

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D19/94

Salaries tax – diplomatic privilege – claim to be employed by international organisation.

Panel: Denis Chang Khen Lee QC (chairman), Anthony N C Griffiths and Yeung Kwok Chor.

Date of hearing: 21 January 1994.

Date of decision: 17 June 1994

The taxpayer claimed that he was a de facto official of an international organisation and was entitled to exemption from tax. He claimed that the organisation for which he worked was an international organisation entitled to diplomatic privilege and that as an employee he was exempted from salaries tax.

Held:

As a matter of fact the taxpayer was not an official of the organisation coming within the terms of the relevant ordinance. Accordingly he was not entitled to exemption from salaries tax.

Appeal dismissed.

Jennifer Chan for the Commissioner of Inland Revenue.

Taxpayer represented by his colleague.

Decision:

1. The Taxpayer claims that he was a de facto ‘official’ of an international organisation (Organisation X) during the relevant years of assessment 1990/91 and 1991/92 and that his income should not be subject to tax by virtue of article 12 in the subsidiary legislation to the International Organizations and Diplomatic Privileges Ordinance (chapter 190) on Organization X.

2. Unless article 12 applied the Taxpayer would be chargeable to salaries tax on the income received under section 8 of the Inland Revenue Ordinance (the IRO).

3. Under article 12 ‘officials’ of Organization X (subject to exceptions not directly relevant here) enjoy ‘exemption from income tax in respect of emoluments received

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by them as officers or servants of Organization X' [emphasis supplied]. The same article, it may be noted, confers on them immunity from suit and legal process in respect of words spoken or written and all acts done by them 'in the course of the performance of their official duties'.

4. The subsidiary legislation of which article 12 forms part follows the scheme of the principal Ordinance chapter 190, the first schedule of which comprises four parts. Part I lists the immunities and privileges of 'the Organization', part II those of 'Representatives, Members of Committees, High Officers and Persons on Missions', part III those of 'Other Officers and Servants' and part IV those of 'Official Staffs and of High Officers' Families'.

5. The principal Ordinance does not itself confer upon any particular organization or person or classes of persons any of the immunities and privileges lists; it empowers the Governor by notification in the gazette to do so within the statutory parameters.

6. The Governor is, for example, empowered to confer upon such 'classes of officers and servants of the organization' (other than those governed by other parts) the immunities and privileges set out in part III (to the extent which may be specified in the notification).

7. The broad class of persons specified under article 12 is 'officials' of Organization X (other than those expressly excepted therefrom).

8. It is the Revenue's case that the Taxpayer was employed not by Organization X but by Organization Y and that he was not an 'official' of Organization X entitled to be exempted from income tax in respect of emoluments received as an 'officer or servant' of Organization X.

FACTS NOT IN DISPUTE

9. In 1989 and 1990 Organization X entered into arrangements with Organization Y concerning legal assistance to be provided to asylum seekers who were 'unaccompanied minors' and 'vulnerable persons' in the determination of their status claims and related issues.

10. The basis of the arrangements was that Organization Y would provide Organization X with a team of professionals and support staff who would collect evidence (that is act as fact finders) and make certain recommendations for Organization X Special Committee A. The Special Committee A would then, on the basis of the evidence collected, formulate recommendations to the Hong Kong Government.

11. The Taxpayer was appointed, as from 1 September 1990, an officer with this Organization Y project team.

12. The said appointment was contained in a letter dated 1 September 1990 from Organization Y to the Taxpayer and which was countersigned by the Taxpayer.

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13. The said letter stated, inter alia, that the Taxpayer was ‘appointed as [an officer] in this project from 1 September 1990 to 31 December 1990’ at a salary of \$15,000 per month.

14. The said letter provided for a four months’ probationary period and that upon completion whereof a joint evaluation between the Taxpayer and his supervisor would be held to decide on his ‘further employment with the Agency’ (that is Organization Y).

15. Under ‘Working Relationship’ the said letter stated that the Taxpayer was ‘accountable to the project co-ordinator/director of the Organization Y’. Mr J was at the time director of Organization Y and signed the said letter on behalf of Organization Y as ‘director’. The project co-ordinator had an employment contract with Organization Y specially for this project and was part of the project team.

16. The duties listed in the said letter under which the Taxpayer was appointed [an officer] were: (1) directly supervise the work of the officers employed in the detention centre; (2) liaise with other voluntary agencies, camp management and Organization X; (3) monitor and evaluate the records and reports to be submitted to ‘the Committee’ (that is, Special Committee A of the Organization X); (4) ensure such reports were of a consistently high standard; (5) attend training as required; and (6) carry out other staff-level activities when and as instructed by the project co-ordinator/director.

