

# TAX UPDATES – JULY 2021

## 1. The Government Agrees to Support the “Global Minimum Tax Rate” under BEPS 2.0

The Inclusive Framework on BEPS (commonly known as "BEPS 2.0") proposed by the OECD in the fourth quarter of Year 2020 has been formally set out as a specific plan after the discussions in the G7 Meeting in June this year.

Please refer to our Monthly Newsletter Update – April 2021 published earlier for detailed introduction to the Framework: <https://henrykwongtax.com/newsletter/international-tax/global-tax-environment-beps-2-0-development-on-digital-economy/>

Consensus on two major aspects of BEPS 2.0 project have been reached by member countries of G7:

1. They are committed to reaching an agreement on the allocation of part of the taxing rights to the market jurisdictions (generally interpreted as the location of customers / markets of the multinational enterprises), targeting on the largest and most profitable multinational enterprises with global revenue of over EUR 20 billion (around HKD181 billion) and profit margin exceeding 10%; and
2. They are committed to a global minimum tax of at least 15% on a country by country basis, targeting those multinational enterprises with global revenue of over EUR 750 million (around HKD 6.8 billion). It is proposed that the parent company / headquarter of the group would have to pay for the difference in actual tax rate in a particular jurisdiction and the global minimum tax rate of 15%.

BEPS 2.0 project aims to achieve an even allocation of taxing rights and ensures that large multinational enterprises pay at least a minimum level of tax. Around 130 tax jurisdictions (including Hong Kong) have already expressed their support towards the project plan.

The Hong Kong Government has established a Consultancy Group in June 2020 to review the possible impact of BEPS 2.0 to the overall business environment in Hong Kong. The Budget announced in February this year also indicated that Hong Kong shall follow the international consensus in the implementation of BEPS 2.0.

## **Points to note**

It appears that BEPS2.0 targets large multinational groups only. However, since general consensus of the G7 participating countries and other tax jurisdictions have already been established, it is expected that some tax authorities may extend the requirements under BEPS2.0 to other smaller multinational groups.

For companies Hong Kong and PRC enterprises, the implementation of BEPS 2.0 will cause an impact to the following taxpayers: -

- Taxpayers who apply for offshore tax exemption in Hong Kong (while no tax has been paid in another jurisdiction);
- Taxpayers who pay considerable sums to companies located in jurisdictions where corporate tax rate is lower than 15% (i.e., the BVI, Cayman Islands, etc.); and
- Multinational group with its management located outside Macau, but retained significant amount of profits in Macau (please note that the current corporate tax rate in Macau is 12%, which is lower than the proposed minimum tax rate of 15%).

Given that the Hong Kong Government has expressed its supportive view to BEPS 2.0, taxpayers should expect the Hong Kong Inland Revenue Department to start examining strictly on the tax position of the companies in Hong Kong and other jurisdictions in order to show its support to global direction of improving tax transparency. Taxpayers should consider whether they should change their tax planning strategies, such as establishing economic substance in Hong Kong so as to become a Hong Kong Tax Resident, in order to meet the upcoming changes in global tax practices.



## 2. Inland Revenue Ordinance Section 15F - Double Taxation Risk on MNC with Research & Development (R&D) functions in Hong Kong

*Pre-Revenue Cross-Border Tax Planning (R&D Cost Recharge Arrangement) needed*

Hong Kong has been promoting itself as the Asian R&D hub in recent years. Lots of subsidies have been provided by the HKSAR government, HKSTP (Science Park), Cyberport and other organisations to encourage MNCs to set up their R&D center in Hong Kong. Meanwhile, as Hong Kong is just a small city with small population size, very often these MNCs would carry out R&D activities in other tax jurisdictions as well (e.g., the PRC, the US, Taiwan).

Effective from the year of assessment 2020/21, Section 15F of the Inland Revenue Ordinance (IRO) has been proven to be a catalyst for taxpayers with R&D functions in multiple locations (including Hong Kong) to implement tax planning. In particular, it applies to the following situations:-

- A Hong Kong company has been set up to carry on R&D functions in Hong Kong. Most of them are located in Science Park, Cyberport and other incubation centres;
- The legal title of the Intellectual Property (IP) generated from the R&D activities does not belong to the Hong Kong company despite the fact that the Hong Kong company contributes all or part of the value creation processes (i.e., DEMPE<sup>1</sup>);
- Particular attention would be paid by the Inland Revenue Department (IRD) if the IP legal owner is located in low-tax jurisdictions (e.g., the BVI, Cayman Islands); and
- The IP is expected to generate income in the future either via licensing (royalty) income or sales of IP.

