

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D17/86

Board of Review:

Charles A. Ching, *Chairman*, Stephen C. C. Cheung and Hwang King Hung, *Members*.

18 August 1986.

Salaries Tax—Income arising in or derived from Hong Kong under Section 8(1) of the Inland Revenue Ordinance Cap. 112—employee on secondment to Macau but paid by Hong Kong office.

The Appellant, a local employee of a foreign bank, was posted to Macau but he was shown as an employee of the Hong Kong office in the employer's returns. He retained the same rank and he remained on the Hong Kong staff provident fund which is only available to employees of the bank in Hong Kong. He made frequent visits to Hong Kong to discuss business and to receive instructions. The Assessor assessed him to salaries tax on the total emoluments received. The Appellant appealed.

Held:

The Appellant's income was in fact derived from or arose in Hong Kong. The Hong Kong office represented him as being its employee throughout and reported his posting to Macau as being a matter of internal transfer.

Appeal dismissed.

J. G. A. Grady for the Commissioner of Inland Revenue.
Appellant in person.

Reasons:

The taxpayer joined the C in Hong Kong as a local staff member in 1958. There was no written contract. He was expected to take up any assignment given to him. He was not obliged to do so but it was expected that he would refuse only for good reason. In 1979, when he was a senior assistant manager, he was made the Macau representative. He was assessed to salary's tax for the period during which he so acted.

The test that we have to apply is not in doubt. We must look at all of the relevant factors. It is not sufficient merely to consider the place in which he entered into his contract of employment, the place where he performs his services, the place where he is paid or the source of the funds from which he is paid. If, having taken into account all of the relevant

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factors, his income arose in or was derived from Hong Kong he comes within section 8(1) of the Inland Revenue Ordinance, Cap. 112, and is properly assessable to tax.

The taxpayer called one witness who described to us the function of a representative office of the bank. The office is not a banking one but is meant to be a link between the country of the head office, France, and the country in which it is situated. It helps to set up trade, gathers intelligence and acts as a liaison. Its expenses are on the head office budget, the bills first being settled by the Hong Kong office which would subsequently be reimbursed by head office. If the taxpayer needed assistance in answering a question he might turn to Hong Kong but that was only because the Hong Kong office was the closest. The Macau representative office was under the overall control of the regional manager in Hong Kong.

The taxpayer himself gave evidence. He agreed that throughout the period in question he was shown as an employee of the Hong Kong office in its employer's returns. He had not resigned from the Hong Kong office when he went to Macau, his rank remained the same and there was a gentlemen's agreement that he would eventually get back his old job. Throughout his time in Macau he remained on the Hong Kong Staff provident fund which is only available to employees of the bank in Hong Kong. He admitted that throughout he remained an employee of the Hong Kong office.

In his determination the Commissioner found that the Macau representative office was but an extension of the Hong Kong office. On the evidence before us we do not think that that was right. It seems clear to us that the Macau office was part of the worldwide group of offices maintained by the bank as a whole. The Hong Kong office would no doubt benefit from the activities of the Macau representative office but it was not set up for that sole purpose. That, however, cannot be determinative of the question in issue.

Mr. J. G. A. Grady, who appeared for the Inland Revenue Department, put before us the following matters:—

- (1) The taxpayer was born in Hong Kong and commenced employment in the Hong Kong office on 1 October 1958. There is no dispute as to that.
- (2) By a memorandum dated 22 June 1979, the External Affairs Department of C Asia/Oceania Branch in Paris commended the Hong Kong office in the following terms:—

“... your choice of (the taxpayer) as your local representative in Macau seems sensible ...”

The original memorandum in the French language shows, however, that this ought to have read

“... *the* choice ...”

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- (3) After finishing in Macau, the taxpayer was assigned to a position in Hong Kong with the same designation as that which he had held before. This was not in dispute.
- (4) According to a letter from the Hong Kong office dated 23 May 1980, the appointment of the taxpayer to Macau was considered as a matter of internal transfer.
- (5) By the same letter it was stated that the taxpayer's work was under the "jurisdiction" of the Hong Kong office.
- (6) During his time in Macau, the taxpayer's salary was paid as to one half by the Macau office and as to the other half by the Hong Kong office. This, however, was done only as a matter of convenience as stated in a letter from the Hong Kong office dated 23 May 1980.
- (7) Whilst acting as the Macau representative the taxpayer visited Hong Kong often. By a letter dated 24 June 1981, the taxpayer gave details of those visits which occurred between 18 July 1980, and 16 March 1981. They show that he was indeed very frequently in Hong Kong. In his opening remarks to us the taxpayer says that he attended two annual general meetings in Hong Kong but that otherwise his visits to Hong Kong were to see his children. We reject that particular piece of evidence. By a letter dated 13 December 1980, the Hong Kong office stated that the taxpayer came to Hong Kong from time to time to report, his stays usually not exceeding two days per week. By a letter dated 12 March 1981, the Hong Kong branch stated that the taxpayer's visits to Hong Kong were irregular and "subject to our chief manager (sic) requirements for business". By a letter dated 6 August 1981, the Hong Kong office stated that the taxpayer "reported to Hong Kong from time to time to discuss the business he brought in and to receive instructions from our chief manager, particularly for common clients".
- (8) The Hong Kong office lodged Employer's Returns which showed the taxpayer as its employee during the relevant period.

We have found this matter to be one of very considerable difficulty. In the end, however, having regard to all of the circumstances we find that the taxpayer's income was in fact derived from or arose in Hong Kong. It may be that some of his visits were to see his children but the others were for the purposes of reporting and receiving instructions. He had, as he told us, a power of attorney from the head office giving him general power to represent the bank. This is to be expected but does not detract from the fact that he was under the supervision of the Hong Kong office. The Hong Kong office certainly represented him as being its employee throughout and regarded his posting to Macau as being a matter of internal transfer. He remained a member of the provident fund of the Hong Kong office and

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that membership was open only to members of the staff of the Hong Kong office. Payment in Macau by the Macau office was only a matter of convenience.

For those reasons we dismiss this appeal.