

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D2/04

Salaries tax – whether income derived from Hong Kong – sections 8 and 8(1A) of the Inland Revenue Ordinance ('IRO').

Extension of time – when the one month period specified in section 66 commences to run – meaning of the phrase 'after the transmission to him' – sections 64(4) and 66 of the IRO – section 10B of the Interpretation and General Clauses Ordinance.

Panel: Benjamin Yu SC (chairman), Barry J Buttifant and Man Mo Leung.

Dates of hearing: 5 February and 5 March 2004.

Date of decision: 27 April 2004.

The taxpayer was dissatisfied with the determination that he had to pay salaries tax in respect of net chargeable income derived from his employment. The taxpayer contended that during the relevant year of assessment he rendered and performed all his services outside Hong Kong and should therefore not be liable to pay salaries tax.

The determination was dated 30 September 2003 and was posted on that day by registered mail to the taxpayer at his residential address. The record of the Post Office showed that it was delivered to the taxpayer's residence on 2 October 2003. The notice of appeal was received by the Board on 31 October 2003. The Commissioner raised a preliminary point that the appeal was out of time.

The taxpayer was employed by Company B as the national channel sales director of a Beijing subsidiary of Company B. That subsidiary has a branch office in Shanghai, where the taxpayer was to be stationed.

According to the records of the Immigration Department, the taxpayer was present in Hong Kong on a total of 133 days during the year ended 31 March 2002, of which 90 days were after the taxpayer commenced employment with Company B.

Held:

1. The question before the Board is when the one month period specified in section 66 commences to run. Its task is not so much the construction of a word –

INLAND REVENUE BOARD OF REVIEW DECISIONS

‘transmit’ – but the meaning of the phrase ‘after the transmission to him’ in the context of the statute. The task is to seek to discover from the words used in the Ordinance its legal meaning. In doing so, the Board should have regard not only to the English text, but also to the Chinese text. By virtue of section 10B(2) of the Interpretation and General Clauses Ordinance the words ‘1 month after the transmission to him under section 64(4) of the Commissioner’s written determination’ in the English text are presumed to mean the same as ‘送交其本人後’. The question is whether those words mean that the intended appellant has one month from the date when the process of transmission begins (that is, when the Commissioner dispatched his determination), or whether he has the one month period after the process of transmission has been completed. In the Board’s view, the latter meaning is more consonant with the legislative intention. The Board derives support from the fact that the words used are ‘after transmission to him’ and the Chinese ‘送交其本人後’. These words appear to the Board to be more consistent with a requirement that the process of transmission has ended, and not merely begun. The Board holds that upon the true and proper construction of section 66(1) this appeal has been lodged within time.

2. Having considered the evidence and the manner in which the taxpayer responded to questions, the Board has come to the conclusion that he has not discharged the burden on him to show that he performed all his services outside Hong Kong during the period in question. Since the taxpayer was in Hong Kong for more than 60 days during the basis period for the relevant year of assessment, he cannot seek exemption from liability under the ‘60 day’ rule.

Appeal dismissed.

Cases referred to:

D111/97, IRBRD, vol 13, 20
D62/98, IRBRD, vol 13, 385
D106/00, IRBRD, vol 15, 913
D57/99, IRBRD, vol 14, 506
D142/99, IRBRD, vol 15, 72
Banks v Goodwin (1863) 3 B & S 548
Aspinall v Sutton [1894] 2 QB 349
Mackinnon v Clark [1898] 2 QB 251
New World Medical Ltd v Cormack [2002] STC 1245
Commissioner of Inland Revenue v Geopfert 2 HKTC 210
D11/97, IRBRD, vol 12, 147
CIR v So Chak Kwong, Jack 2 HKTC 174

INLAND REVENUE BOARD OF REVIEW DECISIONS

Austin Grady for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Introduction

1. Mr A is dissatisfied with the determination by the Acting Deputy Commissioner dated 30 September 2003. The effect of that determination is that Mr A had to pay salaries tax of \$86,187 (subject to a tax rebate of \$3,000) in respect of net chargeable income of \$586,397 that Mr A derived from his employment during the year of assessment 2001/02. Mr A says that during the relevant year of assessment, he rendered and performed all his services outside Hong Kong and should therefore not be liable to pay salaries tax. The Commissioner raises a preliminary point. He says that the appeal is out of time. We told the parties that we would reserve our decision on this point and we heard the parties on the merits of the appeal, without objection from the Commissioner.