Section 15F of the IRO allows the IRD to impose Hong Kong Profits Tax on the income generated from the IP even though the legal owner of the IP is a non-Hong Kong tax resident as long as part or all of the R&D activities are performed in Hong Kong. In most cases, the overseas legal owner is a related company of the Hong Kong company.

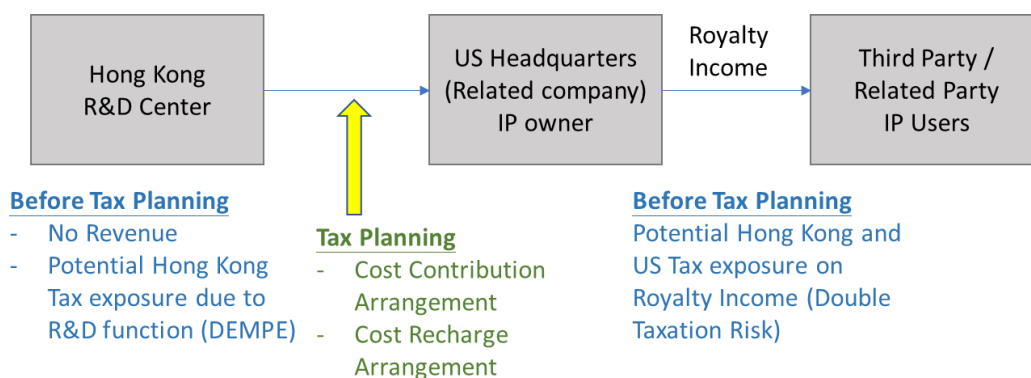
The underlying principle is that taxpayers should pay tax in their value creation jurisdiction / operating jurisdiction (i.e., Hong Kong in this case) over the place of incorporation of the legal owner.

Double Taxation risk arises as the legal owners of the IP may also have to pay tax in their own jurisdictions. If that jurisdiction is not a Double Taxation Agreement (DTA) partner of Hong Kong (e.g., the US and Taiwan), tax credit may not be available to resolve the double taxation risk.

<sup>1</sup> Development, Enhancement, Maintenance, Protection or Exploitation



## Points to note



Section 15F of the IRO aims to tackle situations when a Hong Kong company performs R&D functions for the group but with low or no remuneration. Unfortunately, without inter-company arrangements, it is impossible for the Hong Kong R&D company to earn an income from its R&D activities in an early stage and thus would fall within the target of the IRD.

As such, setting up R&D proper inter-company arrangements such that the Hong Kong company is fairly compensated for its functions and risks is the solution to the double taxation risk.

Based on the above logic, Start-Up companies have to commence considering cross-border tax planning even during pre-revenue period. All these arrangements have to be first reflected in the accounting records and financial statements of the Hong Kong company. As such, taxpayers cannot wait until the challenges from the IRD to remedy the situation.

Two important considerations should be in place in setting up R&D inter-company arrangements:-

- Common arrangements include Cost Recharge Arrangements and Cost Contribution Arrangement (CCA). Taxpayers should select the best suitable methods based on its own situations. Under a typical CCA, the IRD expects that the Hong Kong company would share a portion of the benefits (profits) arising from the relevant IPs; and
- Transfer pricing policy and documentation should be in place to demonstrate that arm's length (fair) amount of income have been allocated to the Hong Kong company to reflect the value created by its R&D activities.

Last but not least, always keep the enhanced R&D tax incentives in mind. With double or even treble amount (200% / 300%) of tax deduction on qualified R&D expenses, it could help you save significant amount of Hong Kong tax or even turn the Hong Kong company into tax loss position even when the Hong Kong company is compensated by overseas group companies with reasonable amount of income for its R&D activities.

All in all, proper early pre-revenue tax planning will not only reduce your double taxation risk, but may not necessarily increase your immediate tax burden at the same time. You can always find your tax consultants for a tailor-made advice.

### **3. Tax Relief Measure: Conditional Surcharge Waiver (i.e., Interest-free) for tax payments by instalment**

*Do not hesitate to make last-minute instalment application*

From December 2019 onwards, due to economic recession, the Hong Kong Government has proposed various relief measures for taxpayers in financial difficulties. Tax payment by instalments are definitely one of the appealing measures to both SME and MNC which have cashflow problems during COVID-19.

