INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D29/89

Salaries tax – whether employed in Hong Kong or not – source of income – section 8(1B) of the Inland Revenue Ordinance.

Panel: H F G Hobson (chairman), David Ling Dah Wai and Tse Tak Yin.

Date of hearing: 8 May 1989.
Date of decision: 2 August 1989.

The taxpayer was resident in Hong Kong where he received and accepted an offer of employment requiring him to work in Hong Kong and China. The taxpayer argued that the source of his income was outside of Hong Kong. He further argued that when deciding whether or not he had spent more than 60 days in Hong Kong during the basis period, only days when he worked in Hong Kong should be taken into account and a day should comprise a period of 24 hours and not less.

Held:

The taxpayer was employed in Hong Kong and the source of his income was Hong Kong. Section 8(1B) of the Inland Revenue Ordinance had no applicability in this case. Even if section 8(1B) was applicable, the taxpayer spent more than 60 days in Hong Kong. The 60-days rule does not refer to working days and does not refer to 'clear' days or units of 24 hours.

Appeal dismissed.

Cases referred to:

BR 20/69, IRBRD, vol 1, 3
D11/84, IRBRD, vol 2, 108
CIR v So Chak Kwong, Jack 2 HKTC 175

Lee Yun Hung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1.1 This appeal is against a salaries tax assessment for the year 1986/87 upon the Taxpayer who was employed by a Hong Kong company ('the employer'), from 26 May 1986 to 31 March 1987 ('the relevant period') during which he spent most of his working time in China as a project engineer on the construction of a power station.

1.2 The Taxpayer claims exemption from liability to salaries tax on the following grounds:

a. He was paid only for those days he actually worked and was not paid for those holidays which he was allowed to take off after each period of 12 working days in China.

b. The total number of days spent in Hong Kong during the relevant period was less than the 60 referred to in section 8(1B) of the Inland Revenue Ordinance.

2. BACKGROUND

From the papers produced to us the following primary facts are clear:

2.1 The Taxpayer received an offer of employment, addressed to him in Tsuen Wan, by an undated letter ('the employment letter') from X Limited. (We were told this company does not exist and in reality the offer came from the employer). The Taxpayer accepted the offer on 10 May 1987. His employment commenced on 26 May 1986.

2.2 The employment letter contains the following provisions:

Basic Salary	$17,000 per month
Salary Uplift	An uplift of 20% on basic salary will be paid for the time the Taxpayer was based in the PRC. This does not apply to time on site visits of up to one week duration whilst remaining based in Hong Kong.
Working Hours	Whilst based in Hong Kong Monday to Friday 9.00 am – 5.30 pm with one hour for lunch. Saturday 9.00 am – 1.00 pm Whilst based at Site Hours required by the job.

Normally a 12 hours day is worked by the contractors and the Taxpayer will be expected to take a full part in the company's responsibilities including work outside normal office hours when required.

Accommodation — Accommodation will be provided whilst at site.

Travel — The cost of travel to and from site will be covered by the company. Whilst based at site the Taxpayer will be covered at company cost for travel to Hong Kong every second weekend.

Probation — The Taxpayer will undergo a probation period of three months.

Leave — The Taxpayer will be entitled to seven working days paid annual leave after completion of each year of service in addition to all statutory holidays. Leave dates must have company approval.

Lunar New Year Bonus — The Taxpayer will be entitled to one month's extra pay provided he has satisfactorily completed his probation and is still on the pay roll of the company on 1 January the same year. The extra pay will be paid before Lunar New Year and will be proportionate to the length of service by 31 December of the previous year in the first year of employment.

2.3 The Taxpayer acknowledged that the assessor's calculations of 107 days being the total of the number of occasions he was in Hong Kong during the relevant period was 'chronologically correct'.

2.4 The Taxpayer was the tenant of an apartment which he 'sub-let' but reserved one room for himself where he could rest on his periodic leaves from the PRC.

3. TAXPAYER'S CONTENTIONS

3.1 The Taxpayer submitted that in counting the days for the purposes of section 8(1B), the following should be ignored:

(a) 57 days comprising Saturdays, Sundays, public holidays and those weekdays he spent on holiday in Hong Kong for the reason expressed in 1.1(a)(that is, unpaid holidays). He said that notwithstanding the reference to a salary of $17,000 per month in the employment letter he was only paid for actual days he worked in each month.

(b) 23 days being the total of the days on which he left China because the ferry did not arrive in Hong Kong until late in the evening and the days he left Hong Kong because he left early in the morning.

3.2 The effect of (a) & (b) above is to reduce the 107 days (2.3 above) down to 27 'working days'. In the Taxpayer's own words – 'The number of the remaining days were purely non-working days which are not days for which I received any remuneration'.

3.3 In support of the submission at 3.1(b) two letters from the employer were produced. Their material parts read as follows:

- 17 December 1987

As requested by the Taxpayer, we wish to confirm that he commenced his employment on 16 [this should be 26] May 1986 as a project engineer for the project management of the construction of a power station in PRC. Initially, he was based in Hong Kong for familiarization and planning. During the period from 26 May 1986 to 20 July 1986, he spent 13 days in PRC. As from 21 July 1986, he was posted to work on site in PRC permanently. During the period from 21 July 1986 to 31 March 1987, he performed his duties in PRC and came back to Hong Kong for leave and vacation purposes only.

We trust that you will consider favourably that the Taxpayer should be exempt from tax in Hong Kong. Should you require further information, please do not hesitate to contact us.