17. The said letter stipulated that medical insurance was to be provided under a medical scheme announced by the management of Organization Y; annual leave was to be taken at such times as Organization Y should consider most convenient ‘having regard to the requirement of its business’; and either party could give the other party two months prior notice (excluding any leave) of their wish to terminate the employment or salary in lieu of notice.

18. By a letter from Organization Y dated 14 December 1990, similarly countersigned by the Taxpayer, the Taxpayer was re-appointed from 1 January 1991 to 31 December 1991 on the same terms as before but at an increased salary of \$16,500 per month.

19. The said Organization Y project was funded by Organization X and the office and other equipment used was paid for by Organization X within certain budgetary limits arrived at by agreement between Organization X and Organization Y, as evidenced by a letter dated 5 January 1990 from Organization X to Organization Y and by a supplementary agreement made in April 1990 between the two organizations.

20. The implementation procedures agreed between Organization X and Organization Y as part of the special procedures programme included the provision by Organization Y of a team of officers with specialised training and in status determination criteria.

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21. The project team would gather relevant information on unaccompanied minors and vulnerable persons and would assess their ability to undergo the normal status determination procedure.
22. The information would be gathered through interviews with the individual concerned and any associated adults and through liaison with other agencies, Organization X or Hong Kong Government personnel.
23. Dossiers containing all available information would then be submitted to Special Committee A of Organization X which might request additional information or call the officer concerned for clarification.
24. Organization X staff involved at Organization X Special Committee stage, as well as other staff directly involved in the screening operation, would monitor the day-to-day implementation of the activities undertaken under the agreement between Organization X and Organization Y. The decision on the recruitment of the project co-ordinator and the senior officers would be mutually agreed by Organization Y and Organization X.
25. The Taxpayer worked as [an officer] in the project team from 1 September 1990 to 30 June 1991 and earned a total salary of \$159,000 during the said period of employment.
26. In the first half on 1991 there was a restructuring by Organization X of the Special Procedures Programme. As a result Organization Y ceased to be the implementing agency for the project as from 1 July 1991.
27. By a letter dated 19 April 1991 Organization Y (under the signature of Mr J as director of Organization Y) informed the Taxpayer of the said restructuring and told him of the intention to terminate his employment contract in the following terms: 'I therefore regret to have to inform you that your current employment contract with Organization Y will terminate on 30 June 1991.' The letter continued: 'Organization X' invites you to apply for a position within the new programme.'
28. To implement the new programme Organization X had entered into a project agreement with Agency S. The Special Committee A of Organization X was re-structured; as part of the re-structuring core members of the disbanded Organization Y project team were invited by Organization X to join the re-structured Special Committee B.
29. By a letter dated 20 August 1991 from Agency S to the Taxpayer and countersigned by the Taxpayer (the terms of which are considered further below) the Taxpayer was appointed as a Member of the Special Committee under the said project agreement between Organization X and Agency S from 1 August 1991 to 31 July 1992.

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30. The appointment of the Taxpayer as a member of the Special Committee B was renewed by letter dated August 1992 from Agency S to the Taxpayer, who countersigned the same, from 1 August 1992 to 31 December 1992.

31. The Revenue has agreed with Organization X that those individuals appointed under the project agreement made between Agency S and Organization X should be recognised as qualified for salaries tax exemption under article 12.

32. In contrast with the position adopted vis-a-vis the Agency S project workers Organization X has declined to state that the Organization Y project team workers were officials of the Organization X. However Organization X subsequent to the Taxpayer's appointment under the Agency S contract was prepared to 'take into account' for the purpose of entitlements under the Agency S contract the Taxpayer's starting date of employment with the Organization Y project.

INFORMATION PROVIDED TO THE REVENUE BY ORGANIZATION Y

33. In its 1990/91 employer's return of remuneration and pensions Organization Y submitted the following particulars concerning the Taxpayer:

Capacity in which employed :	[an officer]
Period of employment :	1 September 1990 to 31 March 1991
Salary :	\$109,500

34. In the 'Notification by an Employer of an Employee's who is about to Cease to be Employed' Organization Y submitted the following particulars:

Capacity in which employed :	[an officer]
Period of Employment :	1 April 1991 to 30 June 1991
Salary :	\$49,500
Reason for Cessation :	Termination of Contract
Name and address of new employer :	Organization X

35. In its correspondence with the Revenue Organization Y stated, inter alia:

- (1) 'Under the auspices of Organization X a specialist Organization Y team ... gathered information from asylum seekers which was used by the Organization X to facilitate the determination of status. No other agency acted in this capacity for Organization X. This agreement lasted until the end of June 1991.'

