Case No. D37/01

Salaries tax – employment – place of service – source of income – 60 days limit – whether liable to salaries tax – meaning of 'visit' – meaning of 'days' – section 8(1B) of the Inland Revenue Ordinance ('IRO').

Panel: Ronny Tong Ka Wah SC (chairman), Lam Andy Siu Wing and John D Whitman.

Date of hearing: 20 March 2001.
Date of decision: 29 May 2001.

The taxpayer was employed as a finance manager in relation to a PRC factory belonged to Company A. Company A confirmed that the taxpayer was stationed in the factory in China and no service was rendered by him to the Employer in Hong Kong. The taxpayer disputed the Revenue's computation that he was in Hong Kong for 85 days during the year of assessment. The taxpayer objected to the salaries tax assessments for the two years of assessment raised on him on the ground that he rendered all his services outside Hong Kong.

Held:

1. The words 'not exceeding a total of 60 days' under section 8(1B) of the IRO must qualify the word 'visits' and not 'services rendered'. 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. The Board considered that 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 (Commissioner of Inland Revenue v So Chak Kwong, Jack (1986) 2 HKTC 174 followed).

2. The Board considered that draconian construction referred to above will work even greater injustice if the word 'days' is to include part of a day. The Board has considered the Revenue's calculations and ignoring the construction of section 8(1B) contended by the Revenue, the Board concludes from the immigration records that the taxpayer was only in Hong Kong during 'working hours' for 22½ days based on a six working day week and working hours of 8 a.m. to 6 p.m. each

day (D29/89, IRBRD, vol 4, 340; D12/94, IRBRD, vol 9, 131 and D47/97, IRBRD, vol 12, 313 considered).

3. The Board noted that the taxpayer was in Hong Kong mostly over weekends or holidays and there was no regular pattern that he was in Hong Kong over a particular day of the week or at a particular time. Taking into account the fact that he would have to travel to and from the office, the time he could spend in the office during ‘working hours’ must be extremely minimal. In these circumstances, the Board is satisfied that the taxpayer was truthful when the taxpayer said he did not render any services in Hong Kong. This was confirmed and corroborated by the Employer. The Board is not satisfied that the Revenue’s computation that the taxpayer was in Hong Kong for 85 days was correct.

Appeal allowed.

Cases referred to:

Commissioner of Inland Revenue v So Chak Kwong, Jack (1986) 2 HKTC 174
D29/89, IRBRD, vol 4, 340
D12/94, IRBRD, vol 9, 131
D47/97, IRBRD, vol 12, 313

Chow Cheong Po for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Background facts

1. The Taxpayer objected to the salaries tax assessments for the years of assessment 1993/94 and 1994/95 raised on him on the ground that he rendered all his services outside Hong Kong.

2. The Commissioner of Inland Revenue (‘the Revenue’), having considered the Taxpayer’s objection by a determination dated 15 October 1999 (‘the Determination’), set aside the assessment for the year of assessment 1993/94 but increased his assessment for the year of assessment 1994/95 from net chargeable income of $192,000 to $264,000 on the ground that the Taxpayer’s income could not be exempt from salaries tax in accordance with section 8(1A)(b)(ii) of the IRO.

The evidence

3. From the Determination, the Taxpayer now appeals. He appears before us in person and gives evidence to the effect that no services of his employment were rendered in Hong Kong at all.

4. There is also before the Board a letter of appointment from the employer, one Company A ('the Employer') dated 13 December 1993 signed by a Mr B, group financial controller of the Employer. This letter confirmed that the Taxpayer was employed as a 'finance manager (PRC)' in relation to a 'PRC factory' belonged to the Employer. This was further confirmed by a calling card of the Taxpayer produced to us which described the Taxpayer in the same terms.

5. In a certificate issued by the Employer dated 7 September 1995 signed by a Mr C, human resources manager, the Employer again confirmed that the Taxpayer was stationed in the Employer's factory in China and 'no service was rendered by him' to the Employer in Hong Kong.

6. In another letter dated 26 February 1996, also signed by Mr C, this time as administration manager, the Employer further confirmed, *inter alia*, that:

(a) The Taxpayer only stayed in Hong Kong for his personal matters.

(b) He had never attended any meetings in the Hong Kong office and did not handle matters in Hong Kong in relation to his work in China.

7. Against the aforesaid evidence, the Revenue points to detailed immigration records which show the Taxpayer was in Hong Kong on 85 days during the year of assessment in question. The Taxpayer admits the records but disputes the Revenue's computation that he was in Hong Kong for 85 days.

The law

8. The relevant provisions of the IRO are in these terms:

' *8(1) Salaries tax shall ... be charged ... on every person in respect of his income arising in or derived from Hong Kong from ... -*

(a) any office or employment of profit;

...

(1A) ... income arising in or derived from Hong Kong from any employment -

(a) ...

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

(i) ...

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

...

(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 ...'

9. The Revenue relies on two propositions:

(a) The words 'a total of 60 days' in section 8(1B) qualifies the word 'visits' and not 'services rendered' so that once it is shown the taxpayer was in Hong Kong for a period or periods exceeding in total of 60 days during which time he performed *some* services, he is not entitled to the exemption provided in section 8(1B).

(b) The word 'days' includes part of a day and does not refer to any 24 hour period.

Visits exceeding 60 days

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 'services rendered'.

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.

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.

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 a *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.

