Hong Kong Institute of
Certified Public Accountants
香港會計師公會

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Tax Bulletin

2022 Annual Meeting

The Inland Revenue Department

and

The Hong Kong Institute of Certified Public Accountants

2022
ANNUAL MEETING BETWEEN
THE INLAND REVENUE DEPARTMENT AND
THE HONG KONG INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Preamble

As part of the Institute's regular dialogue with the government to facilitate tax compliance, improve procedural arrangements and to clarify areas of interpretation, representatives of the Institute met the Commissioner of Inland Revenue (CIR) and members of his staff in May 2022.

As in the past, the agenda took on board items received from a circulation to members of the Institute prior to the meeting. The minutes of the meeting, prepared by the Inland Revenue Department (IRD) are reproduced in full in this Tax Bulletin and should be of assistance in members' future dealings with the IRD. Part A contains items raised by the Institute and Part B, items raised by IRD.

List of Discussion Items

PART A – MATTERS RAISED BY THE INSTITUTE

A1. Profits Tax Issues

A1(a) Annual allowance on second-hand commercial buildings and structures constructed prior to the commencement of the year of assessment 1998/99 (pre-1998/99 commercial building)

A1(b) Tax deduction of costs incurred on purchasing renewable energy credits or certificates (RECs) or carbon credits

A1(c) Hong Kong certificate of residence (HK CoR) for offshore companies

A1(d) Tax-exempt carried interest

A1(e) Applications of the anti-round tripping provisions under sections 20AX and 20AY

A1(f) DIPN on the concessionary tax regime for insurance businesses

A2. Salaries Tax Issues

A2(a) Deduction of home loan interest

A2(b) Taxation of discretionary bonus

A2(c) HK CoR for individuals

A2(d) Issues arising from COVID-19 pandemic

A3. Base Erosion and Profit Shifting Project (BEPS) 2.0 Initiative / Double Taxation Agreements

A3(a) Global Anti-Base Erosion (GloBE) Model Rules

A3(b) Permanent establishment of non-Hong Kong resident persons

A3(c) Tax credit claim of Hong Kong residents exercising employment in the Mainland under the HK-Mainland CDTA

A4. Stamp Duty

A4(a) Advance rulings regime for stamp duty

A5. Departmental Policy and Administrative Matters

A5(a) Advance rulings on permanent establishment

A5(b) Issues related to electronic filing (e-filing)

A5(c) Lodgement of profits tax returns and filing deadlines for 2021/22

PART B – MATTERS RAISED BY THE IRD

B1. Investigation and Field Audit: Discrepancies Detected by Field Audit

B3. Date of Next Annual Meeting

2022
ANNUAL MEETING BETWEEN
THE INLAND REVENUE DEPARTMENT AND
THE HONG KONG INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Full Minutes

The 2021/22 annual meeting between the Hong Kong Institute of Certified Public Accountants and the Inland Revenue Department was held on 13 May 2022 via zoom due to the pandemic.

In Attendance

Hong Kong Institute of Certified Public Accountants (the Institute)

Ms Sarah Chan	Chair, Taxation Faculty Executive Committee
Mr Eugene Yeung	Deputy Chair, Taxation Faculty Executive Committee
Mr Anthony Chan	Member, Taxation Faculty Executive Committee
Mr Edward Lean	Member, Taxation Faculty Executive Committee
Ms Gwenda Ho	Member, Taxation Faculty Executive Committee
Ms Agnes Cheung	Member, Taxation Faculty
Ms Grace Tang	Member, Taxation Faculty
Ms Anita Tsang	Member, Taxation Faculty
Ms Vivian Lam	Senior Tax Manager, Global Employment Services, Deloitte China
Mr Peter Tisman	Director, Advocacy and Practice Development
Ms Selraniy Chow	Manager, Advocacy and Practice Development

Inland Revenue Department (IRD)

Mr Tam Tai-pang, Ashley	Commissioner of Inland Revenue
Mr Chan Sze-wai, Benjamin	Deputy Commissioner of Inland Revenue (Technical) (Acting)
Mr Leung Kin-wa, Wesley	Deputy Commissioner of Inland Revenue (Operations)
Ms Chan Shun-mei, Michelle	Assistant Commissioner of Inland Revenue
Ms Wong Ki-fong, Jenny	Assistant Commissioner of Inland Revenue
Ms Leung Wing-chi, Wings	Assistant Commissioner of Inland Revenue
Ms Tsui Nin-mei, Shirley	Assistant Commissioner of Inland Revenue
Mr Wong Kai-cheong, Tony	Assistant Commissioner of Inland Revenue
Ms Chan Tsui-fung, Canice	Chief Assessor (Tax Treaty)
Mr Tsui Chung-leung, Steven	Chief Assessor (Tax Treaty)
Ms Pan Hiu-yan, Sabrina	Senior Assessor (Research) (Acting)

Mr Tam Tai-pang (CIR) welcomed the representatives of the Institute to the annual meeting and thanked the Institute's support for the past year. CIR introduced the IRD officers in attendance. He appreciated the efforts made by the members of the Taxation Faculty Executive Committee in preparing the agenda for this year's meeting. He expressed that the IRD always treasured the annual meeting as a platform for maintaining an active dialogue with the profession to resolve issues of common interest.

Ms Sarah Chan on behalf of the Institute's Taxation Faculty thanked CIR for arranging the annual meeting. She said that the Institute also viewed the annual meeting as an important event which offered a valuable opportunity to clarify technical issues which were useful and important to its members. She understood that a face-to-face meeting could not be arranged due to the pandemic. She thanked the IRD for providing the Institute to read through the responses before the meeting, and looked forwarded to continuing the cooperation between the Institute and the IRD in future.

The meeting then proceeded to discussion of the agenda items raised by both sides.

PART A - MATTERS RAISED BY THE INSTITUTE

Agenda Item A1 - Profits Tax Issues

(a) Annual allowance on second-hand commercial buildings and structures constructed prior to the commencement of the year of assessment 1998/99 (pre-1998/99 commercial building)

In the 2008 Annual Meeting, the IRD advised that for the purchase of industrial or commercial buildings used for more than 25 years, since the combined effect of sections 33A to 36 of the Inland Revenue Ordinance (Cap. 112) (IRO) was to grant relief in respect of the capital expenditure incurred on construction within a period of not more than 25 years, there was no provision for granting relief in respect of the capital expenditure incurred by the buyer after the 25-year period.

Based on the above, in case the relevant interest in a commercial building constructed before the year of assessment 1998/99 is sold for a consideration after the year of assessment 2023/24, while the seller would be subject to a balancing charge on the amount of the sale money (restricted to the allowances previously made to the seller), the buyer would not be entitled to any annual allowance on the residue of expenditure immediately after the sale. The asymmetric tax treatment would result in an absurd situation that at least part, if not the whole, of the capital expenditure incurred on construction is not eventually relieved even though the building was all along used for the purpose of producing profits chargeable to profits tax during the 25-year period.