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- (2) 'Organization Y had full autonomy over the employment and termination of staff for the project team. Staff were recruited, remunerated and supervised directly by Organization Y.'
- (3) 'After consultation with Organization X, Organization X stated that they were not in a position to state that the Organization Y staff for the project team were officials of Organization X.'

TAXPAYER'S ARGUMENTS

36. The Taxpayer, who gave evidence at the hearing, was if we may say so ably represented by his colleague who argued that despite the terms of Organization Y's letters of appointment the Taxpayer was only 'nominally' employed by Organization Y and was in reality working exclusively for Organization X as a member of a project team which, it was submitted, formed 'an integral part of the work of Organization X itself'.

37. It was emphasized that the Organization Y's project team was a small, highly specialized group working in a very specific, tight-knit relationship with Organization X. It was submitted that the project team was just as much 'a part of Organization X' as the specialized staff appointed pursuant to the project agreement between Agency S and Organization X.

38. It was submitted that in thus subsuming the core of the Organization Y's project team into the core of Organization X's restructured Special Committee B the Organization X was doing little more than recognising what was already the de facto position.

39. The Taxpayer has challenged, among other things, Organization Y's statement that it had 'full autonomy' over the recruitment and dismissal of staff involved in the Organization Y's project team.

40. The Taxpayer is also particularly aggrieved over the refusal and/or failure on the part of Organization X to accept that he was an official of Organization X when he was with the Organization Y's project and considered it incomprehensible why the recognition given to Agency S contract holders should be withheld from the Organization Y's project team workers.

COMPARISON WITH CONTRACTS OF AGENCYS

41. We are of course concerned in this appeal not with whether the Revenue was right in giving exemption to all or any of the project workers of Agency S (an exemption which the Taxpayer began to enjoy after he joined the Agency S project) but whether the Revenue was wrong in withholding exemption from the Taxpayer when he was previously working within the Organization Y project.

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42. Nonetheless, because much of the grievance appears to turn on this point, we have found it useful to examine whether there were any real differences which could form the basis of the different treatment accorded.

43. At least as far as the legal documentation is concerned certain differences are immediately apparent. In the case of the Agency S contracts under which the Taxpayer was appointed, the following points may be noted:

- (i) Although the terms of the Taxpayer's employment and conditions of service were expressed to be with Agency S, the appointment of the Taxpayer was as a member of the Special Committee B.
- (ii) The duties of the Taxpayer were expressed by reference to a job description which stipulated that the 'Duties and Responsibilities of Special Committee Member' were to be discharged under the supervision of the Organization X Chief of Mission and the Co-ordinator of the Special Committee.
- (iii) The duties of 'the incumbent' included the gathering, in his capacity as Special Committee Members, of such information as was necessary to enable assessments and recommendations to be made on the asylum seekers.
- (iv) Indeed the final recommendations would be drafted by the incumbent as special committee member (after having discussed and presented the case to the other special committee members of his team) for agreement by the other members of the special committee.
- (v) In addition to various liaison duties and supervising the work of interpreters and data collection assistants to the extent it was related to the activities of the special committee member, the incumbent also would in his said capacity participate, at the request of the Co-ordinator of the Special Committee or the Organization X Chief of Mission, in discussions on policy and principle.
- (vi) The incumbent would perform other duties as required by the Chief of Mission, Co-ordinator or supervisors.

44. There was another significant difference in the Agency S contracts. The entire section on 'Working Relationship' was omitted from the Agency S contracts. Whereas under the Organization Y contracts there was an express provision under 'Working Relationship' to the effect the Taxpayer was 'accountable to' the project co-ordinator/director of Organization Y there was no comparable provision in the Agency S contracts. Instead we see a 'Job Description' which expressly stated, inter alia, that the duties were to be discharged under the supervision of the Organization X Chief of Mission and the Co-ordinator of the Special Committee.

45. Whilst other provisions, apart from the direct appointment to the Special Committee, were couched in almost identical language to those in the Organization Y

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contracts, the Agency S contracts required completion of specified Organization X forms when apply for annual or sick leave and made it quite clear that official holidays would be set by Organization X and that Organization X and not just Agency S must be informed of any change in address, telephone number or family status.

