Tax Updates

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01

Taxability of Royalty Income generated by R&D activities under Cost Contribution Arrangement

The R&D development in Hong Kong has been rapid with the substantial support from the government in recent years. Many fintech and biotechnology corporations have been set up in Science Park and Cyberport. Having said that, as Hong Kong is just a small city, it is common that Hong Kong entity will only carry out part of the R&D project while other entities in the multi-national group (e.g., The PRC, Taiwan, the US) will also take part in the same R&D projects.

First of all, it is common for all the R&D entities in the Group to enter into the Cost Contribution Arrangement (CCA) such that the proportionate R&D contributions borne by each entity should be determined based on its proportionate shares of benefits. In this regard, the IRD has emphasised in the 2020 Annual Meeting with HKICPA that expected benefits at the beginning of the CCA should be adopted rather than the actual results in the determining the contributions (costs) made by each group entity.

Secondly, no matter the Multi-National Corporations set up a Hong Kong subsidiary or a Hong Kong branch, under a CCA arrangements, part of the royalty income derived from the Intellectual Property (IP) would be subject to Hong Kong Profits Tax as long as the Hong Kong Subsidiary / Branch has participated in the value-creation process under either one of the following sections of the IRO:

Section 50AAK: A Non-Hong Kong resident person who had a Hong Kong permanent establishment was regarded as carrying on trade, profession or business in Hong Kong for the purpose of Hong Kong Profits Tax

Section 15(1)(bc): Any income received by a person for the right to use the IP generated by R&D activity where the tax deduction has been claimed on the costs of R&D activity under Section 16B of the IRO.

Section 15F: Please refer to here for details.

Points to note

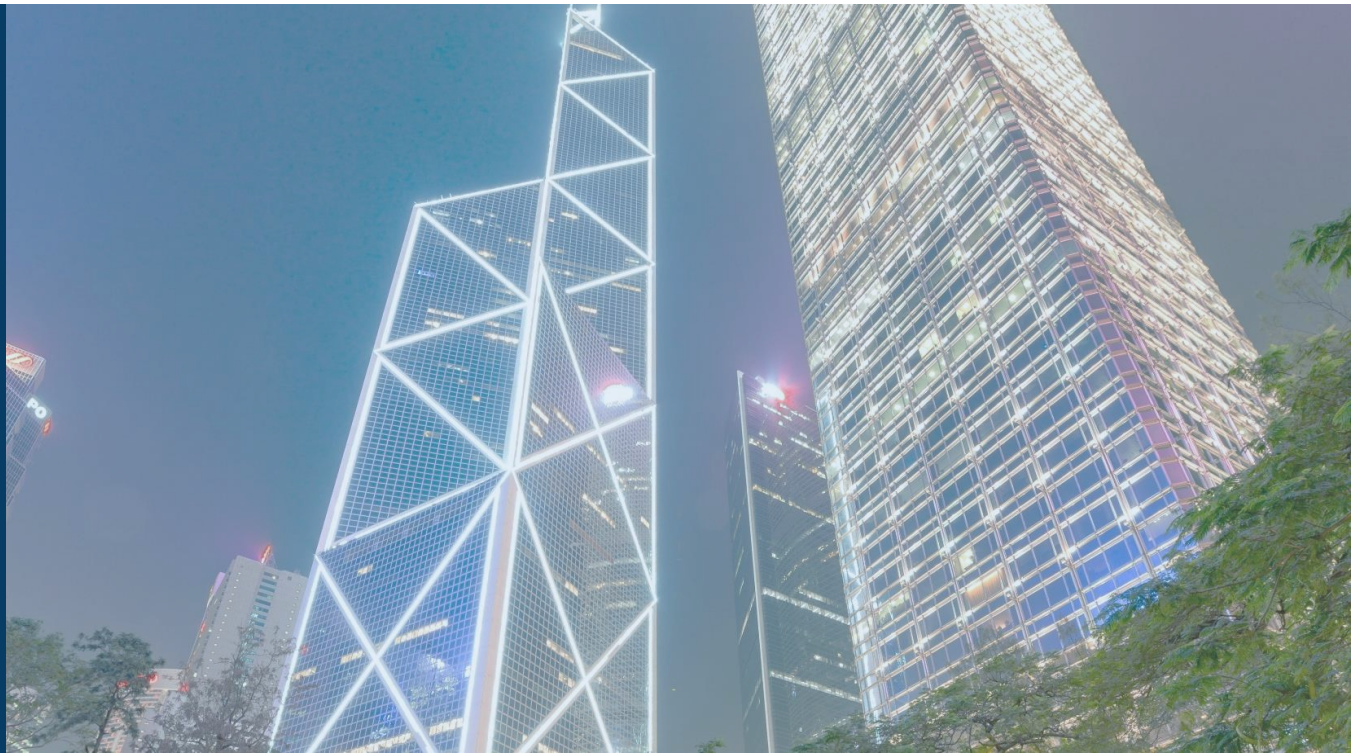
We are aware that Multi-National Corporations in general lack awareness of special tax rule on R&D rule in Hong Kong, no matter on taxability of income generated from R&D activity or tax deduction on R&D expenses.

