

Case No. D6/06

Salaries tax – time apportionment for employment outside Hong Kong – double taxation – sections 8(1)(a), 8(1A)(a) and 68(8) of the Inland Revenue Ordinance (‘IRO’).

Panel: Jat Sew Tong SC (chairman), Peter R Griffiths and Fred Kan.

Date of hearing: 1 March 2006.

Date of decision: 11 April 2006.

Between 2000 and November 2003, the taxpayer, under the employ of a subsidiary company of A, was based in City BB and was responsible for his employer’s China and Country CC operations. From December 2003 he was transferred to Hong Kong and under the employ of another subsidiary of A which was a Country DD registered company with a place of business in Hong Kong. For the assessment year 2003/04, the taxpayer was paid from 1 April 2003 to 31 December 2003 in Country AA, and from 1 January 2004 to 31 March 2004 in Hong Kong. The taxpayer’s evidence which was not challenged by the Commissioner was that he was based in Hong Kong but had to travel to China, Country CC and Country AA frequently. The taxpayer contended that he should only pay salary tax in Hong Kong from January 2004 onwards whereas from April to December 2003 he had already paid Country AA tax. The Commissioner adopted a time apportioned basis in computing the taxpayer’s income.

Held:

1. The taxpayer is not entitled to enjoy exemption for tax in respect of his income for the nine months in 2003. The Commissioner is correct to apportion the taxpayer’s income on the basis of the number of days the taxpayer was in Hong Kong. However, upon examining the taxpayer’s immigration records it would appear that the Commissioner’s estimation is not appropriate. The Board decides to exercise its power under section 68(8) of the IRO to remit the case to the Commissioner for a re-determination of the number of days the taxpayer was outside Hong Kong so as to achieve a fair apportionment.

Appeal dismissed.

Taxpayer in person.

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Poon So Chi and Wong Kai Cheong for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Taxpayer against the determination of the Commissioner of Inland Revenue ('the Commissioner') assessing his salaries tax for the assessment year 2003/04 at \$31,637, with a net chargeable income of \$228,988.

Material facts

2. The facts of this appeal as found by the Board are as follows.

3. The Taxpayer was offered employment by C, a division of R Inc in January 1996. R Inc was a Country AA corporation and itself a subsidiary of A. The Taxpayer commenced his employment with R Inc in mid June 1996 where he remained until 2000.

4. In 1999, the Taxpayer was transferred to the City BB office. The arrangement was that his payroll was maintained in the Country AA, from where funds were transferred to the City BB office to pay his salary.

5. Between 2000 and November 2003, the Taxpayer was based in City BB and was responsible for his employer's China and Country CC operations. From December 2003 he was transferred to Hong Kong and under the employ of R Ltd, another subsidiary of A which was a Country DD registered company with a place of business in Hong Kong. He was laid off in January 2005.

6. For the assessment year 2003/04, the Taxpayer's salaries were paid as follows:

6.1. from 1 April 2003 to 31 December 2003 – he was paid in the Country AA;

6.2. from 1 January 2004-31 March 2004 - he was paid in Hong Kong (his employer would transfer funds to the City BB office, which would then transfer funds to Hong Kong where the Taxpayer receives his salary).

7. The Taxpayer gave evidence before this Board about this work and travel arrangements over the relevant period. His evidence, which was not challenged by the Commissioner and which this Board accepts, is that he was based in Hong Kong but had to travel to China, Country CC and the Country AA frequently.

8. The normal travel arrangements for this travels were as follows:

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- 8.1. For trips to China, he would leave Hong Kong early in the morning, meet with customers, etc, for the entire day and return to Hong Kong in late evening. Sometimes, he might have to stay overnight in which case he would return the next day, normally in the afternoon or evening.
- 8.2. Trips to Country CC would normally take two to three days. He would normally take a morning flight to Country CC, and return on a day time flight which would arrive in Hong Kong in the late afternoon.
- 8.3. Sometimes he had to travel to the Country AA, in which case he would also stop in Country CC. These trips would be longer, taking around 10 days or more.

9. The Taxpayer did not file any tax return for the assessment year 2003/04. This was because when he first left to work in the Country AA, he had made enquiries with the Inland Revenue and was advised that he should simply return the Tax Return without filling it in.

