INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D67/89

Salaries tax – remuneration earned for services provided in the PRC – whether employed in Hong Kong or the PRC.

Panel: William Turnbull (chairman), Chan Pang Fee and William E Mocatta.

Date of hearing: 27 September 1989.
Date of decision: 30 October 1989.

The taxpayer who lived in Hong Kong was employed in Hong Kong to perform services for a joint venture company in China. The taxpayer argued that he was in fact employed by the company in China and that his income should not be subject to salaries tax in Hong Kong.

Held:

The relationship of master and servant is one of great importance and not a casual relationship. The taxpayer was employed in Hong Kong and there was no evidence that his employment was terminated and that he was re-employed in China. Accordingly the remuneration received by the taxpayer from his employer in Hong Kong was subject to salaries tax in Hong Kong.

Appeal dismissed.

D J Gaskin for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

This is an appeal by a taxpayer against an assessment to tax on remuneration which he earned for services which he provided in the People's Republic of China.

The facts are as follows:

1. The Taxpayer was employed by a company ('the company') as an engineer with effect from 1 September 1985. The Taxpayer was a Hong Kong resident.

2. By memorandum dated 2 September 1986 the Taxpayer was given notice by the manager (personnel and administration) of the company that he had been assigned to work in the People's Republic of China with effect from 8 September 1986. This memorandum read as follows:

> ASSIGNMENT TO WORK OVERSEAS
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> This is to give you official notification that you will be assigned to work as assistant resident engineer for China projects with effect from 8 September 1986. It is anticipated that your assignment will continue until the end of September 1987.
>
> During the period of assignment, you will be paid, in addition to your basic salary, an overseas allowance of $3,900 per month. Accommodation and meals expenses will be reimbursed to you by the company.
>
> You will be granted one calendar week leave for every three months' services and be provided with return passage to Hong Kong. You will not earn leave at the rate of three weeks per year during your period of overseas assignment and your accrued leave as at 8 September 1986 will be carried forward until the completion of your overseas assignment. Overseas allowance is not payable for leave periods during your assignment?

3. With effect from 8 September 1986 up to 9 August 1987 the Taxpayer performed his services in the People's Republic of China. He returned to work in Hong Kong earlier than the date specified in the memorandum of 2 September 1986 because he was required to work on a project in Hong Kong.

4. During the period that he was performing his services in the People's Republic of China the Taxpayer returned to Hong Kong at weekends to visit his family.

5. The company had a subsidiary company ('the service company'). The business of the service company was to provide technical services to third parties outside of the company. There was a joint venture in the People's Republic of China between a Japanese company and the service company. The service company was required to provide services in relation to this joint venture which involved the construction of an electricity sub-station in the People's Republic of China. The services provided by the Taxpayer in the People's Republic of China were provided on behalf of the service company. The Taxpayer was under the direct control and supervision of a manager provided by the Japanese company to whom he reported daily and if and when he reported to anyone in Hong Kong he did so to a senior manager who represented the service company but who was also a senior executive of the company.

6. At the hearing of the appeal the Taxpayer gave evidence and certain additional documentary evidence was also produced before the Board of Review. We find that the Taxpayer was truthful and frank in the evidence which he gave. He stated that when he was performing his services in the People's Republic of China he considered that he was performing his services for the service company and not for the company.

7. The Taxpayer was paid his remuneration by the company in Hong Kong but all of the costs and expenses of the Taxpayer including his remuneration were charged by the company to the account of the service company.

8. In respect of the two years of assessment in question namely 86/87 and 87/88 the company filed with the Inland Revenue Department the employer's tax return pursuant to section 52 of the Inland Revenue Ordinance in which the company stated that all of the remuneration paid to the Taxpayer during the period when he was performing his services in the People's Republic of China was paid by the company to him as his employer. Likewise in respect of the two years of assessment in question the Taxpayer himself filed tax returns in which he stated that he had only one employer namely the company and made no mention of his being in the employment of the service company.

9. The assessor assessed to tax the remuneration of the Taxpayer received by him in respect of the services which he provided in the people's Republic of China in accordance with the returns filed by the company and the Taxpayer. The Taxpayer objected on the grounds that he was separately employed by the service company to perform his services in the People's Republic of China and should not be subject to assessment to Hong Kong salaries tax.

10. By determination dated 22 February 1989 the Deputy Commissioner of Inland Revenue rejected the argument put forward by the Taxpayer and determined in favour of the assessor. The Taxpayer duly appealed to the Board of Review.

At the hearing of the appeal the Taxpayer represented himself and gave evidence. As stated in the above facts we found the evidence given by the Taxpayer to be truthful and frank and accept the same. The basis and crux of the Taxpayer's case is that he now considers that he was not employed by the company but was in fact employed by the service company when he was performing his services in the People's Republic of China. The question which this Board has to decide is whether or not the Taxpayer's present belief is justified by the facts and evidence.

The relationship of master and servant is one of great important and not a casual relationship. Commencement of employment and termination of employment have many effects and are subject to various statutory controls including the Employment Ordinance and the Inland Revenue Ordinance. On the facts and evidence before us we are not able to

find that the employment of the Taxpayer with the company was terminated, suspended or otherwise held in abeyance. There was no notice of termination, suspension or abeyance. All we have is a memorandum which stated that with effect from a specific date the Taxpayer would be required to work in the People's Republic of China. It was clearly the belief of the company at the relevant time that the Taxpayer continued to be employed by the company because the company filed employer's tax returns stating that the Taxpayer continued to be employed by it throughout the period that he was in the People's Republic of China. Likewise at that time the Taxpayer held the same belief because he also in his tax returns stated that his employer was the company.

There is no documentary evidence of any description relating to employment at that time with the service company. The only evidence which we have relating to the service company is that the services provided by the Taxpayer were in fact provided for the service company in relation to its joint venture obligations and that the costs attributable to the employment of the Taxpayer were borne by the service company. This is in no way repugnant to the Taxpayer continuing to be employed by the company and being asked by his employer, the company, to perform services for the service company. Frequently employees are asked to perform services for third parties. It is not uncommon for employees to be requested to perform services for others without affecting their employment contracts.

In reality what we have in this case is the situation that at some subsequent date it has appeared to the Taxpayer that he would have beneficial tax treatment if he can establish that he was employed by the service company. Because he performed his services for the service company in the People's Republic of China he has sought to argue that he was separately employed by the service company and that his employment by the company either ceased or was suspended. Unfortunately for him we are unable to agree with this submission. We find that at all material times the Taxpayer continued to be employed by his one and only employer at that time, the company. Accordingly we dismiss this appeal.