In light of the advancements in construction technology over the years, it is not uncommon that buildings are still in good shape and in use even after the 25-year period. In particular, given a significant number of pre-1998/99 commercial buildings are still in use and the year of assessment 2023/24 is fast approaching, the Institute would like to know whether the IRD could consider granting relief, as a concession, to the buyer in the above case in respect of the residue of expenditure immediately after the sale, for example, as follows:

- Based on the provisions in the IRO, the annual allowance for a used building is calculated by dividing the residue of expenditure immediately after the sale by the number of years of assessment comprised in the period which begins with the year of assessment in which the sale takes place, and ends with the 25th year after the year of assessment in which the building was first used (or the 25th year after the year of assessment 1998/99 for a pre-1998/99 commercial building). Could the IRD consider allowing the buyer to claim the entire amount of the residue of expenditure immediately after the sale as annual allowance in the year of acquisition, by deeming the denominator of the fraction (which is not a positive figure) to be one?

The IRD responded as follows–

- The combined effect of section 33A(1) and (2) of the IRO was to grant commercial building allowance (CBA) in respect of the capital expenditure incurred on the construction of a commercial building or structure for a maximum period of 25 years starting from the year of assessment 1998/99 or the year of assessment in which the building or structure was first used, whichever is the later (the 25-year period). Where the relevant interest in such building or structure was sold within the 25-year period, section 33A(2) only allowed CBA to be granted to the buyer for the remaining years. No CBA could be allowed after the 25-year period.

- Where any event referred to in section 35(1) of the IRO (i.e. sale, demolition, etc.) occurred in relation to a commercial building, a balance would be struck between the residue of expenditure immediately before the event and the sale price, insurance, salvage or compensation moneys (if any). If the residue exceeded the sale price or other moneys, the difference would be allowed as a balancing allowance. If the difference was the other way, a balancing charge would be made subject to the extent of CBA previously allowed.

- For any commercial building or structure that was still in use after the 25-year period, there was no provision under the IRO which allowed CBA in respect of such building or structure. Thus, the IRD had no authority to allow any CBA in respect of such building or structure even though a balancing charge might have been made on the seller. The fact that the CBA previously allowed to the seller had been clawed back through a balancing charge would not by itself entitle the purchaser to any CBA if the building or structure had been used beyond the 25-year period.

Ms Gwenda Ho (Ms Ho) asked whether there was any scope for concessions such that the IRD would consider granting CBA after the 25-year period. Ms Sarah Chan added that this would be in line with the government policy of revitalising old industrial and commercial buildings. CIR responded that the law was clear and there was no room to get around it to provide the concession. Hence, granting CBA beyond the 25-year period would not be allowed. Ms Ho further asked, and CIR confirmed, that for a commercial building or structure that had been in use since the year of assessment 1998/99, the last year that such building could enjoy CBA would be the year of assessment 2023/24.

Mr Edward Lean (Mr Lean) appreciated that the IRD had to apply the law within its ambit. However, since a lot of commercial buildings or structures could continue to be in use beyond the 25-year period, Mr Lean asked whether legislative amendments could be explored to address the issue. CIR recommended the Institute to prepare a submission to elaborate the industry's concerns if it was found that a lot of taxpayers were affected by the law as it currently stood. Ms Sarah Chan commented that the 25-year limit for granting CBA could be foreseen as a significant issue since more commercial buildings and structures would be transferred in the coming years. She thanked CIR for his recommendation.

(b) Tax deduction of costs incurred on purchasing renewable energy credits or certificates (RECs) or carbon credits

As part of its Environmental, Social and Governance (ESG) program or initiative, a business group may purchase RECs or carbon credits on a voluntarily basis as a means to lower its carbon footprint or meet its greenhouse gas emission goal. For example, a business group can purchase RECs from the market in a year to match its electricity consumption relating to business operations/activities in that year with an equivalent amount of energy produced in renewable energy projects. The purchase of RECs will generate a renewable energy certificate, indicating the estimated amount of carbon emissions that has been avoided in that year. In this regard, we would like to clarify with the IRD on the following issues:

(i) whether the costs incurred on purchasing such RECs by a company chargeable to Hong Kong profits tax are deductible under section 16(1) of the IRO as part of its general business operating costs and not disallowable under section 17(1);

The IRD responded as follows–

- The deduction of outgoings and expenses under Profits Tax was governed by sections 16 and 17 of the IRO. To qualify for deduction, the expenses had to be allowable under section 16 and not precluded from deduction under section 17.

- Under section 16(1), outgoings and expenses were deductible to the extent to which they were incurred in the production of a taxpayer's chargeable profits. Whether an expense was incurred in the production of a taxpayer's chargeable profits was a matter of fact and degree. Merely because the expense was connected to the taxpayer's trade, profession or business was insufficient. The expense had to be incurred in profit-making activities which produced chargeable profits. The degree of connection between the expense and the profit-earning process of the taxpayer's trade, profession or business was important and had to satisfy the test of being "really incidental to the trade itself" or having been incurred "for the purpose of earning the profits" (see *Strong v*

Woodifield [1906] AC 448 applied in *CIR v Chu Fung Chee* [2006] 2 HKLRD 718).

- Under section 17(1)(b) and (c), no deduction should be allowed in respect of any disbursements or expenses not being money expended for the purpose of producing chargeable profits and any expenditure of a capital nature.

- The system of REC varied among jurisdictions. In Hong Kong, the two electricity companies had introduced voluntary REC schemes. Through purchasing RECs, electricity consumers could demonstrate their support for the development of renewable energy (RE) in Hong Kong and make use of the RECs to achieve their RE or environmental targets. The RECs purchased did not directly relate to the electricity actually used by the consumers in conducting their business activities.

- There was no specific provision in the IRO which governed the deductibility of the purchase costs of RECs. Whether such costs could be deducted in ascertaining a company's assessable profits depended on whether the purchase of RECs was sufficiently connected to the profit-earning process of the company's business and the costs were revenue in nature. Generally, the purchase costs of RECs which formed part of the electricity expenditure incurred by a company in the ordinary course of its business activities were revenue in nature and should be deductible. Conversely, if the purchase of RECs had no or little connection with the profit-earning process of the company's business and merely aimed to demonstrate a company's support towards the development of renewable energy with a view to enhancing its "green image", the costs of such RECs would not be regarded as a revenue expenditure incurred in the production of chargeable profits and hence would not be deductible.

Mr Eugene Yeung (Mr Yeung) considered that even if expenses incurred in purchasing RECs or carbon credits might not be common nowadays, such expenses might become more common and necessary in the future. He asked whether the IRD would consider that in the case where a taxpayer voluntarily purchased the RECs and the amount of expenses was commercially reasonable, those expenses would be deductible.

Ms Michelle Chan replied that to qualify for deduction under Profits Tax, there had to be a direct connection between the expenses incurred and the production of chargeable profits. As the IRD understood, purchase of RECs was not mandatory but was intended to enhance the green image of the purchaser. Hence it was considered that those expenses could not be deducted under sections 16 and 17 of the IRO.

Mr Peter Tisman (Mr Tisman) suggested that it should be recognised that, given Hong Kong's commitment to achieving net zero by 2050, companies would be under increasing pressure to contribute to the efforts to reduce overall carbon emissions. Ms Agnes Cheung (Ms Cheung) added that a company's support to energy saving would facilitate it becoming a cooperative social member. From this angle, RECs expenses should be considered as branding and marketing expenses to build up the corporate image and thus deductible under section 16(1) of the IRO. Ms Cheung suggested that the IRD view the matter from the perspective of social responsibility. Whilst purchase of RECs might not be legally required, it did not mean that a company, as a responsible enterprise, should not be committed to saving energy.