Whether appeal is out of time

2. We shall first deal with the question whether the appeal is out of time. The relevant facts are straightforward: the determination was dated 30 September 2003. It was posted on that day by registered mail to Mr A at his residential address. The record of the post office shows that it was delivered to Mr A's residence on 2 October 2003. The notice of appeal was received by the Board on 31 October 2003.

3. Section 66 of the Inland Revenue Ordinance ('IRO') provides that

'Any person ... who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within –

(a) 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefor and the statement of facts' or

(b) such further period as the Board may allow under subsection (1A) either himself or by his authorized representative give notice of appeal to the Board, but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a copy of the

INLAND REVENUE BOARD OF REVIEW DECISIONS

Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal.'

4. The question before us is when does the one month period specified in section 66 commence to run. If it starts from the dated of posting, Mr A is out of time and he would have to satisfy us that his circumstances come within section 66(1A), that is, prevented from illness or absence from Hong Kong or other reasonable cause from giving notice of appeal before expiry of the period. If, however, the one month period only starts to run from the date of determination reached Mr A's residence, he is within time.

5. This question has come before the Board on a number of occasions, see

D111/97, IRBRD, vol 13, 20;

D62/98, IRBRD, vol 13, 385;

D106/00, IRBRD, vol 15, 913.

The views expressed by the Board in these decisions have not been consistent. We have also considered other cases cited in the Willoughby & Halkyard, Encyclopaedia of Hong Kong Taxation at II[20659] viz. D57/99, IRBRD, vol 14, 506 and D142/99, IRBRD, vol 15, 72 but do not find them of much assistance. Mr Grady has drawn our attention to various authorities on the meaning of the word 'transmit'. On examination, the authorities are not all one way either. We have been referred to Stroud's Judicial Dictionary, 5th edition and 6th edition and to Word and Phrases, Judicially Defined. The cases referred to are Banks v Goodwin (1863) 3 B & S 548, Aspinall v Sutton [1894] 2 QB 349 and Mackinnon v Clark [1898] 2 QB 251. The first two of the cases mentioned concerned a requirement that an appellant must 'transmit' a case stated within three days after receiving the case. It was held in both cases that the case stated must be 'lodged' within three days. In other words, the mere act of sending was insufficient. Mackinnon v Clark concerned a requirement that the election agent of every candidate shall 'transmit' to the returning officer a true return of his election expenses within 35 days after the election. The Court of Appeal held that the word 'transmit' meant in the context the same was 'send' or 'remit' and does not mean lodge. Mr Grady has helpfully drawn our attention to a more recent decision, namely, New World Medical Ltd v Cormack [2002] STC 1245. The question was whether the requirement under certain regulation that a party requiring a case stated should 'transmit' the case to the High Court within 30 days of receiving it meant that the case stated must be received by the court within 30 day period. Blackburne J stated at page 1246 that the requirement meant that the case stated must be received by the court within 30 day period. It was not sufficient that the case stated be merely put in the post within that period. In the Shorter English Oxford Dictionary, the word 'transmit' is assigned the following meaning;

INLAND REVENUE BOARD OF REVIEW DECISIONS

‘to cause (a thing) to pass, go, or be conveyed to another person, place or thing; to send across an intervening space; to convey, transfer; to convey or communicate (usu. something immaterial) *to* another or others’

