

TAX UPDATES – AUGUST 2021

1. [Court Case Study] Are directors liable to penalty of non-compliance of a company? Does the law change in year 2021?

Koo Ming Kown & Murakami Tadao v CIR [HCIA1/2017]

Background of the case

The two appellants, being the directors of a Hong Kong incorporated company (“the Company”) signed on the profits tax returns (“PTRs”) for the Company. The Inland Revenue Department (“IRD”) subsequently reviewed the case and disallowed the deduction claims on management fees and legal and professional fees and raised additional tax assessments.

As the Company was lack of financial resources, it did not settle the outstanding tax liabilities in the full amount and was subsequent wound up pursuant to a petition brought by the Commissioner of Inland Revenue. As the IRD could not recover the whole amount of tax from the Company, it takes actions to recover more by imposing penalties to the directors of the Company as they were the signatories of the PTRs pursuant to Section 82A(1)(a) of the Inland Revenue Ordinance.

	Held in favour of
Board of Review	Commissioner of Inland Revenue
Court of First Instance (“CFI”)	The Directors
Court of Appeal (“COA”)	The Directors
Court of Final Appeal	In progress

The judges of both CFI and COA held in favour of the directors on the basis that it was the corporation, as the taxpayer, which is the only person obliged under the law to file a PTR. The officers of the corporation should not be liable to file an incorrect tax return.

The Commissioner of Inland Revenue has appealed against the decision of COA and the final decision is yet to come.

Points to note

While pending the final results from the Court of Final Appeal, the good old days for PTR signatories has been past. In March 2021, the legal framework for tax filing has been revised.

The concept of “Service Provider” has been introduced. New Penalty provisions have been introduced against Service Providers who have committed certain offences without reasonable excuse when they file the tax return for the taxpayers (i.e., the corporation).

Service Provider is currently restricted to the person who signed on the tax return on behalf of the corporation. Tax representatives are currently not considered as Service Provider. However, we are aware that some of the professional firms (e.g., company secretarial firms) would also sign the tax returns on behalf of their clients. As such, they should be aware of potential legal consequences for any non-compliance in the tax return filing.

In view of the attitude of the IRD in the above court case, we reasonably believe that the IRD would exercise its rights to impose penalty on the Service Provider when it could not recover the whole amount of outstanding tax liabilities from the corporation. The penalty will now be extended to individual level (i.e., officer of the corporation) rather than limited to the taxpayer itself (i.e., the corporation).

On a separate matter, section 429(1) of the Hong Kong Companies Ordinance, Cap. 622 (“CO”) stipulates that a company’s director must, in respect of each financial year, lays before the company’s annual general meeting, a copy of the reporting documents (i.e., financial statements) for the financial year within the period specified in Section 431 (e.g., 9 months after the end of that accounting reference period for private company).

Although company’s directors would not be personally liable to penalty due to incorrect tax filing if they are not the signatories; they could be liable to a fine of up to HK\$300,000 if they fail to take all reasonable steps to secure compliance with Section 429(1) of the CO.



2. [Carried Interest Tax Concessions] Hong Kong Monetary Authority issued a guideline on fund certification

As a recap, our tax updates in January 2021 have introduced the proposed tax concession regime for carried interest. The concessionary tax treatment for carried interest is effective starting from 1 April 2020, and will provide for a 0% tax rate for qualifying carried interest.

On 16 July 2021, the Hong Kong Monetary Authority (“HKMA”) issued a guideline on the certification of funds under Section 16D to the Inland Revenue Ordinance (“IRO”) in relation to tax concessions for carried interest.

Application for Fund Certification

A fund is required to apply for Certification from the HKMA for each relevant Year of Assessment to claim tax concessions on eligible carried interest receipt. The documents required for application for Certification including (i) a completed “Certification Application Form” and (ii) the required supporting documents, including an auditor’s report. The application should be submitted on or before the below applicable deadline, which is the same date as the Profits tax filing deadline: -

Accounting year-end date falling within:	Deadline
1 April to 30 November	2 May in the following year
1 December to 31 December	15 August in the following year
1 January to 31 March	15 November in the same year

Pre-application screening (optional)

In case where a fund would like to assess whether it would meet the criteria for certification, it could apply for pre-application screening. The pre-application screening is intended to provide an indication of whether a fund could meet the criteria in the actual certification process. The screening is optional and will not affect the outcome of the actual certification process.



