

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D40/97

Salaries tax – section 8(1A)(b)(ii) – a continuous contract of employment or two separate contracts in the year of assessment.

Panel: Christopher Chan Cheuk (chairman), Christopher Henry Sherrin and William Tsui Hing Chuen.

Date of hearing: 22 May 1997.

Date of decision: 31 July 1997.

The taxpayer was employed by Company A in Hong Kong since 2 November 1992. He claimed that his employment was terminated on 30 June 1994 and that he was re-employed in a different capacity as Representative in Country B. He argued that he had tendered verbal and written termination and that his terms of new employment were different in job nature, place of work, remuneration and risk. The Board looked at all the relevant evidence.

Held:

There was no termination of the contract, that the resignation was not supported by evidence and that the so-called re-employment was a continuation of the then existing contract with some variation in term.

Appeal dismissed.

Chan Tak Hong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by a taxpayer against the determination dated 11 June 1996 by the Commissioner of Inland Revenue in respect of salaries tax assessment raised on the Taxpayer for the year of assessment 1994/95.

Late Appeal

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2. The Board of Review did not receive the Taxpayer's notice of appeal until 15 July 1996 that was five days behind time. The Taxpayer applied for extension of time to file the notice. Ms Chan for the Revenue did not object to the extension.

3. Having considered the Taxpayer's written submission entitled 'Reasons For Late Appeal' which was enclosed in his letter of 12 May 1997 the Board is satisfied that the Taxpayer was prevented by reasonable cause from giving the notice of appeal, and accordingly grants leave to file the notice out of time.

Facts of the Case

4. The Taxpayer was employed by Company A ('the Company') since 2 November 1992.

5. In his tax return for the year of assessment 1994/95 the Taxpayer declared that he was employed as 'Representative – Country B' and received a total remuneration of \$334,540.

6. His employment for the year divided into two periods: the first period from 1 April 1994 to 30 June 1994 when he worked as Assistant Fabric Development Manager and received a total salary of \$37,540 and the second period from 1 July 1994 onwards as Representative in Country B a total salary of \$297,000.

Issues

7. The Taxpayer disputed that he was liable to pay any salary tax for the second period because he rendered all the services outside Hong Kong in connection with his employment. The key issues are whether he had resigned and whether the second period of employment constituted a new contract of employment.

8. If our answers to the above issues are 'yes' then we have to consider whether the Taxpayer visited Hong Kong for a period of more than 60 days and whether all his services should be regarded as services being rendered outside Hong Kong.

9. No issue was taken by either that the Taxpayer's income was arising in or derived from Hong Kong from his employment of profit.

Evidence

10. The parties did not follow the good practice of agreeing the documents and paginated them for production. At the hearing the following documents were agreed and marked as Exhibit 'A' to 'H':

Exhibit 'A' Letter dated 11 June 1996 from the Revenue to the Taxpayer.

Exhibit 'B' Determination dated 11 June 1996.

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Exhibit 'C'	Appendices to the determination
Exhibit 'D'	Schedule of Movement of the Taxpayer.
Exhibit 'E'	Copy Calendar of 1994/95.
Exhibit 'F'	Letter dated 24 January 1996 from the Taxpayer to the Revenue.
Exhibit 'G'	Additional Information for the appeal by the Taxpayer.
Exhibit 'H'	Notice of Appeal dated 10 July 1996.

11. In addition to the Agreed Documents as set out above the Board had the benefit of hearing the testimony of the Taxpayer on oath.

Taxpayer's Case

12. The Taxpayer was first employed by Company A on 2 November 1992.

13. In April 1994 he verbally submitted his resignation by informing his superiors, Ms C and Mr D. He gave them no specific date for resignation. They asked him to think about it and said that if the Taxpayer could find a better job elsewhere, they would let him resign.

14. The Taxpayer further claimed in his evidence that later he typed a letter and gave it to his superior. But, he did not produce any copy thereof.

15. In support of his claims that his employment had been terminated and that a new contract was entered into between him and his employer, he referred to the differences in the terms of employment between the two periods referred to in paragraph 6 above:

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| (a) the job nature: | he worked as the Company's representative in Country B which covered every aspect of the Company's business while in the first period his work was restricted to trace the sources of fabric supply; |
| (b) place of work: | the new job required him to work exclusively in Country B; |
| (c) remuneration: | the new post had both salary and allowances; |
| (e) risk: | he felt that the new post exposed him to much greater risk and he himself took out insurance policy against risk for working in Country B. |

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16. Before he accepted the new post, he had attended a number of interviews for new job as evidenced in Appendix F of Exhibit 'C' showing the casual leaves of 1 to 3 hours each taken by him before 30 June 1994.

