Tax Updates

January 2022

CHENG & CHENG LIMITED
Certified Public Accountants 鄭鄭會計師事務所有限公司

In our January 2022 edition, we will continue to study three issues highlighted in the 2020 Annual General Meeting between the Hong Kong Institute of Certified Public Accountants ("HKICPA") and the Inland Revenue Department ("IRD")

在這2022年1月的通訊中，我們將繼續探討香港會計師公和香港稅務局在2020年周年會議上的其中三個事項。

01

Provision of R&D Services by Hong Kong Subsidiary to Overseas Headquarters

[H2] Section 15F of the IRO pushes MNCs for early Transfer Pricing Policy settings in R&D Arrangements

The IRD confirmed its principle that it would generally follow OECD's transfer pricing guidelines in the meeting with HKICPA.
Benefited from the substantial support from the Hong Kong Government, MNCs are more eager than ever to set up R&D centers in Hong Kong (e.g. Science Park and Cyberport) to participate in part of the Group R&D project. As such, the HKICPA has quoted an example that the Hong Kong Subsidiary providing R&D services to overseas parent company.

In this particular example (Example 14 of BEPS Actions 8-10 2015 Final Reports), the intangibles derived from the R&D work will belong to the overseas parent company, and the Hong Kong Subsidiary would act under the direction and supervision of the parent company. Under this situation, it is likely that the Hong Kong Subsidiary would charge the parent company a service fee calculated based on its R&D costs incurred plus a mark-up.

In view of this, as the risk of the R&D project lies principally on the parent company, the OCED guidance points out that the Hong Kong subsidiary should not be entitled to the reward of the intangibles. In other words, the future income of the intangibles should not be subject to Hong Kong Profits Tax while the transfer pricing issue here is only on whether the basis of calculation of service income from the parent company fulfills the arm's length principle.

The above treatment seems to be contradictory to Section 15F of the IRO, which seeks to impose Hong Kong Profits Tax on non-Hong Kong resident intangible holders under the scenario that the Hong Kong group company participates in the DEMPE function / Value Creation Process of the intangible.

Please refer to our July 2021 Newsletter for detailed explanation of Section 15F of the IRO.

The IRD has confirmed that it will follow OECD guidance and thus Section 15F of the IRO would not apply if the situation follows the example quoted in the BEPS Actions 8-10 2015 Final Reports. However, the final decision depends on the facts and circumstances of each case.

Reference
BEPS Actions 8-10 2015 Final Reports:
https://www.oecd.org/tax/aligning-transfer-pricing-outcomes-with-value-creation-actions-8-10-2015-final-reports-9789264241244-en.htm

Points to note

We welcome the clarifications from the IRD on the application of Section 15F of the IRO, but also realises that, in practice, Section 15F of the IRO remains to be a significant tax risk of the taxpayers engaged in R&D activities.

The dilemma here is that the inter-company agreement has to be in place at the beginning of the R&D projects in order to demonstrate that the Hong Kong taxpayer has assumed low / no R&D risk and acted under the instruction of the parent company.

However, many corporations tend to ignore tax risk in the beginning of the R&D project, because income will only be derived several years after the commencement of R&D projects. As such, they would not consider the tax implications to each group company when preparing the inter-company agreements.

In order to mitigate their global and Hong Kong tax risk, MNCs with substantial R&D activities should set up concrete R&D cost recharge arrangements and prepare proper supporting documents (e.g., inter-company agreements) in the beginning of each R&D project.

Royalty payment to overseas non-resident

[H2] Royalty fee is important in transfer pricing international tax planning, and is subject to withholding tax in Hong Kong

For royalty fees paid to overseas recipients, Hong Kong taxpayers have the obligation to withhold tax for onward payment to the IRD.

Under Section 21A of the IRO, 100% of the royalty income would be deemed as taxable receipt if the follow two conditions apply:

- The recipient is a related party of the Hong Kong taxpayer; and
- The Intellectual Property (IP) has once been owned by a Hong Kong taxpayer.

