

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D81/98

**Salaries tax** – whether persons employed on the staff of any consulate, who were subjects or citizens of the state concerned were entitled to exemption under section 8(2)(b) of the Inland Revenue Ordinance – whether the taxpayer ‘represented’ the state to the Hong Kong Government – meaning of the word ‘represent’.

The taxpayer was a Country X citizen. Between late 1994 to the end of 1997, he was employed by Country X consulate general in Hong Kong (‘the Consulate’) initially in the capacity of senior clerk to assess migration applications under the business category and was subsequently promoted to the rank of senior assessor within the regional business centre. The issue for this appeal was whether the taxpayer was entitled to exemption under section 8(2)(b) of the IRO which provided that the official emoluments of consuls, vice consuls and persons employed on the staff of any consulate, who were subjects or citizens of the state which they represented, shall be excluded from the charge to salaries tax.

Panel: Robert Wei Wen Nam SC (chairman), Jiang Zhaodong and Philip St John Smart.

Date of hearing: 24 April 1998.

Date of decision: 28 August 1998.

Held:

1. The Board was unable to accept the taxpayer’s basic argument that section 8(2)(b) implied that consuls, vice consuls and persons employed on the staff of a consulate of a particular country do represent that country.
2. It was not right to contend that the words ‘who are subject or citizens of the state which they represent’ was to ensure that the section only applies to those people who are subjects or citizens of a foreign country and who are employed on the staff of that same country’s consulate. The Board was of the view that if this contention of the taxpayer was right, the words ‘which they represent’ would have no meaning and should not be there. Unless there was a compelling reason (and the Board have found none), the Board should not go against a well-known canon of construction and make those words otiose.
3. In its 1993 letter, the Consulate set out its view on which members of staff of the Consulate were exempt from the charges to Hong Kong salaries tax. The context of section 8(2)(b) being consular relations in Hong Kong, the

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Consulate's interpretation of the section was in the view of the Board entitled to be given its due weight.

4. Country X's consular relations in Hong Kong were governed by the Consular Relations Ordinance, Chapter 259, which applied the Vienna Convention on Consular Relations. The Board's reading of the 1993 letter concerned suggested that the Consulate's interpretation of section 8(2)(b) was predicated upon the premise that, apart from being employed on the staff of a consulate of a foreign state and being a subject or citizen of that foreign state, the claimant must satisfy the further requirement that he or she represents the foreign state to the Hong Kong Government before exemption could be granted. In the case of the Consulate, exemption was granted to staff members who were sent by Country X and officially accredited to the Hong Kong Government and recognised as official representatives of Country X and who were paid their emoluments from Country X and so were required to pay tax thereon to Country X government. On the other hand, employees recruited from the Hong Kong market and paid local wages cannot be said to represent Country X and therefore should not be exempt from payment of Hong Kong salaries tax.
5. The Board agreed with the Consulate's interpretation that it was a requirement for the grant of an exemption that the employee represents the foreign state, that is, Country X to the Hong Kong Government. Clearly the context of section 8(2)(b) was consular relations, and the word 'represent' could only refer to consular representation recognised by the Hong Kong Government. The taxpayer did not represent Country X within the meaning of section 8(2)(b) and was therefore not entitled to exemption thereunder.
6. The taxpayer conceded that he was not accredited by Country X government as a consular representative of Country X to the Hong Kong Government and that he has no status under the Vienna Convention. However, he contended that he nevertheless represented Country X within the meaning of section 8(2)(b). There were two limbs to his contention. The first limb claimed that the Consulate by employing him made him a legally authorised representative of Country X, while the second stated that, then, by words and actions, it held him out to third parties such as the public, the migration industry and officers of Country X as representing Country X.
7. The first limb appeared to refer to his employment in Hong Kong as senior clerk by the Consulate during the relevant periods. The taxpayer contended that by reason of the employment, he was a 'person employed on the staff of the Consulate', and by reason of being such a person, he claimed that he was entitled to exemption under section 8(2)(b). For all those reasons, he claimed that he was entitled to exemption under section 8(2)(b). For the same reasons as stated in above paragraph 2, the Board found the argument

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unacceptable because it made it superfluous for the statute to stipulate that the person represents the state.

8. The second limb merely stated that the Consulate by its words and actions held the taxpayer out to third parties as representing Country X. It did not tell whether he was held out as a representative of Country X to the Hong Kong Government or to the third parties, nor did it show in what way the holding out has affected the true position of the taxpayer.

