Case No. D43/85

Board of Review:

H. F. G. Hobson, *Chairman*; Y. C. Jao and B. H. Tisdall, *Members.*

20 March 1986.

Salaries Tax — employee of a Hong Kong subsidiary — also employee of the overseas parent company — whether income wholly arising in Hong Kong.

The Appellant's ultimate employer was a Danish company. Since 1975 he was resident in Hong Kong and held various posts. In 1979, a local subsidiary of the Danish company was incorporated with the Appellant appointed as the Managing Director and on 1 August 1983, he became the Chairman. On the same date, the Appellant signed a new employment with the parent company which appointed him as "Manager and Co-ordinator located in Hong Kong with duties and responsibilities for the People's Republic of China and India". In 1983/84, the Appellant spent 71 days outside Hong Kong. He was paid in Hong Kong by the Hong Kong subsidiary.

The Appellant claimed that the post with the parent company did not required him to perform activities in Hong Kong. His income after 1 August 1983 should therefore be apportioned according to the number of days he spent within and outside Hong Kong and only the income related to the period spent in Hong Kong should be assessed. The Acting Deputy Commissioner of Inland Revenue determined that for the year 1983/84, all the Appellant's income was chargeable to Hong Kong tax. The Appellant appealed.

Held:

There was sufficient evidence to justify the conclusion that the Appellant performed services in Hong Kong for the Hong Kong company from whom he received his salary and for whom he had statutory duties to perform, though the Appellant's main responsibilities might not, so far as the parent company was concerned, have been undertaken for the Hong Kong subsidiary. On balance, the source of the Appellant's income was Hong Kong. The Appellant failed to discharge the burden of proof under section 68(4) of the Inland Revenue Ordinance that the assessment appealed against was incorrect.

Appeal dismissed.

Chan Wong Yee-hing, Jennifer for the Commissioner of Inland Revenue.
Appellant in person.

Reasons:

The Taxpayer, appearing in person, appealed against the Acting Deputy Commissioner's Determination that that part of his 1983/84 assessable earnings attributable to the period from the 1st August 1983 was not eligible for "time in/time out" treatment. The Taxpayer accepted that such treatment did not apply to the earlier part of that tax year.

What happened was this. The Taxpayer's ultimate employer is a large Danish company. One of its businesses is the manufacture and world-wide distribution of marine paints and industrial coatings under the name B. In January 1975 the Taxpayer was appointed Regional Manager for Hong Kong and South East Asia. He was resident in Hong Kong and was attached to C of Hong Kong which was then the Hong Kong agent for B.

In 1979 D was incorporated as a wholly-owned subsidiary of the Danish company and the Taxpayer became its Managing Director from then until the 1 August 1983. He continued however as Regional Manager but received his salary thereafter from D rather than from C as formerly. On the 1 August 1983 he resigned as Managing Director but instead became the Chairman; the other two Directors were E who having retired from C but continued to live in Hong Kong had been appointed a non-executive director of D, but he was otherwise unconnected with the Danish parent company, the other Director being F of the Danish parent company who lived in Denmark. G was appointed General Manager of D. It follows that H was the only resident Executive Director of B after the 1 August 1983. It is not disputed that B was active in business in Hong Kong.

The other change which occurred on the 1 August 1983 was that the Taxpayer signed a new employment with the Danish parent which elevated his position vis-a-vis the parent to that of "Manager and Co-ordinator, located in Hong Kong, with duties and responsibilities for the People's Republic of China and India …". In the job description forming part of the employment contract the aforementioned territories were defined as "the area" and that expression is specifically used throughout the job description thereby indicating territorial limits save that authority is given to "visit associate companies outside the Area as and when direct contact is considered necessary for Area sales, after agreement of Corporate Director, CSM". In this specific outline of duties the Taxpayer is required "to communicate and establish good understanding and co-operation between the Area and associate companies of the I CSM as regards sales and marketing".

In the main the Facts (a copy of which is attached) as found by the Commissioner are not disputed by the Taxpayer. However he took issue with the following points which he believed may have influenced the Commissioner:—

Fact (3)

The Taxpayer claimed that whilst acting as Regional Manager (meaning prior to 1 August 1983 he was not 'based' in Hong Kong he was merely resident and worked out of Hong Kong). As noted above his contract referred to his appointment being "located in Hong Kong" and certainly the Taxpayer even after the 1 August 1983 spent a large part of his time in Hong Kong.

Fact (9)(b)

The Taxpayer said that his Manager and co-ordinator role was a special assignment for the Group's interests in China and India not for the Group's interests in the Far East unlike his previous employment as Regional Manager. We accept that his 1983 employment contract did not specifically require him to perform any activities *in* Hong Kong; we have noted that it contains a provision that "when his presence is not required in the Area, that he assists and advises the corporate director, sales and marketing on issues related to the Area, and to undertake any other special assignments as may be requested by corporate management". In neither case is there any direct evidence that *that* "post involved … responsibilities in Hong Kong …" as stated in paragraph 2 of the Acting DCIR's Reasons.

The Taxpayer gave viva voce evidence and we found him frank and straight forward. Amongst other things he acknowledged that he, as a director of D, received monthly management reports and indeed he produced samples or those reports which clearly showed that they are concerned primarily and in the main with the activities of D (not the parent company) but they do contain reference to "Taiwan office expenses" and amounts due to B Denmark: they also make reference to the parent's related companies in Japan and to prospective orders in the Philippines as well as business affairs in Hong Kong.

It is also clear that the Taxpayer chaired AGMs of D and he was the party that convened these meetings. In the years 1983 and 1984 one meeting took place in Hong Kong and another evidently took place in Copenhagen.

Turning next to the 71 days spent outside Hong Kong during the 243 days between the 1 August 1983 and 31 March 1984, the Taxpayer spend 24 days in China and 25 days in India. However 2 days were spent in Taiwan and 3 days in the Philippines i.e. outside the "AREA" of his 1983 Contract. The Taxpayer said that he did visit customers in these countries and the visits were concerned with sales which, in some instances, ultimately benefited D. Although his primary aim was to co-ordinate sales on behalf of the parent company, sometimes it was more convenient to send stocks from Hong Kong.

The Taxpayer also confirmed that the only manifestation of the Danish parent's presence in Hong Kong was that of D (of which the Taxpayer was the only locally resident executive director) and the Taxpayer himself and his China/India regional capacity.

Adopting the Totality of Facts approach we find that the Taxpayer was paid in Hong Kong by D, a Hong Kong company, and though his *main* responsibilities may not, so far as the parent company was concerned, have been undertaken for D, nonetheless he was actively involved in that company and of course had statutory duties to perform for and responsibilities to that company.

Accordingly whereas we feel that there may be insufficient evidence to conclude that the duties he performed under his 1983 Contract for the parent company indicated a business, as distinct from mere residence, presence in Hong Kong, we think there is sufficient evidence to justify the Acting DCIR in this conclusion that the Taxpayer performed services in Hong

Kong for D from whom he received his salary and that he received that salary even for the 24 days in China and the 25 days in India. In short on balance we consider that the source of his income was Hong Kong.

It follows therefore that we are of the opinion that the Taxpayer has failed to shift the statutory burden (s. 68(4) of the Inland Revenue Ordinance) of proof that the assessment is incorrect.