

Hong Kong Tax Alert

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2020/21 profits tax filing season will soon commence

On 1 April 2021, the Inland Revenue Department (IRD) will issue bulk profits tax returns to taxpayers for the year of assessment 2020/21. This alert draws your attention to the filing due dates for the 2020/21 profits tax returns and the requirement to notify the IRD of chargeability.

In addition, this alert also explains (i) what constitutes a non-Hong Kong resident person having a permanent establishment (PE) in Hong Kong and the tax implications thereof; and (ii) the requirements of certain categories of taxpayers to file supplementary forms together with their 2020/21 profits tax return.

Should you have any questions regarding the filing of your tax returns and the supplementary forms, or the filing bases to be adopted, please contact your tax executives.

2020/21 tax filing deadlines

The tax filing season for the fiscal year ending 31 March 2021 (i.e., year of assessment 2020/21) will commence with the IRD's bulk issuance of the relevant profits tax returns (i.e., Form BIR 51 or Form BIR 52) on 1 April 2021.

Returns are, normally due for filing within one month of their date of issue. However, the IRD has for many years operated a block extension scheme whereby the filing deadline can be extended in instances where a taxpayer is professionally represented. Under the 2020/21 block extension scheme, the filing dates for the bulk returns issued on 1 April 2021 can be extended as follows:

For taxpayers with accounting dates falling between	Extended due date
1 April 2020 – 30 November 2020 (Accounting date code "N")	31 May 2021 (Monday)
1 December 2020 – 31 December 2020 (Accounting date code "D")	16 August 2021 (Monday)
1 January 2021 – 31 March 2021 – with taxable profits for the year (Accounting date code "M")	15 November 2021 (Monday)
1 January 2021 – 31 March 2021 – with tax losses for the year	31 January 2022 (Monday)

Notification of chargeability where no tax return has been issued

Taxpayers who are not issued with a tax return but nonetheless have profits chargeable to tax for any year of assessment (before the set-off of losses brought forward) are required to notify the IRD of their chargeability. The notification is required to be in writing, addressed to the Commissioner of Inland Revenue and submitted within four months after the end of the basis period for the year of assessment concerned.

It should be noted that a taxpayer's basis period for a year of assessment depends on their accounting year-end date. As a result, the time limit for taxpayers to inform the IRD of chargeability will vary. For example, Company A (with an accounting year ended on 30 June 2020) and Company B (with an accounting year ended on 30 September 2020) were required to inform the IRD of their chargeability for the year of assessment 2020/21 on or before 31 October 2020 and 31 January 2021 respectively (i.e., within four months of their respective year-end dates).

Failure to inform the IRD of chargeability within the stipulated time frame, without reasonable excuse, will render a taxpayer liable to a fixed fine of up to HK\$10,000 and potentially a penalty of up to three times the tax involved for each offence.

However, there is no need for a taxpayer to inform the IRD of chargeability if the taxpayer has been filing tax returns annually and could reasonably expect that, in the normal course of events, the IRD would issue a return in the current year. Conversely, if a chargeable taxpayer has previously been advised by the IRD that a profits tax return will no longer be issued on an annual basis, or the taxpayer has recently commenced business, the Commissioner must be notified of chargeability within the stipulated period.

In addition to the above, we would also like to draw your attention to matters that you should be aware of when preparing and filing the 2020/21 profits tax returns.

Non-Hong Kong resident persons having a fixed place, or dependent agent, PE in Hong Kong are required to furnish certain specific information

Section 50AAK of the Inland Revenue Ordinance (IRO), codifying the Organisation for Economic Co-operation and Development's approach (AOA) for attributing profits or losses to a PE in Hong Kong of a non-Hong Kong resident person, has been effective since the year of assessment 2019/20.

Under the AOA, a PE is considered, for the purpose of computing its profits or losses, as a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions. This means that the income (and related costs) of the different parts of an enterprise are allocated based on the fiction that the PE is a distinct and separate entity having a notional interest-free equity capital.

Specifically, the profits or losses attributable to the PE are determined by way of a functional and factual analysis involving the consideration of a number of factors, such as the functions performed, the assets used, and the risks assumed. Moreover, regarding the pricing of internal dealings between a PE and the rest of the enterprise, the arm's-length principle is applied.

