

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D 1/81

Board of Review:

S. V. Gittins Q.C., J.P. *Chairman*; T. J. Bedford; N. B. Rafe; Maurice P. K. Wong, *Members*.

2 April 1981.

Salaries Tax – Company director – whether Director holding office can also have contract of employment – apportionment of earnings – relief under section 8 Inland Revenue Ordinance Cap. 112.

The Appellant was a managing director of a company and received an annual salary. Most of his work for the company was outside Hong Kong and infact he was also the managing director of a UK company the salary from which was considerably more than for the Hong Kong company.

Held: The Appellant is entitled to relief under s. 8(1A)(b)(ii) and 8(1B) of the Inland Revenue Ordinance in respect of his salary and also there should be an apportionment in respect of his fee as director.

Appeal upheld.

A. K. Gill for the Commissioner of Inland Revenue.

D. Flux of Peat, Marwick Mitchell & Co. for the Appellant..

Reasons:

1. The Taxpayer has appealed against a Salaries Tax assessment for the year of assessment 1977/78 in respect of salary and bonus in the sum of \$145,141 with tax payable thereon \$21,771.

2. The facts found by the Commissioner, on which his Determination is based, and which are admitted by the Taxpayer, are as follows:-

- (a) The Taxpayer was appointed as the Managing Director of a Company (the Company) with effect from 1 July 1977 at an annual salary of \$US\$30,000.

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- (b) The Taxpayer is responsible to the Board of the Company for the general business activities of the company. The day-to-day affairs are managed by the Deputy Managing Director. However the Taxpayer remains involved in policies, business development and is consultant on all major decisions. He travels frequently throughout Asia and plays an active role in development business for the company in countries in this region.
 - (c) During the period 1 July 1977 to 31 March 1978 the Taxpayer visited Hong Kong twice for a total of seven days. The purpose of the visits was to meet potential major clients in Hong Kong.
 - (d) There were ten directors' meetings of the Company during the above period, nine of which were held in Hong Kong. The tenth meeting was held at Rome. The Taxpayer attended the Rome meeting but did not attend any of the meetings held in Hong Kong.
 - (e) The company carries on a general merchant banking business. It is a company incorporated in Hong Kong on 27 July 1973. The appointment and the scope of power of its managing director are governed by its Articles of Association.
- 3, At the hearing before the Board, the Taxpayer gave evidence. On this evidence we find the following additional facts:-
- (a) The Taxpayer has been the Managing Director of a U.K. company since 1974;
 - (b) In October 1976 he was appointed a non-executive director of the (Hong Kong) company. He received no remuneration for this appointment.
 - (c) He was appointed Managing Director of the company as from 1 July 1977 at the salary and with duties as set out in paragraphs 2(a) and 2(b) above.
 - (d) His continuing salary from the U.K. company was consideration more than that from the company.
 - (e) Directors fees paid to 4 directors of the company for the year ended 31 December 1977 were as follows:-
 - A US\$8,550.
 - B US\$3,990.
 - C US\$3,990.
 - D US\$2,660.

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Director A received higher remuneration because he performed some special functions.

4. Article 81(b) of the Company's articles provide for the remuneration of a Managing Director or other working Director "by way of salary, commission, or participation in profits or otherwise" in addition to his remuneration as a Director.

5. The Lord President in **Anderson v. Sutherland**, (1941) S.C. 203 at 218, after referring to **Southern Foundries v. Shirlaw**, (1941) A.C. 701, said-

"In my opinion, therefore, the managing director has two functions and two capacities. Qua managing director he is a party to a contract with the company, and this contract is a contract of employment; more specifically I am of opinion that it is a contract of service and not a contract for services. There is nothing anomalous in this; indeed it is a commonplace of law that the same individual may have two or more capacities, each including special rights and duties in relation to the same thing or matter or in relation to the same persons."

6. The Taxpayer's representative concedes that while all directors, including a Managing Director and executive directors, hold offices from the company, he contended that the Taxpayer in this case also held a contract of employment with the company, and was entitled to the relief from Salaries Tax under Section 8(1A)(b)(ii) and Section 8(1B).

7. On the evidence given before the Board, which was not available to the Assessor or the Commissioner, we uphold the Taxpayer's contention and allow the appeal.

8. We also hold that out of the assessment appealed from there should be an apportionment in respect of directors' fees. The material for the computation of such apportionment is imprecise in that the evidence concerning directors' fees is for the year ended 31 December 1977 [paragraph 3(e) above]. We are disposed to take the medial figure of US\$3,990 as being the appropriate basis for the year of assessment and we invite the parties to negotiate on this basis. Should agreement not be reached we determine the amount to be apportioned to be US\$3,990 that being the best computation we can make in the circumstances.

9. The appeal is allowed and the case is remitted to the Commissioner for the assessment to be revised in accordance with the Board's opinion expressed herein.