Ms Michelle Chan referred the Institute to *CIR v Chu Fung Chee* [2006] 2 HKLRD 718 in which it was held that for an expense to be accepted as having been incurred in the production of profits under section 16(1), the degree of connection between the expense and the profit-earning process of the trade, profession or business was important and the tests of being "really incidental to the trade itself" or having been incurred "for the purpose of earning the profits" had to be satisfied. Besides, expenses incurred for promoting corporate image would be regarded as capital in nature and not deductible under section 17(1)(c) of the IRO.

Ms Anita Tsang (Ms Tsang) added that a company's ESG performance could be important for investors when assessing whether or not to invest in its business, or for customers when considering whether or not to do business with it, so it would be helpful if the IRD could give serious consideration to the view that the expenses were connected to the profit-earning processes of the company's business.

CIR concluded that the IRD had to observe the aforesaid general principles and judicial precedent in determining whether an expense was incurred in the production of chargeable profits. The label of the expense was not conclusive. The crux was to examine the facts and circumstances of each case.

(ii) in the scenario where a group company purchased such RECs for the whole group and then allocated the purchase costs to various companies within the group that are operating in different jurisdictions (including a company operating in Hong Kong) based on certain allocation keys (e.g. size of the company/business, amount of electricity consumption or amount of greenhouse gas emissions), whether the costs allocated to and borne by the Hong Kong company are deductible for Hong Kong profits tax purposes;

The IRD responded that provided that the arm's length principle was followed in allocating the purchase costs of RECs to the Hong Kong company, the allocated costs would qualify for deduction if the conditions under sections 16 and 17 of the IRO were satisfied. Any excessive costs of RECs allocated to the Hong Kong company would not be allowed for deduction under section 50AAF of the IRO.

(iii) whether the above tax treatments also apply to the costs of purchasing RECs on a compulsory basis for complying with the relevant regulatory requirements in other jurisdictions; and

> The IRD responded that the tax treatments explained in (i) would apply whether RECs were purchased on a voluntary or compulsory basis. The question remained whether the costs of RECs were revenue in nature and formed part of the costs incurred by a company in the ordinary course of its business activities for the purpose of producing chargeable profits. Each case had to be determined on its own facts and circumstances.

(iv) whether the above tax treatments apply equally to the costs incurred on purchasing carbon credits, which are essentially credits that can be used to offset against or compensate for carbon emissions from business operations/activities.

> The IRD responded as follows–
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> - Same as RECs, the system of carbon credit varied among jurisdictions. In general, a carbon credit was a permit that allowed the owner to emit a certain amount of carbon dioxide or other greenhouse gases. Typically, one carbon credit permitted the emission of one ton of carbon dioxide or the equivalent in other greenhouse gases.
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> - For the purpose of limiting the extent of pollution caused by emission of carbon dioxide or other greenhouse gases, some jurisdictions might introduce a "cap-and-trade" program for carbon credits. Under such a program, carbon credits would be issued to companies which would allow them to emit carbon dioxide or equivalent in conducting their business activities up to a certain limit. Companies would be taxed or fined if they produced carbon emission beyond the limit allowed under the carbon credits issued to them. Companies whose carbon emission was below the allowable limit might sell any excessive carbon credits to other companies which needed extra emission permits through the carbon market.
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> - The conditions for deduction under sections 16 and 17 of the IRO as explained in (i) above were applicable in determining whether the purchase costs of carbon credits were deductible. So long as such conditions were satisfied, the purchase costs would be allowable for deduction.

(c) Hong Kong certificate of residence (HK CoR) for offshore companies

A non-Hong Kong company that has established a place of business in Hong Kong is required to register under the Companies Ordinance and to apply for a business registration certificate with the IRD. It follows that a non-Hong Kong company that has not established a place of business in Hong Kong would not be required to register in Hong Kong.

Based on the decision in a Hong Kong court case in respect of Yung Kee Holdings Limited, *Kam Leung Sui Kwan v Kam Kwan Lai & Ors FACV 4/2015* (commonly known as the Yung Kee case), which primarily concerns an unfair prejudice claim under the former Companies Ordinance, the fact that a company's directors discuss its affairs in a particular place is not sufficient by itself to make that place the company's place of business. The Court of Final Appeal held in the Yung Kee case that, while "business" is not confined to commercial transactions or transactions which create legal obligations, there is no reason to suppose that it covers purely internal activities in the governance of the company itself; and there is nothing in fact or law which requires a company which does not carry on business at all to have a place of business (leaving aside the share transfer and registration office) somewhere.

As discussed in the 2014 and 2015 Annual Meetings, in determining the residency of a non-Hong Kong-incorporated company for the purposes of applying a Comprehensive Double Taxation Agreements (CDTA), the overseas company needs to demonstrate the location of its "management or control". Whether or not a company needs to conduct business registration is determined by whether or not it has a place of business in Hong Kong, which is a different test from "management or control".

In view of the above, the Institute would like to seek the IRD's view under the following circumstances:

(i) Whether a non-Hong Kong holding company with management or control exercised in Hong Kong without a place of business in Hong Kong needs to obtain a business registration certificate in its application for a HK CoR?

The IRD responded as follows–

- In deciding whether a HK CoR could be issued to a non-Hong Kong company, the IRD would thoroughly examine all the relevant facts and circumstances to determine whether the test on "management and/or control" specified in the relevant CDTA was satisfied. The issue was clearly one of fact and degree. All relevant factors, including the company's nature of business, its mode of operation, its place of business, its place of board of directors' meeting, and its place of implementation of top management's decision, would need to be taken into consideration. Whether the company had or had not registered its business in Hong Kong was relevant to, though not conclusive of, the question of where its management or control was exercised and had to be considered along with other relevant facts and circumstances. However, it would not be appropriate to lay down any blanket rules as to whether a non-Hong Kong company needed to apply for business registration for the purposes of applying for a HK CoR. Whether a company needed to apply for business registration was governed by the provisions of the Business Registration Ordinance (Cap. 310) (BRO).

- The BRO required every person who carried on a “business” in Hong Kong to apply for business registration within 1 month from the date of commencement of the business. The word “business” was expressly defined in the BRO to mean “any form of trade, commerce, craftsmanship, profession, calling or other activity carried on for the purpose of gain”. In this connection, a non-Hong Kong company was required to apply for business registration if it carried on any form of activity for the purpose of gain, had established a place of business, or had a representative or liaison office in Hong Kong. Whether a non-Hong Kong company carried on a business in Hong Kong such that it had to apply for business registration was a question of fact.

- The term “business” had different meanings under different ordinances. It should be interpreted according to the provisions of the respective ordinance. The Yung Kee case referred to in the question was a case concerning the meaning of “place of business” under the former Companies Ordinance (Cap. 32) and not “business” under the BRO. As such, the decision of that case was not directly relevant to the determination of whether a company was required to apply for business registration under the BRO.

- It should be reiterated that the CDTA partners of Hong Kong held the strong view that a company without commercial substance in Hong Kong should not be entitled to any treaty benefits. Therefore, the IRD had to apply caution in deciding whether a company was a genuine Hong Kong resident and was entitled to tax benefits pursuant to the terms and purpose of the relevant CDTA. If a non-Hong Kong company did not apply for business registration in Hong Kong on the grounds that it had not established a place of business in Hong Kong, then obviously the company would be required to provide other concrete evidence to establish that it had commercial substance and exercised its management or control in Hong Kong for the purposes of HK CoR application.

