

Tax Updates

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Payment for “going away quietly” NOT subject to Salaries Tax

Commissioner of Inland Revenue v Poon Cho-ming, John [FACV 1/2019]

Background of the case

The taxpayer has been employed as the Group CFO and executive director of a Hong Kong listed company since 1999. In 2008, his contract was terminated by his employer with immediate effect. The taxpayer refused to accept the termination and planned to take legal actions. After hard negotiations, both parties agreed on the termination terms under a “Separation Agreement”.

Under the “Separation Agreement”, a total of six sums would be made by the employer to the taxpayer, out of which the taxability of the following two sums was submitted to courts for determination:

- a. Payment in lieu of a discretionary bonus (“Bonus”); and
- b. A notional share option gain, which was derived from early exercise of share option which was not supposed to be vested as at the employment termination date (“Share Option Gain”).

The judges of both BoR and CFI held in favour of the CIR on the basis that the termination payment were related to the employment services of the taxpayers. However, the decisions were overturned by COA and further confirmed by CFA because of the payments were made “for something else”.

It is considered that the payments were made due to the legal actions proposed by the taxpayer and were made to let the taxpayer “go away quietly”. From our perspective, the timing of payment agreement was of paramount importance. As the payment was negotiated and concluded after the termination decision was held, it was not related to the past employment of the taxpayer.

	Held in favor of
Board of Review (“BoR”)	Commissioner of Inland Revenue (“CIR”)
Court of First Instance (“CFI”)	CIR
Court of Appeal (“COA”)	The Taxpayer
Court of Final Appeal (“CFA”)	The Taxpayer

Lastly, the CFA considered the below arguments are also relevant:

Bonus: The amount was determined arbitrarily and there was no evidence to support that it was related to the employment performance. The bonus review process was after the termination date;

Share Option Gain: The acceleration of vesting was obviously not for the employment performance of the taxpayer, but an incentive for the taxpayer to “go away quietly”.

Points to note

We consider that the facts that the employer is a listed entity and the important role undertaken by the taxpayer are two exceptional factors giving rise to the favorable decisions by the CFA.

Having said that, taxability of termination payments are often controversial which implies room for tax planning. While the “substance-over-form” principle has been used in this court case, the way in which the employment contract and other relevant agreements are drafted are usually the first reference point of the Inland Revenue Department (“IRD”).

On the other hand, besides the payments highlighted in this case, some other termination payments like payment for non-competition after the employment contracts are usually treated as capital in nature and thus non-taxable. The court decision has explicitly pointed those payments “for something else” should not be subject to Hong Kong Salaries Tax, while the employer may still pursue tax deduction on such termination payments.

In view of the above, it is recommended that, taxpayers should ensure that accurate wordings and all the relevant details should be in place when the employment contracts and termination agreements are drafted. Otherwise, the potential non-taxable claim of termination payments would be missed out. You are advised to consult with your tax advisors if necessary.



8.25% Tax Rate available for Hong Kong Insurance Business corporations

Effective from 19 March 2021, the Inland Revenue (Amendment) (Profits Tax Concessions for Insurance-related Businesses) Ordinance 2020 aims to extend the concessionary profits tax rate of 8.25% to the following insurance-related businesses:

- 1. all general reinsurance business of a direct insurer;
- 2. certain types of general insurance business of a specified insurer; and
- 3. certain types of insurance brokerage business of licensed insurance broker companies.

The new bill is going to extend the tax benefits to a significant portion of the insurance-related business corporations in Hong Kong. Having said that, the following five types of risk and liabilities are excluded from the tax concessions:

- 1. Health Risk
- 2. Mortgage Guarantee Risk
- 3. Motor Vehicle Damage Risk
- 4. Employees Compensation Liability
- 5. Owners’ corporation third party liability

In order to qualify for the concessionary regime, the taxpayers must meet the below substantial activity threshold requirements:

Points to note

We welcome the New Bill as it is going to enhance the competitiveness of Hong Kong Insurance Business. We expect more corporations to relocate their hubs from other low-tax jurisdictions to Hong Kong given the attractive tax rate.

Based on our observations, most of the corporations maintained sufficient number of personnel and incurred adequate amount of operating expenses. The only question is that insurance agents are generally self-employed rather than employed as a full-time in practice in Hong Kong. Turning the insurance agents into full-time employees may significantly increase the tax liability of these “employees”. As such, it depends on whether the IRD would apply strict rules on the Minimum Employee Requirement.

