(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D2/06

Salaries tax – services rendered ordinarily outside Hong Kong except on one occasion – whether exemption – Inland Revenue Ordinance ('IRO') section 8(1A).

Panel: Jat Sew Tong SC (chairman), Ng Ching Wo and Jason Yeung Chi Wai.

Date of hearing: 28 October 2005.
Date of decision: 7 April 2006.

The taxpayer was employed in Hong Kong to work for a representative office or subsidiary of the employer on the Mainland. The taxpayer ordinarily rendered her services on the Mainland but returned to Hong Kong for a total of 82 days for the year of assessment 2003/04. In one occasion, she attended a meeting in Hong Kong for the representative office.

The issue is whether because she had attended that one meeting in Hong Kong, and because she had visited Hong Kong for more than 60 days during the assessment year, she is unable to take advantage of the exemption under section 8(1A).

Held:

1. With reluctance, the Board held that the taxpayer must not render any servers during visits which totalled 60 days in the relevant period to take benefit of section 8(1A). (CIR v So followed; D37/01 considered)

2. The Board is unable to distinguish this case from CIR v So. The taxpayer is, therefore, unable to take advantage of the exemption.

Obiter:

The Board doubts whether CIR v So is correctly decided as the respondent was absent and not represented by counsel. It would be appropriate for the issue to be re-considered by the Court or the legislature.

Appeal dismissed.

Cases referred to:

D29/89, IRBRD, vol 4, 340
D11/03, IRBRD, vol 18, 335
CIR v So Chak Kwong, Jack (1986) 2 HKTC 174
D37/01, IRBRD, vol 16, 326
D27/03, IRBRD, vol 18, 448

Taxpayer in person.
Chan Man On for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The issue on this appeal is whether the Appellant Taxpayer' s income of HK$112,419 received during the assessment year 2003/04 was chargeable for income tax. By a determination dated 11 July 2005, the Deputy Commissioner determined that it was. From that determination the Taxpayer appeals to this Board.

2. The appeal raises once again the question of the proper interpretation of Inland Revenue Ordinance sections 8(1A) and 8(1B) and the application of the so-called '*60 days rule*' in a situation that arises frequently, that is, a person who is employed in Hong Kong to work for a representative office or subsidiary of the employer on the Mainland, who ordinarily renders her services on the Mainland but returns to Hong Kong regularly over the weekends or holiday periods.

The relevant facts

3. The relevant facts as found by the Board are as follows. The Taxpayer was employed by a Hong Kong company ('the Employer') since 1998. On 1 August 2003, the Employer terminated the Taxpayer' s employment on the ground of redundancy with effect from 27 September 2003.

4. On 20 August 2003, the Taxpayer accepted an offer of employment from the Employer to work as the Senior Planning Coordinator in the City A Liaison Office from 1 October 2003 to 31 March 2004. As her title indicated, this job required the Taxpayer to be stationed in City A. The Taxpayer' s evidence, which the Board accepts, is that other than her salary which was paid by the Employer in Hong Kong, her accommodation in City A was paid for by the City A office and she received an allowance for transportation between her place of accommodation and the City A office.

5. Further, her evidence, which the Board accepts, is that when discharging her duties for the City A office, she would receive the same treatment in respect of allowances as her Mainland colleagues. For example, if she had to make a business trip to City B, she and her Mainland colleagues would receive the same allowances in respect of transportation and accommodation.

6. According to her immigration record, during the relevant assessment year the Taxpayer 'visited'[1] Hong Kong for a total of 82 days – this includes any part of a day when she was physically here, in accordance with the well established rule: see, for example, Decisions D29/89, IRBRD, vol 4, 340 and D11/03, IRBRD, vol 18, 335.

7. In relation to her visits to Hong Kong, the Taxpayer's evidence, which the Board accepts without hesitation, is that she would normally come back to Hong Kong on Friday evening and stay here with her family for the weekend, returning to City A on Sunday evening or early Monday morning. The Board accepts her evidence that the following cases are the only exceptions:

7.1. The first was that she had come back to Hong Kong on a few occasions during the week in order to attend to some private matters. For these she would have obtained leave from her Employer. An example of this was that on a few occasion she returned to Hong Kong to attend some privately enrolled courses (that is, not training courses provided by the Employer) and to take examinations. Another example was Monday 13 October 2003: she was a bridesmaid at her friend's wedding on the previous day and she had taken leave from the Employer for that day.