Ms Cheung expressed understanding to the substance requirement for HK CoR application. However, in a situation where there was a non-Hong Kong holding company purely holding a subsidiary in the Mainland without many business activities, and its board of directors was based in Hong Kong exercising management or control in Hong Kong, she wondered whether such company would be required to apply for business registration in Hong Kong in order to obtain a HK CoR.

CIR said the answer to Ms Cheung’s question should have been addressed in the IRD’s response. Ms Canice Chan highlighted the main points drawn from the IRD’s response above, and reiterated that all relevant facts and circumstances would be considered in determining whether a non-Hong Kong company exercised its management or control in Hong Kong. She emphasised that business registration in Hong Kong was not a conclusive factor.

(ii) If the non-Hong Kong holding company in (i) belongs to a Hong Kong listed group with commercial substances in Hong Kong, would the answer be different?

The IRD responded that in considering an application for HK CoR by a non-Hong Kong holding company, it was immaterial whether the company belonged to a Hong Kong listed group with commercial substance in Hong Kong. Rather, as mentioned in (i) above, whether the company itself had commercial substance in Hong Kong was relevant. Each company would be decided on an individual basis having regard to the relevant facts and circumstances. As explained in the 2015 Annual Meeting, if a non-Hong Kong holding company held a group of companies with operations in Hong Kong, it could more likely be accepted as having commercial substance in Hong Kong.

Ms Cheung asked if a non-Hong Kong intermediate holding company which held some Mainland investments did not have commercial substance in Hong Kong, whether the IRD would be prepared to issue a HK CoR to it based on the commercial substance of its Hong Kong ultimate holding company such that it would not be required to apply for business registration. She said that such situation was faced by many of the Institute’s members and companies in Hong Kong, thus prompting the need to seek clarification from the IRD.

Ms Canice Chan responded that the important point was to look at the commercial substance of the company itself. Each company had to be decided on an individual basis, having regard to the facts and circumstances of that company. In the scenario put forward by Ms Cheung, one had to establish on facts and circumstances as to whether the non-Hong Kong intermediate holding company itself had commercial substance in Hong Kong. From practical experience, a non-Hong Kong intermediate holding company did not necessarily have no commercial substance. It was not uncommon to see such company maintaining permanent office and employees in Hong Kong, say through arrangements with group companies to share their business premises and manpower in Hong Kong.

Ms Grace Tang (Ms Tang) considered that a company’s business registration should not be used to determine whether the company exercised its management or control in Hong Kong as these were two different concepts. Ms Canice Chan replied that under the BRO, a company carrying on a business in Hong Kong was required to apply for business registration, and the term “business” was defined widely. In the IRD’s view, the fact that a company had or had not obtained business registration in Hong Kong was an objective factor giving indication of whether the company exercised management or control, and had commercial substance, in Hong Kong. In any case, such factor was not conclusive, and other facts and circumstances had to be considered.

Ms Tang said her understanding was that business registration was only one of the factors to be considered, and there might be other factors which might be more relevant in determining whether a company exercised management or control in Hong Kong. She asked whether the absence of business registration would be a hurdle for a company's application for HK CoR in Hong Kong. Ms Canice Chan responded that in the absence of full facts, it would be difficult to provide a response on that aspect. She stressed that the totality of facts of a case would need to be considered.

Mr Benjamin Chan supplemented that it would not be appropriate to lay down hard and fast rules to determine whether it was necessary to apply for business registration in order to obtain HK CoR as each case had to be determined on its own facts. If a non-Hong Kong company claimed that its management or control was exercised in Hong Kong and it also had commercial substance in Hong Kong, there should be some business activities carried out by the company in Hong Kong. If the activities carried out by a company were within the meaning of "business" laid down in the BRO, then it would be necessary for the company to apply for business registration. In short, the facts and circumstances of each case had to be considered in determining whether business registration was necessary.

Mr Tisman said that practitioners were hoping that the IRD could provide a definite answer as to whether business registration was a necessary condition for HK CoR application. Ms Cheung put it in the context of the Circular of the State Taxation Administration ("STA") on Matters Concerning "Beneficial Owners" in Tax Treaties (STA Circular 2018 No. 9) ("PN 9"). As it was the IRD's current practice to allow relevant companies in a multi-level holding structure to submit their applications for HK CoR in relation to PN 9 in a bundle, Ms Cheung asked whether it could be concluded that business registration was not required for non-Hong Kong holding companies for the purposes of HK CoR application.

Ms Canice Chan clarified that PN 9 only provided for how the beneficial ownership test was to be applied in the Mainland, notably to claims for tax treaty benefits on dividends and other passive income. PN 9 did not make any changes to the "resident" concept in the implementation of CDTAs, and there was nothing in PN 9 allowing non-Hong Kong holding companies which held subsidiaries in the Mainland to be directly regarded as, or even deemed as, residents of Hong Kong. It was important to note that whether the said holding companies were managed or controlled in Hong Kong, and had commercial substance in Hong Kong, remained a question of fact. The IRD would still thoroughly examine all the relevant facts and circumstances regarding the operations of each holding company to determine whether it could be regarded as a resident of Hong Kong.

Ms Sarah Chan asked whether the same treatment applied to HK CoR application made by intermediate holding companies at different layers of the holding structure. Ms Canice Chan responded in the positive. In processing HK CoR application by a non-Hong Kong holding company, the IRD would consider all the facts and circumstances, and business registration was one of the relevant factors that would be taken into account.

(d) Tax-exempt carried interest

How should taxpayers report tax-exempt carried interest in the 2021/22 profits tax returns (BIR51 and BIR52) and individual tax returns (BIR 60)? Where the IRD has yet to announce the process to confirm the tax exempt status of the fund that pays the carried interest, which is a condition for the carried interest to qualify for tax exemption in the hands of the recipients, can the recipients nevertheless exclude the carried interest from their taxable income/profits in the 2021/22 tax returns?

The IRD responded as follows–

- The Inland Revenue (Amendment) (Tax Concessions for Carried Interest) Ordinance 2021 was enacted on 7 May 2021. The Amendment Ordinance introduced profits tax and salaries tax concessions for qualifying persons and qualifying employees in relation to eligible carried interest received by, or accrued to, them on or after 1 April 2020 from their provision of investment management services for certified investment funds and specified entity, subject to the satisfaction of certain conditions.

- Profits tax and salaries tax concessions in relation to eligible carried interest should be claimed in a Profits Tax Return (BIR51 or BIR52) or Tax Return – Individuals (BIR60), as the case may be, for the year of assessment 2020/21 and subsequent years.

<u>Profits Tax Return</u>

- A taxpayer who was a qualifying person as defined in section 4(3) of Schedule 16D to the IRO and wished to claim profits tax concession in respect of eligible carried interest was required to declare in Item 9.6 of BIR51 or BIR52. The taxpayer was further required to complete Supplementary Form S15 and supply the required information in respect of each fund for which the taxpayer carried out investment management services in Hong Kong or arranged such services to have been carried out in Hong Kong in relation to eligible carried interest received or accrued for the year of assessment. Supplementary Form S15, being part of the return, should be downloaded from the IRD’s website (www.ird.gov.hk/e_pfr) for completion and submission together with the Profits Tax Return.