On one hand, they should build up the awareness to prepare a proper Cost Contribution Arrangement (CCA) at the beginning of the R&D project. More importantly, they should study whether their existing CCA fulfills the requirements set under DIPN 55.

More importantly, we are aware that a lot of Asian Group (e.g., the PRC, Taiwan) has assigned a Hong Kong group company to bear the R&D costs and become the IP owner to take up the income from the IP generated from the R&D activity, most probably due to the low Profits Tax rate in Hong Kong.

However, under most circumstances, none of the relevant R&D activities take place in Hong Kong. In other words, the Hong Kong group company only bears the financial burden of the R&D activity but sub-contracted the R&D work to non-Hong Kong group entities. In this regard, it is highly unlikely that the R&D expenses paid by the Hong Kong company to overseas group entities would be eligible to tax deduction under Section 16B of the IRO.

The Hong Kong company may end up paying substantial amount of tax in Hong Kong as a substantial portion of R&D costs may be disallowed by the IRD. While the Hong Kong entity may pursue offshore claim on income generated by the IP on the basis that all the relevant R&D work are performed outside Hong Kong, it may not be the best option under the latest BEPS Development.



02

Taxability of Greater Bay Area Tax subsidy and Tax Credit Claim in Hong Kong

In the 2020 Annual Meeting between the IRD and HKCIPA, the following two issues about the Greater Bay Area ("GBA") have been discussed which is going to bring significant impact to Hong Kong people travelling frequently to GBA to work:-

WHETHER THE GBA TAX SUBSIDY WILL BE SUBJECT TO HONG KONG SALARIES TAX

Based on the latest arrangements, an individual has to be employed by a PRC entity in order to benefit from the GBA Tax Subsidy. In other words, the individual will be under Non-Hong Kong employment. In case the individual has to travel between the PRC and Hong Kong to work, under normal circumstances, the GBA Tax Subsidy should be attributable to the employment services of the individual in the PRC, and thus should not be chargeable to Hong Kong Salaries Tax under Section 8(1A)(a) of the Inland Revenue Ordinance.

WHAT SHOULD BE THE APPROPRIATE IN HONG KONG

It is a normal practice that the GBA Tax Subsidy would only be granted several months after the PRC Individual Income Tax Payment is made. In other words, it is likely that the Hong Kong Individual will pay higher amount of Individual Income Tax first, while receiving the subsidy / refund later. In case Tax credit claim is made on the original higher amount of PRC Individual Income Tax paid, the taxpayer has the obligation to notify the IRD within 3 months after receipt of the GBA Tax subsidy and pay back the Hong Kong Salaries Tax arising from over-claimed tax credit (if any).

