INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D37/88

Salaries tax – source of employment income – substantial portion of services rendered offshore – whether salary could be apportioned – whether secondment creates a new employment – s 8(1)(a) of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Dr Richard Lee and Lincoln Yung Chu Kuen.

Date of hearing: 9 August 1988.
Date of decision: 22 September 1988.

The taxpayer was employed by a Hong Kong company, originally performing his services in Hong Kong and being paid in Hong Kong. He was subsequently seconded to work for his employer's subsidiary in the PRC, but his employer did not change. He frequently returned to Hong Kong, in which he spent more than 60 days each tax year, during which he performed services for his employer.

The taxpayer had previously declared the whole of his salary to tax, but had applied under section 70A for a correction to be made by virtue of an 'error or omission'.

Held:

(a) The whole of the taxpayer's income was sourced in Hong Kong, notwithstanding his secondment to the PRC. There is no provision for apportioning his salary in such a case.

(b) The effect or the secondment was to vary the employee's duties and terms of employment, but his employment remained continuous and no new employment was created.

Appeal dismissed.

Cases referred to:

CIR v So Chak Kwong (1986) 2 HKTC 174

Jennifer Chan for the Commissioner of Inland Revenue.
T S Au of T S Au & Co for the taxpayer.

Decision:

This appeal is by a private individual against the refusal by the Deputy Commissioner to allow an application made under section 70A of the Inland Revenue Ordinance to correct an alleged error. The Taxpayer, through his representative, submitted that an error had been made because he had included in his salaries tax return certain income which he now alleged was in fact not assessable and should not have been included. The appeal related to two years of assessment, 1982/83 and 1983/84. In respect of each of those years of assessment, the Taxpayer had filed salaries tax returns in which he had given details of his income chargeable to salaries tax and had included sums which he received and which he claimed had been included in error because they were not in fact assessable.

The meaning of section 70 and section 70A of the Inland Revenue Ordinance are not in dispute and it was not argued before us that a mistake had not been made if, on the facts as proved before us, it were to be established that part of the moneys included by the Taxpayer in his tax return were in fact not assessable. Accordingly, it is open to us to look at the facts to see whether or not an error had been made and, if such an error has been made, then it is open to us to order that the same be corrected under section 70A.

The relevant facts were as follows:

1. The Taxpayer had been employed by a company incorporated in Hong Kong which carried on business in Hong Kong. He held a senior management position with his employer and performed his services originally in Hong Kong.

2. In the course of the first of the two years of assessment which are the subject matter of this appeal, the Taxpayer was transferred from Hong Kong to Beijing. In the course of giving evidence, there was a suggestion by the Taxpayer that he had ceased to be employed by the original employer and had been taken into the employment of the subsidiary. In so far as it may be relevant, we find as a fact that there was no such change of employment and that at all times the Taxpayer was employed by the parent company and was directed by it to work on secondment for its subsidiary. As, however, the subsidiary was also a Hong Kong incorporated company having its headquarters in Hong Kong, and as the employee's service contract arose in Hong Kong and he was paid in Hong Kong, it would not appear to be material whether or not there was in fact a change of employer.

3. The Taxpayer proceeded to take up his assignment in Beijing with effect from 29 October 1982. This was the effective date of his posting to Beijing, but his official transfer to the subsidiary company took effect from 1 January 1983. This was for administrative reasons because the subsidiary company could not

afford the expense of the Taxpayer during the period from 29 October 1982 up to 31 December 1982.

4. The Taxpayer remained on secondment to the subsidiary in Beijing until he returned to Hong Kong with effect from either 31 March 1984 or 14 April 1984. As the appeal period before us does not extend beyond 31 March 1984 it is not necessary for us to consider or decide upon the exact date of when the secondment of the Taxpayer terminated, and it is assumed for the purposes of this appeal to have taken place with effect from 31 March 1984.

5. One of the terms of the Taxpayer's secondment to Beijing was an agreement by his employer that he would be entitled to return to Hong Kong on vacation for one week in every period of one month. This was to compensate him because he was not given an increase in salary for his increased responsibilities and duties and because working in Beijing was not attractive because at that time there were few facilities available to foreigners.

6. In practice, the Taxpayer did not return regularly to Hong Kong for one week every month but made frequent and irregular visits to Hong Kong and on a number of occasions went on business from Beijing to Japan via Hong Kong.

7. During the period from 29 October 1982 up to 31 March 1983, the Taxpayer visited Hong Kong on three occasions and was present in Hong Kong on a total of 15 days. During the period from 1 April 1983 up to 31 March 1984, the Taxpayer visited Hong Kong on 13 occasions and was present in Hong Kong on a total of 95 days. We find as a fact, for the reasons stated below in our decision, that when visiting Hong Kong the Taxpayer did perform services for his employer.