- If the fund’s certification status and its eligibility of tax exemption were yet to be determined at the time of completion of the Profits Tax Return, the taxpayer could exclude the eligible carried interest from the computation of assessable profits. Assessment would be raised to withdraw the exemption if the fund was subsequently confirmed not to be a certified investment fund.

<u>Tax Return - Individuals</u>

- In BIR60, a taxpayer who was a qualifying employee as defined in section 8(4) of

Schedule 16D should include the amount of carried interest accrued in income declared in Part 4.1(1). If the taxpayer wished to claim salaries tax concession in respect of any eligible carried interest, he or she could make such a claim in Part 4.1(2). The taxpayer should also provide the information required in Section 4 of the Appendix to BIR60 and Form SP4, together with a Form IR6177 (Notification of Accrual of Carried Interest for Claiming Salaries Tax Concessions) completed by the qualifying person in support of the application.

Ms Cheung said taxpayers would hesitate to make a tax concession claim if there was a lot of uncertainty about whether their claims would be accepted at the end of the day. The notes in the Supplementary Form S15 were not entirely clear. If taxpayers needed to wait up to several years to know the outcome, this could make the Hong Kong regime unattractive. Ms Michelle Chan explained that upon receiving a tax concession claim from a taxpayer, the IRD would check whether the fund concerned was a “fund” within the meaning of section 20AM of the IRO that was certified by the Hong Kong Monetary Authority (HKMA) to be in compliance with the criteria for certification published by it, and whether the relevant income was really carried interest. The time required by the IRD to process the tax concession claim depended on how quickly the taxpayer could provide sufficient and relevant information to the IRD.

Ms Sarah Chan asked whether the “Assess First Audit Later” (AFAL) approach would be used by the IRD in processing the application for profits tax exemption on carried interest. Ms Michelle Chan explained that the AFAL approach would not be adopted. Instead, each case would be examined before the concession claims were accepted, and taxpayers would be required to provide supporting documents and the necessary proof upon enquiries from the IRD. Guidance in respect of the general requirements of the types of supporting documents would be issued in due course. Besides, the IRD had engaged in several rounds of discussions with the HKMA in respect of the procedures for dealing with such concession claims.

Mr Benjamin Chan added that the application and review procedures for carried interest were no different from those of other preferential regimes. If taxpayers fulfilled the stipulated conditions, they could apply for the concessions in the profits tax returns and complete the necessary supplementary forms for the IRD’s consideration. If upfront certainty was required, taxpayers could apply for an advance ruling on the contemplated arrangement. It had to be stressed that even if a ruling had been applied for, whether a taxpayer could be considered as eligible for the profits tax concessions in relation to carried interest would depend on the actual arrangement. It had to be reviewed on a case-by-case basis to ascertain whether a taxpayer had fulfilled the conditions for exemption, such as the substantial activity requirement including the number of full-time qualified employees as well as the amount of operating expenditures.

Ms Cheung mentioned that from the industry perspective, timing was very important because the lifespan of private equities was usually around 4 to 5 years, and carried interest would generally be paid out at the end of the fund’s cycle. Therefore, if there were any uncertainty regarding the carried interest exemption, fund managers might not view Hong Kong as an attractive location to operate their business. Furthermore, from a practical point of view, upon the completion of a fund's life cycle and all the investments were sold off, the investment professionals might have moved on and left the fund. There would be difficulty accessing financial information or information that might be required by the IRD in the review and assessment of the application for the concessionary treatment. It was hoped that clear guidance would be provided soon. Ms Cheung suggested that the IRD might consider providing some initial assessment on the taxpayers' eligibility for tax concessions, such as through an advance application, so that the taxpayers would be able to know their potential eligibility before proceeding to obtain certification from the HKMA, and applying for the concession in the tax returns.

Mr Benjamin Chan reiterated that the best way to obtain upfront certainty on the eligibility of carried interest concession was through the application for an advance ruling. Furthermore, the preparation of the DIPNs on carried interest was in the pipeline and would be rolled out for industry comments upon completion. It was hoped that the DIPN on carried interest would facilitate addressing concerns and enquiries of the industry.

(e) Applications of the anti-round tripping provisions under sections 20AX and 20AY

(i) Application of the anti-round tripping provisions to a resident fund investing in another resident fund or in a special purpose entity (SPE) owned by another resident fund

The Institute would like to seek the IRD's view on the following:

A resident fund ("Fund A") holds a more than 30% beneficial interest in another resident fund ("Fund B"). Fund B also owns a SPE, the profits of which would also be exempt from tax under section 20AO. Both Fund A and Fund B satisfy the conditions for tax exemption under section 20AN of the IRO. The Commissioner is not satisfied that Fund B is a bona fide widely held fund.

Literally read, it appears that the anti-round tripping provisions under sections 20AX and 20AY would apply such that a corresponding portion of the exempted profits of Fund B and the SPE would be deemed to be the assessable profits of Fund A, notwithstanding that Fund A itself is an exempt fund under section 20AN.

Such a literal interpretation of sections 20AX and 20AY would however appear to defeat the very purpose of exempting funds under section 20AN.

The IRD responded as follows–

- The purpose of sections 20AX and 20AY of the IRO was to prevent abuse or round-tripping by resident persons to take advantage of the profits tax exemption. Section 20AY also prevented booking of profits in an SPE without distributing to the fund.

- If a resident person, either alone or jointly with the person's associates, held a **beneficial interest** (whether direct or indirect or both) of not less than 30% in a fund with profits exempted under section 20AN, or any percentage if the fund was the resident person's associate, the resident person was deemed under section 20AX to have derived assessable profits in respect of the profits earned by the fund from the qualifying transactions and incidental transactions carried out in Hong Kong.

- In the question above, the hypothetical structure contained 3 entities: Fund A, Fund B and the SPE. Fund A held an ownership interest in Fund B which in turn holds the SPE. However, Fund A did not appear to be a beneficial owner for the purposes of the anti-round tripping provisions under sections 20AX and 20AY as Fund A, being exempt from profits tax under section 20AN of the IRO, should be an arrangement which satisfies the three requirements of "fund" specified in section 20AM(2) of the IRO. Among these requirements, section 20AM(2)(a)(ii) required the pooling of the capital contributions of the participating persons and the profits or income from which payment is made to them. Section 20AM(2)(c) provided that the purpose or effect of the arrangement was to enable the participating persons to participate in the acquisition, holding, management or disposal of the property, or to receive profits or income from those transactions or sums paid out of such profits or income. Adopting a purposive approach to construe sections 20AX and 20AY, the IRD held the view that it should be the participating persons of Fund A, rather than Fund A itself, who had to be regarded as the beneficial owners of interests in the property underlying the fund.

- Having said that, in the absence of full details about the participating persons of Fund A, it would neither be safe nor appropriate to conclude whether or not the anti-round tripping provisions under sections 20AX and 20AY were applicable. The crux was whether a participating person of Fund A was a resident person and the person through Fund A held a beneficial interest of: (a) any percentage in Fund B if the person was an associate of Fund B; or (b) not less than 30% in Fund B either alone or jointly with associates in any other cases. If yes, the anti-round tripping provisions would be triggered such that a corresponding portion of the exempted profits of Fund B and the SPE would be deemed to be the assessable profits of the participating person.

