

# Tax Updates

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In our May 2022 Issue of Newsletter, we will discuss certain tax issues addressed in the 2021 Annual Meeting between the Hong Kong Institute of Certified Public Accountants ("HKICPA") and the Inland Revenue Department ("IRD").

在2022年五月發行的通訊中，我們將會討論某些在香港會計師公會和稅務局在2021年舉行的年度會議提及過的稅務議題。

## Application of the Source Principles to a Datacentre or Server Permanent Establishment (“PE”)

***A Hong Kong Server alone does not constitute a Hong Kong PE, but more to be seen to pursue offshore claim for e-commerce and cryptocurrencies mining business***

While Hong Kong is still adopting traditional operation tests in determining source of profits of e-commerce profits, digital services tax has been popular across the globe and BEPS 2.0 also suggests other methods to determine allocation of taxing rights for e-commerce business. HKICPA would therefore like to clarify the importance of the location of datacentre or server in determining the source of profits.

HKICPA suggested that Examples 5 and 19(a) of DIPN 39 seem to provide different answers to the importance of the location of server. Their details are as follows:-

### Example 5 of DIPN 39

A non-Hong Kong corporation leased a primary datacentre from an unrelated service provider in Hong Kong to support its core business in which the profits attributable to that datacenter would be assessed to tax in Hong Kong.

### Example 19(a) of DIPN 39

A Hong Kong corporation that performs all its core business activities in Hong Kong is fully chargeable to tax in Hong Kong, even though the PE server is located outside Hong Kong.

The Inland Revenue Department (“IRD”) has further confirmed that merely maintaining a server in Hong Kong alone would not give rise to Hong Kong Profits Tax. Based on our interpretations, physical location of personnel carrying out the business operations remained to be the most important factor. Nevertheless, it is likely that the IRD will consider that a profit will be subject to Hong Kong Profits Tax as long as any of the profit-generating activities are performed in Hong Kong.

Lastly, the IRD has also highlighted that the existence of the server in Hong Kong will become more important in determining the source of the profits under the following circumstances:-

- Datacentre/ Server/ Mining Machines constitutes the core operations of the taxpayer; and
- The server was at the disposal of the taxpayer (i.e., under the effective control of the taxpayer).



## Points to note

Based on our observations, it is common for corporations to utilise server/ datacentre/ cryptocurrencies mining machines in Hong Kong despite the fact that the operation teams are based outside Hong Kong. More importantly, some corporations will outsource the operations to a third-party consultant instead of carrying out the operations on its own.

In any case, we are of the opinion that the importance of the existence of server/ datacentre/ mining machines in Hong Kong in determining the source of profits cannot be denied. It is important for the taxpayers to provide sufficient documentary evidence to support that these kinds of equipment do not form the core part of their business operations and thus do not form the profit-generating activities of the taxpayers.



## Taxation of Financial Instruments – Interaction between Source and Fair Value Taxation

***Regarding the non-taxability of investment income, tools like unified fund exemption, offshore claim and capital gain claim should come first, while Nice-Cheer case should be the last resort***

In the annual meeting, HKICPA enquired the practical difficulty to apply offshore claim if the taxpayer applies fair value basis (i.e., unrealised gain are taxable) instead of realisation basis (i.e., unrealised gain are non-taxable as per Nice-Cheer case).

Very often the source of investment income could be finalised after both sales and purchase transactions are completed as the place of effectiveness of sales transactions is also an important factor in determining the source of investment income. However, if the relevant unrealised gains have been treated as taxable already, it would be difficult for the taxpayers to re-open the assessment of prior years even when the taxpayers can prove that the source of investment income is offshore sourced.

In this regard, the IRD has replied that, under the prevailing practice, if one of the sales or purchase contracts is effected in Hong Kong, the source of investment income would become Hong Kong sourced already. As such, if the purchase contracts are already effected in Hong Kong, the profits would be Hong Kong sourced regardless of how the sales contracts are effected. However, the IRD also realised that the determination of the source of investment income could be complex as well.