Meaning of ‘days’

14. The draconian construction referred to above will work to even greater injustice if the word ‘days’ is to include part of a day. The word is not defined in the IRO. Nor does section 71(1) of the Interpretation and General Clauses Ordinance (Chapter 1) help.

15. In D29/89, IRBRD, vol 4, 340, this Board was of the view as a matter of ‘obiter’ that days perhaps should include part of a day. As part of the reasons given, they said this at paragraph 5.2:

> *‘As to the submission concerning late evening arrivals or early morning departures (thereby treating a day as 24 consecutive hours rather than a calender 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.’*

16. That decision was rendered in 1989. It is no longer a matter of ‘administrative difficulty’ nowadays to find out precisely when a person enters or leaves Hong Kong. All entry and exit points are monitored by computers and the Immigration is able to provide complete and exact records of times of arrivals and departures to the minute as in the present case.

17. D29/89, was followed in D12/94, IRBRD, vol 9, 131 where the Board decided that part days should be included in the calculation of days. We note that that was a decision by the same Chairman as in D29/89.

18. In D47/97, IRBRD, vol 12, 313, a differently constituted Board was of the view that such a construction ' may lead to the absurd result in some cases of more than 365 days in a year.'

19. The injustice of this approach can be readily demonstrated in this case by looking at the immigration records which are set out at page 15 of Bundle R1. For example:

(a) On Saturday, 23 April 1994, the Taxpayer arrived at Hong Kong at 1:43 p.m. and left on Sunday, 24 April 1994 at 7:24 a.m. That was counted as two days.

(b) On Sunday, 15 May 1994, the Taxpayer arrived at Hong Kong at 10:53 a.m. and left on Monday, 16 May 1994 at 10:56 a.m. That was counted as two days.

(c) On Saturday, 18 June 1994, the Taxpayer arrived at 1:55 p.m. and left on Sunday, 19 June 1994 at 11:01 a.m. That was counted as two days.

(d) On Wednesday, 14 September 1994, the Taxpayer arrived at 5:51 p.m. and left about four hours later at 10:17 p.m. That was counted as one day.

(e) On Tuesday, 20 September 1994, the Taxpayer arrived at 6:17 p.m. and left at 10:19 p.m. That was counted as one day.

(f) On Sunday, 2 October 1994, the Taxpayer arrived at 5:24 p.m. and left at 10:07 p.m. That was counted as one day.

(g) On Wednesday, 12 October 1994, the Taxpayer arrived at 5:54 p.m. and left on Thursday, 13 October 1994, a public holiday at 8:36 a.m. That was counted as one day.

(h) On Tuesday, 15 November 1994, the Taxpayer arrived at 5:36 p.m. and left at 9:09 p.m. That was counted as one day.

(i) On Saturday, 19 November 1994, the Taxpayer arrived at 6:46 p.m. and left on Sunday, 20 November 1994 at 9:18 p.m. That was counted as two days.

(j) On Saturday, 10 December 1994, the Taxpayer arrived at 5:43 p.m. and left on Sunday, 11 December 1994 at 6:43 p.m. That was counted as two days.

(k) On Sunday, 25 December 1994, the Taxpayer arrived at 6:14 p.m. and left on Monday, 26 December 1994, a public holiday, at 4:35 p.m. That was counted as two days.

(l) On Saturday, 28 January 1995, the Taxpayer arrived at 11:37 a.m. and left on Friday, 3 February 1995 at 9:52 p.m. That was Chinese New Year and 31 January, 1 and 2 February 1995 were all public holidays. That was counted as seven days.

(m) On Sunday, 26 February 1995, the Taxpayer arrived at 12:06 p.m. and left at 8:26 p.m. That was counted as one day.

20. Even on the Revenue's own calculation, there was only 36 days or parts of a day where the Taxpayer was in Hong Kong during 'working hours'. We have considered the Revenue's calculations and ignoring the construction of section 8(1B) contended by the Revenue, we conclude from the immigration records that the Taxpayer was only in Hong Kong during 'working hours' for 22½days (adding up two half days as one day) based on a six working day week and working hours of 8 a.m. to 6 p.m. each day.

Conclusion

21. We note that the Taxpayer was in Hong Kong mostly over weekends or holidays and there was no regular pattern that he was in Hong Kong over a particular day of the week or at a particular time. Indeed, of the entire period, the Taxpayer was only in Hong Kong for a full working day on Thursday, 19 May 1994, Saturday, 31 December 1994, Monday, 30 January 1995 and Friday, 3 February 1995 for a total of four days. The second date was New Year's Eve and a Saturday. The last two dates were over the Chinese New Year period. Other than these four days, the Taxpayer was in Hong Kong during 'working hours' for less than a half day each time, mostly early in the morning, leaving before 12 a.m. or arriving late in the afternoon. Taking into account the fact that he would have to travel to and from the office (assuming that was where he was spending his time in Hong Kong), the time he could spend in the office during 'working hours' must be extremely minimal.

22. In these circumstances, we are satisfied that the Taxpayer was truthful when he said he had not rendered any services in Hong Kong. This was confirmed and corroborated by the Employer. We are of the view that the Taxpayer's salaries are excluded by section 8(1A)(b)(ii) and there is no need for him to rely on section 8(1B) of the IRO even though we are not satisfied that the Revenue's computation that the Taxpayer was in Hong Kong for 85 days was correct.

23. For all these reasons, we are of the view that the appeal should be allowed and the Determination insofar as it relates to salaries tax assessment for the year of assessment 1994/95 must be set aside.