Points to note

As COVID-19 has already impacted us for more than 1 year, we can observe that an increasing number of Hong Kong Individuals have decided to work in the PRC continuously for a couple of months without travelling back to Hong Kong due to travel restrictions. As they cannot travel back to Hong Kong every day, they should commence to pay attention to their PRC Individual Income Tax exposure.

In order to encourage their staff to work in the PRC, it is a common practice that the employers of these individuals would bear the additional tax liabilities of these individuals so that the after-tax benefits of the employees would not change. This is commonly referred to as the Tax Equalisation Exercise.

Their first consideration would be whether the GBA Tax Subsidy is available to their staff, which will effectively reduce the amount of PRC Individual Income Tax liabilities to similar level as their current Hong Kong Salaries Tax. Each of the nine PRC cities in the GBA has its own rules and procedures. Individuals should study carefully whether they qualify as High-end Talent or Talent in Short Supply in the city they are working at.

The GBA Tax Subsidy is going to provide significant relief to Hong Kong talents working in the GBA. Stay tuned for our next update on the detailed requirements and the application procedures.

Points to note (Cont'd.)

Their second consideration is Calculation of Correct PRC Individual Income Tax liabilities, which could depend on a number of the below factors:-

1. Whether the Individual is domiciled in the PRC or not;
2. The number of days of residence of the staff in the PRC (< 90 days, 90 - 183 days, > 183 days);
3. Whether the Individual is a top management personnel or a normal staff, etc.

Different formulas apply under different situation. As such, it is important to consult with your tax advisors in the adopt the correct formula in calculating your PRC Individual Income Tax Liabilities and thus the extra costs to the Employers under Tax Equalisation Exercise.

Last but not least, the employers should also be aware of their Permanent Establishment (PE) Risk in the PRC due to the substantial activities performed by their staff in the PRC. The Corporate Income Tax Liabilities arising from PRC PE would far exceed the additional costs on Staff compensation under Tax Equalisation Scheme. Corporations should thoroughly examine Article 5 of Double Taxation Agreement between the PRC and Hong Kong on the definition of PE to structure their operation model.

03

Housing Benefits provided by third party to an employee

Section 9(1)(b) of the IRO defined income from employment to include the Rental Value of place of residence provided rent-free by the employer or its related company.

The question here is that, when a foreign employee is given a place of residence by the client during his / her business trip in Hong Kong, would the employee be subject to additional Hong Kong Salaries Tax liabilities due to the accommodation provided by the client assuming that the client is unrelated to the employer.

In the 2020 Annual Meeting between the IRD and HKICPA, the IRD has pointed out that a number of factors have to be considered in order to determine which company is the actual provider of the accommodation. It is difficult to draw a conclusion without having the case details.

In our opinion, one of the key factors would be whether the accommodation costs would be recharged by the third-party client to the employer of the foreign employee. In such case, the IRD may consider that the actual provider of the recommendation is the employer and thus the chance of charging Rental Value would be much higher.

Points to note

Housing benefits have always been an effective tax planning for the employers to save the Hong Kong Salaries Tax liabilities of their employees. Certainly directors of the corporation can also enjoy this benefit by residing in the director's quarters provided by the corporation.

Tax saving opportunity arises as the amount of taxable income (commonly referred to as Rental Value) of the employee could be significantly less than the amount of deductible expenses incurred by the Company. Rental Value is generally calculated as 4/8/10% of the employment income which could be significantly less than the actual rental expenses paid on the place of residence.

Having said that, the IRD has been applying strict approach in examining whether the employers have applied proper internal control in housing benefit policy. Fixed amount of housing allowance without checking the actual rental expenses borne by the employee would not benefit from the Rental Value Policy.

Employers are suggested to prepare a proper written housing benefit policy, proper rental payment claim form for circulation to their staff. The HR Department should also collate the tenancy agreements and rental receipts from their employees regularly.