Ms Cheung said that based on the response provided, Fund A held an ownership interest in Fund B and it appeared that Fund A did not seem to be the beneficial owner for the purpose of the anti-round tripping provisions. She asked whether the IRD would look through the corporate veil and uplift the corporate veil of the holding structures to look behind who were the beneficial owners for the purpose of this provision.

Mr Benjamin Chan responded that the IRD would adopt a look-through approach in applying the anti-round tripping provisions but it might not involve lifting the corporate veil because a fund might not be in a corporate form. In order for the anti-round tripping provisions to apply, the beneficial owner(s) must be a resident person. In the example, Fund A was a fund, and hence considered as an arrangement under the IRO and thus could not be regarded as a resident person. In order to determine whether the anti-round tripping provisions would be applicable, it was necessary to consider whether any participating persons of the fund was a resident person. If the fund was in the form of a limited partnership fund, the participating person should be the limited partner. If the fund was in the form of an Open-ended Fund Company (OFC), the participating person should be the shareholders of the OFC. Such kind of approach and practice had also been laid down in the DIPN on the offshore fund regime. This approach would also be adopted in applying the anti-round tripping provisions of the Unified Fund Regime (UFR).

Mr Lean acknowledged that the IRD's response could be favourable for taxpayers, as it suggested that the anti-round tripping provisions would not apply in this hypothetical scenario if Fund A's investors were non-HK residents. However, section 20AW of the IRO defined "direct beneficial interest" for the purposes of section 20AX and it appeared that Fund A would have a direct beneficial interest in Fund B under this definition. This would be the case unless a company could not be an "arrangement" under the exemption regime. However, Mr Lean believed that a company could be an "arrangement" under the exemption regime. Therefore, he had reservations about the IRD's position and was concerned whether it would give rise to any unintended consequences.

Mr Benjamin Chan said that the fact that an investor of a fund was a resident person would not by itself trigger the anti-round tripping provisions. It would be necessary to look through the arrangement to see whether the beneficial owner of the fund was a resident person. Such interpretation would reflect the legislative intent to prevent abuse of the fund regime by resident beneficial owners whilst avoiding an outcome of having a resident exempted fund (with no resident participating persons) being caught because of its investments in another exempted fund. Such an outcome was clearly absurd and could not have been intended by the legislature.

(ii) Departmental Interpretation and Practice Notes (DIPN) No. 61 – Deemed assessable profits in Example 5.4 of Appendix 5

In Example 5.4 in Appendix 5 of DIPN 61, the deemed assessable profits of Company-HK4 under section 20AX(3) appears not to be correctly stated. Given that Hong Kong resident Company-HK4 holds only a 20% beneficial interest in the associated offshore fund Fund(LP)-F3, it appears that only 20% of the exempted profits of Fund(LP)-F3 should be deemed to be the assessable profits of Company-HK4 under section 20AX(3) of the IRO. However, the example states that "[a]ll profits of Fund(LP)-F3 exempted from tax under section 20AN would be deemed to be the assessable profits of Company-HK4".

The Institute would like to clarify the correct tax treatment. If the deemed assessable profits of Company-HK4 are not correctly stated in the example, we suggest that an appropriate amendment be made.

The IRD responded that it was clear that the purpose of section 20AX(3) of the IRO was to prevent resident persons from circumventing the anti-round tripping provisions under sections 20AX and 20AY by holding beneficial interests in funds through associates. The IRD had taken note of the observation made by the Institute and would further review the correct application of section 20AX(3) and consider whether the answer to Example 5.4 in Appendix 5 of DIPN 61 should be modified.

(f) DIPN on the concessionary tax regime for insurance businesses

We note that DIPNs have been issued on various existing tax concessionary regimes, such as those for corporate treasury centres, aircraft leasing business and ship leasing business.

The Institute would like to ask whether the IRD is planning to issue a DIPN to provide more guidance on the application of the concessionary tax regimes for (i) professional reinsurers and authorized captive insurers and (ii) general insurance/reinsurance business of specified insurers and insurance brokerage business (which became effective from 19 March 2021)? If so, what is the expected timeline?

In particular, more guidance on the "substantial activity requirements" would be welcomed. We note that the minimum average number of qualifying employees and the minimum amount of operating expenditure required for the tax concessions in (ii) above have already been specified by means of a notice published in the Gazette on 15 January 2021. However, we would like to ask for clarification as to whether the minimum requirements will be assessed on a group versus entity basis (i.e. whether a Hong Kong entity within an insurance group can leverage on the "economic substance" of the other entities within the group (in or outside) Hong Kong, such as qualified personnel employed by other group entities who provide support / services to the Hong Kong entity). In certain cases, insurers / brokers may outsource certain activities, e.g. accounting, actuarial and claims processing to professional service providers. The Institute would appreciate guidance on how these outsourced activities would be considered in assessing the substantial activity requirements.

The IRD responded as follows–

- A DIPN setting out the IRD's interpretation and practices on the provisions of the IRO in relation to the profits tax concessions for qualifying insurance business and insurance brokerage business was under preparation.

- Generally, to qualify for profits tax concessions, a specified insurer or licensed insurance broker company must carry out or arrange to carry out its core income generating activities (CIGAs) in Hong Kong. To determine whether the CIGAs were carried out or arranged to be carried out in Hong Kong, the prescribed threshold requirements must be met. For this purpose, the CIGAs outsourced to other persons including associated persons of the specified insurer or licensed insurance broker company would be taken into account provided that the outsourced activities were adequately monitored.

Agenda Item A2 - Salaries Tax Issues

(a) Deduction of home loan interest

This question concerns the example of a couple who own their residence as joint tenants, where the home loan to finance the acquisition of their residence was taken out in the name of the husband only.

In such a situation, the Board of Review decision in D9/13 indicates that provided that the wife can prove she has paid her share of the home loan interest, she would be eligible to claim a tax deduction for the interest borne by her, notwithstanding that the home loan was taken out in the name of the husband only.

However, with reference to FAQ No. 5 on home loan interest posted on the IRD's website, although, in this case, the interest was fully paid by the taxpayer and not by his or her spouse, the example could give the impression that, in situations similar to the above, given that the home loan was taken out in the name of only one of the spouses, the other spouse would not be eligible to claim his or her share of the interest so incurred, regardless of whether the other spouse had actually borne or paid the relevant interest.

The Institute would, firstly, like to confirm the IRD's current practice. Assuming it is in line with the Board of Review decision, secondly, we would suggest that the IRD add one additional scenario under FAQ No. 5, covering the tax treatment where a share of the home loan interest is proved to have been borne or paid by each of the spouses, notwithstanding that the home loan was taken out in the name of the one spouse only.

The IRD responded as follows–

- The IRD's current practice was in line with the Board of Review's decision in *D9/13* 28 IRBRD 288. Section 26E of the IRO did not require a home loan within the meaning of the section to be taken out by a taxpayer who was a joint tenant or tenant in common of the dwelling. Paragraph 37 of the decision also pointed out that given the legal effect of the bank loan agreement was between the borrower (the husband) and the bank, it was the husband who paid the interest to the bank, not the taxpayer (the wife). It remained a question of fact whether a joint-owner or co-owner who was not the borrower of a home loan had actually paid home loan interest. A claimant had to bear the burden of proof.