7.2. The other exception was the only occasion when she provided work related services in Hong Kong. She attended a meeting at the Employer's office here on 17 March 2004, which lasted one full day, but which she attended in her capacity as the representative of the City A office. Her evidence is that she could have attended that meeting via telephone or video link from City A, and when she went up to the Employer's office she was admitted as a visitor and had to register at the reception.

8. From the above recitation of facts, two things are clear and undisputed. First, her salaries were derived from Hong Kong within the meaning of section 8(1). Secondly, it is equally clear that but for that one meeting on 17 March 2004, the Taxpayer would have provided all her

[1] There is no issue over whether the Taxpayer was 'visiting' Hong Kong within the meaning of section 8(1B).

services outside Hong Kong and would be exempted from salaries tax by reason of section 8(1A)(b)(ii).[2]

Issue for determination

9. The only issue for determination is whether because she had attended that one meeting in Hong Kong, and because the Taxpayer had visited Hong Kong for more than 60 days during the assessment year, she is unable to take advantage of the 'exemption' under section 8(1A).

Relevant provisions

10. For ease of reference, the relevant parts of sections 8(1A) and 8(1B) are reproduced here:

> '*(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment-*
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> *(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services;*
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> *(b) excludes income derived from services rendered by a person who-*
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> *(ii) renders outside Hong Kong all the services in connection with his employment;*
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> *(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.'*

Discussion

11. In CIR v So Chak Kwong, Jack (1986) 2 HKTC 174, Mortimer J (as he then was) held that the proper construction of section 8(1B) was clear and unambiguous: the words '*not exceeding a total of 60 days*' in section 8(1A) qualified the word '*visits*' and not the words '*services rendered*', so that to take benefit of the section a taxpayer must not render services during visits which totalled 60 days in the relevant period.

[2] The Taxpayer did not contend (in the view of this Board rightly) that attending the meeting was rendering services in connection with her employment.

12. This Board understands that this decision has not been considered by another Court. Moreover, since it is a decision of the High Court on an appeal by way of case stated, it is binding on the Board.

13. However, this Board notes that other panels of the Board have expressed unease over the correctness of the decision. In Case No D37/01, IRBRD, vol 16, 326, another panel of the Board (chaired by Mr Ronny K W Tong SC) questioned the correctness of the decision. In that decision, the Board observed at paragraphs 10-13:

> ***'Visits exceeding 60 days***
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> *10. In relation to the first proposition, the Revenue relies on Commissioner of Inland Revenue v So Chak Kwong, Jack (1986) 2 HKTC 174, a decision of Mortimer J as he then was in 1986. It was an extremely short judgment with hardly any argument as to how the section should be construed. This was not surprising as the appeal was by the Revenue and the taxpayer did not appear. The learned Judge was thus deprived of proper arguments to the contrary. The learned Judge decided the matter on the basis that grammatically, the words "not exceeding in total of 60 days" must qualify the word "visits" and not "service rendered".*
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> *11. With respect, that will give rise to extraordinary results. For example, someone spending 61 days of holidays or weekends in Hong Kong will not qualify for exemption if he so much as spent half an hour on an ad hoc assignment for his employer in Hong Kong. Such an absurd result could not possibly be the intention of the legislature.*
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> *12. We have been reminded by the Revenue that the taxpayer can claim exemption arising from double taxation but that is hardly a legitimate explanation for the construction contended for. The Revenue in Hong Kong does not act as a policeman for foreign tax authorities. If someone has successfully avoided or even unlawfully evaded tax in a foreign jurisdiction, that is his matter. It can hardly serve as an excuse to levy tax on the individual for services rendered overseas.*
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> *13. It may be that the words "services rendered" should be construed to mean regular work contemplated by the contract of employment and exclude any work done on an ad hoc or an informal basis. Be that as it may, we are bound by the decision in the So Chak Kwong, Jack case. All that we can say is that it is perhaps time for the legislature to review this subsection to clarify precisely what is the true intention of this subsection.'*

14. Case No D37/01 was mentioned in at least one later decision of the Board, see: Case No D27/03, IRBRD, vol 18, 448, at paragraphs 9(c) and 10(b)(iii).

