TAX UPDATES – May 2021

1. Tax treatments for court-free amalgamation: Utilisation of tax losses

The Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021 ("the Bill") was gazetted on 19 March 2021 in order to codify the current assessing practice for court-free amalgamation into the Inland Revenue Ordinance.

The proposed assessing practice largely follows the interim assessing practice currently adopted by the Inland Revenue Department ("the IRD"). The market focus remained to be the attitude of the IRD on the utilisation of pre-amalgamation tax losses as it seems to be the best incentives to corporations given the high costs of amalgamation.

Pursuant to the Bill, the IRD has no intention to relax the requirements for utilisation of tax losses as it may significantly reduce the Profits Tax revenues of the HKSAR Government. The following requirements have to be fulfilled for unrestricted utilisation of pre-amalgamation tax losses of Amalgamating company (Disappeared entity) and Amalgamated company (Surviving entity):-

	Tax Loss Utilisation Requirements
Amalgamating company (Disappeared entity)	1. **Same Business**: Pre-amalgamation losses can only be used to off-set against profits of same business 2. **Post Entry**: Pre-amalgamation losses can only be used when they were incurred during the time both companies are wholly vertically or horizontally related (i.e., 100% shareholding relationship) *The tax losses of amalgamating company will lapse if the above conditions are not fulfilled*
Amalgamated company (Surviving entity)	1. **Financial Resources**: The amalgamated company has sufficient financial resources (excluding related party loans) to acquire the business of the amalgamating company 2. **Business Continuation**: The amalgamated company continued to carry out loss-sustaining business until the date of amalgamation 3. **Post Entry**: Same as above *The tax losses of amalgamated company can only be used to set-off against profits of its own business (but not business from amalgamating company) if the above conditions are not fulfilled*

Points to note

Due to strict requirements for loss utilisation, enterprises should thoroughly study the tax implications arising from amalgamation before they implement the group restructuring decisions.

For utilisation of pre-amalgamation tax losses sustained by the amalgamating company, we expect the IRD would continue to be strict in assessing the **Same Business** Requirements. In the website of the IRD, it has cited that a high-end Japanese Restaurant and a low-end Italian Restaurant are unlikely to be considered as carrying on same business.

Retail Industry hit hard during COVID-19. Some of them urgently need to reduce their tax liabilities through utilising tax losses via amalgamation. It is common that they maintain a large number of companies for holding the operations of each retail shops. They should plan carefully on a combination of amalgamation to reduce the risk of tax loss disallowance.

If the amalgamation method does not give favourable tax treatments to your group, you may consider other tax planning options (e.g., business restructuring) in order to utilise the tax loss. We would be pleased to provide advice on your specific situation.

[1] Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021
https://www.legco.gov.hk/yr20-21/english/bills/b202103195.pdff

2. Court Case Study: Hong Kong Property Stamp Duty Refund Claim dismissed Yau Sun Yee v Collector of Stamp Revenue [HCAL 3514/2019]

Let us first set out the important dates of the Court of First Instance Case about Hong Kong Property Sales & Purchase ("S&P") Agreement:-

Entry of S&P Agreement for acquisition of Second Property (first-hand property not yet ready for use)	31 October 2017
Entry of S&P Agreement for sales of First Property	11 March 2019
Completion of S&P Agreement for acquisition of Second Property	20 November 2019
Application of fund of Stamp Duty and was **Rejected** by the IRD due to late application	25 November 2019 (5 days later)

The applicant, Mr. Yau, would like to replace his existing property ("First Property") with a first-hand property ("Second Property") as his primary home in year 2017. However, Second Property was still under construction at that time.

As such, Mr. Yau continued to live in the First Property for some time. Interestingly, he sold the First Property in March 2019, which was well before the Second Property was available to use in November 2019. Mr. Yau filed the application of Partial Refund of Stamp Duty (being the difference of 15% and Scale 2 charges) on 25 November 2019 (i.e., 5 days after the Second Property was available for him).

Mr. Yau believed that he has already taken immediate actions, but was told that he was late in the Stamp Duty Refund Application.

So when should Mr. Yau lodge the application?