In that case, it seems the basis of calculation of the royalty fee does not matter as the whole amount of the royalty income will be subject to Hong Kong Profits Tax while the royalty fees paid by the Hong Kong taxpayers should generally be fully deductible. In other words, it seems the transfer pricing domestic exemption apply as the pricing does not give rise to any potential Hong Kong tax advantage from the Group perspective.

Having said that, the IRD has reiterated that as the royalty recipient is a non-Hong Kong resident, the Domestic nature condition is not fulfilled, and thus the IRD is still empowered to make transfer pricing adjustments on the royalty fee. Taxpayers are reminded to carry out benchmarking study if the amount involved is significant.

Points to note

Royalty fee is usually calculated based on percentage of sales or gross profit. In view of the potential significant amount involved, it is an effective way to lower the MNC group's effective tax rate.

Setting up economic substance to carry out DEMPE functions in a low-tax jurisdiction (e.g., Hong Kong) and charging royalty fee to operating entities in other tax jurisdictions would be one of the important international tax planning opportunities. Having said that, global tax authorities would certainly thoroughly review the transfer pricing policy of the royalty fee arrangements. MNCs should certainly carry out benchmarking study to look for comparables (i.e., industry peers with similar arrangements) in order to minimise their transfer pricing risk.

03

County-by-country (CbC) reporting – Changes in ultimate parent entity (UPE) during the financial year

[H2] MNCs should be mindful of the threshold and penalty of CbC notification and reporting in Hong Kong

Section 58H(1) of the IRO requires Hong Kong entities of a reportable group to file a written notice relating to the group's CbC reporting obligation (CbC notification).

Under normal circumstances, a Hong Kong entity should only file one CbC notification each year. However, many taxpayers encountered difficulties in CbC notification when their UPE changed during the financial year. It is unclear whether it should report the financial information of the former or current UPE.

In the 2020 Annual Meeting between HKICPA and IRD, the IRD confirmed the Hong Kong entity has to file CbC notification for both former UPE and current UPE if the financial data of the Hong Kong is incorporated into the consolidated financial statements of both UPEs, provided that the consolidated revenue of both UPEs exceeds the reporting threshold.

When a Hong Kong entity is required to file multiple CbC notifications or returns for the same accounting period, the entity is advised to approach the Assessor for arrangements via the message box in the CbC Reporting Portal, since the portal now only supports submission of one notification or report for a financial year. You may also consult with your tax advisors to facilitate the liaison with the IRD.

Points to note

As a general reminder, the threshold for CbC Reporting in Hong Kong is that consolidated revenue of the Group for the preceding year exceeds HK$6.8 Billion (or EUR 750 million).
The following circumstances could not evade obligation to file CbC notifications in Hong Kong:

- The Hong Kong entity did not enter into related party transactions during the year; and
- The Group has filed CbC return in other tax jurisdictions.

The maximum penalty for failure to file CbC notification is HK$50,000 and an additional HK$500 per day during which the offence continues after conviction.

01

香港子公司向海外總部提供研發服務

[H2] 稅務條例第15F條推動跨國公司儘早設立研發安排中的轉讓定價政策

香港稅務局在與香港會計師公會的會議上確認了稅務局一般會遵循經濟合作與發展組織(經合組織/OECD)的轉讓定價指引。

由於香港政府的大力支持，很多跨國公司均在香港(如科學園和數碼港)設立研發中心，參與集團研發項目的一部分。因此，香港會計師公會在會議上引用了香港子公司為海外母公司提供研發服務的例子。

在2015年的稅基侵蝕與利潤移轉(BEPS)報告中列出的例子14，海外母公司將擁有研發所產生的無形資產，而香港子公司則在母公司的指導和監督下運作。在這情況下，香港子公司會向母公司收取研發服務費，服務費一般會以其研發成本按成本加成定價法計算。

OCED的指引指出，由於母公司承擔了研發項目的主要風險，香港子公司不應享有由無形資產所產生的回報。換言之，無形資產將來的收入不應繳納香港利得稅，而這裡的轉讓定價問題只應涉及香港子公司所收取的服務費的計算方法是否合乎獨立交易原則。