10. R Ltd filed an employer's return for the year ended 31 March 2004 in respect of the Taxpayer, stating his salaries to be \$583,128.

11. Given the above background, the Assessor raised on the Taxpayer estimated salaries tax for the assessment year 2003/04 as follows:

| | |
|------------------------------|------------------|
| Income | \$583,128 |
| <u>Less: Basic allowance</u> | <u>(104,000)</u> |
| Net chargeable income | \$479,128 |
| Tax payable thereon | \$77,913 |

12. The Taxpayer objected to this assessment on the ground that he should only pay salary tax in Hong Kong from January 2004 onwards, whereas for the period from April to December 2003 he had already paid Country AA tax.

13. To substantiate his objection, the Taxpayer filed a 2003/04 Tax Return-Individuals in which he declared his income as follows:

| | | |
|--------------------------|---------------------|--------------------|
| Name of Employer: | R Inc | R Ltd |
| Period of employment: | 1-4-2003-31-12-2003 | 1-1-2004-31-3-2004 |
| Total assessable income: | \$478,928 | \$145,782 |

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14. The Assessor accepted that the Taxpayer's place of employment was outside Hong Kong and the total amount of income received. Upon enquiry, the Assessor found that during the assessment period the Taxpayer spent 209 days in and 157 days outside Hong Kong.

15. On the basis of the above, the Assessor apportioned the Taxpayer's income for the assessment period on the basis of the number of days he spent in and outside Hong Kong, so that 209/366 of his total income was assessed to be taxable. The net chargeable income so assessed was \$228,988 and tax payable thereon was \$31,637. This assessment was confirmed by the Commissioner.

16. The Taxpayer remained unhappy with this determination and appealed to this Board. The Taxpayer contends, in essence, that he had already paid US tax for the 9 months and he should only be chargeable for tax in Hong Kong for the 3 months in 2004.

Decision of this Board

17. Once the material facts have been set out, it is clear that the Taxpayer is not entitled to enjoy exemption for tax in respect of his income for the nine months in 2003.

18. In the present case the Commissioner accepts that the locality of the Taxpayer's employment was outside Hong Kong. By virtue of sections 8(1)(a) and 8(1A)(a) of the Inland Revenue Ordinance ('IRO'), only that portion of the Taxpayer's income derived from services rendered in Hong Kong is subject to salaries tax. Hence the Commissioner is correct to apportion the Taxpayer's income on the basis of the number of days the Taxpayer was in Hong Kong.

19. The Board, however, disagrees with the Commissioner on the apportionment exercise.

20. As stated above, the Commissioner, on the basis of the Taxpayer's immigration records, found the Taxpayer to be outside Hong Kong for 157 days. However, upon examining the Taxpayer's immigration records which have been made available to the Board, it would appear that the Commissioner's estimation is not appropriate.

21. The Board only needs to refer to two examples.

21.1. Take the record for 1 March 2003. On that day the Taxpayer left and returned to Hong Kong on the same day. The Commissioner took that as being 0.5 day outside Hong Kong. But on the basis of the Taxpayer's evidence, which it will be remembered is not challenged and is accepted by this Board, this would be a visit to China and the Taxpayer would have spent the entire working day there. The Board therefore considers that instead of 0.5 day this should be counted as 1 day outside Hong Kong.

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21.2. Another example is 17 June 2003 and 22 June 2003. This would have been a trip to Japan. On the Taxpayer's evidence, he would have spent a total of six days outside Hong Kong but the Commissioner took it to be five days which this Board is unable to agree.

22. Unfortunately, the Board does not have before it a detailed immigration record of the Taxpayer showing the exact times of the day when the Taxpayer had left and returned to Hong Kong. In the circumstances, the Board decides to exercise its power under section 68(8) of the IRO to remit the case to the Commissioner for a re-determination of the number of days the taxpayer was outside Hong Kong along the lines stated above, so as to achieve a fair apportionment. It is hoped that the Commissioner and the Taxpayer would co-operate and agree on the appropriate apportionment. In the event that they are unable to agree, the matter should be re-listed before this Board for determination.

23. Finally, the Board wishes to express its considerable sympathy with the Taxpayer, because unfortunately he has been subject to double taxation. This result is, however, dictated by the law as it stands and there is nothing which this Board could do about it.