INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D54/97

Salaries tax – income arising in or derived from Hong Kong – whether all services rendered outside Hong Kong – section 8(1B) – 60 days' rule.

Panel: Christopher Chan Cheuk (chairman), Stephen Lau Man Lung and Norman Ngai Wai Yiu.

Dates of hearing: 18 June and 4 July 1997.
Date of decision: 15 September 1997.

The taxpayer was first employed by a company in Hong Kong as production supervisor. Later she was promoted to the position of production manager and stationed in the Company's factory outside Hong Kong. According to the Revenue's calculation she stayed in Hong Kong for 251 days. She claimed she did not render any service during her stay in Hong Kong. The Board found that her evidence was not reliable and she had failed to discharge her burden of proof. The Board has considered the method of counting days and the meaning of 'visit' in section 8(1B) but has not made any ruling thereon.

Held:

The taxpayer did render services to the Company during her stay in Hong Kong.

Appeal dismissed.

Cases referred to:

D29/89, IRBRD, vol 4, 340 at 344
D12/94, IRBRD, vol 9, 131

Wong Ki Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Appeal

This is an appeal by the Taxpayer against the determination of 5 July 1996 by Commissioner of Inland Revenue, in respect of the salaries tax assessment for the year of assessment 1993/94 raised on the Taxpayer.

Late Filing

The Taxpayer did not file her notice of appeal until 9 August 1996 which was late by four days. The Taxpayer's explanation was that during that period she was not in Hong Kong. The Revenue did not challenge this. In exercise of the power vested in us the Board allows the Taxpayer to file the appeal out of time.

The Taxpayer's Case

1. The Taxpayer was first employed by Company A in 1989 as production supervisor. Later she was promoted to the position of production manager (not as set out in Exhibit 'R3' factory manager) and stationed in the Company's factory in Country B.

2. She claimed that the Company had special arrangement as to holidays and leave to those who worked in Country B. Because of this she was able to return to Hong Kong nearly every weekend and spent two to three days as both compensatory holidays and contractual holidays.

3. She did not deny that her visits to Hong Kong were over 60 days in aggregate but averred that she rendered no services in Hong Kong.

Issue

The issues of this case can be briefly summarised in the following manner:

(a) It is not disputed that the Taxpayer was employed in Hong Kong.

(b) During the year in question, she visited Hong Kong for a period more than 60 days.

(c) The main issue is whether she rendered any service during her visit in Hong Kong at all.

Law

A person has to pay salaries tax if he falls within the charging provision of section 8(1) of the Inland Revenue Ordinance (the IRO) which provides as follows:

> *'Salaries tax shall, subject to the provisions of this IRO, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –*

(a) any office or employment of profit; and

(b) any pension.'

However he will be exempted if he has rendered all his services outside Hong Kong as set out in section 8(1A)(b) which states as follows:

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

(i) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft;

and

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

In determining whether a person truly renders all the services outside Hong Kong the IRO allows certain grace period as set out in section 8(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 in the basis period for the year of assessment.'

Counting Days

The Revenue counted the total number of days in Hong Kong by including both the arrival and departure days. The Taxpayer felt very aggrieved by such method of counting. The subject has been discussed by two previous Boards of Review in at least two cases, first in D29/89 and then D12/94. The method that has been adopted is that if the arrival and departure are not of the same day, both days are counted: though the person may stay in Hong Kong for less than twenty four hours, for the purposes of revenue and in this context it is taken as two days. Both cases rest their argument on 'clear day' concept. In D29/89, IRBRD, vol 4, 340, the Board commented as obita dicta on the 'clear day' method at 345:

'To limit the meaning in the context of section 8(1B) to the elapse of 24 hours from midnight to the following midnight would result in treating the 60 days as "clear" days (excluding the day of arrival and day of departure). If that had been intended, then we think the draftsman would have said so ...'

It is clear that the Board used the 'clear day' concept in their argument that is, both the days of arrival and departure are disregarded. This argument was followed by D12/94, IRBRD,

vol 9, 131 which tried to illustrate the ridiculous situation of this 'clear day' concept by giving the following example:

> *'If part days are ignored then in the case of a person who, say, visits each weekend throughout the year spending only one night in Hong Kong on each occasion, thereby covering a total of 104 part days, none of those visits would count towards the 60 days limit.'*

The Boards in both cases have used the logic that they count either both the arrival and departure days or no day at all. They have not considered another alternative – by counting only one of the two days. This way of counting may be much fairer and does not go to either the extremes. Unfortunately, this case as in D29/89 quoted earlier did not have the benefit of hearing the argument of the effect of section 71(1) of the Interpretation and General Clauses Ordinance, Chapter 1, on computing the period in the context of section 8(1B). For ease of reference, we quote section 71(1):

> *'71.(1) In computing time for the purposes of any Ordinance-*
>
> *(a) a period of days from happening of any event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;'*

It can be argued that the arrival is the happening of the event which should be ignored. Even if we were to rule accordingly, it would not help the Taxpayer in this case for reasons we set out later.