15. At the hearing of this appeal, this Board put to Mr Chan Man-on, assessor, who represented the Commissioner, a number of possible (and by no means fanciful) scenarios if the decision in CIR v So were taken to its logical extreme.[3]

16. Consider the following contrasting scenarios this Board posed to Mr Chan during argument:[4]

16.1. Scenario 1: a person is employed to work outside Hong Kong, and under ordinary circumstances no part of her work is performed in Hong Kong. She normally returns to Hong Kong to stay with her family every weekend; hence, like the Taxpayer, would be visiting Hong Kong for more than 60 days in an assessment year. However, on one Sunday while she is having lunch with her family, she receives an urgent telephone call from the overseas office asking her for a code to access some information. She gives the code to the caller, and hangs up. The call only takes a few seconds.

16.2. Scenario 2: a person mainly works outside Hong Kong, but within the assessment year she visits Hong Kong on a total of exactly 60 days, during which she works full time for her employer.

17. On the basis of CIR v So, the person in Scenario 1 would have to pay salaries tax because there is no question that she has performed in Hong Kong *a service* in connection with her employment, although only for a few seconds,[5] and her total visits to Hong Kong amount to more than 60 days. But the person in Scenario 2, although physically working in Hong Kong full time for 60 days, does not have to pay salaries tax. This result seems, at least to this Board, to be absurd, and certainly unfair. It is exactly the type of 'absurd result' mentioned in Case No D37/01.

18. Mr Chan strongly argued before this Board that in accordance with CIR v So, as long as the person renders any services in Hong Kong during any of the visits in Hong Kong, no matter how short, then if the total length of those visits exceed 60 days (calculated in accordance with the rule that part of a day counts as one day), the person is liable to pay salaries tax. Applying that decision to the facts of the instant case, Mr Chan argued that because of the one meeting that the Taxpayer attended in Hong Kong, and because she was unable to take advantage of the '60 days rule', her entire income received during the relevant period was chargeable for salaries tax.

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[3] This Board was not referred to Case No D37/01 or D27/03 at the hearing.

[4] Assuming, for present purposes, that in the examples there is no issue as to whether the income arises in or is derived from Hong Kong or whether the person was visiting Hong Kong.

[5] Contrast Case No D27/03, IRBRD, vol 18, 448.

19. The Board put to Mr Chan another (admittedly hypothetical) scenario. Assuming that in Scenario 1, the person received a message or email on her mobile phone from the overseas office asking her whether the file is located in a particular cabinet, and further says that if the answer is 'yes' she does not have to call back. Mr Chan had to accept that in this scenario whether the person calls back the overseas office (or sends a message or email) or not she would have performed a service in connection with her employment in Hong Kong.

20. Another variation put to Mr Chan was that instead of physically attending the meeting in Hong Kong, the Taxpayer attended via video link from City A. Mr Chan's answer to that scenario was that since the Taxpayer would not be physically in Hong Kong, she did not render any services in Hong Kong. This is despite the fact that her image and voice would be received in Hong Kong and the meeting was otherwise 'based' in Hong Kong. A reasonable person would be justified in thinking that there is little, if any, practical difference between this scenario and the Taxpayer attending the meeting in person, and the result should be the same.

Decision

21. This Board recognises that CIR v So is a binding decision on this Board. And unless there is introduced a '*de minimus*' exception, this Board has no alternative but to dismiss the appeal.

22. Having considered the matter very carefully, this Board does not consider it appropriate to introduce any *de minimus* qualification. To do so would introduce uncertainty and this Board is not prepared to take that route without the benefit of full submissions.

23. That being the case, this Board is unable to distinguish the instant appeal from CIR v So. Accordingly, and with considerable unease and regret, this Board has no alternative but to dismiss the appeal.

24. Nonetheless, like the Board in Case No D37/01 this Board must voice its serious doubts as to whether the decision in CIR v So is correctly decided. This Board notes that in CIR v So only the Commissioner appeared before Mortimer J. The respondent was absent and was not represented by counsel. The learned Judge therefore did not have the benefit of submissions from the other perspective. In contrast, the Board from which the Commissioner appealed by way of case stated had the benefit of argument from experienced counsel (Mr Anthony F Neoh, as he then was) and arrived at the opposite conclusion which appears to this Board to be more logical and certainly more fair and reasonable. This Board strongly believes that it would be appropriate for the issue to be re-considered by the Court or the legislature.

25. Finally, we must express our gratitude to the Appellant, who has presented her case with admirable clarity, and to Mr Chan, who ably and tenaciously defended the Commissioner's position.