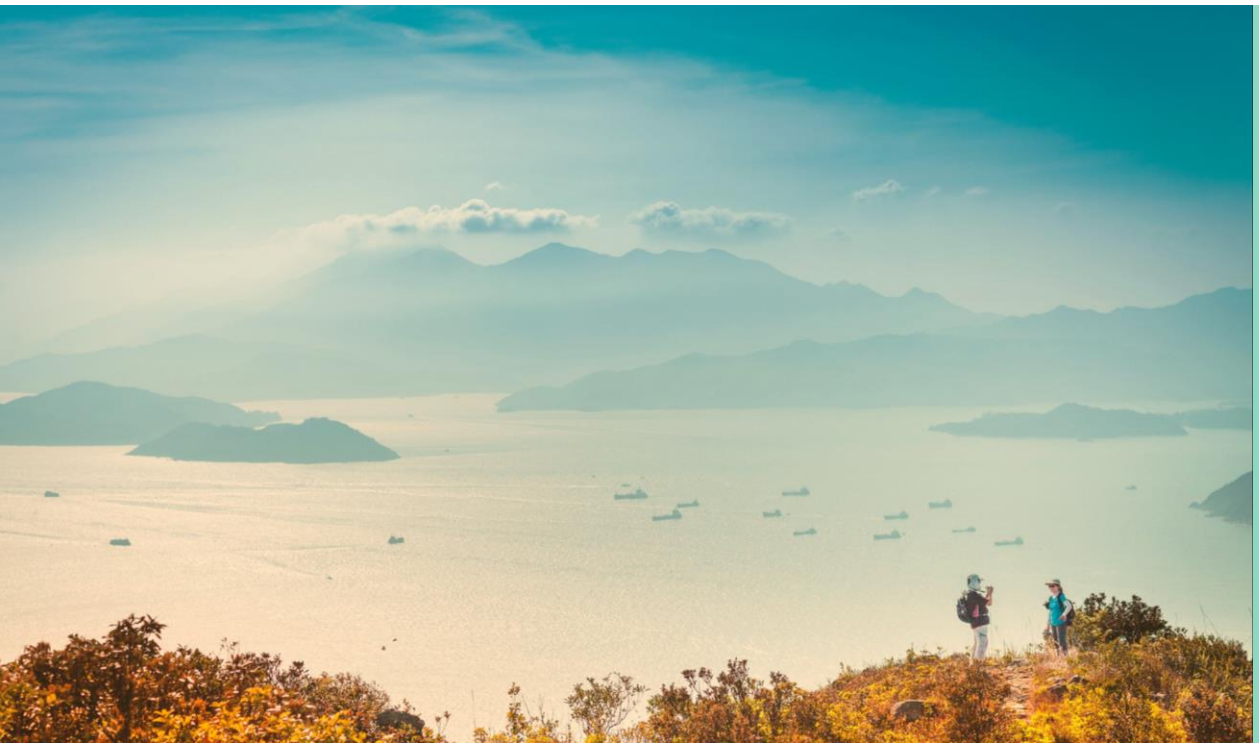
上述OCED指引似乎與稅務條例第15F條互相矛盾。根據第15F條，如果香港子公司在香港為一個知識產權作出創造價值的貢獻，香港稅務局可對該知識產權所產生的收入徵收香港利得稅。

有關稅務條例第15F條的詳細說明，請參閱本所的2021年7月通訊。

稅務局已確認將遵循經合組織的轉讓定價指引，因此稅務條例第15F條將不適用於上述BEPS 2015年最終報告中提及的例子的情況。但是，最終決定仍取決於每個案件的個別事實與情況。

參考連結

稅基侵蝕與利潤移轉最終報告8-10 2015 (BEPS Actions 8-10 2015 Final Reports):
https://www.oecd.org/tax/aligning-transfer-pricing-outcomes-with-value-creation-actions-8-10-2015-final-reports-9789264241244-en.htm