Visit

Another point taken by the Revenue is the word 'visit' in the IRO. Ms Wong for the Revenue contends that the Taxpayer's coming back to Hong Kong did not fall within the meaning of 'visit' simply because the Taxpayer had her home here. Ms Wong found support for her argument in D29/89, IRBRD, vol 4, 340 at 344:

> *'We find as a fact that the Taxpayer was not "visiting" Hong Kong when he came here from China. In no sense could China be said to be his normal place of residence even though, as we were told by the Taxpayer, he had six months visas. Indeed the very fact of a visa tends to rule out China as his normal place of residence.'*

D29/89 introduced an element of 'normal place of residence' in the concept of visit: one can only visit a place when he has another place as his normal place of residence. The Board feels that such concept overloads the meaning of 'visit'. We think the word 'visit' is not a term of art. Its ordinary meaning according to the Oxford Shorter Dictionary is *'call on a person or at a place, temporary residence with person or at place.'* As any ruling made by us will not affect the outcome of this case and we are not fully addressed on this point, the Board decides not to make any further comment thereon.

Findings

1. This is an appeal case and according to section 68(4) the burden of proof is on the Taxpayer to show that the Commissioner is wrong. In this case the Commissioner was not satisfied that 'the Taxpayer rendered outside Hong Kong all the services in connection with her employment and section 8(1A)(b) is, thus, not applicable.' Therefore, the Taxpayer has to prove to us that during her stays in Hong Kong she did not render any service in connection with her employment. The aggregate period of her stays in Hong Kong is exceptionally long: according to the Revenue's calculation it has a total of 251. She has to explain to us why during this long period she did not have to work at all. To prove the negative is not at all easy. We cannot accept bare assertion by the Taxpayer without looking into other evidence. We have to take into consideration all the evidence in its totality.

2. Ms Wong for the Revenue relied on the documentary evidences, the appointment letter of 15 January 1991 (Exhibit R3) and tax return – Individual 1993/94 (Exhibit R1), and she pointed it out to us that the Taxpayer was employed as factory manager. The Taxpayer's explanation was that the term in the appointment letter was only loosely used and in fact she was a production manager answerable to her superior, the real factory manager Mr C in 1993 and Mr D in 1994. She also claimed that part of the tax return was completed by an office accounting staff. The Board accepts that there might possibly be some confusion as to title. In other words the documents issued by her employer were not very reliable. Because of this we also question the credibility of the statement in the letter of 4 November 1994 from Company E that 'Her job nature does not require her to work in Hong Kong office'.

3. According to the oral evidence of the Taxpayer, she was responsible for overall inventory and production materials control and also co-ordinated production process. She received instructions from her superior Mr C who attended all meetings in Hong Kong. The Taxpayer's channel of communication with her colleagues in Hong Kong was either through her superior or by fax and telephone. She did not contact any of them while she was in Hong Kong. This is very difficult to believe. As she was the production manager, she was wholly responsible for the quality of the product and the production time. It would be much easier to contact the various departments of the Company in Hong Kong direct for example the quality of raw materials supplied, the design, manufacturing schedules etc. It does not appeal to reason that while she was in Hong Kong she did not communicate and contact her colleagues at all, particularly when we discovered that many of her stays in Hong Kong occurred on weekdays as set out in the following paragraphs.

4. Appendix B to the Commissioner's determination, which the Taxpayer did not dispute, shows that she usually left the factory in Country B on Friday or Saturday and returned to the factory on Tuesday (28 times) and Wednesday and beyond (14 times) during the assessment year. It is also found that she was in Hong Kong on 51 Mondays, 50 Tuesdays, 24 Wednesdays, 13 Thursdays, 14 Fridays and 49 Saturdays. It means that there were plenty of opportunities for her to contact her colleagues here. We find it incredible

that she only participated in meetings held in the factory in Country B but not in those held in Hong Kong.

5. She could be regarded as the Company's representative in Country B. Her presence there was absolutely necessary; otherwise, the Company would not have employed her. There were 251 days, either in whole or in part that she was absent from the factory in Country B. Unless she had other duties to perform, no factory would employ a person who was away from the place of work nearly 70% of the year.

6. The Taxpayer admitted that she made calls to factory to check production progress and other matters relating to manufacturing while she was waiting in Hong Kong for a new return permit in April 1993. She also stated that she sometimes received calls from the Company's factory in Country B either by telephone or pager in respect of urgent matters and she gave instructions to deal with them while she was in Hong Kong. All these activities, we find, amount to rendering services in Hong Kong irrespective whether she was in Hong Kong for holidays or otherwise.

7. Having had the chance of seeing the Taxpayer and hearing her evidence the Board finds that she is a very intelligent person and is very conscientious in performing her duty. We find it difficult to believe that she did not contact or communicate with the Company and make reports to them while she was in Hong Kong.

Decision

For the above reasons we rule that the Taxpayer has failed to discharge her burden of proof. Accordingly, the appeal is dismissed and the Commissioner's determination of 5 July 1996 is confirmed.