INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D20/00

Salaries tax – taxpayer working in Hong Kong for approximately 60 days per year – whether exempt from salaries tax – definition of 'a total of 60 days' – sections 8(1), 8(1A)(b), 8(1B), 66(1) of the Inland Revenue Ordinance ('IRO'), section 71(1) of the Interpretation and General Clause Ordinance.

Panel: Anna Chow Suk-han (chairman), Nigal Kat and Anthony So Chun Kung.

Date of hearing: 8 March 2000.
Date of decision: 13 June 2000.

In the years of assessment 1996/97 and 1997/98 the taxpayer visited Hong Kong for business. The Commissioner found that days of arrival and departure counted as full days in computing the number of days under section 8(1B) IRO. It concluded that in each of the years of assessment the taxpayer's visits to Hong Kong exceeded 60 days and he was thus liable to salaries tax. The question left to be decided by the Board was what amounted to 'a total of 60 days'.

Held by the Board :-

1. In determining how to compute '60 days' under section 8(1B), the Board must consider the provision in section 8(1B) itself: Wilkie v IRC followed in part;

2. The Board would follow Hong Kong law and adopt a purposive construction;

3. After considering a number of Board of Review decisions, it was decided that fractions of a day should not count as fractions. Rather they should count as whole days. Hence, both visits of the taxpayer to Hong Kong exceeded '60 days';

4. The taxpayer would thus be liable to pay salaries tax.

Appeal dismissed.

Cases referred to:

D29/89, IRBRD, vol 4, 340
D12/94, IRBRD, vol 9, 131
Wilkie v Commissioner of Inland Revenue 32 TC 495
D26/96, IRBRD, vol 11, 483
D54/97, IRBRD, vol 12, 354
Lysaght v Commissioner of Inland Revenue 13 TC 511
D11/97, IRBRD, vol 12,147
D143/98, IRBRD, vol 13, 667
CIR v So Chak Kwong, Jack 2 HKTC 174
D129/99, unpublished

Tam Tai Pang for the Commissioner of Inland Revenue.
Patrick Kwong of Messrs Ernst & Young for the taxpayer.

Decision:

The appeal

1. This is an appeal by the Taxpayer against the determination of 1 September 1999 by the Commissioner of Inland Revenue, in respect of the salaries tax assessment for the years of assessment 1996/97 and 1997/98, raised on the Taxpayer.

Law

2. A person is chargeable to salaries tax if he falls within the provision of section 8(1) of the IRO which provides as follows :

> ' *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 profits; and*
>
> *(b) …*'
>
> However, that person will be exempted if he has rendered all his services outside Hong

Kong as set out in section 8(1A)(b) which states as follows :

> '*(b) excludes income derived from services rendered by a person who :*
>
> *(i) is not employed by ..; and*
>
> *(ii) renders outside Hong Kong all the services in connection with his employment;'*

In determining whether a person renders all services outside Hong Kong, certain grace period is allowed by the IRO, such period is set out in section 8(1B) which reads as follows :

> '*In determining whether or not all services are rendered outside Hong Kong for the purpose 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.'*

The background

3. The facts of this case are not in dispute.

4. For the year of assessment 1996/97, the Taxpayer received a total income of $6,158,020 from four companies. They are Company A, Company B, Company C and Company D. Out of the said sum, $6,128,020 represented salaries and bonus from the first three companies and $30,000 a director' s fee from the last one.

5. For the year of assessment 1997/98, the Taxpayer received a total income of $6,744,870 from Company B, Company C and Company D. A sum of $6,692,370 represented salaries, bonus, value of option shares and travelling allowance from Company B and Company C and a sum of $52,500 was payment of director' s fee from Company D.

6. The Taxpayer does not dispute that the respective sums of $30,000 and $52,500 being director' s fees from Company D are chargeable to salaries tax under section 8(1)(a) of the IRO. However, the Taxpayer contends that his other income for the aforesaid years of assessment, should be exempt from salaries tax by virtue of section 8(1B) because he spent less than 60 days in Hong Kong in each of the said assessment years.