8. When the Taxpayer filed his tax returns for the two years in question, he thought that all of his income was taxable and he included all of it in his tax returns. Subsequently, he was advised that the income which he earned whilst on secondment to Beijing was not subject to Hong Kong salaries tax and should not have been included. Accordingly, the Taxpayer through his representative made an application to the assessor to correct the assessments which had been issued pursuant to his tax returns. These applications under section 70A were rejected by the Assessor and this rejection was in due course confirmed by the Deputy Commissioner's determination.

At the hearing of this appeal, the Taxpayer appeared and gave evidence. A crucial part of his evidence related to the performance of his duties and in particular the performance of his duties during the second of the two years under appeal. His representative submitted that, during the period from 29 October 1982 up to 31 March 1984, the Taxpayer was employed to perform services in Beijing and that throughout that period he did not perform any services in Hong Kong under his employment contract.

When giving evidence, the Taxpayer stated that, on the frequent visits which he made to Hong Kong, he did not perform any work or duties for his employer though he conceded that he met colleagues who were employed by the same company as himself. He alleged that all contact between himself and his employer took place whilst he was in Beijing and was in the form of written communications, telex messages, and telephone conversations. He supported his statement by saying that the full time staff in Beijing comprised only a small number of people like himself and that the full time staff was supplemented by frequent visits from personnel from head office in Hong Kong. With due respect to the Taxpayer, we do not accept that there was no communication of a business nature between him and his employers on the very many times that he visited Hong Kong during the period in question and that he never performed any services for his employer when he was in Hong Kong. It would be a very surprising and unusual relationship if throughout the period the employer never took the opportunity of meeting and consulting with or instructing the manager of its subsidiary company operating in Beijing. It was apparent from the evidence given by the Taxpayer that there was close contact and liaison between the Beijing office and the head office in Hong Kong. Many services were performed by the head office in Hong Kong for its subsidiary which the subsidiary could not conveniently handle from Beijing.

It was agreed and conceded by the Taxpayer that, during a number of the days when he visited Hong Kong in the months of February and March 1984, he actively participated in the recruitment of staff for the Beijing office. He said that this was not part of his contractual duties but was something which he did voluntarily of his own accord because he wished to help to ensure that future employees would be aware of the problems and hardships of working in Beijing. With due respect to the Taxpayer, it is quite obvious that he was performing duties for his employer in the course of his employment service when he assisted in the interviews of staff. Such assistance is no less than one would expect from the senior executive in charge of the Beijing office. The Taxpayer himself said that he considered it in his interests to ensure that future staff working for him in Beijing would work satisfactorily and have no complaints. He said that the personnel department of his head office were not able to explain what it was like to live and work in Beijing, and this was something which he considered he should attend to because of his personal knowledge of living and working there.

It is also quite clear from the Taxpayer's own evidence and the submissions made on behalf of the Taxpayer that not all of his services were provided outside of Hong Kong. Reference was made on a number of occasions to the Taxpayer performing services in Hong Kong. For example, it is an agreed fact, as stated by the employer in reply to enquiries from the assessor, that 'during 29 October 1982 to 1 April 1984 Mr X was required by our company to perform all his duties outside Hong Kong in our Beijing office. He was required to work full time in Beijing other than vacation returns to Hong Kong. His service in Hong Kong during such periods were incidental to his Beijing duties.' This is a clear statement that service was performed in Hong Kong.

As we have found as a fact that the Taxpayer did perform services for his employer when he visited Hong Kong, it is quite simple to decide this case.

In the first of the two years under appeal, the Taxpayer is quite clearly subject to salaries tax on all of his income. There is no provision in the Inland Revenue Ordinance allowing apportionment of income during the year. The source of the Taxpayer's salary was Hong Kong. At all material times, he was employed under a continuing contract with a Hong Kong employer and received his salary in Hong Kong. When he was seconded to Beijing, his contract of employment with the parent company was not terminated. Though his duties and terms of employment were changed, the employment itself was continuous.

The Inland Revenue Ordinance was amended some years ago to provide that, where a person's source of employment is Hong Kong, he will be exempt from Hong Kong salaries tax provided that all of the services in connection with his employment are rendered outside of Hong Kong: Inland Revenue Ordinance section 8 1A(b)(ii). Sub-section (1B) of that section states that, in determining whether or not all services are rendered outside of Hong Kong, '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.' During the first of the two years in question, the Taxpayer spent more than the first six months of the year in Hong Kong performing his services in Hong Kong. It is quite clear that the Taxpayer is liable to salaries tax on all of his income in that year. It is not possible to treat his emoluments after 29 October 1982 differently from those in the first part of the year. The working of the Inland Revenue Ordinance does not permit this.

With regard to the second year of assessment, the Taxpayer clearly spent more than 60 days visiting Hong Kong. In the case of CIR v So Chak Kwong (1986) 2 HKTC 174 it was held that the 60 days period relates to visits and not to working days. During the second year of assessment, the Taxpayer most definitely worked for his employer on some of the days in question and was in Hong Kong for much a longer period in total than the maximum of 60 days. Accordingly, it is not possible for the Taxpayer to argue that all or any part of his remuneration for the second year is not subject to salaries tax.

For the reasons stated, we dismiss this appeal and confirm the two assessments appealed against.