The IRD allows taxpayers (including individuals, sole proprietorships, partnerships and corporations) in financial difficulties to apply for surcharge (interest) waiver for instalment settlement of Profits Tax, Salaries Tax and Personal Assessment (Property Tax are specifically excluded) for assessments for the Years of Assessment 2018/19, 2019/20 and 2020/21 issued on or before May 2022.

Under normal circumstances, for successful cases, the IRD will grant instalment plans for a duration of 6 months or less (longer duration of no more than 12 months under special circumstances) to individuals and a duration of 12 months for corporations. Taxpayers have to strictly follow the payment schedule of approved instalment plan in order to successfully obtain “zero-interest” status throughout the period.

While the IRD did not specifically mention its criteria in granting surcharge waiver application, the IRD did not seem to take a stringent approach based on our experience. As such, it is worthwhile for taxpayers which are cash strapped to consider making an application.

Taxpayers have to make the application in writing together with detailed instalment proposal and supporting documents. Typical supporting documents include latest 3-month bank statements, while other documents which could demonstrate your financial difficulties would be useful to the application (e.g., Cash flow forecast, future debt repayment details) as well.



## **Points to note**

Based on our experience, many taxpayers face a dilemma in instalment applications. They probably would only be certain of their cash position around a week before the tax payment deadline, but for late applications the IRD is unlikely to make a decision before the deadline. Thus they considered that they have to settle the full amount anyway in order to avoid any penalty or surcharge.

However, your concern has been resolved by the following latest prevailing practice of the IRD:-

1. The IRD pledges to respond (i.e., Approve, Revise or Reject) the instalment proposals within 21 working days from the date of applications. It is suggested the taxpayers (or its tax representatives) to make informal phone calls to negotiate the proposals and provide supplementary documents to fight for the best deals;
2. While pending the result from the IRD, taxpayers only had to settle the tax payment in accordance with its instalment proposal first; and
3. In the case of rejection, taxpayers are only required to settle the full amount of tax liabilities within 14 days from the issue dates of the rejection letters. In other words, taxpayers are not in a hurry to settle the tax before the result announcements and have some time to look for alternative financing options.

Last but not least, tax instalment plans generally come with Provisional Profits Tax holdover applications. The chance of success of holdover application is generally very high as long as it is submitted i) before the application due date and ii) with proper supporting documents (e.g., certificated copies of financial statements). As such, taxpayers may also take into consideration the effect of holdover applications in your instalment proposals.

# 稅務資訊

## - 2021年7月號

### 1. 香港政府發文支持推行 BEPS 2.0 的「全球最低稅率原則」

由經合組織 OECD 於 2020 年第四季所提出的國際稅收規則（通常被稱為「BEPS 2.0」），於本年六月的 G7 會議中正式劃出具體框架方案。有關我司早前針對相關的稅收規則所述的簡介，請參閱每月通訊的 2021 年四月號 <https://henrykwongtax.com/global-tax-environment-beps-2-0-development-on-digital-economy/#more-2688>。

經過會議上各國的討論，框架方案分成兩個部份：-

- 方案的第一部分針對全球營業額超過 200 億歐元（約 1,813 億港幣）及利潤率高於 10% 的大型跨國集團，有關企業部分利潤的徵稅權將會分配予市場所在的稅務管轄區（即一般理解為集團客戶的所在地）。
- 方案的第二部分則針對全球營業額超過 7.5 億歐元（約 68 億港幣）的大型跨國企業集團，若有關跨國企業集團在某一稅務管轄區的實際稅率低於全球最低稅率（不低於 15%），其母公司或附屬公司須向所在地就差額繳納額外稅款。

「BEPS 2.0」旨在設定框架以更公平的方式分配大型跨國企業利潤的徵稅權，以及制訂全球最低稅率。全球共 130 個稅務管轄區（包括香港）早前表示接受有關方案。

香港政府於 2020 年六月已成立諮詢小組，檢視 BEPS 2.0 方案對香港營商環境可能造成的影響，並在今年二月公佈的《財政預算案》中亦表明香港將會積極跟隨國際共識落實 BEPS 2.0 方案。

## 注意事項

雖然 BEPS 2.0 的方案主要針對大型跨國集團，但既然方案基本上已得到各參與國以至其他稅務地區的基本共識，我們估計部份稅務地區或會在成立法例時，將 BEPS 2.0 的要求伸延到未符合框架要求的其他跨國集團。