### **Appeal dismissed.**

J R Smith for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

#### **Nature of appeal**

1. This is an appeal by an individual (the Taxpayer) against the salaries tax assessments raised on him for the years of assessment 1994/95 and 1995/96 respectively. The question for this appeal is whether the Taxpayer is entitled to exemption under section 8(2)(b) of the Inland Revenue Ordinance (the IRO) which provides that the official emoluments of consuls, vice consuls and persons employed on the staff of any consulate, who are subjects or citizens of the state which they represent, shall be excluded from the charge to salaries tax.

2. The Taxpayer is a Country X citizen. In late July 1994, he came to Hong Kong from Country X. In the following month he was employed by Country X consulate general in Hong Kong (the Consulate) in the capacity of senior clerk to assess migration applications under the business category. In September 1995, he was promoted to senior assessor within the regional business centre. He resigned from the Consulate at the end of 1997 and is no longer associated with the Consulate.

3. On 14 September 1993, a consul of the Consulate wrote to the Inland Revenue Department setting out the Consulate's interpretation of section 8(2)(b), and, in particular, the word 'represent', and seeking confirmation from the Inland Revenue Department. The letter reads as follows:

'Liability for Taxation: Locally Engaged Staff From Country X

The taxation office in Country X has written to the Consulate seeking clarification on which employees in the Consulate are liable for payment of Country X taxation. Under the domestic tax law local staff who are considered

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still to be residents of Country X are required to pay tax on income earned overseas unless they are liable to pay tax in the country of residence, that is, Hong Kong.

By way of background, the Consulate currently employs two categories of staff. Those that are sent by the government and who are officially accredited to the Hong Kong Government and recognized as official representatives of Country X under the Vienna Convention and, secondly, local employees who are recruited from the Hong Kong market and paid local wages and conditions (sic). The official representatives are paid salary and allowances from Country X and so are required to pay Country X taxation. The local staff on the other hand consist of both Chinese and Country X nationals and it is the latter category for which we seek your interpretation of Part III section 8(2) of the Inland Revenue Ordinance.

From our interpretation of 8(2) of the Inland Revenue Ordinance, official representatives that is, consuls and vice-consuls etc are exempt from payment of Hong Kong tax. However, our reading of the Ordinance also suggests that local employees working for the Consulate who happen to be Country X citizens are not exempt from the payment of local staff. This interpretation is based on the fact that such employees are recruited from the local labour market, receive remuneration in line with other Hong Kong residents and cannot be said to “represent” Country X for the purposes of the Vienna Convention on Consular Relations. If this interpretation is correct then such employees are liable to pay Hong Kong tax and as an extension of this fact are exempt from payment tax to Country X.

...

I would be grateful if you could officially confirm that this interpretation of the Inland Revenue Ordinance Part III 8(2) is correct.’

4. On 20 October 1993, the Inland Revenue Department replied as follows:

‘I am of the view that the clause “which they represent” in section 8(2)(b) of the IRO is to qualify in the general sense the word “state” and is not meant specifically for the purposes of the Vienna Convention on Consular Relations. I may add that if only consuls and vice-consuls can be regarded as representing the state, the reference to “and persons employed ...” would not have been necessary. It is also my view that whether the staff is recruited from the local labour market is not relevant to the issue.

The department’s view is that the official emoluments of any person who is employed on the staff of Country X consulate general in Hong Kong and who is a subject or citizen of Country X is exempt from Hong Kong salaries tax under section 8(2)(b) of the IRO.’

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5. The Taxpayer entered into his first contract of employment with the Consulate on 25 August 1994. The contract was for the period from 22 August 1994 to 22 August 1995. It contains the following clause:

‘Taxation-Nationals Employed as Locally Engaged Staff

The Hong Kong Inland Revenue Ordinance exempts from taxation the salaries and other emoluments of certain categories of persons, including “the official emoluments of consuls, vice-consuls and persons employed on the staff of any consulate, who are subjects or citizens of the state which they represent”.

It follows that the salaries of citizens of Country X working in the consulate general are exempted from Hong Kong tax. Therefore LES (local engaged staff) who are deemed to be Country X residents are required to pay Country X taxation and should make their own arrangements direct with the tax office in Country X.’

A similar clause is contained in the contract of employment entered into by the Taxpayer with the Consulate on 25 September 1995, which was for the term of one year.