- 6 June 1988

As further requested by the Taxpayer, we wish to confirm again that as from 21 July 1986, he was posted to work on site in PRC permanently. During the period from 21 July 1986 to 31 March 1987, he performed his duties in PRC and came back to Hong Kong for leave and vacation purposes only. The salary and other allowances paid to the Taxpayer during the year of assessment 86/87 is wholly attributable to his working and performing duties in PRC and we pay no salary and other allowances for his vacation and leave in Hong Kong during that period.

3.4 In cross examination the Taxpayer acknowledged that he spent the first few weeks (26 March 1986 – 20 July 1986) of his employment working ('familiarization and planning') in Hong Kong. However he maintained that apart from the 27 days covered by that period he never worked in Hong Kong nor did he visit his employer on any of the holidays he took off from China after he became based there on 21 July 1986.

4. REVENUE'S CONTENTIONS

The Commissioner's representative put forward the following arguments:

4.1 The source of the Taxpayer's salary is Hong Kong (BR 20/69, IRBRD, vol 1, 3) and is therefore liable to tax unless the Taxpayer falls within the exclusion contained in section 8(1A)(b)(ii)(all services rendered outside Hong Kong) or as that provision is refined by section 8(1B)(excluding visits of up to 60 days).

4.2 The exclusion provided for by section 8(1A)(b)(ii) is not available to the Taxpayer because in fact he did render some services in Hong Kong during the 27 days at the beginning of his employment.

Additionally the relief provided for in section 8(1B) is of no assistance because 107 days period calculated by the assessor exceeded 60 days.

4.3 The Commissioner's representative argued that even if the period had been less than 60 days the Taxpayer's trips to Hong Kong did not constitute 'visits' because his base was Hong Kong where he had a flat to which he returned on his days off and where he began his employment. In this regard he referred us to D11/84, IRBRD, vol 2, 108.

4.4 With respect to the submission at 3.1(a) the employment letter makes no reference to calculating salary on a daily basis and no evidence other than the 6 June letter was produced to support the Taxpayer's statement. The submission at 3.1(a) must therefore fail.

4.5 As regards the Taxpayer's submission at 3.1(b) above, the Commissioner's representative argued that 'day' in section 8(1B) means a calendar day and includes any part of a day.

5. CONCLUSION

5.1 We find as a fact that the Taxpayer was not 'visiting' Hong Kong when he came here from China. In no sense could China be said to be his normal place of residence even though, as we were told by the Taxpayer, he had six months visas. Indeed the very fact of a visa tends to rule out China as his normal place of residence. Although we know very little of the Taxpayer's background it would seem that he was a bachelor, he holds a Hong Kong identity card, he was living in Tsuen Wan at the time he received the employment letter and we note also that he had a residential address in Wanchai during the relevant period and was still there when he lodged his notice of appeal. All of which is consistent with his home or normal residence being in Hong Kong. His accommodation in China, provided by the employer, was at the site and without evidence to the contrary we assume it provided merely for the bare essentials of

accommodation and therefore unlikely to qualify as a residence in the normal sense of that term.

In view of this finding the relief provided by section 8(1B) is not available to the Taxpayer, nor is the exclusion under section 8(1A)(ii) available because of the 27 days worked in Hong Kong.

5.2 Nevertheless we feel we should also deal with the Taxpayer's two contentions referred to at 3.1(a) and (b) above.

In the first place there is nothing in section 8(1B) which requires that the visitor receives remuneration for or during his visits. Moreover the ruling of Mortimer J in CIR v So Chak Kwong, Jack 2 HKTC 175 to the effect that the 60 days is not calculated by reference to 'working days' suggests that whether or not the visitor receives a salary for the days he is in Hong Kong is irrelevant. To hold otherwise would reintroduce, by a side wind, the decision of the Board of Review in that case to the effect that it was working days that counted not simply the total of the visits, which decision was decisively overruled by Mortimer J. We say by a side wind because work and remuneration therefor generally go hand in hand, hence if the criterion of work is immaterial then logically so is the presence or absence of remuneration. Such being the case all of the 57 days at 3.1(a) above must be counted and when these are added to the 27 'working' days the 60 days relief is exceeded.

With regard to the argument at 3.1(b) the Inland Revenue Ordinance contains no definition of day, we are of the opinion that any part of a day counts as a 'day' for the purpose of section 8(1B). To limit the meaning in the context of section 8(1B) to the elapse of a period of 24 hours from midnight to the following midnight would result in treating the 60 days as 'clear' days (excluding the day of arrival and day of departure). If that had been intended then we think the draftsman would have said so: we therefore find this suggestion unacceptable. It is possible that section 71(1) of the Interpretation and General Clauses Ordinance, Cap 1, may apply in computing the period however as we were not addressed upon the point we make no comment. As to the submission concerning late evening arrivals or early morning departures (thereby treating a day as 24 consecutive hours rather than a calendar day) to accept this could lead to administrative difficulty in adding up hours and minutes, even if the Revenue were convinced of their accuracy, in which respect it should be borne in mind that although immigration authorities do put date chops in passports, so far as we are aware they do not enter the time of arrival and departure. We therefore also reject this submission.

Naturally in view of our finding at 5.1 the remarks in this paragraph 5.2 are 'obiter' but we would have come to these conclusions if we had found as a fact that the Taxpayer's trips to Hong Kong constituted visits.

For the foregoing reasons we dismiss this appeal.