7. By the determination of 1 September 1999, the Commissioner informed the Taxpayer that she was of the view that the Inland Revenue Board of Review Decisions in D29/89, IRBRD, vol 4, 340 and D12/94, IRBRD, vol 9, 131 should be followed. Both the days of arrival and departure should count as full days in computing the number of days for the purpose of section 8(1B) of the IRO. On that basis, the Taxpayer' s visits to Hong Kong exceeded a total of 60 days

for each year of assessment concerned and section 8(1B) was not applicable to him.

8. As the facts of this case were admitted by both the Taxpayer and the Respondent (the Revenue), the only issue in dispute is ' what amounts to a total of 60 days for the purpose of section 8(1B) of the IRO?' . In other words, how should a ' day' be computed for the purpose of that provision?

The proceedings

9. Prior to the hearing, the parties presented this Board with the following authorities.

The Taxpayer :

(i) Wilkie v Commissioners of Inland Revenue 32 TC 495

(ii) D29/89

(iii) D12/94

(iv) D26/96, IRBRD, vol 11, 483

(v) D54/97, IRBRD, vol 12, 354

(vi) Lysaght v Commissioner of Inland Revenue 13 TC 511

The Respondent (the Revenue) :

(i) D12/94

(ii) D26/96

(iii) D11/97, IRBRD, vol 12, 147

(iv) D54/97

(v) D143/98, IRBRD, vol 13, 667

(vi) CIR v So Chak Kwong, Jack 2 HKTC 174

(vii) D129/99, unpublished

We considered each of these authorities and, where necessary to our decision to do so,

we refer to them below.

10. The Taxpayer did not attend the hearing of the appeal. He was represented by Mr Patrick Kwong and Miss Patrina Chang of Messrs Ernst & Young in his absence. The Respondent was represented by Mr Tam Tai-pang and Ms Chow Chee-leung.

11. No evidence was adduced on behalf of the Taxpayer. Mr Kwong and Mr Tam confirmed that the following are not in dispute :

a. the facts of this case,

b. the Taxpayer was only visiting Hong Kong, during the two years of assessment in question,

c. the employments of the Taxpayer are fundamentally Hong Kong sourced, and

d. the words ' not exceeding a total of 60 days ' in section 8(1B) of the IRO qualify the word ' visits' .

12. Their respective positions were also agreed to be summarized on the Taxpayer' s bundle of documents, to which we also made reference. Mr Kwong also confirmed on behalf of the Taxpayer that the Taxpayer was not claiming exemption under section 8(1B) in respect of the Taxpayer' s income arising out of his office of directorship with Company D for the two years of assessment in question.

The Taxpayer' s contention

13. Mr Kwong on behalf of the Taxpayer provided a written detailed argument and a written skeleton to which he spoke and both of which we have considered. He contended that when computing the period of 60 days for the purpose of section 8(1B) of the IRO, the computation should be made by counting hours spent in Hong Kong and dividing the same by 24 or alternatively, if that contention fails, the days of arrival should not be taken into the computation.

14. The Taxpayer placed reliance on the English High Court case of Wilkie v IRC. It was submitted that this case was not binding on us but it was persuasive. It was asserted that as held in that case, there was no common law rule to reckon fractions of a day as a full day. Thus fractions of a day should be taken into account as fractions. As the burden of proof was on the taxpayer, this method of computation of time for the purpose of section 8(1B) of the IRO, would not cause undue administrative burden on the Revenue.

15. The Taxpayer also found support from one of the several meanings of ' day' given in the Concise Oxford Dictionary of Current English, Eighth Edition. ' "DAY" is a period of 24 hours

as a unit of time, especially from midnight to midnight …'.. It was contended that this meaning of ' day' was the same as that decided by Donovan J in Wilkie v IRC.

