INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D36/95

Salaries tax – whether income taxable in Hong Kong and whether rental value of accommodation liable to be assessed.

Panel: Andrew J Halkyard (chairman), Nicholas Ian Billingham and Erwin A Hardy.

Date of hearing: 23 May 1995.
Date of decision: 13 July 1995.

The taxpayer was employed as a storekeeper to work outside of Hong Kong. The taxpayer did not pay individual income tax in the country where he worked. Prior to being employed to work overseas the taxpayer was employed as a storekeeper to work in Hong Kong. The taxpayer submitted that there were two separate employment contracts one in Hong Kong and one outside. As an alternative ground of appeal the taxpayer submitted that if he was employed under a Hong Kong contract of employment he should not be assessed to tax on the value of a hotel room provided for his residence in the foreign country because he shared the room with another person and did not have unrestricted access to the accommodation for himself or his family members.

Held:

There was only one continuous employment. On the evidence before the Board there was not a termination of employment and reemployment. As the employee had rendered services to the employer in Hong Kong for more than 60 days during the year of assessment his total remuneration was subject to Hong Kong salaries tax. With regard to the hotel room the Board held that the shared hotel room was not a place of residence. The appeal was allowed to the extent of excluding from salaries tax the rental value of the hotel room.

Appeal partly allowed

Cases referred to:

D12/76, IRBRD, vol 1, 218
D43/94, IRBRD, vol 9, 278
D101/89, IRBRD, vol 6, 375
D37/88, IRBRD, vol 3, 360
D67/89, IRBRD, vol 5, 52
R v Fermanagh Justices [1987] 2 IR 563
CIR v Chow Hung-kong [1978] HKLR 475
D13/80, IRBRD, vol 1, 386
D46/87, IRBRD, vol 2, 447

D76/88, IRBRD, vol 4, 136
D30/92, IRBRD, vol 7, 299
D54/92, IRBRD, vol 8, 46

Luk Nai Man for the Commissioner of Inland Revenue.
C M Tam of Messrs C M Tam & Co for the taxpayer.

Decision:

The Taxpayer has appealed against a determination of the Commissioner of Inland Revenue relating to the salaries tax assessment for the year of assessment 1992/93 raised on him. The Taxpayer claims that by virtue of section 8(1A)(b)(ii) of the Inland Revenue Ordinance (the IRO) his income received for the period he worked in Country X should be exempt from taxation. In any event, the Taxpayer claims that he should not be taxed on the rental value of the accommodation provided by his employer in Country X as it was not a place of residence.

During the course of the Board hearing the Taxpayer gave oral evidence. He presented his evidence in a forthright and candid manner. On the basis of that testimony and various documents produced before the Board, we find the following facts.

The facts

1. At all relevant times, the Taxpayer was employed by Company A ('the Employer'). He commenced employment in August 1988.

2. The Taxpayer joined the Employer's staff provident fund scheme in June 1990. At all relevant times he contributed 5% of his monthly salary to the scheme. To date, he has not received any payment from the scheme.

3. For the period 1 April 1992 to 16 August 1992, the Taxpayer's duties were:

(a) Looking after the Employer's warehouse in Hong Kong;

(b) Handling documents for goods delivered to an despatched from that warehouse;

(c) Dealing with documents relating to customs procedures for goods to be exported to Country X; and

(d) On occasion, travelling to Country X to clarify the classification of certain goods for the purposes of Country X customs law.

4. With effect from 17 August 1992, the Taxpayer commenced work for the Employer at its premises in Country X. Some weeks prior to this date, the Taxpayer and the

Employer signed a document entitled 'Employment Contract' which provided for the following matters:

(a) The Taxpayer's position was described as store supervisor at the Employer's factory in Country X and he was responsible to the production manager;

(b) Remuneration (at an increased salary);

(c) Leave entitlements, which included gazetted public holidays of Country X (no reference was made to Hong Kong gazetted public holidays and the Taxpayer was required to work on these days);

(d) Provident fund (the relevant clause stated: 'You have to join the provident fund scheme on a joint contributory basis, which is 5% of your monthly salary');

(e) Working hours (although a five and a half-day working week was specified, the Taxpayer was often required to work overtime, sometimes up to 11.00 pm); and

(f) Termination (which included the right for the Employer to terminate the contract if the Taxpayer breached any Country X law).

5. At all times during the period 17 August 1992 to 31 March 1993, the Taxpayer rendered all his services to the Employer in Country X.

6. During the period 17 August 1992 to 31 March 1993, the Employer provided the Taxpayer with the use of a shared hotel room in Country X. The room was also provided by the Employer to the Taxpayer's male colleague. This room was not available for the Taxpayer's use during the lunar new year. The Taxpayer checked out of the hotel during this period.

7. Every Saturday after finishing the morning's work, the Taxpayer, a married man, returned to Hong Kong to his family home. Typically, he went back to Country X early on Monday morning in time to commence work.