Last but not least, many directors and shareholders who lived in the place of residence provided by their own company are unaware of their personal Hong Kong Salaries Tax liabilities. As the IRD is actively carrying out field audit and investigation on private companies and individuals in year 2021, taxpayers should not take the chance of tax evasion and should adopt remedial action immediately if necessary.

研發活動產生特許權收入的應納稅額成本攤分安排

香港研發活動近年來在政府大力支持下迅速發展，許多金融科技及生物科技公司已在科學園及數碼港成立。話雖如此，由於香港只是一個小城市，一般來說香港公司只會參與研發項目的部份工序，項目其餘的部份普遍由其他地區 (例如中國內地，台灣，美國) 的關聯公司負責。

首先，集團內所有研發項目會簽訂成本攤分安排，每間集團公司應該承擔的研發成本應根據其收益比例而確立。在這方面，稅務局在2020年與香港會計師公會舉行的週年會議上強調在確立每間集團公司承擔的研發成本時，應採取簽訂成本攤分安排時的預期收益，而不是其實際結果。

其次，無論跨國集團在香港設立子公司或分公司，在成本攤分安排下，只要香港子公司或分公司參與了無形資產價值創造過程，部份特許權使用費收入將因以下其中一條稅務條例繳納香港利得稅:

第50AAK條: 就徵收香港利得稅的目的而言，在香港設有常設機構的非香港居民均視為在香港經營貿易、專業或業務。

第15(1)(bc) 條: 若相關研發活動成本根據《稅務條例》第 16B條進行了稅收減免，因研發活動所產生的知識產權使用權而獲得的任何收入將需要繳納香港利得稅。

第15F條: 詳情請點擊這裡

注意事項

我們留意到跨國企業普遍缺乏對香港研發活動稅務政策的了解，這包括研發活動產生的應納稅額及研發費用的稅務扣減。

跨國企業在研發項目前期應已有意識準備合適的成本分攤安排。另一方面，企業應研究他們現有的成本分攤安排，是否能滿足釋義及執行指引 55下的要求。

更重要的是，我們留意到許多亞洲集團 (如中國，台灣) 已指定了由香港集團公司承擔研發費用，並成為知識產權的擁有者，及賺取日後研發活動產生的特許權收入，其中很大原因是因為香港的利得稅稅率較低。

然而，在大多數情況下，相關的研發活動並不是在香港進行。換言之，香港公司只是承擔研發活動的財務負擔，而實質研發工作則是由非香港集團公司進行。故此，香港公司支付給海外集團公司的研發費用極可能不符合《稅務條例》第 16B 條下的稅務扣減條件。

如稅務局拒絕扣減大部分研發成本，香港公司最終可能會在香港繳納大量稅款。雖然香港公司可以因為所有相關研發工作在香港境外進行，就其特許權收入提出離岸申索，但根據最新的稅基侵蝕與利潤移轉 (BEPS) 的發展，這可能不是最佳選擇。

02

大灣區稅收補貼及在香港申請稅務寬免安排

在稅務局於2020年與香港會計師公會舉行的週年會議上，他們討論了以下兩個有關大灣區補貼的問題，這些問題將對經常前往大灣區工作的香港雇員產生重大影響：-

大灣區的稅務補貼是否需繳納香港薪俸稅？

根據最新安排，個人必須受僱於中國公司才能享受大灣區稅收補貼。換言之，該雇員將屬於非香港受僱工作。如果雇員必須往返於中國和香港之間工作，在正常情況下，大灣區稅收補貼應歸屬於個人在雇員的就業服務收入，因此根據《稅務條例》第8(1A)(a)條，大灣區稅務補貼是不需繳納香港薪俸稅。