6. In employer’s returns dated 26 April 1995 and 26 April 1996, the Consulate disclosed the following particulars relating to the Taxpayer’s emoluments:

<b>Year of assessment</b>	<b>1994/95</b>	<b>1995/96</b>
(a) Period employed	22-8-1994 to 31-3-1995	1-4-1995 to 31-3-1996
(b) Capacity	Senior Clerk	Senior Clerk Business SK
(c) Income		
Salary	\$157,635	\$303,303
Bonus	-	<u>27,121</u>
	<u>\$157,635</u>	<u>\$330,424</u>

7. The Taxpayer furnished tax returns for the years of assessment 1994/95 and 1995/96 in which he did not offer any income for assessment.

8. After exchanges of correspondence between the assessor and the Taxpayer relating to the Taxpayer’s liability to salaries tax, the assessor raised the following salaries tax assessment on the Taxpayer:

<b>Year of Assessment</b>	<b>1994/95</b>	<b>1995/96</b>
	\$	\$
Assessable income	157,635	330,424
<u>Less: Allowances</u>	<u>72,000</u>	<u>79,000</u>

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Net chargeable income	<u>85,635</u>	<u>251,424</u>
Tax payable thereon	<u>9,327</u>	<u>42,484</u>

9. By a letter dated 4 April 1997, the Taxpayer objected against the assessment as set out in paragraph 8 above, and by his determination dated 21 August 1997 the Commissioner of Inland Revenue determined the objection against the Taxpayer, adopting the Consulate's interpretation of section 8(2)(b) as shown in paragraph 3 above.

### **Grounds of appeal**

10. The Taxpayer's grounds of appeal are principally to the following effect:

10.1 Having status under the Vienna Convention on Consular Relations is not the sole test as to whether he represented Country X while employed by the Consulate. He agrees that he had no status under the Vienna Convention and that he was not accredited to the Hong Kong Government. But only some of the Consulate staff are officially accredited to the Hong Kong Government. Some of the most senior trade and migration officials are not accredited and do not have status under the Vienna Convention. Conversely some of those who are accredited to the Hong Kong Government are junior administrative staff. In any case, section 8(2)(b) does not refer to the Vienna Convention or consular representation.

10.2 The interpretation of section 8(2)(b) (the Section) The Section implies that consuls, vice-consuls and persons employed on the staff of a consulate of a particular country do represent that country. The intent of the words 'who are subjects or citizens of the state which they represent' is to insure that the Section only applies to those people who are subjects or citizens of a foreign country and who are employed on the staff of that same country's consulate.

10.3 The Revenue's previous interpretation of the Section contained in its 1993 letter (see paragraph 4 above) which states that a person in the Taxpayer's position is exempt from Hong Kong salaries tax.

10.4 Powers delegated by the minister for immigration and multicultural affairs Locally engaged staff working in Country X migration offices around the world are formally authorised to be officers under the law of Country X. By this process locally engaged staff are able to exercise certain powers delegated them by the minister. By exercising those powers, the Taxpayer was acting as the minister's representative.

10.5 Being held out by the Consulate as representing it and Country X

- (a) The Consulate had printed for the Taxpayer business cards bearing his name and Country X's coat of arms. The government uses the coat of arms to authenticate documents and for other official purposes. By requiring his use of

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business cards and stationery carrying the coat of arms, the Consulate held him out as representing it and Country X.

- (b) In his time at the Consulate he sent out about 700 letters to people applying to migrate to Country X, all of which were under the coat of arms and signed off by him in his own name.
- (c) He was regularly asked to meet with migration consultants to discuss specific issues and Country X's migration policies.
- (d) On behalf of the Consulate, he travelled to Country Y (seven times, a week at a time) and City Z to interview migration applicants and to meet with parties associated with migration matters.
- (e) He was asked to attend the 1996 and 1997 national day official receptions. It was stressed at briefings prior to these functions that the invited staff were not guests but were to act as representatives of Country X.
- (f) As a team member he was awarded an achievement medallion in 1997 by Country X.
- (g) In summary, by employing him the Consulate made him a legally authorised representative of Country X and then by its words and actions held him out to the general public, the migration industry and to officers of Country X as representing Country X.

### **Parties and witnesses at the hearing**

11. At the hearing of this appeal, the Taxpayer appeared in person, while Mr J R Smith, assessor, appeared as the representative of the Commissioner of Inland Revenue. The Taxpayer was the only witness. He confirmed that the statements of fact in his grounds of appeal and the addendum thereto were true and gave some further evidence by way of supplement.