8. The Employer's return of remuneration and pensions in relation to the Taxpayer for the year ended 31 March 1993 disclosed the following particulars:

Capacity in which employed	:	storekeeper
Period of employment	:	1 April 1992 to 31 March 1993
Income	:	$194,791

9. In his salaries tax return for the year of assessment 1992/93 the Taxpayer reported the same particulars as shown in fact 8.

10. Neither of the documents described in facts 8 and 9 contained any reference to termination of the Taxpayer's employment with the Employer. However, when submitting his salaries tax return a covering letter from his tax representative ('the Representative') stated that the Taxpayer had been employed by the Employer in Country X and that his income of $194,791 was derived from services rendered outside Hong Kong and should be exempt from salaries tax.

11. During the period 17 August 1992 to 31 March 1993, the Taxpayer did not pay individual income tax in Country X.

The Taxpayer's contentions

The Representative first contended that, with effect from 17 August 1992, the Taxpayer had a new and separate employment with the Employer. This is evidenced by the fact that all the terms of the employment contract, such as holiday entitlements, remuneration and termination (fact 4 refers), apply only to work to be undertaken in Country X. As all the Taxpayer's services under that contract took place in Country X (fact 5 refers), the Representative argued that the income referable to that contract is exempt from salaries tax by virtue of section 8(1A)(b)(ii). In similar vein, the Representative contended that as the Taxpayer had no obligation to work in Country X prior to 17 August 1992, it must follow that for the purposes of section 8(1A)(b)(ii) the income in dispute could not be referable to any other contract than that referred to in fact 4. According to the Representative, the Taxpayer's employment in Hong Kong prior to 17 August 1992 must have ceased. In this regard, however, the Representative could not shed light upon the Taxpayer's continued participation in the Employer's provident fund scheme. Without adopting it as an argument, the Representative ventured the comment that this may have been purely a matter of convenience for the Employer.

If this initial contention were rejected, the Representative argued that, for the purposes of section 9(1)(b), the hotel room provided for the Taxpayer whilst he was in Country X (fact 6 refers) was not a 'place of residence'. The main thrust of the Representative's argument was that the Taxpayer did not have unrestricted access to the accommodation provided: he was forced to share the room with a male colleague, he could not stay in the room during the lunar new year, and his family members could not use the room (compare D12/76, IRBRD, vol 1, 218).

The Commissioner's contentions

In relation to the broader issue raised by the Taxpayer, the Commissioner contends that this appeal is virtually identical to the case D43/94, IRBRD, vol 9, 278. In that case it was held that the taxpayer was continually employed by the same employer; although a second contract had been entered into governing the taxpayer's employment in Country X, the Board decided that there was no termination of employment and re-employment. Applying that case to the present appeal, the Commissioner asks the Board to conclude that section 8(1A)(b)(ii) can not assist the Taxpayer as he rendered services to the Employer in Hong Kong for more than sixty days during the year of assessment, that is, from 1 April 1992 to 16 August 1992.

The Commissioner then contends that the accommodation provided by the Employer to the Taxpayer is a 'place of residence' for the purposes of section 9(1)(b). In essence, the Commissioner argues that the hotel room was the Taxpayer's dwelling and home where he was supposed usually to live and sleep and the place where he was to be found daily.

Exemption of income

So far as relevant, section 8(1)(a) provides that salaries tax shall be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from any employment. Section 8(1A)(b)(ii) then provides that income arising in or derived from Hong Kong from any employment excludes income derived from services rendered by a person who renders outside Hong Kong all the services in connection with his employment. In determining whether all the services are rendered outside Hong Kong for the purposes of section 8(1A), section 8(1B) states that no account should 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.

As the source of employment income was not a ground of appeal, the main issue for decision is whether by virtue of section 8(1A)(b)(ii) the income received by the Taxpayer for the period he worked in Country X should be exempt from salaries tax.

We agree with the Commissioner that in relation to this issue our decision in this case should be governed by the precedent case D43/94, IRBRD, vol 9, 278. The facts of both cases are virtually identical. The Representative tried valiantly to distinguish that case on the basis that the source of employment income was directly in issue in D43/94 whereas it was not in dispute in this appeal. The fact remains, however, that the issue in dispute in this appeal was directly before the Board in D43/94 as the following passage at page 280 shows:

> *'The Taxpayer's case is that … **in any event** it was a new employment which arose upon the termination of the old employment … [and] therefore there was no salaries tax to pay in respect of his income from the new employment because he rendered all his services in connexion with the new employment [outside Hong Kong].'* (emphasis added)

It is thus hardly surprising that the taxpayer's argument in D43/94 bears striking similarity to the Representative's contentions:

> *'In support of his argument, the Taxpayer repeatedly pointed out: that the terms of the second employment contract were difficult from those of the first employment contract; that, in particular, by the second employment contract he was appointed to a new post; that his place of work under the second employment contract was [outside Hong Kong], and that he rendered all his services under the second employment contract [outside Hong Kong].'* (at page 280)

Before dealing with that arguments, the Board set out the relevant principles which it should apply in dealing with the case:

> *'First of all, one must bear in mind the difference between the employment and the services rendered under the employment contract. An employment is a state in which an employee is employed by an employer; it is the source of the employee's income, but it is not necessarily located where the employee renders his services under the employment contract … Furthermore, the same employment may continue notwithstanding the variation of the terms and conditions of the employment contract or even the replacement of the entire contract by a new employment contract (see D101/89, IRBRD, vol 6, 375), and notwithstanding that the employee is seconded or transferred to work outside Hong Kong (see D37/88, IRBRD, vol 3, 360 and D67/89, IRBRD, vol 5, 52).'* (at page 280)

The Board then concluded that there was only one continuous employment. It relied upon the following factors. These factors are equally applicable to this appeal.

