

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D20/82

Board of Review:

L. J. D'Almada Remedios, *Chairman*; N. J. Gillanders, D. J. McIntosh & B. H. Tisdall, *Members*.

10 March 1983.

Salaries Tax—section 8(1)—employee of foreign corporation, recruited and residing in Hong Kong by regional office located in Hong Kong—whether income arose in or derived from Hong Kong.

The appellant was employed by a foreign corporation, both in Hong Kong and abroad to undertake auditing, having been recruited and offered employment by the corporation's Regional Office in Hong Kong. The appellant reported to the Regional Office. He resided and was paid in Hong Kong. The appellant was assessed to Salaries Tax on the income from his employment for the years 1978/79 and 1979/80. The appellant appealed on the grounds that he was employed by a foreign corporation which did not engage in business in Hong Kong and that only the apportioned part of his salary in respect of days actually worked in Hong Kong was chargeable to tax.

Held:

- (1) The foreign corporation carried on business in Hong Kong although it made no profit here.
- (2) The appellant's employment was controlled by the Hong Kong Regional Office and the source of payment was of peripheral importance.

Appeal dismissed.

Woo Sai-hong for the Commissioner of Inland Revenue.
Appellant in Person.

Reasons:

The question that is canvassed for our decision in this appeal is whether the Appellant's income employment for the years of assessment 1978/79 and 1979/80 arose in or was derived from the Colony so as to be taxable under section 8(1) of the Inland Revenue Ordinance.

The Appellant's case is that he was employed as an Internal Auditor by the A Inc., which is a foreign corporate entity. His duty with A was to carry out audits as may be required by the company in the South East Asia sphere of which Hong Kong was one. For such purpose, in the year ended 31st March 1979, he spent 32 days abroad. For the subsequent year, he

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spent 161 days away from Hong Kong. He claims, therefore, that as he was employed by a foreign company, he is not subject to Salaries Tax under section 8(1) but is entitled to compute his taxable liability by reference to the number of days during which he rendered services in the Colony.

A person is not exempt from Salaries Tax only by reason of his being employed by a foreign corporation. Income may still be derived from the Colony although a person may be so employed by one whose principal place of business is situated abroad. In every case, whether income is so derived from the Colony is a question of fact. Derivation of income is to be garnered by having regard to the cumulative facts which taken as a whole would serve as a pointer in resolving the issue.

In the case before us we find the situation to be this: A is a foreign company with headquarters in New York. It is the parent company of a number of subsidiaries. It has an office in Hong Kong which, at the time of the Appellant's employment, occupied part of the 13th floor of a building in S Road. The Regional Office in Hong Kong was established in 1974 to oversee the operation of the group companies in South East Asia. It is staffed by persons who assist in the functioning of its undertaking. Contrary to the Appellant's contention, we take the view that it does carry on a business in Hong Kong which is that of overseeing the administration of A's branch offices in South East Asia. "It is not essential to the carrying on of a trade that the people carrying it on should make a profit, nor is it even necessary to the carrying on of a trade that the people carrying it on should desire or wish to make a profit" (**I.R. Comrs. v. Incorporated Council of Law Reporting** (1888) 3 T.C. at p. 113).

The Appellant is not a person in overseas employment who has been sent to this part of the world to take up various assignments in South East Asia countries. He was recruited and offered employment by the manager of Regional Office of A in Hong Kong to undertake auditing locally and also abroad. His reports are not sent directly to A, New York. His comments and recommendations contained in his Reports are discussed and agreed in principle with the local management before being passed on to the head office of A. His contract was entered into in Hong Kong and his remuneration was paid in Hong Kong. He resides in Hong Kong.

The Appellant resigned in January 1981 and his letter of resignation was addressed to Mr. B who is the Regional Audit Manager located in the Regional Office in Hong Kong. There is nothing before us to show that the Appellant's functions were not associated with or formed part of the operations for which the Hong Kong Office was established. In fact, his duties and assignments were effectively controlled by the Hong Kong Office as he was required to act under the direction of the Regional Audit Manager in Hong Kong for the Asian Zone.

The Appellant's link with the quarter from which he was remunerated, was therefore, peripheral and which when weighed against other considerations justifies the conclusion arrived at by the Commissioner.

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We have therefore come to the view that the Appellant's income arose in or was derived from the Colony wherefore the assessments as determined by the Commissioner are confirmed.