Points to note

To begin with, let us set out two important deadlines for Stamp Duty Refund in respect of Hong Kong Residential Property Replacement (i.e., the deadline to dispose the First Property ("**Disposal Deadline**") as well as the deadline to lodge the Stamp Duty Refund Application ("**Application Deadline**"):-

- **Disposal Deadline:** Within 12 months after the S&P Agreement of the Second Property was completed

- **Application Deadline:** Within (i) 2 years after the date of the S & P Agreement of the Second Property was entered into; or (ii) 2 months after the First property is disposed, whichever is later

The IRD acknowledged that very often if the Second Property is a first-hand property, it may not be available for use at the time when the S&P Agreement was entered into. As a concessionary practice, for Disposal Deadline, the time limit of 12 months counted from the completion date of S&P Agreement (i.e., 20 November 2019 in Mr. Yau's case). This allows taxpayers to continue to live in the First Property before the Second Property was ready for use.

However, *such concessionary practice does not apply to Application Deadline*. The 2-year time limit mentioned above started the count from the date in which the S&P Agreement of the Second Property was entered into (i.e., 31 October 2017). As such, the Application Deadline in Mr. Yau's case is 31 October 2019.

To make things easier, we believe taxpayers should *lodge the refund application at your earliest convenience after the disposal of the First Property*. As long as you submit the application within 2 months from the disposal of the First Property, you do not have to pay attention to the above confusing concept and will not miss the deadline.

Last but not least, in view of the heavy Stamp Duty liabilities on purchase of Hong Kong properties, you are recommended to purchase property holding companies instead of direct property purchases. Transfer of Hong Kong company shares are subject to Stamp Duty rate of 0.2% only, even when the company is a property-holding entity.

[2] Yau Sun Yee v Collector of Stamp Revenue [HCAL 3514/2019]
https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2019/HCAL003514A_2019.doc

3. IRD Warning on late Country-by-Country Return Notification

In the past, many corporations tend to disregard their Country-by-Country ("CbC") compliance obligation. They consider that CbC return does not offer much help to the IRD in reviewing the tax position, and thus tend to believe that the IRD would not check whether a taxpayer has already reached the threshold of CbC filing and whether they have missed the due date of both CbC notification and reporting.

However, it does not seem to be the case anymore...

One of our clients has recently received the below message in the CbC reporting portal :-

2021/4/29 e-Message

To

Subject CbC Reporting Notification for the year 2019

CbC ID

Date 29 APR 2021 00:00

I am of the opinion that you have without reasonable excuse failed to comply with a requirement under Section 58 H of the Inland Revenue Ordinance which requires you to file a country-by-country reporting notification within 3 months after the end of the relevant accounting period and that you have rendered yourself liable to a penalty of $50,000 under Section 80G of the Ordinance.

I am directed to inform you that no action will be taken against you on this occasion. However, any future offence of this nature will not be treated so leniently.

It seems the IRD is now checking the prior years' filing status of each taxpayer and issue similar warning to taxpayers who have been late in CbC Reporting in prior years, despite the fact that the taxpayer may have already completed the procedures long time ago.

More importantly, the IRD has explicitly pointed out that, for any subsequent late CbC filing, it will most probably impose penalty on the taxpayers as the IRD is likely to waive penalty on first time offence only.

Points to note

Let us recap the threshold of CbC Filing in Hong Kong:-

A multinational enterprise ("MNE") group is required to file CbC Return in Hong Kong when both of the below conditions are satisfied:-

- Annual consolidated group revenues of the MNE in the preceding accounting period exceed the threshold (HK$6.8 billion for a Hong Kong ultimate parent entity or EUR750 million for other cases); and

- The MNE maintained entities in Hong Kong as well as overseas.

We note that there are a number of MNE group which are still unaware that they are required to fulfil to the CbC requirements. They may consider CbC is irrelevant to them because the business scale of the Hong Kong company is small or the Hong Kong company only derives negligible amount of income. However, this does not take away their duty to file CbC as the threshold solely depends on the group consolidated data rather than Hong Kong company-level data.

In view of the stringent attitude of the IRD, taxpayers should regularly check with their overseas headquarters on the group consolidated annual revenues. Taxpayers should take prompt actions to perform back-year CbC filing if necessary. If you would like us to assist in assessing whether your company is required to make the CbC notification, please feel free to contact our tax team members.