- FAQ No. 5 would be revised to clarify that the spouse could not claim any deduction of home loan interest since the spouse had not paid any bank loan interest. FAQs aimed at simplicity and generality, so no additional scenario relating to peculiar circumstances would be inserted. Each claim would be decided on its own merits and evidence adduced.

(b) Taxation of discretionary bonus

The Institute would like to follow up on the IRD's response to agenda item A2(c) raised during 2020 Annual Meeting and the further response to agenda item A2(a) in the 2021 Annual Meeting, and confirm whether the IRD agrees to the following tax and filing treatment of the discretionary bonus:

(i) <u>Timing of accrual of the bonus:</u>

This would depend on the terms of the bonus plan and whether the accrual of the bonus is conditional on continued employment on the payment date:

- *Scenario 1*: The employee was entitled to a discretionary bonus based on the following four factors: (i) the individual's performance for calendar year 2019; (ii) the financial result of the group for calendar year 2019; (iii) the general economic environment at the time of award, and (iv) the bonus would be payable to the employee only if he remained employed by the company (or a related company of the group) until May 2020 (i.e. the payment date of the bonus). In this scenario, the time of accrual of the bonus should be in May 2020. As such, the bonus should be reported by the employer in year of assessment 2020/21. As the 60-day tax exemption should apply to that year, the bonus would not be taxable.

- *Scenario 2:* The employee was entitled to receive the bonus in May 2020 as long as conditions (i) to (iii) mentioned above were met, regardless of whether he remained employed by the company until May 2020. In this scenario, the bonus should be considered as accrued to the employee in December 2019 (but paid in May 2020). As a result, the bonus should be reported by the employer in year of assessment 2019/20 and the time-apportionment basis, as mentioned above, should apply in computing the amount of bonus that is subject to salaries tax.

The IRD responded as follows–

- In this question, an employee under a non-Hong Kong employment worked in Hong Kong from 1 January 2019 to 31 October 2019. He was relocated outside Hong Kong on 1 November 2019, and was chargeable to salaries tax on a time-apportionment basis under section 8(1A)(a) of the IRO in respect of his income from the employment. He was entitled to a discretionary bonus of $A in respect of his performance for the calendar year 2019.

- According to section 11D(b) of the IRO, the discretionary bonus accrued to the employee when he became entitled to claim payment of the bonus. Such accrual or entitlement date might not necessarily be the same as the date of payment. Depending on when the financial result of the group for the calendar year 2019 was available and when the amount of discretionary bonus payable to the employee was ascertained, the date of accrual could fall within either the year of assessment 2019/20 or 2020/21. If the employee's employment ceased in the year of assessment 2019/20, the bonus was deemed to have accrued to him on the last day of that employment (i.e. in the year of assessment 2019/20) under proviso (ii) to section 11D(b). The year of accrual of the discretionary bonus was the year of assessment for which the employee was chargeable to salaries tax on such bonus.

- Regardless of the year of assessment in which the discretionary bonus accrued or was paid to the employee, the source of the discretionary bonus was the employee's services rendered in the calendar year ended 31 December 2019 (relevant period) under his non-Hong Kong employment. The relevant period fell within the years of assessment 2018/19 and 2019/20. Unless the 60-day exemption under section 8(1B) of the IRO applied to the employee for both years of assessment, he was subject to salaries tax on such bonus.

Scenario 1

- Under Scenario 1, the employer decided that the employee was entitled to the discretionary bonus in May 2020. The bonus was paid to the employee in May 2020, i.e. the year of assessment 2020/21. Pursuant to sections 8(1A)(a), 11B and 11D of the IRO, the employee was chargeable to salaries tax on the discretionary bonus for the year of assessment 2020/21 and the chargeable amount was as follows:

  $$\$A \times B/C$$

  where B was the number of his working days in Hong Kong plus attributable leave days during the relevant period; and C was 365 (i.e. the number of days during the relevant period).

- The ratio of B/C determined the amount of the discretionary bonus derived from services rendered in Hong Kong. If the employee visited Hong Kong for not more than a total of 60 days in the year of assessment 2018/19 and could avail of the 60-day exemption, then only the number of working days in Hong Kong plus attributable leave days during the period from 1 April 2019 to 31 December 2019 would effectively determine B. If the employee could avail of the 60-day exemption for both years of assessment 2018/19 and 2019/20, no bonus would be taxable. The number of days of the employee's physical presence in Hong Kong during the year of assessment 2020/21 was irrelevant.

Scenario 2

- Under Scenario 2, the financial results of the group for the calendar year 2019 were unlikely to be available in December 2019. It followed that entitlement to the discretionary bonus could only be ascertained after 31 December 2019. The date of accrual of the bonus could fall within either the year of assessment 2019/20 or 2020/21 depending on when the employee became entitled to claim payment of the bonus. Similar to Scenario 1, the chargeable amount of the discretionary bonus was $A x B/C. The application of the 60-day exemption was also the same as explained under Scenario 1.

Ms Tsang asked whether the IRD had cessation of employment in mind by making reference to section 11D(b) of the IRO. The Institute's intention was to illustrate that the individual in the question did not cease employment and was all along under one non-Hong Kong employment. In the absence of cessation of employment under the scenario, Ms Tsang sought clarification on her understanding that the time of accrual of discretionary bonus to the employee was when he became entitled to claim payment of the bonus. Ms Jenny Wong ("Ms Wong") said that reference to section 11D(b) was to make the answer more comprehensive. If there was no cessation of employment, Ms Tsang's understanding was correct with respect to the time of accrual of discretionary bonus to the employee.

Ms Tsang said that the Institute's intention was to make scenario 1 less complicated. Hence, if the discretionary bonus were accrued and paid to the employee in May 2020, whether it would be correct to state that the discretionary bonus was actually accrued to the employee in the year of assessment 2020/21. Ms Wong confirmed Ms Tsang's understanding and added that accrual year was the year when the discretionary bonus was taxable.

Ms Tsang said, based on the IRD's response, it seemed that the date of payment or accrual was not relevant in determining the source of the bonus. It appeared that the IRD would look at the service period, rather than the year of assessment in which the bonus was accrued, to determine the source of the bonus. Ms Tsang asked whether the IRD's position would be applied consistently no matter whether the payment was a bonus or other forms of taxable payments. In a hypothetical situation, if an individual's service period was outside Hong Kong, and the discretionary bonus was accrued to that individual after he was relocated to Hong Kong, whether by looking at the service period, it meant that the discretionary bonus to the individual would be considered as sourced outside Hong Kong and not subject to tax in Hong Kong.

Ms Wong confirmed Ms Tsang's understanding that the IRD would determine the source of the discretionary bonus by reference to the service period or performance period of the employee concerned. If an employee rendered service outside Hong Kong during the full year in question and the discretionary bonus accrued after his subsequent relocation to Hong Kong, the year of accrual would be after his relocation to Hong Kong. The IRD would not assess the discretionary bonus as the period of performance taken into account in the ascertainment of the discretionary bonus was entirely outside Hong Kong.

(ii) Employer's return reporting positions:

- *Scenario 1:* The bonus should, nevertheless, be reported in the employer's return (Form IR56B) for year of assessment 2020/21.