16. The Taxpayer also sought to rely upon the statutory provision of section 71(1) of the Interpretation and General Clause Ordinance (' the IGCO') which overrode a common law rule, if any, to reckon fractions of a day as a full day.

17. If there was a common law rule that fractions of a day counted as a full day, it was argued that the Taxpayer was outside Hong Kong for 324 days and 335 days for the years of assessment 1996/97 and 1997/98 respectively. Accordingly, it could be said that the Taxpayer was in Hong Kong for a total of 41 days (that is, 365 days – 324 days) and of 30 days (that is, 365 days – 335 days) for the years of assessment 1996/97 and 1997/98 respectively.

The Respondent' s (the Revenue' s) contention

18. We also had the benefit of a written submission from the Respondent. He contended that the computation of time by counting fractions of a day as a day for the purpose of section 8(1B) was correct and this method of computation was supported by a series of Board of Review decisions.

19. The Board of Review Decision in D54/97 was not an authority for excluding the days of arrival in computation the total of 60 days for the purpose of section 8(1B).

20. Section 71(1)(a) of the IGCO had no bearing on the construction of section 8(1B).

21. The words ' 60 days' in section 8(1B) did not mean an accumulation of 1,440 hours as the Taxpayer contended.

22. The English High Court case Wilkie v IRC was not relevant to or helpful in the construction of section 8(1B).

Our findings and reasons therefor

23. This appeal comes before us under section 66(1) of the IRO and involves a question of whether the Taxpayer' s visits in each of the two years of assessment 1996/97 and 1997/98, exceeded a total of 60 days in the basis period, for the purpose of section 8(1B) of the IRO.

24. The facts of this case are straightforward and not in dispute. It is common ground between the parties that the Taxpayer was only visiting Hong Kong during the two years of assessment in question, the employments of the Taxpayer were fundamentally Hong Kong sourced and the assessment of the director' s fees was chargeable to salaries tax. It was also agreed that the words ' not exceeding a total of 60 days' in section 8(1B) qualify the word ' visits' in the same

provision. The sole question for us to decide is ' how should "days" be reckoned for the purpose of section 8(1B)?' .

25. Mr Kwong for the Taxpayer contends that for the purpose of section 8(1B) of the IRO, a ' day' should be a period of time in aggregate 24 hours, or alternatively, if that contention fails, the days of arrival of the Taxpayer' s visits should not be taken into account in computation of time. In respect of his former contention, Mr Kwong relied on the case Wilkie v IRC and a dictionary meaning of ' day' . In respect of his latter contention, he relied on the application of section 71(1) of the IGCO and the Board of Review Decision in D54/97.

26. In the case of Wilkie v IRC, Mr Wilkie appealed to the Special Commissioners of Inland Revenue for their decision on whether or not he actually resided in the United Kingdom for a period equal in the whole to six months in the year of assessment 1947/48, for the purpose of Rule 2 of the Miscellaneous Rules applicable to Schedule D of the English Income Tax Act 1918. The facts in that case were that Mr Wilkie arrived in the United Kingdom about 2 p.m. on 2 June 1947 and left about 10 a.m. on 2 December following. Before the Special Commissioners, it was contended on behalf of Mr Wilkie, that in computing the length of his visit to the United Kingdom the day of arrival should be disregarded and it was contended on behalf of the Crown that according to the established rule of law a fraction of a day fell to be treated as a full day and that days of arrival and departure were both days of residence in the United Kingdom. The Special Commissioners dismissed the appeal. Mr Wilkie required them to state a case for the opinion of the High Court. The case came before Donovan J in the High Court when a novel point of construction of the said Rule 2 of the Miscellaneous Rules was raised on behalf of Mr Wilkie which was upheld by Donovan J. In his decision, Donovan J said ' when computing the period of six months for the purposes of Rule 2 there is nothing in the language of the Rule to prevent hours being taken into the computation; but that, on the other hand, since what has to be determined is the period of actual residence, it is legitimate to do so.'