稅務資訊
— 2021年5月號

1. 不經法院的公司合併之稅務處理:稅務虧損的利用

《2021年稅務（修訂）（雜項條文）條例草案》("《條例草案》") 已於三月十九日刊憲，其主要目的是將現時對不經法院的公司合併（"合併"）之評稅指引納入《稅務條例》（第112章）（"《稅務條例》"）。

《條例草案》中所建議的評稅法規大致遵循香港稅務局（"稅務局"）目前採用之評稅指引。稅務局對利用合併前之稅務虧損的態度仍然是市場的關注焦點，因這是很多企業是否願意付出高昂成本進行合併之最大誘因。

由於可能會大幅減少香港特別行政區政府的稅收，稅務局並無意放寬利用稅務虧損的規定。如要不受限制地使用"被合併的公司"和"合併後的公司"在合併前之稅務虧損，必須滿足以下條件：

	利用稅務虧損的規定
"被合併的公司"	1. **相同業務測試:** 合併前的稅務虧損只可用作抵銷相同業務性質的利潤 2. **相同集團測試:** 在產生稅務虧損時，被合併的公司及合併後的公司均屬於同一集團旗下的全資附屬公司 如未能付合以上兩個條件，被合併的公司之稅務虧損便會失效
"合併後的公司"	1. **財務資源測試:** 合併後的公司有足夠的財務資源(不包括集團內部貸款）併購被合併的公司所經營的業務 2. **持續經營測試:** 在合併發生時，合併後的公司須持續經營該虧損的業務 3. **相同集團測試:** 同上 如未能付合以上所有條件，合併後的公司的稅務虧損只可用作抵銷自家公司原有業務之利潤，不能抵銷來自於被合併的公司業務的利潤

值得留意的事項

基於使用稅務虧損的要求非常嚴格，企業在實施集團重組決策之前應仔細研究合併所衍生的稅務影響。

我司預計稅務局將繼續嚴格執行針對利用被合併的公司的稅務虧損之**相同業務要求**。請注意，稅務局在網站上清楚表示了一家高級日本餐廳和一家大眾化的意大利餐廳或不會被視為經營同一業務。

零售業在疫情期間遭受重創，一些零售集團有迫切需要通過合併方式以利用稅務虧損來減少集團整體的稅務負擔。零售企業通常會成立很多公司以分別獨立營運每一家零售店，因此在進行合併時，他們應仔細計劃如何組合相關公司，以減低稅務虧損不被允許使用的風險。

如合併不能為 貴集團帶來稅務效益，貴集團亦可考慮其他稅務規劃方案（如業務重組以取代架構重組）以利用稅務虧損。我司很樂意就 貴司之情況提供相關建議。

[1]《2021年稅務(修訂)(雜項條文)條例草案》
https://www.legco.gov.hk/yr20-21/chinese/bc/b202103195/general/b202103195.htm

2. 個案研究: 不接受申請退還部分從價印花稅

首先讓我們列出這高等法院原訟法庭個案的重要日期:

尤新異先生(“申請人”)就購入新住宅物業簽訂正式買賣合約	2017年10月31日
申請人就出售現有住宅物業簽訂正式買賣合約	2019年3月11日
申請人就購入新住宅物業簽立轉讓契（正式完成整個買賣過程）	2019年11月20日
申請人作出退還部分印花稅之申請，但因超出限期而被拒絕相關申請	2019年11月25日 (5日後)

申請人在2017年欲以新住宅物業取代現有住宅物業作為其居住地方。但因當時新住宅物業還未落成，所以申請人繼續居住在現有住宅物業。

值得留意的是申請人在2019年3月已把現有住宅物業出售，遠早於新住宅物業可入住之日期(2019年11月)。 而申請人於2019年11月25日(簽立轉讓契後5日) 已經作出印花稅退還申請(金額為標準稅率15%與第2標準稅率之相差)。

申請人認為自己已經用最短的時間提出申請，卻被告知相關申請已超出限期。到底他應該何時進行印花稅退還申請呢?