6. Words derive their meaning from their context. Thus, decisions on the meaning of a word in the context of a different statutes can at most provide some guide as to the possible parameters of the meaning of the word used. Moreover, our task is not so much the construction of a word – ‘transmit’ – but the meaning of the phrase ‘after the transmission to him’ in the context of the statute. The task is to seek to discover from the words used in our Ordinance its legal meaning. In doing so, we should have regard not only to the English text, but also to the Chinese text. Section 10B of the Interpretation and General Clauses Ordinance, Chapter 1 provides that the English language text and the Chinese language text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly. Subsection (2) goes on to provide that the provisions of an Ordinance are presumed to have the same meaning in each authentic text. Subsection (3) applies only if a comparison of the two authentic texts discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve. In that event, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted.

7. Thus, by virtue of section 10B(2) of the Interpretation and General Clauses Ordinance, the word ‘1 month after the transmission to him under section 64(4) of the Commissioner’s written determination’ in the English text are presumed to mean the same as ‘送交其本人後’. The question is whether those words mean that the intended appellant has one month from the date when the process of transmission begins (that is, when Commissioner despatched his determination), or whether he has the one month period after the process of transmission has been completed. In our view, the latter meaning is more consonant with the legislative intention. We derive support from the fact that the words used are ‘after transmission to him’ and the Chinese ‘送交其本人後’. These words appear to us to be more consistent with a requirement that the process of transmission has ended, and not merely begun. Furthermore, it seems to us that, unless the intention is clear, we should not impute to the legislative an intention that time begins to run even before the determination could have reached the taxpayer for him to have any chance of dealing with it. We should observe that the end of the process of transmission does not depend upon whether the determination has physically reached the recipient. The process of transmission would normally end when the determination reaches the address that it was sent to.

8. We hold that upon the true and proper construction of section 66(1) this appeal has been lodged within time.

Was the income derived from Hong Kong?

9. Section 8(1) of the IRO is the charging provision for salaries tax. It provides that:

INLAND REVENUE BOARD OF REVIEW DECISIONS

‘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 profit; and

(b) any pension.’

10. There is no real dispute in this case that the income in question was derived from an employment of profit in Hong Kong. The facts, which are not in dispute, disclose that the taxpayer was employed by Company B, a Hong Kong company. The employment contract was negotiated and concluded in Hong Kong. The taxpayer’s remuneration was paid through auto-pay into his bank account in Hong Kong. In line with the authorities cited to us, such as Commissioner of Inland Revenue v Geopfert 2 HKTC 210, Case No D11/97, IRBRD, vol 12, 147, we have no difficulty in finding that the income comes within the charging provision of section 8(1).

Did the taxpayer perform all his services outside Hong Kong?

11. The real bone of contention is whether the taxpayer can satisfy us that he comes within the exclusion contained in section 8(1A)(b), that is, that he provided all the services in connection with his employment outside Hong Kong.

That section reads:

*‘For the purposes of this Part, income arising in or derived from Hong Kong from any employment –
excludes incomes income derived from services rendered by a person who –
(ii) renders outside Hong Kong all the services in connection with his employment...’*

12. The taxpayer gave evidence before us. He was employed by Company B in May 2001. His position was the national channel sales director of a Beijing subsidiary of Company B. That subsidiary has a branch office in Shanghai, where the taxpayer was to be stationed. The taxpayer reported to the chief executive officer on 15 May 2001 and received a briefing. The taxpayer says that the briefing lasted less than an hour. Although he was mainly stationed at the Shanghai office, he had to travel to other parts of China, namely, Beijing, Guangzhou, Wuhan, Shenyang and Chengu. His evidence is that he left Hong Kong and arrived in Shanghai on 21 May 2001. He told us that his duties were all performed outside Hong Kong. He also relied on a letter from his employer to the Commissioner dated 3 January 2003 where the chief financial officer of the employer told the Commissioner that the taxpayer ‘was not required to render service in Hong Kong’ and another letter dated 11 September 2003 where the financial controller, in response to a question from the Inland Revenue Department, stated that the taxpayer had not rendered any

INLAND REVENUE BOARD OF REVIEW DECISIONS

services relating to the PRC Office during his stays in Hong Kong from 1 April 2001 to 31 March 2002. The chief financial officer also provided information with regard to the taxpayer's leave days.