在香港有哪些適當的申請稅務寬免措施？

在現時的做法，大灣區稅收補貼只會於在繳納中國個人所得稅幾個月後才完成審批。換言之，香港雇員先要繳納較高的個人所得稅後才會收到補貼或退稅。如果之前對已繳納的中國個人所得稅的較高金額申請稅務寬免，納稅人有義務在收到稅收補貼後的3個月內通知稅務局，並退還因補貼而產生的額外香港薪俸稅。

注意事項

疫情已影響我們超過一年，由於防疫措施的限制，我們觀察到越來越多的香港人決定在中國內地連續工作幾個月而不會中途返回香港。由於他們不能每天往返香港，他們應該開始注意自己的中國個人所得稅風險。

為鼓勵其員工在中國工作，雇主通常會承擔這些個人的額外稅務責任，從而使雇員的稅後福利不會產生變化，這做法通常被稱為稅負平衡計劃。

他們首先應該考慮的是大灣區稅收補貼可否供其員工使用，這將有效地將其員工中國個人所得稅的應繳稅額減少至與目前香港薪俸稅相近的水平。大灣區九個城市均有其稅務法則和程序，雇員應慎重考慮其是否符合所在城市的高端人才或緊缺人才要求。

大灣區稅務補貼將為在大灣區工作的香港人才提供顯著的稅務優惠，我們將詳細說明其要求和申請程序，請繼續關注我們下一次的稅務資訊。

第二個考慮因素是計算正確的中國個人所得稅應繳稅額，這取決於以下幾個因素：

1. 個人是否在中國有住所；
2. 工作人員在中國內地的居住天數（<90天，90-183天，>183天）；
3. 該個人是高級管理人員還是普通員工等

不同的情況將適用不同的公式。因此，我們建議您應諮詢您的稅務顧問以採用正確的公式來計算中國個人所得稅應繳稅額以及在稅負平衡計劃下雇主的額外成本。

最後，由於員工在中國進行的大量活動，雇主還應了解其在中國的常設機構風險。中國常設機構產生的企業所得稅應繳稅負遠遠超過稅負平衡計劃下員工薪酬的額外成本。公司應審視《中港避免雙重徵稅協定》第5條關於常設機構的定義，以規劃其運營模式。

03

第三方向員工提供的住房福利安排

根據《稅務條例》第 9(1)(b) 條，應課稅入息包括雇主或其關聯公司提供免租金的居住地的租金價值。

這裡的問題是，當外籍雇員在香港出差期間獲第三方客戶提供居住地點的情況下，雇員是否會因客戶提供的住宿而承擔額外的香港薪俸稅稅負。

在稅務局於2020年與香港會計師公會舉行的週年會議上，稅務局指出在確定哪一家公司是住宿的實際提供者時必須考慮多項因素。故此，在沒有案例細節的情況下很難下結論。

我們認為關鍵因素是相關住宿費用是否會由第三方客戶向外籍雇員的雇主收取。在這種情況下，稅務局可能會認為雇主是實際提供住宿，向雇員收取租金價值的機會較高。

注意事項

房屋租金補貼一直是雇主為節省雇員香港薪俸稅的有效方法。當然，公司董事也可以通過居住在公司提供的住宿來享受這項福利。

由於雇員的應課稅收入（通常稱為租金價值）大大低於公司可扣除的費用金額，這可節省員工在香港的稅務負擔。租金價值通常按工資收入的4/8/10%計算，可能遠低於實際居住的租金成本。

儘管如此，稅務局一直以嚴格的方式審查雇主是否在房屋福利政策中應用了適當的內部控制。雇主需定時查證租約及租金收據，核對雇員是否曾實際支付了租金。

我司建議雇主準備一份正式的房屋福利政策、制定適當的租金補貼申請程序。人力資源部亦應定期核對雇員的租約及租金收據。

最後，許多居住在自己公司提供的居所的董事和股東並不知道他們個人的香港薪俸稅責任。由於稅務局在2021年積極對私人公司和個人進行實地審計和調查，納稅人不應冒險逃稅，如有需要應立即採取補救措施。

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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