In our opinion, the same dilemma also applies to capital gain claim. The validity of capital gain claim highly depends on the length of ownership and circumstances leading to disposal, which could only be determined when the sales are made. As such, the taxpayers should think thoroughly how the unrealised gains should be treated under Hong Kong Profits Tax on their investment income.



## Points to note

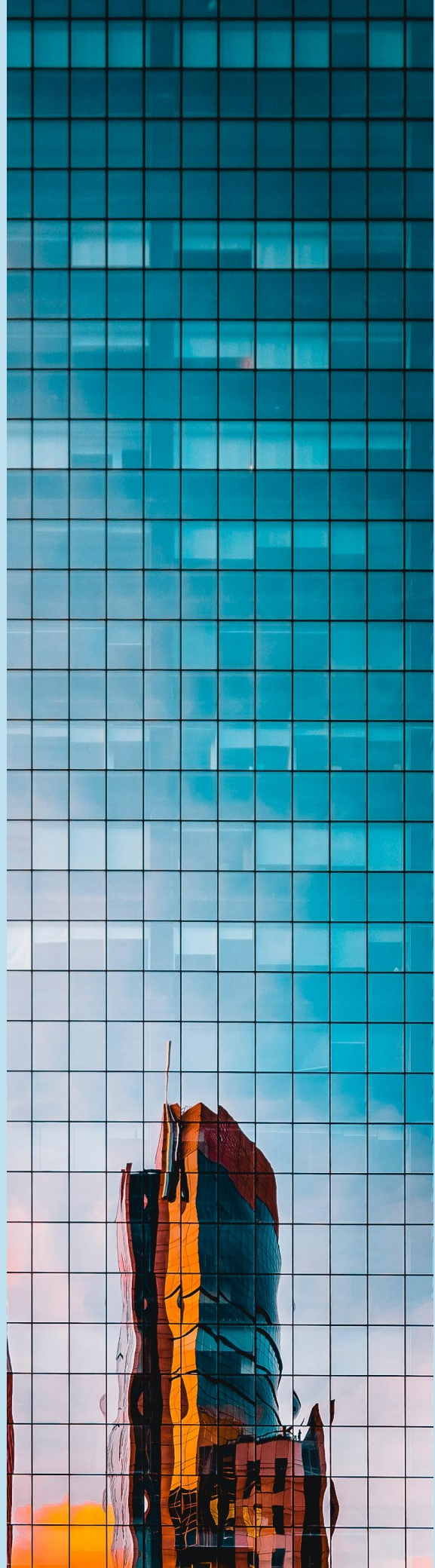
Imagine your accounting year-end is 31 March. You have been investing in Tencent Holdings Limited (0700.HK) over the past few years and accumulated a substantial amount of unrealised gain until 31 March 2021. Unfortunately, the stock price dropped significantly since then.

Assuming that you adopt fair value model, the unrealised gain accumulated up to 31 March 2021 has been treated as taxable and subject to Hong Kong Profits Tax. Following the same basis, the subsequent unrealised loss would be deductible and the loss can be used to set off against future assessable profits.

From cash flow perspective, the taxpayer suffers a lot because it has to pay substantial amount of tax on unrealised gains first, while the losses can only be used to offset against future profits and cannot relieve immediate cash burden.

However, if the principle of Nice Cheer case is adopted, the unrealised gain would become non-taxable. In such case, the taxpayer does not have to pay any tax before the sales of the investment. If the taxpayer eventually does not derive any realised gains (due to significant drop in price in the later stage of holding period), the taxpayer does not have to pay any tax throughout the whole holding period.

The principle of Nice Cheer Case is particularly useful for investment entities. However, this should only be the last resort. Taxpayers should first consider flexible use of various tools to pursue non-taxable claim, including capital gain claim, offshore claim, unified fund exemption.