The only question left is whether the insurance products offered fall within the above excluded lists. While five types of products are specifically excluded, we consider that quite a number of insurance products in the market may still qualify for the tax concession. We would be pleased to assist you to examine whether any of your current income is eligible for the 8.25% tax rate.

	Minimum	
	No. of full-time qualified employees in Hong Kong	Operating expenditure incurred in Hong Kong
Specified insurer – Mutual Insurance corporation	4	HK\$2 million
Specified insurer – Non-Mutual Insurance corporation	7	HK\$4 million
Insurance brokerage company	3	HK\$1 million

Profits Tax Treatment of Leases accounted for under HKFRS 16

On 17 September 2020, the IRD published guidance on tax treatment of leases accounted for under Hong Kong Financial Reporting Standard (“HKFRS”) 16.

Upon the adoption of the HKFRS 16, lessee is required to recognize the right-of-use (“ROU”) asset and lease liability in its statement of financial position and recognize depreciation of ROU asset and interest expense on lease liability in its statement of profit or loss and other comprehensive income.

Under the guidance, lease expenditures could be deducted in one of the following two approaches:

- a) tax deduction in respect of the depreciation of ROU asset and interest expense on lease liability charged to the profit and loss account in accordance with HKFRS 16; or
- b) tax deduction in respect of the agreed contractual lease payments.

The above two approaches will eventually result in the same tax implications over the whole lease term, even though the total amount of depreciation of ROU and interest expense on lease liability may not equal the contractual lease payments for one

particular year of assessment. It simply reflects a matter of timing difference. As such, both approaches will be accepted by the IRD.

Points to note

While many of us should be familiar with the basic tax treatments under HKFRS 16, we would like to draw your attention to the following complex situations:

	First Adoption of HKFRS16	Adjustments in Retained Earnings Carried Forward
1		
2	Impairment loss on ROU asset	Deductible straight-line over the lease terms

Tax adjustments must be made in the above situations. Please feel free to contact us for the profits tax treatment tailor-made to your situations if you encounter the above situations.



因「靜靜離開」而得到的款項 不須課薪俸稅

Commissioner of Inland Revenue
v Poon Cho-ming, John [FACV 1/2019]

案例背景

納稅人自1999年起受聘於一家香港上市公司的集團財務總裁及執行董事。在2008年，其僱主無故終止納稅人的僱傭合約。納稅人拒絕接受是次解僱，並打算採取法律行動。經過艱苦的談判後，雙方簽訂《離職協議》達成終止僱傭合約的所有條款。

根據《離職協議》，僱主需要向納稅人支付六筆款項，其中以下兩筆款項被提交至法院，就納稅人是否需要課稅進行裁決：

- 替代酌情花紅的款項（“花紅”）；和
- 因提前行使認股權而得到的股份認購權收益，而該認股權在納稅人被解僱時理應還未到期（“認股權收益”）。

獲判勝訴

審查委員會

稅務局局長

原訟法庭

稅務局局長

上訴法庭

納稅人

終審法院

納稅人

審查委員會和原訟法庭均裁定稅務局局長勝訴，原因是以上兩筆款項均與納稅人的僱傭服務有關。然而，裁決被上訴法庭推翻，並得到終審法院的進一步確認，判定該兩筆款項是「因其他目的」而支付的。

根據終審法院的最終裁決，僱主向納稅人支付款項的目的是要納稅人放棄採取法律行動，並讓他「靜靜離開」。本所認為達成的支付以上兩筆款項的時間是至關重要的。由於以上兩筆款項款項是在僱主通知納稅人終止僱傭關係後才開展去談判及達成協議的，它們與納稅人過去的工作無關。

最後，終審法院概括了以下論點：

花紅：決定花紅的程序是納稅人被解僱後才開始。另一方面，該花紅金額是隨意決定的，並沒有證據證明是與工作表現掛鉤；

認股權收益：「加速」行使認股權顯然不是由於納稅人的工作表現，而是因為希望納稅人「靜靜離開」。

■ 注意事項

我們認為，僱主是上市實體及納稅人在公司所擔任重要角色這兩個事實是導致終審法院裁定納稅人勝訴的主要因素。

話雖如此，解僱補償金的可徵稅性極具爭議，也意味著其有稅務籌劃的空間。雖然上述法庭案件採用了「實質重於形式」的原則，但香港稅務局（“稅務局”）的首要參考基準是僱主草擬的僱傭合約及其他相關協議的條款。