Points to note

For carried interest tax concession, the critical requirements on the fund is that it had to qualify for Hong Kong Profits Tax exemption. Please refer to our article (<https://henrykwongtax.com/home/article/hong-kong-tax/offshore-fund-exemption/>) for more details.

Before certification from the HKMA, fund managers perform tax study on whether their funds qualify for Hong Kong Profits Tax exemption. Otherwise they may expose the funds into Hong Kong Profits Tax liabilities. There has been a misconception that carried interest tax concession only applies to Hong Kong Limited Partnership Fund. Indeed, it applies to overseas-domiciled fund (e.g., Cayman SPC) as well as long as the fund exemption is satisfied.

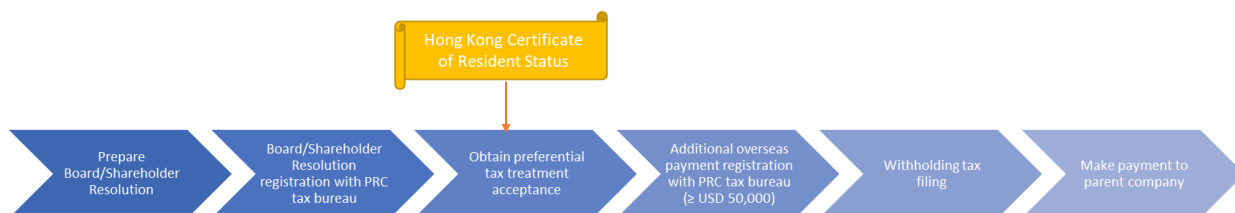
Where a fund has satisfied the requirements, the HKMA will endeavour to, within **2 months** after receiving all the required information and documents, issue the Certification to the fund and inform the IRD of the issuance of the Certification. As such, if the fund would like to elect for the tax concession for carried interest, it should make sure that all required documents will be ready before the deadline.

Please note that the certification by the HKMA does not mean that the fund is automatically entitled to the tax concession under the IRO. The IRD will take into account all relevant provisions under the IRO and may request taxpayer to supply further information and documents in processing the claim for tax concession.

3. Relaxation of Procedures of claiming treaty benefits in the People's Republic of China (“PRC”)

In October 2019, the State Taxation Administration (“STA”) issued Administrative Measures on Non-resident Taxpayers Claiming Tax Treaty Benefit (STA Public Notice [2019] No.35 (“PN 35”)), which took effect from 1 January 2020. The application procedures of claiming tax treaty benefits in the PRC by non-resident has changed from “Record-filing Procedure” (備案制) to “Retaining Documents for Inspection Mechanism” (備查制). In particular, non-resident taxpayers can claim the tax treaty benefits provided that they have collected and retained relevant supporting documents for future inspection by the PRC tax authorities.

The whole application procedure should take around one month. The procedures are shown as below:



Article 7 of PN 35 stipulates that the documents required to be retained include non-resident taxpayers’ Certificate of Resident Status (“CoR”) for the current or previous calendar year where dividends are derived, resolution of the board of directors/shareholders. Although the non-resident taxpayers are not required to submit the CoR by the time of the dividend remittance; the CoR should be in place for inspection by the PRC tax authorities anytime after the remittance.

As such, the non-resident taxpayers are still responsible for making appropriate self-assessment on their treaty benefit eligibility and retaining relevant documents (e.g., CoR) under the new application system. If they fail to fulfil the requirements, the PRC tax authorities may reject their application for treaty benefit and request them to settle the underpaid withholding tax plus late payment surcharge.