27. Mr Kwong urged us to follow the method of computation of time adopted in the case of Wilkie v IRC because of the similarities of the relevant provisions of the United Kingdom legislation and of the Hong Kong legislation.

28. He correctly pointed out to us that Rule 1 of Schedule D of the Income Tax Act 1918 is a charging section which charges income from foreign possession and securities arising to any person residing in the United Kingdom, while section 8(1) of the IRO is also a charging section, which charges income derived from Hong Kong sourced employment.

29. Mr Kwong invited us to compare the provisions of Rule 2 of Schedule D of the Income Tax Act 1918 with those of section 8(1A) and section 8(1B) of the IRO. Mr Kwong contended that Rule 2 of the Miscellaneous Rules was the exempting section which was comparable to our section 8(1B) of the IRO. In view of the similarities of the two charging sections, he said, section 8(1B) should be construed by treating fractions of a day not as a whole day as held in the English

High Court case. Mr Kwong noted that in reaching his decision, Donovan J carefully considered the significance of the word ' actually' which was used to qualify the word ' resided' in the said Rule 2. He argued that the absence of the word ' actual' to qualify the word ' visits' in section 8(1B), should not affect the relevance of the case.

30. Mr Kwong also asserted that the construction contended for by the Taxpayer that fractions of a day be counted as fractions in computation of time for the purpose of section 8(1B), would not impose an undue administrative burden on the Respondent (the Revenue), since the burden of proof was on the Taxpayer.

31. We therefore turn to consider Rule 2 of the English legislation and section 8(1A) and section 8(1B) of the Hong Kong legislation and also Donovan J' s reasons for treating fractions of a day as fractions and not as a whole day for the purpose of Rule 2.

Rule 2 and section 8(1A) and section 8(1B) read as follows :

English	**Hong Kong**
Rule 2 of the Miscellaneous Rules applicable to Schedule D :	Section 8(1A) and section 8(1B) of the IRO :
' A person shall not be charged to tax under this Schedule as a person residing in the United Kingdom, in respect of profits or gains received in respect of possessions or securities out of the United Kingdom, who is in the United Kingdom for some temporary purpose only, and not with any view or intent of establishing his residence there, and who has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment, but if any such person resides in the United Kingdom for the aforesaid period he shall be so chargeable for that year.'	*' (1A) …income arising in or derived from Hong Kong from any employment -* *(b) excludes income derived from services rendered by a person who -* *(ii) renders outside Hong Kong all 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.'*

As summed up in Wilkie v IRC, Rule 2 of Schedule D provides that a person shall not be charged

to tax under Schedule D if he proves three things (1) he is in the United Kingdom for a temporary purpose; (2) he has no intention of establishing his residence in the United Kingdom; (3) he has not actually resided in the United Kingdom on and off for six months in the year of assessment. In the English High Court case, the matters referred to in (1) and (2) above were admittedly satisfied by Mr Wilkie. The Revenue thus argued that there left only the matter in (3) for determination and nothing else, that is ' how long the person was resident in UK' . However, Donovan J disagreed. In view of the concluding proviso in Rule 2, ' but if any such person resides in the United Kingdom for the aforesaid period he shall be so chargeable for that year' , there was one further matter to be determined, that is, ' how long that person had not actually resided in UK' . Donovan J found that under Rule 2, instead of one, there were two other issues to be determined, firstly, the matter in (3) that Mr Wilkie had not actually resided in the United Kingdom for six months in the year of assessment, and secondly, the matter referred to in the concluding words that had Mr Wilkie resided in the United Kingdom for six months, he should be so chargeable for that year.

Tellingly, Donovan J also found that if the Revenue could invoke the rule about treating fractions of a day as a whole day, so could Mr Wilkie. Thus, in applying the rule about fractions of a day as a whole day to determine the two remaining issues under Rule 2, the result would be, quoting Donovan J ' one gets the absurdity that the taxpayer is actually resident outside the United Kingdom for more than six months and actually resident inside the United Kingdom for more than six months. In other words he is both exempt and chargeable under the Rule.' However, as it was found, the absurdity could easily be avoided by rejecting the method of treating fractions of a day as a whole day and employing the method of treating fractions of a day as fractions.

