

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D54/02

Salaries tax – whether an appellant had rendered all the services in connection with his employment outside Hong Kong and thereby his income was thus excluded by section 8(1A) – various factors to be considered – dictated by the facts of the case – frequency and duration and arrival and departure times of the appellant’s stays in Hong Kong – amounts of salary earned – job nature – the frequency and amounts of cash taken by the appellant on arrival and departure – onus of proof that any of the assessments appealed against is excessive or incorrect on the appellant – sections 8(1A), 8(1B) and 68(4) of the Inland Revenue Ordinance (‘IRO’).

Panel: Kenneth Kwok Hing Wai SC (chairman), Christine Koo and Kenneth Leung Kai Cheong.

Date of hearing: 20 July 2002.

Date of decision: 28 August 2002.

This was an appeal against the additional salaries tax assessments raised on the appellant for the years of assessment 1995/96 to 1998/99 and also against the salaries tax assessment for the year of assessment 1999/2000.

There were no dispute on the amounts and that the location and source of the appellant’s employment was in Hong Kong. The appellant did not rely on section 8(1B) of the IRO.

The appellant gave evidence to the effect that he had rendered all the services in connection with his employment outside Hong Kong, and contended that his income was thus excluded by section 8(1A). The Board rejected his evidence and found against him on this factual issue.

The facts appear sufficiently in the following judgment.

Held:

1. In relation to the assertion of the appellant that he had never gone back to his employer’s place of business in Hong Kong except for personal matters, had not met his boss in Hong Kong, had not travelled to China together with his boss, had not discussed business matters with his boss by telephone while the appellant was in Hong Kong, and had not discussed business matters with his two sons (who were his second-in-command in the factory in China) by telephone while the appellant was in Hong Kong, having regard to the frequency and duration and arrival and

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departure times of the appellant's stays in Hong Kong, the Board considered his assertions as highly improbable.

2. The Board did not believe that all work stopped the moment and every moment he stepped foot on Hong Kong. The appellant placed heavy reliance on the fact that his two deputies were his sons. If anything, this was a factor against him. The Board did not believe that father and sons, nor for that matter, the appellant and his boss, would not discuss about business matters except when the appellant was outside Hong Kong.
3. The Board disbelieved that the appellant took large sums of cash in Hong Kong currency on almost all trips to and from China for personal reasons. The frequency and amounts were decisively against him. His salary in the year of assessment 1995/96 was \$690,000. The Board concluded that it was probable that it was part of his job to carry cash from Hong Kong to China.
4. The appellant had not discharged the onus under section 68(4) of the IRO of proving that any of the assessments appealed against was excessive or incorrect. The Board confirmed the assessments as increased by the Commissioner.

Appeal dismissed.

Yeung Siu Fai for the Commissioner of Inland Revenue.

Dennis Law Shiu Ming Counsel instructed by Messrs K Y Woo & Co for the taxpayer.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 28 March 2002 whereby:
 - (a) Additional salaries tax assessment for the year of assessment 1995/96 under charge number 9-4196065-96-5, dated 14 November 2001, showing additional chargeable income of \$618,000 with additional tax payable of \$88,300 was increased to additional chargeable income of \$1,020,000 with additional tax payable of \$148,600.
 - (b) Additional salaries tax assessment for the year of assessment 1996/97 under charge number 9-2554009-97-3, dated 14 November 2001, showing additional chargeable income of \$1,350,000 with additional tax payable of

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\$206,420 was increased to additional chargeable income of \$1,572,000 with additional tax payable of \$239,720.

- (c) Additional salaries tax assessment for the year of assessment 1997/98 under charge number 9-3967717-98-8, dated 14 November 2001, showing additional chargeable income of \$1,699,000 with additional tax payable of \$231,939 was increased to additional chargeable income of \$1,883,146 with additional tax payable of \$256,798.
- (d) Additional salaries tax assessment for the year of assessment 1998/99 under charge number 9-2110911-99-2, dated 14 November 2001, showing additional chargeable income of \$1,623,100 with additional tax payable of \$267,827 was increased to additional chargeable income of \$1,703,456 with additional tax payable of \$281,487.
- (e) Salaries tax assessment for the year of assessment 1999/2000 under charge number 9-1611634-00-1, dated 4 December 2000, showing net chargeable income of \$1,272,080 with tax payable thereon of \$205,753 was increased to net chargeable income of \$1,403,655 with tax payable thereon of \$228,121.

2. The facts stated in the facts upon which the determination was arrived at in the determination were agreed by the Appellant and we find them as facts.

3. Counsel for the Appellant told us that:

- (a) there was no dispute on the amounts;
- (b) there was no dispute that the location and source of the Appellant's employment was in Hong Kong; and
- (c) the Appellant did not rely on section 8(1B) of the IRO.

4. The Appellant gave evidence to the effect that he had rendered all the services in connection with his employment outside Hong Kong, and contended that his income was thus excluded by section 8(1A). We reject his evidence and find against him on this factual issue.