值得留意的事項

在退還部分從價印花稅之安排中有兩個需要注意的期限，分別為轉換住宅物業之期限(“出售期限”)及申請退還部分從價印花稅之期限(“申請期限”)。兩個期限之詳情如下:

- 出售期限: 新住宅物業簽立轉讓契後的12個月內
- 申請期限: (i)就購入新住宅物業簽訂正式買賣合約後的2年內，或(ii)出售現有住宅物業後的2個月內(兩者以較遲者為準)

稅務局明白如果新購入之住宅物業為一手物業，購買者通常在簽訂正式買賣合約時並未能入住該物業。因此，出售期限所述之12個月內限期是從新住宅物業簽立轉讓契(在這個案中為2019年11月20日) 後開始計算，以便所有市民在能入住新住宅物業前可以繼續居住在現有住宅物業。

但是，這不適用於申請期限。申請期限所述之2年內限期是從就購入新住宅物業簽訂正式買賣合約(在這個案中為2017年10月31日)後開始計算。因此，這個案的申請期限為2019年10月31日。簡單而言，納稅人應在出售現有住宅物業後儘早提出申請。而只要在出售現有住宅物業後的2個月內提交申請便不會超出期限，那就不必理會上述那些容易混淆的規定。

最後，鑑於現時購買香港房地產時需要承擔高昂的印花稅，各位可考慮以購買持有房產公司的方式買入物業，而不是直接購買房產。因即使有關公司持有香港房產，轉讓其股份需繳納印花稅之相關稅率也是0.2%，與其他香港公司並沒有分別。

[2] Yau Sun Yee v Collector of Stamp Revenue [HCAL 3514/2019]
https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2019/HCAL003514A_2019.doc

3. 稅務局向遲交國別報告通知的跨國企業發出警告

以往，很多跨國企業不太重視國別報告申報責任。它們一般認為國別報告對於香港稅務局審視他們的稅務狀況沒有太大幫助，繼而相信稅務局檢查納稅人是否達到申報門檻並錯過了遞交國別報告通知及申報表的截止日期的機會不大。

然而，我們其中一個客戶最近在稅務局的網上帳戶收到以下信息:-

2021/4/29 e-Message

To

Subject CbC Reporting Notification for the year 2019

CbC ID

Date 29 APR 2021 00:00

I am of the opinion that you have without reasonable excuse failed to comply with a requirement under Section 58 H of the Inland Revenue Ordinance which requires you to file a country-by-country reporting notification within 3 months after the end of the relevant accounting period and that you have rendered yourself liable to a penalty of $50,000 under Section 80G of the Ordinance.

I am directed to inform you that no action will be taken against you on this occasion. However, any future offence of this nature will not be treated so leniently.

稅務局已經開始查看納稅人往年的申報狀況，儘管納稅人已完成往年國別報告的申報，稅務局仍發出以上的警告給在往年遲交國別報告申報的納稅人。

更重要的是，稅務局明確地指出由於這次豁免罰款的原因是初犯，往後任何遲交國別報告申報等不合規行為均可被判罰款。

<u>值得注意的事項</u>

讓我們重溫香港國別報告的申報門檻:-

符合以下兩項條件的跨國企業集團需在香港提交國別報告；-

- 跨國企業集團上一個會計期的全年總收入達到門檻（即68億港元或在其他情況下7.5億歐元）;及

- 跨國企業集團同時持有香港及其他地區的實體。

我們注意到很多跨國企業集團未留意到它們是否需要在香港提交國別報告。由於香港公司的規模和收入相對較小，跨國企業集團的香港實體可能認為國別報告申報與它們無關。可是，國別報告的門檻完全取決於整個集團合併的全年總收入，而非香港公司層面的財務資料。

基於稅務局逐漸嚴謹的態度，納稅人應定期向海外總部檢查集團合併的全年總收入金額。如有需要，納稅人應盡快完成以往年度的國別報告申報。如您希望我們評估您的公司是否符合預備國別報告通知的要求，請隨時與我們稅務團隊聯絡。

Contact Us 聯絡我們

For further information regarding the above, please feel free to contact us.
如有任何查詢，歡迎隨時與我們聯絡。

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