針對中港企業而言，方案的推行將直接影響以下納稅人：-

- 於香港申請離岸免稅的納稅人（而其未有在其他相關地區繳納稅款）；
- 支付大額費用給處於低於 15% 稅率地區公司（如英屬處女島，開曼群島等）的香港納稅人；及
- 集團管理層在澳門以外地區，但利潤集中在澳門的跨國集團（請注意，澳門現行的稅率為 12%，低於最低稅率的 15%）

從香港政府已經表明其支持方案的態度，納稅人應預計香港稅務局將更嚴格審查企業於香港以及其他地區的納稅情況，以表示其支持國際社會提高稅務透明度之大方向。納稅人應盡快檢討是否轉變其稅務籌劃策略，例如於香港建立經濟實質及成為香港稅務居民，以迎接即將轉變的稅務常規。





## 2. 稅務條例第15F條 - 在香港具有研發 (R&D) 職能的 跨國公司之雙重徵稅風險

### *營收前的跨境稅務籌劃 (研發成本補收安排) 之必要性*

近年來，香港一直在推動自己成為亞洲研發中心的地位。香港特別行政區政府、科學園、數碼港及其他機構均提供大量補貼給予這些研發中心，以鼓勵跨國公司在香港設立研發中心。同時，由於香港只是一個人口稀少的小城市，這些跨國公司通常亦會在其他稅務地區（例如中國、美國、台灣）開展研發活動。

自 2020/21 課稅年度起，針對同時在多個地點（包括香港）進行研發的納稅人，稅務條例第15F條已被證明為這些納稅人進行稅務籌劃的催化劑。這特別適用於以下情況：

- 已成立一家香港公司在香港從事研發職能。這些公司大多位於科學園、數碼港及其他創業孵化中心；
- 研發活動產生的知識產權 (IP) 的法定產權不屬於香港公司，儘管香港公司貢獻了全部或部分價值創造過程（即DEMPE<sup>1</sup>）；
- 如果知識產權的法定擁有人位於低稅率地區（例如英屬維爾京群島、開曼群島），香港稅務局 (IRD) 將會格外注意；及
- 相關知識產權估計將來會賺取收入（通過特許權使用費或銷售知識產權）。

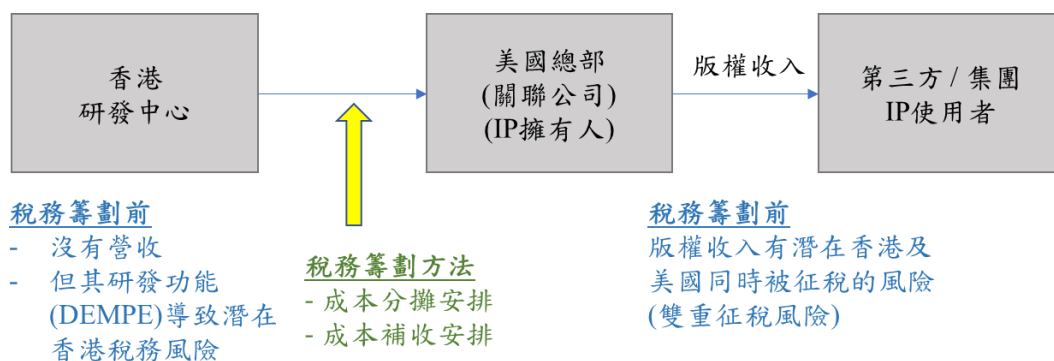
即使知識產權的法定擁有人不是香港稅務居民，只要部分或全部研發活動在香港進行，稅務條例第 15F 條允許稅務局對該知識產權產生的收入徵收香港利得稅。在大多數情況下，該海外法定擁有人為香港公司的關聯公司。

該徵稅權的基本原則是納稅人應納稅在其價值創造地區/經營地區（即本文中的香港），而非法定所有人註冊成立地。

由於知識產權的法定擁有人可能還需在自己的地區納稅，因此會產生雙重徵稅風險。如果該地區不是香港的雙重徵稅協定 (DTA) 合作夥伴（例如美國和台灣），其雙重徵稅風險或未能以稅收抵免方法來解決。

<sup>1</sup> 發展(Development)、強化(Enhancement)、維護(Maintenance)、保護(Protection) 及利用 (Exploitation) (DEMPE)

## 注意事項



稅務條例第15F條旨在針對香港公司，在只有少量甚至沒有報酬的情況下，為集團履行研發職能。遺憾地，如果集團公司之間沒有進行稅務籌劃安排，從事研發的香港公司不可能在研發初期賺取收入，從而成為稅務局的針對對象。