## Provisional Tax Payable on Royalties

### ***Hong Kong Royalty payers may enjoy lower withholding tax rates under Double Taxation Agreement Benefits***

HKICPA raised the questions on Provisional tax payable due to the following two recent Hong Kong Tax developments:-

- Annual Profits Tax Reduction / Rebates have become common in recent years to reduce the burden of taxpayers; and
- Hong Kong has been expanding its Double Taxation Agreement ("DTA") Network.

As a result of the above, there are two common methods in calculating the Hong Kong Profits Tax Liabilities arising from the payment of royalties to non-residents:-

1. Tax liabilities computed under Hong Kong Domestic Tax Law (e.g., 4.95% = 16.5% x 30%) less Tax Reduction; and
2. Tax liabilities computed under DTA (i.e., Tax Treaty rates without Tax Reduction).

As Tax Reduction is available in Method 1 but not in Method 2, there will be occasions that Final Tax Liabilities are lower for Method 1 while Provisional Tax Liabilities are lower for Method 2.

HKICPA would like to confirm if the Inland Revenue Department ("IRD") allows taxpayers to use different methods in calculating Final and Provisional Tax Liabilities, and the IRD confirmed this approach is acceptable.

### **Points to note**

Based on our experience, many taxpayers overlook the tax benefits they can obtain in royalty withholding tax in Hong Kong. Below are the two tax saving ideas they may consider:-

	Tax Saving Methods	Actions to be taken
1	Two-tiered Tax rates	Taxpayers should review the shareholding structure of the royalty recipients
2	DTA Benefits (e.g., 3% tax rates)	Taxpayers should examine whether the DTA can provide a lower royalty withholding tax rate

## 來源原則在數據中心或者服務器常設機構的應用

**僅有香港服務器並不構成服務器常設機構，但對於尋求離岸利潤豁免的電子商務及加密貨幣挖礦業務還需審視更多因素**

當香港仍採用傳統的運營測試來判斷電子商務利潤的來源地時，數字服務稅已經在全球流行，同時，稅基侵蝕與利潤轉移2.0提出其他方法來判斷電子商務業務徵稅權分配。因此，香港會計師公會想澄清數據中心或服務器位置在確定利潤來源方面的重要性。

香港會計師公會指出DIPN39示例5和示例19(a)似乎對服務器的重要性提供了不同的答案，詳情如下：

### DIPN39示例5

一家非香港公司從香港一家第三方服務提供商租用一個主要數據中心以支持其核心業務，該數據中心應佔利潤將在香港評稅。

### DIPN39示例19(a)

一家在香港開展其所有核心業務活動的香港公司，即使其服務器常設機構位於香港境外，仍須在香港全額納稅。

稅務局其後確認只在香港維持服務器並不會造成利得稅。根據我們的理解，開展業務人員的實際工作地點仍然是最重要的因素，只要任何產生利潤的活動是在香港進行，這些利潤就要繳納香港利得稅。

最後，稅務局強調在以下的情況，香港服務器的存在對於判斷利潤來源將變得更重要：

- 數據中心/服務器/挖礦機是納稅人的核心業務；和
- 服務器受納稅人支配（即處於納稅人的有效控制下）。



## ■ 注意事項

根據我們的觀察，儘管企業的運營團隊位於香港以外，他們在香港使用伺服器/資料中心/加密貨幣挖礦機的情況仍很常見。更重要的是，一些企業會將業務外判給第三方顧問公司，而非親自營運。

無論如何，我們無可否認香港的伺服器/資料中心/採礦機的存在對確定利潤來源有重要意義。納稅人必須提供足夠的書面證據，來證明這些設備不是其經營活動的核心部分，因此不屬於納稅人的盈利活動。



## 金融工具稅收 - 來源與公允價值稅收之間的相互作用

在投資收益的不徵稅議題上，應首先考慮統一基金豁免、離岸利潤豁免和資本利得豁免等方法，最後再考慮Nice-Cheer一案

在年度會議上，香港會計師公會查問了稅務局關於納稅人若採用公允價值準則（即未實現利潤須課稅）而非實現準則（即根據Nice-Cheer個案，未實現的利潤無須課稅），申請離岸利潤豁免的困難。