Part 3.9 of BIR 51 or Part 2.8 of BIR 52 (the BIRs being the bulk tax returns issued on 1 April 2021) requires a taxpayer to declare whether they were a PE in Hong Kong of a non-Hong Kong resident person for the year of assessment 2020/21.

Whether the activities or presence of a non-Hong Kong resident person in Hong Kong will constitute a PE depends on how the applicable term is defined.

For a non-Hong Kong resident person who is a resident of a jurisdiction which has a comprehensive avoidance of double taxation arrangement (CDTA) with Hong Kong, the term PE as defined in the relevant CDTA will be applicable. For a non-CDTA territory resident person, the term PE as defined in Part 3 of Schedule 17G to the IRO will be applicable.

Broadly, there are three types of PE: (i) a fixed place PE; (ii) a service PE (i.e., constituted by a certain number of days that the personnel of a non-Hong Kong resident person renders services in Hong Kong during a certain period of time, and only applicable to certain CDAs concluded by Hong Kong; and (iii) a dependent agent PE.

The term PE as defined in Part 3 of Schedule 17G to the IRO does not include a service PE. However, the scope of a dependent agent PE as defined in Part 3 of Schedule 17G is wider than the concept as defined in most existing Hong Kong's CDTAs.

In addition to making the declaration for each year of assessment, a taxpayer needs to furnish the following information in respect of a PE that did exist for the purposes of computing the profits or losses attributable to the PE in Hong Kong:

- (i) for each funding provided by the non-Hong Kong resident person to the PE, the amount of funding, nature, interest rate and interest expense for the year of assessment;
- (ii) amount of free capital attributed to the PE and its computation [i.e., the notional interest-free equity capital that a notional distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions as the PE would require]; and
- (iii) amount of capital attribution tax adjustment and its computation [i.e., that portion of the funding cost of the PE that is attributable to (ii) above which would be non-deductible in ascertaining the taxable profits or losses of the PE in Hong Kong].

Such a non-Hong Kong resident person should also note that:

- (i) if they are chargeable to tax in Hong Kong in a given year of assessment, they are required to inform the IRD of their chargeability within the stipulated time frame as explained above; and
- (ii) the profits or losses attributable to the PE under the AOA will not necessarily equate to taxable profits or allowable losses in Hong Kong; the attributable profits or losses may for example be sourced offshore Hong Kong for tax purposes, or other normal tax adjustments under certain specific provisions of the IRO may be applicable.

Taxpayers who are acting in Hong Kong for a non-Hong Kong resident person, especially where they are related parties and the solicitation of business, or the negotiation or conclusion of contracts for the benefit of the latter are involved, should pay particular attention to the applicable PE definition.

New supplementary forms S11 to S14

Commencing from the year of assessment 2018/19, certain categories of taxpayers have been required to provide the IRD with additional detailed information by way of completing and filing various supplementary forms, numbering from S1 to S10.

Subsequent to the recent introduction of the tax concessions for qualifying ship leasing and insurance businesses, four new supplementary forms have been added to the 2020/21 tax returns, namely that for:

- ▶ a qualifying ship lessor (S11);
- ▶ a qualifying ship leasing manager (S12);
- ▶ a specified insurer (S13); and
- ▶ a licensed insurance broker company (S14).

Where applicable, taxpayers are required to complete and submit the relevant supplementary forms, even if they do not elect in writing for their relevant taxable profits or losses to be accorded the special tax treatments under the relevant provisions of the IRO.

In addition, taxpayers should also note that these supplementary forms will not be enclosed together with the hard-copy Form BIR 51 or Form BIR52 sent to taxpayers by the IRD. If required, taxpayers will have to go to the IRD's webpage¹ to access and complete the relevant supplementary form(s) electronically. After completing the relevant supplementary form(s) in their electronic format, taxpayers will then have to print, hand-sign and then file the relevant form(s) together with the Form BIR 51 or Form BIR 52, all in hard-copy format, with the IRD.

Clients who have any questions regarding the filing of their tax returns, PE tax implications in Hong Kong or the requirements for the completion of the supplementary forms, should contact their tax executives.

1. Supplementary forms can be accessed from the following link:
www.ird.gov.hk/e_pfr

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