因此，通過建立嚴謹的集團研發費用安排，令香港公司的職能和風險得到公平的補償，是減低雙重徵稅風險的解決方案。

基於上述邏輯，初創公司應在賺取收入前就必須開始考慮跨境稅務籌劃。這些稅務安排都必須預先反映在香港公司的會計記錄和財務報表中。因此，納稅人不可能在收到稅務局的挑戰時才解決這個問題。

在建立研發集團公司之間安排時，應考慮以下兩個重要因素：

- 常見的安排包括成本報銷安排 (Cost Recharge Arrangements) 和成本分攤安排 (Cost Contribution Arrangement)。在典型的成本分攤安排下，香港稅務局預期香港公司將共享相關知識產權所產生的部分利益 (利潤)；及
- 納稅人應當預備好其轉讓定價政策及文檔，以證明已向香港公司分配了公平合理的收入，以反映其研發活動所創造的價值。

最後，不要忘記香港研發加計扣除的稅務優惠，合資格研發費用可獲雙倍甚至三倍 (200% / 300%) 的稅務減免。因此，即使從海外集團公司收取合理收入的情況下，香港研發公司仍然可以節省大量香港利得稅稅負，甚至令香港公司在稅務上處於虧損狀態。

總而言之，嚴謹的營收前稅務籌劃不僅會降低貴公司的雙重徵稅風險，而且不一定會增加短期稅負。您的稅務顧問可以給您一個度身訂做的建議。

### 3. 稅務紓困措施：有條件豁免附加費(免息)分期繳稅

#### *最後一刻申請分期付款是可行的*

自2019年12月起，受經濟衰退影響，香港政府向財政困難的納稅人提出多項紓困措施。對於在新冠肺炎疫情期間出現現金流問題的中小企業和跨國公司來說，分期繳稅絕對是一種有吸引力的措施。

稅務局容許有財政困難的納稅人（包括個人、獨資企業、合夥企業及有限公司）申請豁免附加費（利息）的分期繳稅。這紓困措施涵蓋於2022年5月或之前發出的2018/19、2019/20和2020/21課稅年度之利得稅、薪俸稅及個人入息課稅（物業稅特別地除外）稅單。

一般情況下，對於成功的個案，稅務局會向個人發放為期6個月或以下（特殊情況下不超過12個月）的分期付款計劃，以及為公司發放為期12個月的分期付款計劃。納稅人必須嚴格按照批准的分期付款計劃的繳納稅款，才能在整個期間順利獲得“零利息”狀態。

雖然稅務局沒有特別提及批准豁免附加費申請的標準，但根據我們的經驗，稅務局似乎並沒有採取嚴格的態度處理相關個案。因此，現金拮据的納稅人是值得考慮提出申請的。

納稅人必須以書面形式提出申請，並附上詳細的分期付款方案及相關證明文件。典型的證明文件包括最近3個月的銀行帳單，而其他可以證明您的財務困難的文件也有助申請（例如現金流預測、未來債務償還細節）。



## 注意事項

根據我們的經驗，很多納稅人在申請分期付款時面臨兩難。他們一般只能在納稅截止日期前一周左右才能準備判斷自己的現金狀況，但對於臨近繳稅限期的申請，稅務局不太可能在截止日期前做出決定。因此，他們認為他們無論如何都必須全額付款，以避免任何罰款或附加費。

不過，稅務局以下最新的現有措施可以解決您的顧慮：

1. 稅務局承諾會在申請日期起計 21 個工作天內回應（即批准、修改或拒絕）分期付款申請。然而，我們建議納稅人（或其稅務代表）通過電話與稅務局進行非正式協商議案，及提供補充文件以爭取最好的方案；
2. 在等待稅務局出結果時，納稅人只需按其分期付款的建議繳稅；及
3. 在被拒絕的情況下，納稅人只需在拒絕函發出之日起 14 天內清繳稅款。換言之，納稅人不需急於在結果公佈前繳清稅款，需要有時時間尋找替代融資方案。

最後，分期付款計劃通常附帶緩繳暫繳稅申請。只要 i) 在申請到期日之前和 ii) 連同適當的證明文件（例如，財務報表的認證副本）提交，緩繳申請的成功機會通常非常高。因此，納稅人也可在分期付款建議中考慮緩繳暫繳稅的影響。

## 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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