由於交易的有效地點也是決定投資收入來源的一個重要因素，因此投資收入的來源往往需要在買賣交易完成後才可確定。然而，如果相關的未實現利潤已經被視為應稅收益，即使納稅人能夠證明投資收益的來源是境外的，也很難重新進行前幾年的評估。

對此，稅務局答覆道，按照現行慣例，如果其中一份買賣合約是在香港生效的，投資收入就會源自香港。因此，如果採購合約已在香港生效，不論銷售合約如何生效，其利潤均來自香港。然而，稅務局亦意識到，判斷投資收入的來源地是很複雜的事。

在我們看來，同樣的兩難局面也適用於資本利得豁免。資本利得豁免的有效性在很大程度上取決於擁有權的時長和出售時的境況，而這只有在標的出售時才能決定。因此，納稅人應仔細考慮如何處理其投資收入的未實現利潤。

### ■ 注意事項

假設您的會計年終是3月31日。您在過去幾年中一直投資於騰訊控股有限公司(0700.HK)，並在2021年3月31日之前積累了大量未實現利潤。不幸的是，股價自那以後大幅下跌。假設您採用公允價值模型，截至到2021年3月31日的未實現利潤已被視為應課稅利潤及須繳納香港利得稅。在相同的基礎上，其後未實現的虧損可予扣除，並可用於抵銷未來應評稅利潤。

從現金流的角度來看，納稅人的損失很大，因為他首先要為未實現的利潤繳納大量的稅款，而損失只能用來抵消未來的利潤，不能減輕眼前的現金負擔。然而，如果採用Nice-Cheer案例的原則，未實現的利潤將變為免稅。在這種情況下，納稅人在出售投資前無需繳納任何稅款。如果納稅人最終沒有獲得任何實現利潤（由於持有期後期價格大幅下跌），那麼納稅人在整個過程中亦無需繳納任何稅款。

Nice-Cheer案例的原理對投資公司特別有用。然而，這只能是最後的手段。納稅人應首先考慮靈活運用各種手段進行非應稅豁免，包括資本利得豁免、境外利潤豁免、統一基金豁免。



## 特許權使用費暫繳稅款

根據雙重徵稅協定，香港納稅人支付特許權使用費予海外公司可享有較低的預扣稅率

由於以下兩項最近的香港稅務發展，香港會計師公會提出了有關暫繳稅款的問題：-

- 近年來，年度利得稅減免/退稅已成為普遍現象，以減少納稅人的負擔；和
- 香港一直在擴大其雙重徵稅協定（“DTA”）網路。

因此，有兩種常見的方法計算因向非香港居民支付特許權使用費而產生的利得稅稅負：

1. 根據香港稅法計算的應納稅額（例如  $4.95\% = 16.5\% \times 30\%$ ）減去稅款寬減；和
2. 根據DTA計算的應納稅額（即按稅收協定稅率但沒有稅款寬減）。

由於用方法1計算可以減去稅款寬減，但用方法2未有稅款寬減，因此在某些情況下，方法1的最終應納稅額較低，而方法2的暫繳應繳稅款較低。

香港會計師公會希望稅務局確認是否允許納稅人使用不同的方法計算最終和暫繳應納稅額，而稅務局確認這種方法是接受的。

### 注意事項

根據我們的經驗，許多納稅人忽視了他們在香港的特許權使用費預扣稅中可以獲得的稅務優惠。以下是兩個他們可參考的節稅方法：

節稅方法	應採取的行動
1 利得稅兩級制	納稅人應審查特許權使用費接受者的股權架構
2 雙重徵稅協定優惠（例如，3%的稅率）	納稅人應審查DTA是否可以提供較低的特許權使用費預扣稅率


# 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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