessable since he was required to and did spend 60% of his time away from Hong Kong.

Held:

On the facts the Appellant was throughout the period in question employed by a Hong Kong Company. He worked in and from Hong Kong where he lived and where he was paid. Although he was required to report to Germany and was required to take instructions from Germany this was no more than an internal arrangement between the associated companies.

Appeal dismissed.

WONG Chi-wah for the Commissioner of Inland Revenue.
Appellant in person.

Reasons:

The taxpayer was assessed to salaries tax for the years 1981/82, 1982/83 and 1983/84. The Inland Revenue Department took the view that his income arose in or derived from an office or employment of profit in Hong Kong. The taxpayer took the view that he was employed by a foreign company. In his objection to the Commissioner, which was determined against him, he asserted that he was not subject to salaries tax at all, alternatively that if he was subject to salaries tax only 40% of his income was assessable since he was required to and did spend 60% of his time away from Hong Kong. Before us the taxpayer abandoned any argument that he was not subject to salaries tax at all and restricted himself to an argument that only 40% of his income was assessable to tax.

There are two limited companies involved, one in Hong Kong and the other, its associate, in Germany. At one stage the taxpayer asserted that he had never been employed by the Hong Kong company. We think this arose from a misunderstanding on his part that a contract of employment must be in writing and signed by the parties. We were shown a copy

of a letter dated 7 July 1981, which offered him employment by the Hong Kong company. Although the copy we were shown was not countersigned by the taxpayer it is clear that he entered into employment with the Hong Kong company on the terms set out in that letter. We therefore find that he was originally employed by the Hong Kong company with effect, in accordance with that letter, from 20 July 1981. His post was Technical Representative, Southeast Asia and he was to be eligible for, inter alia, the provident fund of the Hong Kong company.

The Hong Kong Company had been responsible for the Far Eastern Sales of one of the products of the German company. Late in the month of July 1981, it was decided that that responsibility should be transferred to the German company. This is set out in a letter dated 27 July 1981, in which it was stated that

> "The (product) marketing representative located in Hong Kong will be directed by (the German company) but will receive administrative support (salary and benefit programs, expense-report administration, office space, secretarial assistance, etc.) from (the Hong Kong company). (The German company) will reimburse (the Hong Kong company) for all expenses connected with the (product) representative plus 2% profit before tax and sales."

Provision was made for the supply of the product from elsewhere than Germany and the manner in which the Hong Kong company would be paid the 2%.

Under cover of a letter dated 31 March 1982, the taxpayer was sent 'working guidelines' dated 7 January 1982, from the German company. This referred to the taxpayer as the sales representative for the product in Asia. It continued

> "His place of employment is in the (Hong Kong company's) Hong Kong office and he is responsible to the manager of this office in all administrative affairs. Extent and manner of his activity is determined by the Marketing Manager (of the German company)."

The taxpayer was advised to use 60% of his working time visiting customers and agents and he was to report to the German company. The taxpayer gave us details which showed that for the five odd months in 1981 he had been away from Hong Kong for 44 days and that for the year 1982, up to 22 May 1982, he had been away from Hong Kong for 64 days.

In September of 1983 the German company sent the taxpayer a "Job Description" which described him as a Technical Representative. Under "Plant" is

> "(The German company) Textile Products Division (Hong Kong Office)."

His function is described as being under the general function direction of the Division Sales and Marketing Manager, Textile Products (German company) and administration guidance of the General Manager of the Hong Kong company. Again, he was required to report to the German company.

For the three years in question the taxpayer made returns asserting that he was employed by the German company. The only exception was that he reported that for the period 20 July 1981, to 30 September 1981, he was employed by the Hong Kong company. In his return for the year 1983/84 he added a note stating that his wages and bonus had been advanced to him by the Hong Kong company on behalf of the German company.

In reply to an enquiry by the Commissioner the Hong Kong company stated inter alia that there was an internal decision to transfer the responsibility for sales 'in this part of the world' to the German company, the taxpayer's duties and conditions of employment were negotiated directly between the taxpayer and the German company, that he was paid by the Hong Kong company which was reimbursed by the German company, that he was a member of the provident fund operated by the Hong Kong company and that he utilised space in the offices of the Hong Kong company. Indeed we have seen a copy of an application to the Inland Revenue Department for appeal of a provident fund by the Hong Kong company and the taxpayer is a member of it.

The Hong Kong company had consistently listed the taxpayer as an employee in its return. On 28 May 1985, apparently in response to a letter from the taxpayer in which he stated that the Inland Revenue Department had agreed that he was employed by the German company throughout, the Hong Kong company purported to withdraw its employer's returns insofar as it related to the taxpayer.

It is common ground that the taxpayer lived in and worked from Hong Kong. He stated that he had actually been engaged by a Lancaster company associated with the Hong Kong and German companies and that he had been interviewed in Australia.

Looking at the matter in the round we find that the taxpayer was throughout the period in question employed by the Hong Kong company, that he worked in and from Hong Kong where he lived and where he was paid. We find that although he was required to report to Germany and was required to take instruction from Germany this was no more than an internal arrangement between the Hong Kong and German companies. On the evidence before us we accept that the taxpayer spent some time out of Hong Kong in pursuance of his duties but he did not spend as much as 60% of his time doing so.

Our attention was drawn to decisions of this Board, namely Nos. BR20/69 and D20/82. We agree with those decisions. We find therefore that the taxpayer's income arose out of or derived from an office of employment of profit in Hong Kong and is assessable to salaries tax under section 8 of the Inland Revenue Ordinance, Cap. 112. We do not see any ground for apportioning any part of that income between work done within and without Hong Kong.

We therefore dismiss this appeal.