Moreover, as Mr Wilkie contended, it would also be right to do so on any question arising under Rule 2. The reasons were twofold. First ' because there is no general rule established in English law that fractions of a day should count as a whole day. The method to be employed in computing time must be determined by the terms of the instrument, be it statute or something else, which requires the computation.' Secondly, ' because the terms of Rule 2 require the period of "actual" residence to be computed, and "actual" means "truly" and "in fact" and is the reverse of notional.' Thus, in applying the computation of a lower unit of time, the actual period of residence of a person within and outside the United Kingdom can be ascertained at the truth and without a fiction.

32. Commencing on Wilkie v IRC, Mr Kwong asserted that as opposed to Rule 2, in section 8(1B), the word ' actual' was not necessary to qualify the word ' visits' , because the word ' visit' in its ordinary sense, already comprised the meaning of actual. Furthermore, the word ' actual' was necessary in Rule 2 because it served to qualify the word ' resided' in the latter part of the Rule, so as to distinguish its meaning from the meaning of the word ' residing' appeared in the early part of Rule 2, which ' residing' , as Mr Kwong asserted, meant ' ordinarily residing' and had a different meaning to ' actually resided' . Mr Kwong argued that since a person' s residence was immaterial to his chargeability to salaries tax in Hong Kong, the draftsman saw fit to use the word

' visits' in the provision of section 8(1B). Mr Kwong thus argued that despite the word ' actual' was absent from section 8(1B) to qualify the word ' visits' , its absence did not effect the relevance of Wilkie v IRC to our present case. Notwithstanding the absence of the word ' actual' to qualify the word ' visits' , Mr Kwong contended that the computation of time on a notional or fictional basis was not intended for the purpose of section 8(1B).

33. We observe that apart from the absence of the word ' actual' to qualify the word ' visits' in section 8(1B) upon which difference we put no weight, unlike Rule 2 which includes the concluding proviso quoted under paragraph 31 above, under section 8(1B), there is only one issue to be determined, that is, whether a person' s visits to Hong Kong exceed a total of 60 days. However, under Rule 2, apart from the matters set out in (1) and (2) under paragraph 31 above, there are two other issues to be determined and because there being two issues to be determined, the computation of fractions of a day as a whole day becomes unworkable. But with only one issue to determine under section 8(1B), the application of the method treating fractions of a day as a whole day to section 8(1B) is workable and it does not produce the absurdity as it did to Rule 2. However, Mr Kwong failed to address us on this distinction drawn from these two relevant provisions. Because of this distinction, we do not have to follow the method of computation of time as adopted in Wilkie v IRC.

34. As to Mr Kwong' s contention that ' day' means ' a period of 24 hours as a unit of time, especially from midnight to midnight' , this meaning is only one of several meanings appeared in the dictionary. Each depends on its context, as can be seen from that entry in the dictionary. We do not find that this is helpful in ascertaining the meaning to adopt for the purpose of construing section 8(1B).

35. Although Wilkie v IRC is not binding on us, we are satisfied that we should no less observe the principle held in it that ' the method to be employed in computing time must be determined by the terms of the instrument, be it statute or something else, which requires the computation.' Thus, in determining the method to be employed in computing the ' 60 days' under section 8(1B), we must first consider the terms of the provisions in section 8(1B). In so doing, we also bear in mind what Lord Esher, M R sitting in the Court of Appeal, says in North [1895] 2 AB 264 on page 269, as quoted in Wilkie v IRC: ' *... the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made.'* We will follow established Hong Kong law and adopt a purposive construction and, where possible, the ordinary meaning of the words used.

