

Press release

LCQ14: Arrangement for avoidance of double taxation

Wednesday, December 21, 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 (December 21):

Question:

Regarding the reply given by the Secretary for Financial Services and the Treasury (SFST) to my written question on December 7 this year, will the Government inform this Council:

(a) given that SFST stated that according to the Commentary of the Organisation for Economic Co-operation and Development Model Tax Convention (the Convention), the "days of physical presence" method was the only method which was consistent with the wording of the Article on Income from Employment, whether it is mandatory for Hong Kong to fully comply with the Convention; if so, of the reasons; if not, whether any problem will arise if the Convention is not fully complied with; if so, of the details;

(b) whether it knows if there are tax jurisdictions which do not fully comply with the "days of physical presence" method in the Convention in calculating income from employment; if it does, of the names of such tax jurisdictions, their reasons for not fully complying with such method and the calculating methods they adopt; if it does not, whether it will take the initiative to understand the facts;

(c) given that SFST stated that European countries which had special tax provisions for frontier workers included France, Germany, Italy, Belgium and Switzerland, and that these countries levied tax on a worldwide basis, whether SFST implied that levying tax on a worldwide basis was one of the premises or conditions for introducing special tax provisions for frontier workers; if so, of the justifications; if not, why SFST mentioned it;

(d) given that SFST stated that both the Inland Revenue Department (IRD) and the State Administration of Taxation (SAT) considered that as double non-taxation might arise, it was not appropriate to introduce special tax provisions for frontier workers at this stage, at which stage or under what circumstances the introduction of special tax provisions for frontier workers will be considered appropriate;

(e) given that SFST stated that the total number of claims for exemption of Hong Kong Salaries Tax for the years of assessment 2009-10 and 2010-11 was 6,243 and 10,731, whether it has assessed why the number of such claims has increased by 72% in a year; if it has assessed, of the details; if not, whether it will make the assessment;

(f) of the reasons why IRD did not have the relevant statistics for the years prior to 2009-10 or the amount of tax involved for the cases of the two years in (e);

(g) given that SFST stated that generally speaking, the Mainland would only tax Hong Kong residents in respect of their remuneration derived from their work on the Mainland, whether it knows under what non-general circumstances the Mainland will tax Hong Kong residents not only in respect of their remuneration derived from their work on the Mainland;

(h) given that SFST stated that both IRD and SAT considered that the 183-day threshold (ie 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) should not be changed as it was an international standard which had been effectively applied, whether it knows if there are other tax jurisdictions which do not adopt the 183-day threshold; if it does, of the names of such tax jurisdictions, their reasons for not adopting the 183-day threshold and the standard they adopt; if it does not, whether it will take the initiative to understand the facts;

(i) regarding the annual meeting held between IRD and SAT last month, whether it can provide an extract of the relevant parts of the minutes of the meeting relating to the 183-day threshold or special tax provisions for frontier workers or other relevant information; if not, of the reasons for that and how such information can be obtained;

(j) during the meeting between the authorities and SAT, whether both sides or any one side had confirmed that there were discrepancies in the time standard adopted by the two places in determining the places in which wages and salaries were derived; if so, of the details; if not, the reasons for that; and

(k) whether the authorities had, during their meeting with SAT, attempted to fight for or examine the adoption by both sides of a more reasonable time standard (actual working time) to determine the places in which wages and salaries were derived; if so, whether both sides or any one side had agreed to adopt such new standard?

Reply:

President,

(a) and (b) The Organisation for Economic Co-operation and Development Model Tax Convention (OECD Model Tax Convention) is commonly adopted internationally by tax jurisdictions as blueprint for negotiation of avoidance of double taxation agreements. Some other tax jurisdictions adopt the United Nations Model Double Taxation Convention. The Article on Dependent Personal Services of the United Nations Model Double Taxation Convention also adopts the OECD Model Tax Convention's standard of 183 days of physical presence as the threshold for determining the taxing right. Whether to deviate from the OECD Model Tax Convention requires the consensus of both contracting parties and cannot be decided unilaterally by Hong Kong. The "days of physical presence" method is generally accepted by various tax jurisdictions and is consistent with the standard used by the Hong Kong Board of Review in determining the tax liabilities of a person.

(c) and (d) Residents of those countries which levy tax on a worldwide basis, especially frontier workers who cross the borders frequently, may have higher incidence of double taxation. Hence, these countries may have a more imminent need to introduce special tax provisions for frontier workers. As for Hong Kong, our 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 introduction of special tax provisions for frontier workers would rather lead to double non-taxation of income derived from Hong Kong employments by these workers. As a result, we and the State Administration of Taxation both consider that it is currently inappropriate to introduce special tax provisions for frontier workers. There is also no plan at the moment to further explore this matter.

(e) and (f) The number of claims for exemption of Salaries Tax under section 8(1A)(c) of the Inland Revenue Ordinance (IRO) increases from 6,243 in 2009-10 to 10,731 in 2010-11, as a result of more taxpayers paying tax in jurisdictions outside Hong Kong with respect to their income from employment in 2010-11.

The Inland Revenue Department (IRD) only started to gather statistics on the number of exemption claims under section 8(1A)(c) of the IRO in 2009. Hence, it does not have the relevant statistics for years prior to 2009-10 nor the amount of tax involved.

(g) We believe that the "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) can reduce the incidence of double taxation that may be encountered by residents of the two sides. Generally speaking, the Mainland will only tax Hong Kong residents in respect of their remuneration derived from their work in the Mainland. We will closely monitor the situation regarding any double taxation issue between the Mainland and Hong Kong to ensure the effectiveness of the Arrangement. Any Hong Kong resident who considers that the tax authorities of one side or both sides have adopted measures leading to taxation not in accordance with the Arrangement (ie non-general circumstances) can refer the case to IRD for review. If necessary, IRD will discuss the case with the Mainland competent authority.

(h) According to our understanding, the 183-day rule is a common international standard. In the case of Hong Kong and the Mainland, the competent authorities of both sides consider that the 183-day rule is an international standard which has been effectively applied and will not give rise to double taxation problem. We have no intention to further explore this matter.

(i) to (k) The annual meeting between IRD and the State Administration of Taxation is a working meeting between two competent authorities. We do not consider it appropriate to disclose details of the discussion at the meeting.

Ends