### **Findings and reasons**

12. The Taxpayer's basic argument is that section 8(2)(b) implies that consuls, vice consuls and persons employed on the staff of a consulate of a particular country do represent that country. The intent of the words 'who are subjects or citizens of the state which they represent', he contends, is to ensure that the section only applies to those people who are subjects or citizens of a foreign country and who are employed on the staff of that same country's consulate. We are unable to accept that argument. If the Taxpayer is right, the words 'which they represent' have no meaning and should not be there at all. Unless there is a compelling reason (and we have found none), we should not go against a well-known canon of construction and make those words otiose.

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13. In its 1993 letter (see paragraph 3 above), the Consulate sets out its views on which members of staff of the Consulate are exempt from the charges to Hong Kong salaries tax. The context of section 8(2)(b) being consular relations in Hong Kong, the Consulate's interpretation of the section is in our view entitled to be given its due weight.

14. Country X's consular relations in Hong Kong are governed by the Consular Relations Ordinance, Chapter 259, which applies the Vienna Convention on Consular Relations. Hence the references refer to the Convention in the 1993 letter. Our reading of the letter suggests that the Consulate's interpretation of section 8(2)(b) is predicated upon the premise that, apart from being employed on the staff of a consulate of a foreign state and being a subject or citizen of that foreign state, the claimant must satisfy the further requirement that he or she represents the foreign state to the Hong Kong Government before exemption can be granted. In the case of the Consulate, exemption is granted to staff members who are sent by Country X and officially accredited to the Hong Kong Government and recognised as official representative of Country X and who are paid their emoluments from Country X and so are required to pay tax thereon to Country X government. On the other hand, employees recruited from the Hong Kong market and paid local wages cannot be said to represent Country X and therefore should not be exempt from payment of Hong Kong salaries tax.

15. We agree with the Consulate's interpretation that it is a requirement for the grant of an exemption that the employee represents the foreign state, that is, Country X to the Hong Kong Government. Clearly the context of section 8(2)(b) is consular relations, and the word 'represent' can only refer to consular representation recognised by the Hong Kong Government.

16. The Taxpayer concedes that he was not accredited by Country X government as a consular representative of Country X to the Hong Kong Government and that he has no status under the Vienna Convention. He contends, however, that he nevertheless represented the state, that is, Country X within the meaning of section 8(2)(b). There are two limbs to his contention. The first limb claims that the Consulate by employing him made him a legally authorised representative of Country X, while the second states that, then, by words and actions, it held him out to third parties such as the public, the migration industry and officers of Country X as representing Country X (see paragraph 10.5(g) above).

17. The first limb appears to refer to this employment in Hong Kong as senior clerk by the Consulate during the relevant periods. By reason of the employment, he was a 'person employed on the staff of the Consulate', and, by reason of being such a person, he claims that he represented Country X. Furthermore, he is a Country X citizen. For all those reasons, he claims that he is entitled to exemption under section 8(2)(b). As we have stated above, we find the argument unacceptable because it makes it superfluous for the statute to stipulate that the person represents the state.

18. The second limb merely states that the Consulate by its words and actions held the Taxpayer out to third parties as representing Country X. It does not tell whether he was



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held out as a representative of Country X to the Hong Kong Government or to the third parties, nor does it show in what way the holding out has affected the true position of the Taxpayer.

19. Towards the end of the hearing, the Taxpayer agreed with Dr Jiang, a member of the Board, that his case was that he was a representative of Country X to those who needed his help, but not a representative to the Hong Kong Government because he was not on the accredited list, and he further stated that the Hong Kong Government did not recognise him, and rightly so, as a consular representative. And he further agreed with Mr Smart, another member of the Board, that his argument was that the word 'represent' in section 8(2)(b) included representation of any administrative character and was not limited to consular activities. We are unable to accept the argument. The context of section 8(2)(b) is clearly consular relations. We have no hesitation in saying that 'represent' refers only to consular representation recognised by the Hong Kong Government. Since he was not a consular representative of Country X recognised by the Hong Kong Government, the Taxpayer did not represent Country X within the meaning of section 8(2)(b) and is therefore not entitled to exemption thereunder.

20. It follows that this appeal is dismissed and that the salaries tax assessments under appeal are hereby confirmed.