(1) There was no break between the first and second employment contracts.

(2) The Taxpayer's continued participation in the Employer's provident fund scheme notwithstanding the change of contracts.

(3) Neither the Employer's return nor the Taxpayer's salaries tax return referred to any termination of employment (facts 8 and 9 refer).

(4) No convincing explanation was given as to why the Taxpayer's participation in the provident fund scheme was not terminated and then renewed upon signing the employment contract.

We accept that posting of an employee to a different location can amount to a termination of employment followed by re-employment. In this case, however, the evidence before us indicates that the employment of the Taxpayer by the Employer was varied by mutual agreement. On this basis, and following the decision in D43/94 which we find indistinguishable from the present case, we conclude that the Taxpayer had one continuous employment throughout the year ended 31 March 1993. In the event, we accept the Commissioner's contention that section 8(1A)(b)(ii) can not assist the Taxpayer as he rendered services to the Employer in Hong Kong for more than sixty days during the year of assessment.

Place of residence

There is no dispute between the parties that the usual meaning of residence appears from R v Fermanagh Justices [1897] 2 IR 563 which was applied in D12/76, IRBRD, vol 1, 218:

> *'The words "residence" and "place of abode" are flexible, and must be construed according to the object and intent of the particular legislation where*

they may be found. Primarily, they mean the dwelling and home where a man is supposed to usually live and sleep; they may also include a man's business abode, the place where he is to be found daily.'

The facts before us are, however, somewhat unusual. As D12/76 was the only authority cited by the parties to this appeal and as the facts before us were quite different from this case, we have conducted our own research into this matter. In CIR v Chow Hung-kong [1978] HKLR 475, the fact that the employee did not have exclusive use of and control over a bungalow provided by the employer and could be required to give up possession at regular intervals influenced Zimmern J in arriving at his decision that the accommodation provided was not a place of residence. In D13/80, IRBRD, vol 1, 386 it was held that quarters which the employer used regularly and in respect of which the employer had not given the employee exclusive possession were not a place of residence. A similar case was D46/87, IRBRD, vol 2, 447 where it was indicated that for there to be a taxable housing benefit there must be found some element of benefit beyond merely enabling the employee to eat, sleep and relax whilst on duty (compare D76/88, IRBRD, vol 4, 136). These decisions can be contrasted with D30/92, IRBRD, vol 7, 299 where it was a term of employment that the employee reside in certain quarters to enable him to perform his duties and the taxpayer and his family used the quarters as the family residence (see also D54/92, IRBRD, vol 8, 46).

As a preliminary matter, we note that section 9(2)(a) provides specifically for rental value to be charged for the provision of a 'hotel, hostel or boarding house'. However, this paragraph is predicated upon the fact that, in any particular case, the accommodation provided is a 'place of residence'.

Having considered the facts of this case and the authorities referred to above, we have concluded that the shared hotel room provided by the Employer for the Taxpayer was not a place of residence. The Commissioner contends that the Taxpayer was free to leave the Employer's premises in Country X after office hours but, instead, he chose to spend his leisure hours in the hotel room. There is no evidence before us to support this contention. Rather, the evidence goes the other way. First, the contention ignores the fact that the Taxpayer was often required to work overtime; he effectively had no choice as to where he would stay during the working week. Second, the Taxpayer did testify that typically he returned to Hong Kong every Saturday and did not go back to Country X until Monday morning; but this is a far cry from concluding that he could have made those trips during the working week.

More importantly, we accept the evidence of the Taxpayer that family members were effectively not allowed to use the hotel room (contrast D30/92 and D54/92). The Taxpayer had to share this room with a male colleague. It is hardly plausible to argue that technically it was the Taxpayer's choice not to ask his wife to share the same room. Similarly, there is unchallenged evidence by the Taxpayer to the effect that he was forced by his Employer to vacate the room during the lunar new year. In short, the Taxpayer had no exclusive possession and control of any part of the shared hotel room. And, in our view, there was no additional benefit flowing from the provision of the hotel room other than enabling the employee to rest and sleep whilst on duty in Country X (compare D46/87). Simply put, the effective restrictions placed in this case upon the Taxpayer's use of the hotel

room are such that it does not qualify as a ‘place of residence’ as that term has been interpreted in previous court and Board decisions (see particularly, CIR v Chow Hung-kong).

In the result, this appeal is allowed to the extent of excluding from salaries tax the rental value of the hotel room included in the assessment.