另一方面，除了上述法庭案件討論的解僱款項外，其他解僱款項，例如競爭限制條款的相關收入，通常被視為資本性質而無需納稅。法院的裁決明確指出，「因其他目的」而支付的款項不須納入薪俸稅，而僱主仍可就此類解僱款項進行扣稅。

鑑於上述情況，我們建議納稅人應確保僱傭合約和解僱協議上所用的措辭準確，並提供所有相關細節，否則納稅人可能錯過「非應課稅解僱款項」的索賠機會。如有需要的話，請向您的稅務顧問查詢。



8.25% 的稅率可適用於 香港保險業務法團

由 2021 年 3 月 19 日起，《2020 年稅務（修訂）（與保險有關的業務的利得稅寬減）條例》旨在將 8.25% 的優惠利得稅稅率擴大至以下與保險相關的業務：

1. 直接保險人的所有一般再保險業務；
2. 指明保險人的特定一般保險業務；和
3. 持牌保險經紀公司的特定保險經紀業務。

新法案將把稅率優惠擴大到香港一部份與從事保險業務相關的公司。儘管如此，以下五類風險或法律責任的業務不包括在稅率優惠範圍內：

1. 健康風險
2. 按揭擔保風險
3. 汽車損壞風險
4. 僱員補償法律責任
5. 業主立案法團的第三者法律責任

納稅人必須滿足以下重大商業活動門檻要求，以享受新法案的優惠稅率：

■ 注意事項

我們非常歡迎新法案，因為它將會提升香港保險業的競爭力。鑑於香港擁有具吸引力的稅率，我們預計會有更多公司將其樞紐從其他低稅管轄區遷往香港。

根據我們的觀察，大多數保險經紀人和指定保險公司均在香港保留了足夠的人員及產生足夠的營運開支。唯一的問題是現時大部份保險經紀通常以自僱（而不是全職員工）的形式與保險公司合作。把這些員工轉為全職員工或大幅增加這些員工的稅負。因此，我們必須留意稅務局是否會嚴格執利全職員工的規定。

最後要思考的問題是所提供的保險產品是否屬於上述排除的清單。雖然以上五大保險業務被排除在外，本所認為市場上還是有一部份的產品可以享受稅務率優惠。本所很樂意協助您檢查您當前的收入是否享受 8.25% 的稅率優惠。

最低要求

	在香港具有資 格的全職員工 人數	在香港產生的 營運開支
屬相互保險法團的 指明保險人的合資格活動	4	200 萬港元
並非相互保險法團的 指明保險人的合資格活動	7	400 萬港元
持牌保險經紀公司的 合資格活動	3	100 萬港元

《香港財務報告準則》第16號引伸的租賃支出之稅務處理

香港稅務局於2020年9月17日發布了關於《香港財務報告準則》第16號引伸的租賃支出之稅務處理指引。

當採納《香港財務報告準則》第16號後，承租人須在資產負債表中確認使用權資產和租賃負債，並在損益及其他全面收益表中確認使用權資產的折舊和租賃負債的利息費用。

根據指引，租賃支出可以透過以下其中一種方法扣除：

- 直接扣除損益表內所根據《香港財務報告準則》第16號入賬的使用權資產折舊和租賃負債利息支出；或
- 直接扣除租約商定的租賃支出。

雖然在某一個特定的課稅年度上，使用權折舊額和租賃負債利息支出總額未必等於租賃支出，但在整個租賃期內總共的扣稅金額應該是一致的。兩個方法的

不同只是時間差異的問題而已，所以稅務局均會接受。

■ 注意事項

雖然我們相信大部份人已經熟悉《香港財務報告準則》第16號下的基本稅務處理，但本所仍想特別提及以下複雜的情況：-

首次採用《香港財務報告準則》第16號

期末未分配利潤的調整

2 使用權資產的減值損失

按租賃年期以直線法扣除

以上情況下均必須作出納稅調整。如果您遇到上述情況，請隨時聯繫我們。


Contact Us.

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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