36. The terms of section 8(1B) are simple. The one we are concerned with is the length of visits which should not exceed a total of 60 days for the year of assessment for the purpose of entitlement to exemption of salaries tax. The relevant words are ' visits not exceeding a total of 60 days' . There is no definition or qualification of the word ' days' for the purpose of this provision. In particular, the provision does not say ' visits not exceeding a period in total amounting to 60 days.' Thus, in the ordinary sense of the language of section 8(1B) and for the purpose of

computing time for the purpose of section 8(1B), as an example, when a person arrives today and leaves tomorrow even if the duration of his visit is less than 48 hours, one would treat his visit as two days. Should the legislature have intended the duration to be otherwise computed, we think it would so stipulate in the legislation.

37. To determine what would be the right approach to the problem, perhaps it is also desirable to bear in mind the purpose for which the provision was made. The purpose of section 8(1B) is to provide an exemption from salaries tax to services rendered in Hong Kong during the grace period. The grace period is the duration of ' visits not exceeding a total of 60 days' for the year of assessment. Services rendered in Hong Kong during the grace period are not taken into account for the purpose of section 8(1A). That being the case, it is logical to say that if services are indeed rendered during the grace period, those days of services will not and cannot exceed 60 days. We note that in this appeal the Taxpayer was only visiting Hong Kong and the rendering of services by the Taxpayer during his visit to Hong Kong is not an issue. But for the sake of argument, we would put forward a case wherein during the year of assessment a person visited Hong Kong from Monday to Wednesday for 24 weeks, each Monday arriving at 8 a.m. and each Wednesday leaving at 6 p.m. and it was proved that he worked each day during his visits here. By applying the computation that fractions of a day count as fractions, for the purpose of section 8(1B), he would only have been here for totalling 58 days (that is, 24 hours on the first day, 24 hours on the second day and 10 hours on the third day totalling 58 hours per week for 24 weeks which equal to 1,392 hours or 58 days). He would therefore be entitled to exemption under section 8(1B) even though he had been working here for 72 days (that is, at 3 days per week for 24 weeks). Could this be the intention of the legislature?

38. As to Mr Kwong' s alternate contention that section 71(1) of the IGCO should apply in computing time for the purpose of section 8(1B) of the IRO, we do not find this helpful. Section 8(1B) does not require time to be calculated from the happening of any event. We do not accept that it was the intention of the legislature that the arrival was meant to be the happening of an event to start time running. Had that been the intention, wordings such as those which appear in section 66(1) of the IRO, would be employed. We regard the words of the provision as simply prescribing the total number of days during which a person visited Hong Kong. We agree with the submissions of the Commissioner' s representative recited in the Board of Review Decision D12/94 on section 71(1) and accept that section 71(1) has no bearing on the calculation of ' the 60 days' in section 8(1B).

As to the Board of Review Decision D54/97, not that the decision in that case turned on this point. In that decision, the Board said :

> ' *It can be argued that the arrival is the happening of the event which should be ignored. Even if we were to rule accordingly, it would not help the Taxpayer in this case for reasons we set out later.'*

It is evident that no ruling was made by the Board on the application of section 71(1). Accordingly, we agree with the Respondent (the Revenue) that the Taxpayer cannot rely upon that decision as even persuasive authority that section 71(1) of IGCO should apply.

39. We come to the conclusion that no sufficient grounds have been shown that the computation of time that fractions of a day should count as fractions, should be employed, for the purpose of section 8(1B). Other Board of Review decisions have been cited to us, in which in computing time for the purpose of section 8(1B), fraction of a day counts as a whole of a day. We find the reasoning in those cases persuasive and we cannot think of any reasons why they should not be followed.

40. For the reasons aforesaid, this appeal fails and the determination is hereby confirmed.

41. Finally, we would like to record our appreciation of the careful and able arguments presented by the representatives of the parties to this appeal. Although we have rejected the Taxpayer' s arguments, we are nonetheless impressed by his representatives' thoroughness in the preparation of the case and in particular, Mr Kwong' s conscientiousness in the discharge of his duties in this appeal.