Points to note

When applying for the treaty benefit (e.g., preferential withholding tax rate on dividends) in the PRC, the applicants would also have to submit the latest audit report. Please note that the PRC company is required to retain 10% of the annual statutory net profit (after offsetting any prior years’ losses) as statutory reserve funds before the dividend distribution under the PRC Company Law. In addition, the details of the net profits and statutory reserve funds are required to be disclosed in the resolution of the board of directors/shareholders.

If you would like to know more information related to the application, please feel free to contact us.



稅務資訊

- 2021年8月號

1. [法院案例研究] 董事是否會因公司不遵從規定而受到處罰嗎？相關法例有否在2021年作出調整？

Koo Ming Kown & Murakami Tadao v CIR [HCIA1/2017]

案例背景

兩名上訴人為一家香港註冊成立公司的董事，曾代表香港公司簽署利得稅報稅表。香港稅務局在審閱公司的報稅表時不批准公司管理費用及法律專業費的稅務扣除，並發出了補加評稅通知書。

由於該公司缺乏財務資源，未能全額償還未繳稅項債務，因此須根據稅務局局長提出的呈請進行清盤。由於稅務局未能向該公司追討全額稅款，故採取行動向該公司董事（報稅表的簽署人）根據《稅務條例》第82A(1)(a)條處以罰款。

	獲判勝訴
審查委員會	稅務局局長
原訟法庭	董事
上訴法庭	董事
終審法院	候審中

原訟法庭和上訴法庭均裁定兩名董事勝訴，原因是公司在法律上是唯一有義務提交報稅表的納稅人，因此公司的高級人員不應對提交不正確的報稅表承擔罪責。

稅務局局長已就上訴法庭的裁決提出上訴，最終裁決尚未作出。



注意事項

在等待終審法院的最終裁決公佈之際，報稅表簽署人不用負上責任的情況已經過去了。在2021年3月，納稅申報的法律框架已進行了修訂。

“服務提供者”的概念正式推行。對於在為納稅人（即公司）提交納稅申報表時沒有合理辯解而違犯稅務條例的服務提供者，已引入新的罰款條文。

服務提供者目前僅限於代表公司在報稅表上簽字的人。稅務代表目前未被視為服務提供者。然而，我們得悉一些專業服務公司（例如公司秘書）也會代表客戶簽署報稅表。因此，他們應該留意任何不遵守納稅申報表的潛在法律後果。

鑑於稅務局在上述法庭案件中的態度，我們相信當稅務局無法向公司追討全部未繳稅款時，將行使其對服務提供者處以罰款的權利。罰款現在將擴大到個人層面（即公司的高級人員），而不是僅限於納稅人本身（即公司）。

此外，香港公司條例第429(1)條Cap 622規定，就每個財政年度而言，公司董事必須在第431條規定的期間內（即私人公司的財政年度結束後9個月內）在公司年度股東大會上提交該財政年度的報告文件（即審計報告）。

雖然公司董事個人現時若不是簽署者的話不會因稅務申報不正確而受到處罰，但如果他們未能採取一切合理措施確保遵守《公司條例》第429(1)條，他們可能會被處以高達港幣300,000元的罰款。

2. [附帶權益的稅務寬減] 香港金融管理局公佈相關的基金核證指引

回顧一下，我們在2021年1月的稅務資訊中介紹了擬定附帶權益稅務優惠。附帶權益稅務優惠已在2020年4月1日起生效，並將為符合條件的附帶權益提供0%的稅率。

香港金融管理局（“金管局”）在2021年7月16日根據《稅務條例》第16D條，公佈與附帶權益的稅務寬減相關的基金核證指引。

基金核證申請

基金須就每個相關課稅年度向金管局申請核證，以就合資格附帶權益收據申請稅務寬減。申請核證所需的文件包括(i)一份完整的“核證申請表”和(ii)所需的證明文件，包括審計報告等。申請應在以下相應的截止日期或之前提交，該截止日期與利得稅申報截止日期大致相同：-

會計年度結束日期在以下範圍內：	截止日期：
4月1日至11月30日	次年5月2日
12月1日至12月31日	次年8月15日
1月1日至3月31日	同年11月15日