- (a) The Appellant asserted that he had never gone back to his employer's place of business in Hong Kong except for personal matters, had not met his boss in Hong Kong, had not travelled to China together with his boss, had not discussed business matters with his boss by telephone while the Appellant was in Hong Kong, and had not discussed business matters with his two sons (who were his second-in-command in the factory in China) by telephone while the

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Appellant was in Hong Kong. Having regard to the frequency and duration and arrival and departure times of the Appellant's stays in Hong Kong, as listed in pages 14 to 36 of R1 bundle, we consider his assertions as highly improbable. We do not believe that all work stopped the moment and every moment he stepped foot on Hong Kong. The Appellant placed heavy reliance on the fact that his two deputies were his sons. If anything, this is a factor against him. We do not believe that father and sons, nor for that matter, the Appellant and his boss, would not discuss about business matters except when the Appellant was outside Hong Kong.

- (b) The Appellant took large sums of cash in Hong Kong currency on almost all trips to and from China. He alleged that he did so for personal reasons. We disbelieve him. The frequency and amounts are decisively against him. His salary in the year of assessment 1995/96 was \$690,000. In our decision, it is probable that it was part of his job to carry cash from Hong Kong to China.

Entry date to China	Exit date from China	Amount \$	
3-4-1995	5-4-1995	28,000	
6-4-1995	9-4-1995	12,000	
11-4-1995	15-4-1995	9,000	
19-4-1995	22-4-1995	8,000	
25-4-1995	28-4-1995	6,000	63,000
			April 1995
2-5-1995	3-5-1995	18,000	
5-5-1995	6-5-1995	10,000	
9-5-1995	13-5-1995	8,000	
16-5-1995	19-5-1995	35,000	
22-5-1995	23-5-1995	10,000	
24-5-1995	27-5-1995	10,000	
30-5-1995	1-6-1995	18,000	109,000
			May 1995
5-6-1995	5-6-1995	13,000	
6-6-1995	9-6-1995	30,000	
12-6-1995	14-6-1995	10,000	
15-6-1995	17-6-1995	15,000	
21-6-1995	23-6-1995	20,000	
26-6-1995	28-6-1995	17,000	
29-6-1995	1-7-1995	16,000	121,000
			June 1995
4-7-1995	7-7-1995	16,000	
10-7-1995	12-7-1995	30,000	

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13-7-1995	15-7-1995	13,000	
18-7-1995	19-7-1995	30,000	
20-7-1995	21-7-1995	20,000	
24-7-1995	26-7-1995	15,000	
27-7-1995	29-7-1995	11,000	
31-7-1995	4-8-1995	13,000	148,000
			July 1995
8-8-1995	11-8-1995	22,000	
15-8-1995	19-8-1995	8,000	
22-8-1995	27-8-1995	14,000	
30-8-1995	2-9-1995	30,000	74,000
			August 1995
4-9-1995	9-9-1995	28,000	
12-9-1995	17-9-1995	16,000	
19-9-1995	22-9-1995	10,000	
26-9-1995	27-9-1995	20,000	
28-9-1995	30-9-1995	13,000	87,000
			September 1995
2-10-1995	3-10-1995	18,000	
5-10-1995	7-10-1995	16,000	
10-10-1995	13-10-1995	5,000	
16-10-1995	18-10-1995	9,000	
19-10-1995	21-10-1995	10,000	
24-10-1995	27-10-1995	7,000	
30-10-1995	31-10-1995	18,000	83,000
			October 1995
2-11-1995	4-11-1995	16,000	
7-11-1995	10-11-1995	15,000	
14-11-1995	19-11-1995	13,000	
21-11-1995	24-11-1995	25,000	
28-11-1995	2-12-1995	20,000	89,000
			November 1995
5-12-1995	8-12-1995	30,000	
13-12-1995	14-12-1995	20,000	
19-12-1995	22-12-1995	25,000	
23-12-1995	25-12-1995	7,000	
28-12-1995	29-12-1995	10,000	92,000
			December 1995
2-1-1996	4-1-1996	20,000	
8-1-1996	12-1-1996	18,000	
17-1-1996	18-1-1996	8,000	
19-1-1996	20-1-1996	8,000	

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23-1-1996	26-1-1996	15,000	
30-1-1996	2-2-1996	60,000	129,000
			January 1996
5-2-1996	8-2-1996	-	
9-2-1996	10-2-1996	28,000	
26-2-1996	27-2-1996	17,000	
29-2-1996	2-3-1996	12,000	57,000
			February 1996
6-3-1996	7-3-1996	28,000	
8-3-1996	9-3-1996	14,000	
11-3-1996	14-3-1996	8,000	
15-3-1996	15-3-1996	7,000	
19-3-1996	21-3-1996	30,000	
22-3-1996	23-3-1996	14,000	
25-3-1996	26-3-1996	10,000	
27-3-1996	29-3-1996	8,000	119,000
			March 1996
2-4-1996	3-4-1996	10,000	
5-4-1996	6-4-1996	6,000	
10-4-1996	13-4-1996	4,000	
15-4-1996	16-4-1996	7,000	
17-4-1996	19-4-1996	5,000	
23-4-1996	26-4-1996	30,000	
29-4-1996	30-4-1996	19,000	81,000
			April 1996
2-5-1996	3-5-1996	8,000	
6-5-1996	10-5-1996	4,500	
13-5-1996	15-5-1996	9,000	
16-5-1996	17-5-1996	14,000	
20-5-1996	23-5-1996	35,000	70,500
			May 1996

5. The Appellant has not discharged the onus under section 68(4) of the IRO of proving that any of the assessments appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessments as increased by the Commissioner.