

Press release

LCQ15: Arrangement for avoidance of double taxation

Wednesday, November 23, 2011

Following is a question by Dr Hon Lam Tai-fai and a written reply by the Secretary for Financial Services and the Treasury, Professor K C Chan, in the Legislative Council today (November 23):

Question:

According to the Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (Arrangement), remunerations derived by Mainland and Hong Kong residents from their employment in the Other Side shall be taxed in that Other Side if they are present in the Other Side for a period or periods exceeding in the aggregate 183 days in any 12-month period commencing or ending in the taxable period concerned (183-day threshold). In this connection, will the Government inform this Council:

(a) whether only the actual working periods in the Other Side of cross-boundary residents are counted under the 183-day threshold of the Arrangement, and how the Hong Kong and mainland authorities calculate the actual cross-boundary working periods of such residents;

(b) as the Secretary for Financial Services and the Treasury indicated in the reply to my question on January 20, 2010 that the practice among tax jurisdictions is to adopt the "183 days in a 12-month period" threshold, whether it knows how the Macao authorities calculate cross-boundary working periods;

(c) as the number of days during which Hong Kong residents stay on the Mainland for sightseeing is also counted under the 183-day threshold at present even though they have not engaged in any work-related activity during such periods, whether it knows the reasons for that, and whether it will plan to conduct a review with the mainland authorities and introduce improvement; if it will, of the details; if not, the reasons for that;

(d) why weekends and holidays, even though they are not working days, are counted under the 183-day threshold, and whether the authorities will consider revising such arrangement; if they will, of the details; if not, the reasons for that;

(e) why cross-boundary trips taken by residents with same-day return are also counted as one day under the 183-day threshold, and whether the SAR Government will seek exemption arrangement from the mainland authorities for same-day return trips or cross-boundary trips of less than 24 hours; if it will, of the details; if not, the reasons for that;

(f) as some Hong Kong residents who live in Shenzhen are employed by Hong Kong companies and receive salaries from such companies, and have to work on the Mainland for half day on each working day, how the Hong Kong and mainland tax authorities assess the tax payable based on their income;

(g) regarding holders of valid Chinese visas leaving the Mainland and returning there later, whether it knows if the days they spend outside the Mainland are counted under the 183-day threshold of the Arrangement; if so, of the reasons;

(h) as Hong Kong and the Mainland are enhancing their economic integration and development, and the number of cross-boundary workers continues to increase, whether the SAR Government will take the initiative to request the mainland authorities to relax the 183-day threshold, and not just relay to them the views of the trade in Hong Kong; if it will, of the details; if not, the reasons for that;

(i) as the Secretary for Financial Services and the Treasury indicated in the reply to my question on February 3, 2010 that all comprehensive avoidance of double taxation agreements signed by European Union (EU) countries between each other adopt the 183-day threshold, whether the authorities know if EU member countries have signed any agreement among themselves regarding cross-boundary workers to provide specific tax arrangement for cross-boundary workers of both sides; if they know, of the details; if not, whether they will seek an in-depth understanding of the matter;

(j) whether the Hong Kong and mainland authorities will consider introducing tax rules for cross-boundary workers; if they will, of the details; if not, the reasons for that; and

(k) as the Secretary for Financial Services and the Treasury indicated in the reply to my question on February 24, 2010 that the Inland Revenue Department (IRD) of Hong Kong and the State Administration of Taxation (SAT) meet annually to discuss the implementation of the Arrangement, and the IRD will relay to the SAT specific suggestions from the trade concerning the relaxation of the 183-day threshold and other issues relating to the implementation of the Arrangement, whether the Government had requested the mainland authorities to relax the 183-day threshold in the past five years; if it had, when each of such requests was made and of the details of the requests; if not, the reasons for that?

Reply:

President,

(a) to (d) As the relevant provisions of "The Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income" (the Arrangement) provides that "the recipient is present in the Other Side for a period or periods not exceeding in the aggregate 183 days in any 12-month period commencing or ending in the taxable period concerned", the Hong Kong and the Mainland tax authorities have to refer to the "days of stay" and not the "actual working days" in determining a person's tax liabilities in the other side under the Arrangement. This "days of physical presence" method is a correct interpretation of the provisions under the Arrangement. It is also the method commonly adopted by other tax jurisdictions and consistent with the standard used by the Hong Kong Board of Review in determining the tax liabilities of a person.

According to "The Arrangement between the Macao Special Administrative Region and the Mainland of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income", the Mainland and the Macao tax authorities also adopt "183 days of stay" as the threshold to determine which party has the taxing right.

(e) and (g) According to international practice, a day during any part of which, however brief, the taxpayer is present in a tax jurisdiction counts as a day of presence in that jurisdiction. Hence, a same-day trip or a stay of less than 24 hours in the Mainland is counted as a day of presence. This interpretation about the counting of days is consistent with the decision of the Hong Kong Board of Review.

(f) The income of the said person derived from a Hong Kong employment will be assessed to Hong Kong salaries tax in full. If a part of the income is derived from the person's services in the Mainland and he has been assessed to Individual Income Tax in the Mainland, that part of the income can be exempted from Hong Kong salaries tax under section 8(1A)(c) of the Inland Revenue Ordinance.

Besides, if that person is regarded as a Hong Kong resident under the Arrangement and has not claimed exemption under section 8(1A)(c), he can claim pursuant to the Arrangement to have the tax paid in the Mainland in respect of the relevant income allowed as a credit when computing his Hong Kong tax liabilities. The amount of the credit shall not exceed the amount of Hong Kong tax in respect of that income computed in accordance with the tax laws of Hong Kong.

(h) and (k) We have raised the suggestion of relaxing the 183-day threshold with the State Administration of Taxation. After discussions, both parties consider that the 183-day threshold should not be changed as it is an international standard which has been effectively applied. Furthermore, it has taken into account and balanced the tax interests of the resident and the source jurisdictions.

(i) According to our understanding, some European countries have special tax provisions for frontier workers. Pursuant to these provisions, frontier workers only have to pay tax to the government of his place of residence and not to the government of his place of work. These provisions usually cover definitions on frontier cities (e.g. the distance from the border) and frontier workers (e.g. the frequency of travel between the two countries), as well as allocation of financial resources (e.g. the government of the place of residence of the frontier workers has to make financial compensation to the government of the place of work).

(j) As Hong Kong's taxation system is based on the territorial principle, Hong Kong residents' income derived from the Mainland is not subject to tax in Hong Kong. The proposal of introducing special tax provisions for frontier workers will therefore lead to double non-taxation of the income. Besides, it is difficult to determine the coverage of the exemption area and to define frontier workers on an objective basis. Hence, the proposal requires careful deliberations.

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