申請前之初步檢查（非必需）

如果基金希望評估其是否符合核證標準，可以進行申請前的初步檢查，旨在評估基金成功申請的機會。此初步檢查不是必需的，而且不會影響實際認證過程的結果。

注意事項

關於附帶權益的稅務寬減，對基金關鍵要求是它必須符合香港利得稅豁免資格。請參閱我們的文章瞭解更多詳情吧。

(<https://henrykwongtax.com/home/article/hong-kong-tax/offshore-fund-exemption/>)

在金管局的核證之前，基金經理需就其基金是否符合香港利得稅豁免資格進行稅務評估。否則，基金將有可能涉及香港利得稅之稅務風險。有一種誤解的說法是，附帶權益的稅務寬減只適用於香港有限合夥基金。但事實上，它同樣也適用於在海外註冊基金（如開曼群島獨立投資組合公司）。

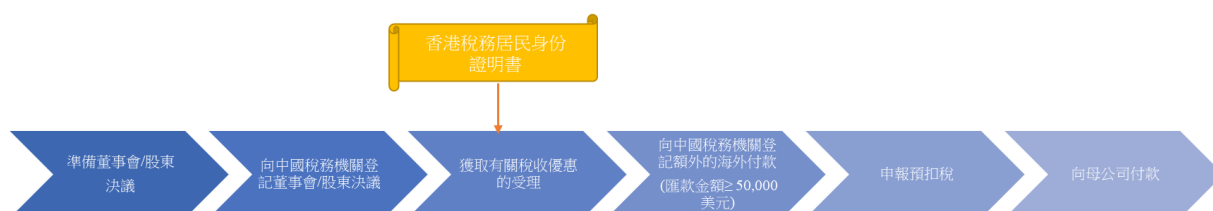
如基金已符合規定，金管局在收到所有所需資料後**2個月**內，向該基金發出證明書並通知稅務局。因此，如果基金希望選擇附帶權益的稅務寬減，則應確保在截止日期前準備好所有必需的文件。

請注意，金管局的核證並不表示基金自動享有《稅務條例》下的稅務優惠。稅務局會考慮《稅務條例》的所有有關條文，並可要求納稅人在處理稅務寬減申索時，提供進一步資料。

3. 中國國家稅務總局放寬非居民納稅人享受協定待遇申請程序

國家稅務總局在2019年10月發佈了《非居民納稅人享受協定待遇管理辦法》(國家稅務總局公告2019年第35號「35號公告」)，並已在2020年1月開始實行。其中，非居民納稅人向國家稅務總局申請享受協定待遇的制度由「備案制」轉為「備查制」。非居民納稅人在申請享受協定待遇前須確保已搜集及保存所有相關證明文件，以供中國稅務機關日後審查之用。

整個申請程序預計需一個月的時間。申請程序如下：



35號公告第七條中列明需保存的文件包括非居民納稅人獲得股息收入的當年度或上一年度的稅務居民身份證明書、董事會或股東決議等。雖然非居民納稅人無需在股息匯款時提交稅務居民身份證明，仍須在匯款前申請稅務居民身份證明書以供中國稅務機關在股息匯款後可隨時審查。

因此，在新的申請享受協定待遇制度下，非居民納稅人仍有責任就是否符合享受協定待遇的條件進行自我判斷及保存有關文件(例如稅務居民身份證明書)。如他們未能符合有關要求，中國稅務機關或會拒絕他們享受協定待遇的申請並要求他們補納少付的預扣稅並追加罰款。

注意事項

在申請中國享受協定待遇(如優惠股息預扣所得稅稅率)時，申請人需提交最新年度的審計報告。請留意，根據《中華人民共和國公司法》，中國企業在分派股息前，需從當年稅後利潤中(減去往年度虧損後)撥出百分之十為法定盈餘公積。此外，稅後利潤及法定盈餘公積的明細亦需在董事會或股東決議中披露。

如您有興趣了解更多有關享受協定待遇申請的資訊，歡迎隨時與我們聯絡。



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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