注意事項

我們歡迎稅務局就稅務條例第 15F 條的應用作出澄清。然而，在真實個案中，稅務條例第 15F 條仍然對從事研發活動的納稅人構成重大稅務風險。

這裡的窘境是，公司之間的研發協議必須在項目開始前已準備妥當，以證明香港納稅人承擔了很低或零研發風險，並且在海外母公司的指導下行事。

然而，因為研發項目普遍於項目開展幾年後才開始獲得收入，很多企業往往在研發之初忽略了稅務風險。因此，他們在準備集團研發協議時沒有考慮對集團下每間公司的稅務影響。

為降低其全球和香港的稅務風險，從事大量研發活動的跨國企業應在每個研發項目開始時制定具體的研發成本分攤安排並準備合適的證明文檔（例如集團公司之間的協議）。

向境外非香港居民支付特許權使用費

[H2] 特許權使用費在轉讓定價國際稅務籌劃中擔當重要的角色，並且需要在香港繳納預扣稅

香港納稅人須於支付特許權使用費給海外收款人時代扣預扣稅並及後轉交予香港稅務局。

根據稅務條例第 21A 條，如果以下兩個條件同時發生，海外收款人100%的特許權使用費收入將被視為香港應評稅利潤：-

- 收款人為香港納稅人的關聯公司；及
- 該知識產權曾被任何香港納稅人所擁有。

在這種情況下，因為全額特許權使用費收入均需要繳納香港利得稅，而支付特許權使用費的香港納稅人也普遍能在稅務上作出全額扣除，因此特許權使用費的定價方法看來並不重要。從集團的角度來看，任何定價方法均不會產生潛在的香港稅收優勢，換言之，轉讓定價中的本地豁免條件似乎適用。

話雖如此，稅務局重申，由於特許權使用費的收款人為非香港稅務居民，所以並不符合本地性質條件，因此稅務局仍有權對特許權使用費作出轉讓定價之調整。如涉及的金額較大，納稅人應進行標準化研究報告 (Benchmarking Study)。

注意事項

特許權使用費通常以銷售額或毛利的某個百分比來計算，涉及的潛在金額巨大，所以這是一個有效降低跨國集團全球有效稅率的途徑。

在低稅收地區（例如香港）建立經濟實體以作出創造價值的貢獻，並向其他地區的經營實體收取特許權使用費是一個重要的國際稅務籌劃機會。然而，全球稅務機關將會嚴謹審查特許權使用費安排中的轉讓定價政策，所以跨國集團必須進行標準化研究報告，對比進行類似安排的同行公司，以減低其轉讓定價風險。

03

國別報告 – 香港子公司在一個財政年度內更換了最終母公司

[H2] 跨國集團應注意在香港遞交國別報告通知和報告的門檻及相關處罰

稅務條例第 58H(1) 條要求須申報集團的每個香港實體，均須就集團的國別報告事宜提交書面通知(即國別報告通知)。

在正常情況下，香港公司每年只應提交一份國別報告通知。然而，如果香港子公司的最終母公司在一個財政年度內變換了，它應該為過去還是現在的最終母公司提交國別報告通知呢？

在香港會計師公會和稅務局的2020年周年會議上，稅務局回覆了這情況需視乎個別集團所採用的會計準則。如果香港公司的財務數據需被納入最終母公司的綜合財務報表，而集團的總收入亦超過國別報告的門檻，那麼香港公司就需要提交該集團的國別報告通知。所以，香港公司有機會需要為過去及現在兩間最終母公司同時提交國別報告通知。

由於現時國別報告網站於每個財政年度只能提交一份通知或申報表，當香港公司需要提交多個通知或申報表時，應在國別報告網站內與評稅主任聯絡，以商討提交的安排。您也可以諮詢您的稅務顧問，以促進與稅務局的聯系。

注意事項

香港國別報告的門檻是該集團在對上一個會計期的集團的綜合總收入不少於68億港元(或7.5億歐羅)。

以下情況並不能逃避在香港提交國別報告通知的義務：-

- 香港實體在年度內未發生任何關聯交易；或
- 集團已在其他稅務管轄區提交國別報告。

未提交國別報告通知的最高罰款為港幣50,000元，並在定罪後仍未提交的期間內每天額外罰款港幣500元。

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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