13. According to the records of the Immigration Department, the taxpayer was present in Hong Kong on a total of 133 days (counting both days when he was in Hong Kong for the whole day and days when he was in Hong Kong for only part of the day) during the year ended 31 March 2002, of which 90 were after the taxpayer commenced employment with Company B. We pause to observe that Mr Grady submitted that the picture presented by the record is very different from what the taxpayer stated in a form filed in October 2002 that he stayed in Hong Kong for '2-3 weekends' on holiday only.

14. In correspondence with the assessor, Company B provided the following information:

- (1) The taxpayer did not take any sick leave or compensatory leave during the relevant year of assessment,
- (2) the taxpayer was entitled to the PRC public holidays, viz Labour Day (1 to 7 May), National Day (1 to 8 October), the first day of January and Lunar New Year holidays (11 to 19 February);
- (3) in addition, the taxpayer took 15 days' annual leave during the year of assessment.

15. The records of the Immigration Department reveal that the taxpayer was in Hong Kong on the whole of the following week days:

Date	Day of the week
25-5-2001	Friday
11-6-2001	Monday
26-6-2001 and 27-6-2001	Tuesday and Wednesday
16-7-2001	Monday
30-7-2001	Monday
7-9-2001	Friday
3-10-2001 to 5-10-2001	Wednesday to Friday
12-11-2001	Monday
2-1-2002 to 5-1-2002	Wednesday to Friday
8-2-2002 to 16-2-2002	Friday to Saturday

Leaving aside the day on which, according to his employer, he was taking his leave, there were 14 whole week days when the taxpayer was in Hong Kong. The taxpayer was supposed to be at

INLAND REVENUE BOARD OF REVIEW DECISIONS

work on those days. When asked about this, the only explanation that the taxpayer was able to offer was that there were days when he was unable to fly out due to unavailability of a plane ticket.

16. Having considered the evidence and the manner in which the taxpayer responded to questions, we have come to the conclusion that he has not discharged the burden on him to show that he performed all his services outside Hong Kong during the period in question. The taxpayer was a senior executive. Part of his duty was to report to the chief executive officer, and another part of his duty was to supervise his staff. In this day and age, with the advent of telecommunication, such duties can be performed practically anywhere, and certainly when the taxpayer was in Hong Kong. We would need a great deal more than what has been adduced in evidence to be satisfied that a senior executive such as the taxpayer who spent up to 90 days including 14 whole working days in Hong Kong did not perform any of his services in Hong Kong. We need only say that we are unpersuaded that this is the case. We do not overlook the fact that the financial controller of his employer responded negatively to the following query from the senior assessor:

‘ Confirm whether [Mr A] had rendered any services relating to the PRC Office as its national channel sales director during his stays in Hong Kong from 1 April 2001 to 31 March 2002. If yes, describe the nature and frequency of the services rendered.’

We do not feel we should attach much weight to that statement when the maker is not available to be cross-examined to test the state of his knowledge and his understanding of the purport of the question.

17. In the course of his submission, Mr Grady also dealt with the question whether the taxpayer could obtain relief under the ‘60 day’ rule. Although this has not been relied on by the taxpayer either in his notice of appeal or in his oral evidence or submission, it is right for us to record that since the taxpayer was, on the facts and upon the authority CIR v So Chak Kwong, Jack 2 HKTC 174, in Hong Kong for more than 60 days during the basis period for the relevant year of assessment, he cannot seek exemption from liability under the ‘60 day’ rule.

18. For the reasons we have attempted to state, we would dismiss this appeal.