17. The Taxpayer did not call any witness or produce any other documentary evidence to support his case.

Law

18. Section 8(1) of the Inland Revenue Ordinance states that salaries tax shall (subject to the provisions described in paragraphs 19, 20 and 21 below) 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 of profit.

19. Section 8(1A)(b)(ii) 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. This forms the main issue of this appeal.

20. In determining whether or not all services are rendered outside 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 (Section 8(1B)).

21. The Taxpayer was not claiming relief under the provisions of section 8(1A)(c) and did not produce any evidence that he had paid tax in Country B.

Finding

22. Having heard and seen the evidence and the demeanour of the Taxpayer the Board finds it difficult to believe.

23. The Taxpayer knew full well that the resignation was the key issue in this appeal but he did not produce any copy of his resignation letter to the Board or to try to take any positive step to obtain one for production.

24. It is also very unusual that a person resigning does not specify the date of resignation to take effect. The Board has serious doubt whether he had submitted any resignation at all. What he had done might probably be that he indicated his desire to leave and started looking for new job. His superiors were aware of this and discussed with him. Later, he was offered a new post, that is, the Company's representative in Country B which he readily accepted.

25. Our doubt was further perpetuated by the following documentary evidence:

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- (a) In his salaries tax return (Appendix B of Exhibit C) for the relevant year at section D1 about his period of employment he made no distinction between the two periods of employment and treated the employment as a continuous service.
- (b) In his letter of 22 June 1995 to the Revenue Department, he did not mention that he had resigned and that the second period was a new employment. It leads one to think whether the 'resignation' ground of appeal is a recent invention.
- (c) The letter dated 23 June 1995 from the Company (Appendix D of Exhibit C) which he submitted to support his claim for the relief did more harm than good. The opening paragraph states as follows:

'This is to certify that (the Taxpayer) has been under our employment since 2 November 1992; and he was assigned to station in Country B, as our Representative – Country B, from 1 July 1994 ...'

This is a clear indication that his employment was a continuous one since 2 November 1992 and was not interrupted by any resignation.

26. This indication is further confirmed by the letter of 29 June 1994 from his employer (Appendix of Exhibit C) which states as follows:

'This is to confirm that effective from 1 July 1994 you are assigned to station in Country B taking up the position of Liaison Representative – Country B under the following terms and conditions ...'

The letter was not in the same form as the letter of employment he received on 13 November 1992 when he was first employed (Appendix A of Exhibit C). It just mentioned that he was assigned to a new post abroad. The letter went on to set out the terms which were different from those in the letter of 13 November 1992 (Appendix A of Exhibit C) and specifically referred to the latter letter in Clause 5 which states: *'Other terms and conditions of the employment contract will remain in full force except term (6).'* If the Company were of the view that the employment had been terminated it would not have referred to the original letter of employment and stated that the other terms of the employment would remain in full force. He accepted the terms of the letter of 29 June 1994 without raising any objection. When this was put to the Taxpayer in cross-examination, he offered no satisfactory answer but re-stated the bare assertion that to his employer and himself he had resigned.

27. For reasons set out above the Board finds it as fact that the employment of the Taxpayer with Company A had not been terminated on 30 June 1994 or at any time during the year of assessment and that the period from 1 July 1994 to 30 March 1995 was a continuation of the employment before that date under one contract of employment except with some of the terms being varied for the new assignment.

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28. In view of the finding it is not necessary for us to address the alternative issue raised by the Revenue whether the visits during the second period in aggregate exceeded 60 days.

Decisions

29. It has never been in dispute that the Taxpayer was employed by Company A in Hong Kong for the period from 1 April 1994 to 30 June 1994 which in any event exceeded more than 60 days. Because of the above the Board finds that the Taxpayer did not render outside Hong Kong all the services in connection with his employment during the year of assessment 1994/95. Accordingly, the Taxpayer's appeal is dismissed and the salaries tax assessment raised on the Taxpayer for the year of assessment 1994/95 is hereby confirmed.