Case No. D29/00

Salaries tax – income arising in or derived from Hong Kong – taxpayer being seconded to work in another country in the currency of his employment – sections 8(1), 8(1A)(a), 8(1A)(b) and (c), 8(1B), 66(1), 66(1A) and 68(2) of the Inland Revenue Ordinance (' IRO'), Chapter 112.

Panel: Ronny Wong Fook Hum SC (chairman), Gregory Robert Scott Crichton and Dianthus Tong Lau Mui Sum.

Date of hearing: 24 March 2000.
Date of decision: 29 June 2000.

By a letter dated 20 May 1996 [' the 1996 Employment Letter'], the taxpayer was seconded to work in Country B. The 1996 Employment Letter further provided that ' You will continue to be employed by [Company A] under the employment agreement set out in [the 1994 Employment Letter]' .

The taxpayer contended that he was not liable for salaries tax in respect of his earnings from 1 June 1996 as he was seconded to work in Country B. For the period between 1 June 1996 and 31 March 1997, the taxpayer was in Hong Kong for a total of 31 days. The taxpayer maintained that the Revenue should not take into account his 46-day stay in Hong Kong between 1 April 1996 and 1 June 1996 ' since I was a working resident of Hong Kong until 1 June 1996' .

Notwithstanding the assessor' s enquiry, the taxpayer had not furnished any evidence that he paid tax in Country B on his income earned during the period of secondment.

Held:

1. Hong Kong was the source of the taxpayer' s income. Company A was a company based in Hong Kong. The 1994 and the 1996 Employment Letters were concluded in Hong Kong. The terms of the two Employment Letters indicated that the taxpayer was under one continuous employment. At all material times, Company A paid the taxpayer in Hong Kong. His earnings throughout that year of assessment were sourced in Hong Kong (CIR v Geopfert 2 HKTC 210 applied).

2. The case of Goepfert also makes it clear that the starting point is the year of assessment. Given the finding that the locality of the taxpayer' s earnings under one

continuous employment was in Hong Kong, the taxpayer has to satisfy the Board that he rendered outside Hong Kong all the services in connection with his one integral employment. Under that employment, the taxpayer rendered services in Hong Kong for the period between 1 April 1996 and 31 May 1996.

3. There was no evidence that the taxpayer paid any tax in Country B. The exemption under section 8(1A)(c) has no application.

Appeal dismissed.

Case referred to:

CIR v Geopfert 2 HKTC 210

Ngan Man Kuen for the Commissioner of Inland Revenue.
Taxpayer in absentia.

Decision:

Background

1. By letter dated 18 August 1994 [' the 1994 Employment Letter'], the Taxpayer was employed by Company A as manager in the cable equity fund department. The 1994 Employment Letter conferred on the Taxpayer entitlements under Company A' s provident fund scheme and medical scheme.

2. By letter dated 20 May 1996 [' the 1996 Employment Letter'], the Taxpayer was promoted to the position of sales and marketing director in the distribution & marketing (SE Asia) department. The Taxpayer was to be stationed in Country B. The 1996 Employment Letter further provided that ' You will continue to be employed by [Company A] under the employment agreement set out in [the 1994 Employment Letter].' The Taxpayer retained his benefits under Company A' s provident fund scheme and medical scheme.

3. After the Taxpayer' s secondment to Country B, Company A continued to pay his salary in Hong Kong.

4. By notice dated 1 January 1998, the Taxpayer terminated his employment under the 1994 and 1996 Employment Letters.

5. There is no issue between the parties that the Taxpayer is chargeable to salaries tax in respect of his earnings for the period between 1 April 1996 and 31 May 1996. The Taxpayer however contends that he is not liable for salaries tax in respect of his earnings from 1 June 1996 as he was seconded to work in Country B.

6. For the period between 1 June 1996 to 31 March 1997, the Taxpayer was in Hong Kong for a total of 31 days. The Taxpayer maintains that the Revenue should not take into account his 46-day stay in Hong Kong between 1 April 1996 and 1 June 1996 ' since I was a working resident of Hong Kong until 1 June 1996.'

7. Notwithstanding the assessor' s enquiry, the Taxpayer has not furnished any evidence that he paid tax in Country B on his income earned during the period of secondment.

Procedural points

8. By her determination dated 22 June 1999, the Commissioner rejected the Taxpayer' s claim that he is not liable for Hong Kong salaries tax. The determination was sent to the Taxpayer in Country C where he is currently residing. By letter dated 20 July 1999, the Taxpayer appealed against the determination. This letter did not reach this Board until 27 July 1999 which is beyond the 1 month period for appeal stipulated by section 66(1) of the IRO. The Revenue has however fairly conceded that we should extend time in favour of the Taxpayer under section 66(1A) of the IRO. We so extend time in favour of the Taxpayer.

9. By letter dated 26 February 2000, the Taxpayer indicated that he would not be attending the scheduled hearing on 24 March 2000. We decided to hear this appeal in his absence pursuant to the provisions in section 68(2) of the IRO.

The taxing provisions

10. The basic charging section is section 8(1) of the IRO. It 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 profit; and*
>
> *(b) any pension.'*

11. The basic charging section is extended by section 8(1A)(a) which reads :

> ' *For the purposes of this Part, income arising in or derived from Hong*

Kong from any employment –

(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.'

12. Sections 8(1A)(b) and (c) of the IRO go on to exclude certain income from the charge to salaries tax as follows –

' (b) excludes income derived from services rendered by a person who –

(ii) renders outside Hong Kong all the services in connection with his employment.'

' (c) excludes income derived by a person from services rendered by him in any territory outside Hong Kong where –

(i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and

(ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.'

13. Section 8(1B) of the IRO further provides :

' 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.'

14. The leading case of CIR v Geopfert 2 HKTC 210 makes it clear that the expression ' income arising in or derived from Hong Kong' in section 8(1) is referrable to the locality of the source in income. Macdougall J further pointed out in that case that :

' If during a year of assessment a person's income falls within the basic charge to salaries tax under section 8(1), his entire salary is subject to salaries tax wherever his services may have been rendered, subject only to the so called "60 days rule" that operates when the taxpayer can claim relief by way of exemption under section 8(1A)(b) as read with section 8(1B). Thus, once income is caught by section 8(1) there is no provision for apportionment.'

15. We have no doubt that Hong Kong was the source of the Taxpayer's income. Company A was a company based in Hong Kong. The 1994 and the 1996 Employment Letters were concluded in Hong Kong. The terms of the two Employment Letters indicate that the Taxpayer was under one continuous employment. At all material times, Company A paid the Taxpayer in Hong Kong. His earnings throughout that year of assessment were sourced in Hong Kong.

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16. The above cited passage from Goepfert also makes it clear that the starting point is the year of assessment. Given our finding that the locality of the Taxpayer's earnings under one continuous employment was in Hong Kong, the Taxpayer has to satisfy us that he rendered outside Hong Kong all the services in connection with his one integral employment. Under that employment, the Taxpayer rendered services in Hong Kong for the period between 1 April 1996 and 31 May 1996. In essence, the Taxpayer is seeking an appointment which is not recognised by the law.

17. There is no evidence that the Taxpayer paid any tax in Country B. The exemption under section 8(1A)(c) has no application.

18. For these reasons, we are of the view that the Taxpayer was correctly assessed. We dismiss his appeal.