46. It is clear on the evidence, and we so find, that the Special Committee B was an official organ and an integral part of Organization X. As was the position with the Organization X Special Committee prior to its restructuring, the Special Committee B would as a recognised organ of Organization X make recommendations to the Hong Kong Government.

47. The change in the accountability provisions appears to us to provide part of the basis for the Revenue's willingness to treat an incumbent such as the Taxpayer on the Special Committee B as an 'official' of the Organization X and for saying that any emoluments in connection with the appointment were received by the official as officer or servant of the Organization X.

MEANING OF 'OFFICIALS' OF ORGANIZATION X

48. The Revenue contends that 'official' should be given its dictionary meaning as 'a person who holds a public office'. It takes the view that the Organization X should be in the best position to know who was or who was not its officials and says that it is unnecessary to speculate why Organization X has not found it possible to state that the Organization Y project team workers were its officials.

49. In our view the ability or willingness or otherwise of an organization to certify whether any particular person is or is not one of its officials is not conclusive of the matter although a failure to do so may, depending on the facts of each case, be relevant or even significant.

50. We agree with the Taxpayer that it is not the nominal relationship or the label which is decisive of the matter but the substance of the relationship objectively ascertained.

51. We can well understand the Taxpayer's sense of frustration when his repeated efforts to get Organization X to recognise him as an 'official' (in relation to his employment within the Organization Y project) had not met with the response that he wanted.

52. We also agree with him when he says that Organization Y was not right in stating that Organization Y had 'full autonomy' over employment of staff for the project team. We find that at least as regards the recruitment of senior officers the decision had to be mutually agreed between Organization Y and Organization X. We find that Organization X, as the funding agency, did exercise a considerable measure of control over the recruitment of senior officers including the Taxpayer. Effectively Organization X had, at the recruitment end, a veto over their employment and closely monitored their work.

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53. We have however come to the conclusion that these factors and the closely-knit working relationship between the Organization Y project team and the Organization X Special Committee were not sufficient to make the Taxpayer an 'official' of Organization X. It is not enough in our view merely to show that the Organization Y project team was in some sense working 'for' Organization X.

54. In the context of article 12, an 'official' of the Organization X in our view means a person holding an office or position of responsibility in that organization and includes someone employed by and invested with a function by the organization in the manner of a functionary or charged with a position of authority within the organization in the manner of an officer. To qualify for exemption the official must have received the emoluments as an officer or servant of the organization.

55. Thus, it must be ascertained on the facts of each case whether or not the person concerned was an 'official' who had received the emoluments in the capacity of an officer or servant of the Organization X.

FURTHER ANALYSIS AND FINDINGS

56. We find, as a fact, that the Taxpayer was not at the relevant period a member of the Special Committee of Organization X (that is prior to its restructuring). It is clear from the evidence, and we so find, that the restructuring was not a mere cosmetic exercise to enable previous Organization Y project team workers who joined the new project thenceforth to claim exemption from salaries tax.

57. On the evidence we find that the re-structuring did not merely formalize relationships which already existed previously but did actually have the effect of making real changes to the previous relationships both on the ground and as a matter of legal reality.

58. In particular, as evidenced by the changed wording of the appointment letters, we find that instead of being accountable to the co-ordinator/director of Organization Y as a member of Organization Y project team, the Taxpayer upon being appointed to Organization X's restructured Special Committee became a full member thereof accountable to the Organization X Chief of Mission and the Co-ordinator of the Special Committee under whose supervision the Taxpayer as special committee member would be performing the official duties and responsibilities of an incumbent on that organ of Organization X.

59. Furthermore instead of being merely monitored by Organization X as he was under the Organization Y contracts he became part of the monitoring body and part of the recognised body within the Organization X which made recommendations to or otherwise dealt with the Hong Kong Government and others at large.

60. We find, as a fact, that under the Organization Y contracts the Taxpayer was not an 'official' of Organization X within the meaning of article 12 and that the emoluments were not received by him as servant or officer within the meaning of the said article.

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61. In making this finding we have not ignored the fact that Organization X itself was prepared to take into account the starting date of Organization Y project workers for the purposes of calculating entitlements under the Agency S contracts. This in no way however has the effect of turning Organization Y workers retrospectively into officials of the Organization X.

62. We find that the Taxpayer is not entitled to the exemption claimed and dismiss the appeal accordingly.