  Scenario 2: The bonus should be reported in an additional / a replacement of the Employer's Notification of Employee Departure from Hong Kong (Form IR56G) for year of assessment 2019/20. No filing of a notification of chargeability is required.

The IRD responded as follows–

- The discretionary bonus should be reported by the employer for the year of assessment in which the bonus accrued to the employee, i.e. the year of assessment 2020/21 under Scenario 1 and the year of assessment 2019/20 or 2020/21 under Scenario 2, depending on when the employee became entitled to claim payment of the bonus.

- If the employee intended to leave Hong Kong upon relocation overseas on 1 November 2019 for any period exceeding 1 month, the employer had to file a Form IR56G in respect of the employee for the year of assessment 2019/20 and withhold payment of money to the employee for a period of 1 month from the date of giving the notice. In addition, upon accrual of the discretionary bonus, the employer had to file an additional Form IR56G for the year of assessment in which the bonus accrued to the employee and observe the relevant payment withholding obligation.

Ms Tsang referred to that part of the response stating that an additional Form IR56G had to be filed to report the discretionary bonus for the year of assessment 2020/21 if that was the year of accrual. She asked in relation to this part of the question, if the individual did not intend to leave Hong Kong during the year of assessment 2020/21, but had in fact left Hong Kong during the year of assessment 2019/20, whether, in such case, an additional Form IR56G should be filed for the year of assessment 2020/21. Ms Wong clarified that if IR56G was filed for the year of assessment 2019/20 and the reporting year for the accrual of the discretionary bonus was the year of assessment 2020/21, an IR56G for the year of assessment 2020/21 had to be filed for assessment to be raised on such discretionary bonus after departure from Hong Kong.

(c) Hong Kong certificate of residence (HK CoR) for individuals

When assessing whether an individual is a Hong Kong tax resident under a Hong Kong tax treaty, the 180/300-day test is applied in respect of a year of assessment (YOA) rather than a calendar year. However, the current practice of the IRD is to issue a HK CoR on a calendar year basis (e.g. a HK CoR for calendar year 2020 covers the period from 1 January to 31 December 2020) instead of a YOA basis. This results in a mismatch between (i) the period in which an individual qualifies as a Hong Kong tax resident under a tax treaty and (ii) the period covered by a HK CoR, and can cause a problem for individual taxpayers to claim a treaty benefit in a treaty jurisdiction in some cases (see the example below).

The Institute would like to ask: (i) the rationale / technical basis of issuing a HK CoR on a calendar year basis given the tax residency assessment under a tax treaty is made based on a YOA basis and (ii) whether there is flexibility to issue a HK CoR based on a YOA instead (please refer to the example below for illustration).

Example:

An Indian national was employed by a Hong Kong company and worked in Hong Kong during 1 August 2020 to 28 February 2021. Since 1 March 2021, he has been assigned to work in Singapore and spent only limited time in Hong Kong thereafter.

Based on the above facts, the individual stayed in Hong Kong for over 180 days during year of assessment 2020/2021 but his stay in Hong Kong is less than 180 days during year of assessment 2021/2022, and the aggregated number of days in Hong Kong in years of assessment 2020/2021 and 2021/2022 is less than 300 days.

The India tax authority requested a proof from the individual that he was a tax resident outside of India during the Indian tax year from 1 April 2020 to 31 March 2021 such that he is only liable to Indian income tax on his India-sourced income during that period.

For year of assessment 2020/2021 (i.e. for the whole period from 1 April 2020 to 31 March 2021), the individual should qualify as a Hong Kong tax resident under the HK-India CDTA under the temporary resident test. However, as the HK CoR issued for calendar year 2020 only covers the period from 1 January to 31 December 2020, there is no proof of his Hong Kong tax residency for the period from 1 January to 31 March 2021. It is also not possible for him to apply for a HK CoR for calendar year 2021 as he did not meet the 180/300-day conditions for year of assessment 2021/22.

The IRD responded as follows–

- The IRD had all along been committed to providing Hong Kong residents with assistance in claiming tax benefits to which they were entitled under a CDTA. The IRD appreciated that the issuance of HK CoR on the basis of the taxable period of the relevant CDTA partner would facilitate Hong Kong residents to claim tax benefits in a more efficient manner.

- The CDTA partners of Hong Kong, however, adopted different taxable periods. If all their taxable periods were to be catered for, the IRD would need to issue at least 5 different types of HK CoR (the number would likely be increased when more and more CDTAs were concluded by Hong Kong). The issuance of non-standardised HK CoR might, however, attract unnecessary questions from

CDTA partners and affect its reliability.

- Given that the same criteria for determining Hong Kong resident status were adopted in the generality of Hong Kong's CDTAs, the IRD considered that the wording and format of HK CoR should be standardised with a view to achieving consistency. Hence, the IRD took the calendar year, which was the most common taxable period adopted by Hong Kong's CDTA partners, as the basis for the issuance of HK CoR. As the IRD saw it, such an approach minimised both the compliance burden on Hong Kong residents and the administrative burden on the IRD.

- The IRD understood that the prevailing practice of issuing HK CoR on a calendar year basis had been working smoothly. The IRD had no record of any actual case as that illustrated in the example above, and had not received any feedback from Hong Kong residents that they had been denied treaty benefits only because of not having HK CoR issued on a year of assessment basis.

- It was worthwhile to note that Hong Kong's CDTA partners took the position that any entitlement to treaty benefits would require the individual to have the necessary personal and economic relations with Hong Kong. Given that the Indian national only worked a short period of time in Hong Kong and probably did not have strong social and economic ties with Hong Kong, the Indian tax authorities might consider that the Indian national was not entitled to treaty benefits under the Hong Kong-India CDTA as a Hong Kong resident.

- In any case, where a Hong Kong resident had been denied treaty benefits because of not having a HK CoR issued on a year of assessment basis, the Hong Kong competent authority stood ready to assist and would consider writing to the relevant CDTA partner as appropriate to confirm the period of residence of the Hong Kong resident provided that a justifiable case was made out in writing.

Ms Tsang said that, from a practical point of view, the taxpayer needed to provide the relevant documentation when making the claim, and could not wait until the treaty benefit was denied. She asked whether, in such situation, the IRD could consider providing some form of letter, if not a HK CoR, giving information on the period of the taxpayer's residence in Hong Kong (i.e. for 1 August 2020 to 28 February 2021 in the current hypothetical scenario).

Mr Benjamin Chan said that the IRD had not received any enquiries or comments from Hong Kong's tax treaty partners raising implementation issues on HK CoR issued on a calendar basis. Nor were there any cases where the treaty partners had sought for written confirmation of the period of residence as mentioned by Ms Tsang. The IRD would suggest taxpayers submit their HK CoR to the treaty partners first, and if they encountered any problems, the IRD would try to provide appropriate assistance as far as possible.

(d) Issues arising from COVID-19 pandemic

(i) Due to the regulations imposed under COVID-19, people coming from overseas would have to be quarantined. If an employer reimburses the cost of quarantine hotel in Hong Kong for a new assignee relocating from overseas to take up a Hong Kong assignment, would this benefit be subject to salaries tax?

The IRD responded that the cost of quarantine hotel in Hong Kong was a private or domestic expense of a new assignee relocating from overseas. On the authority of *CIR v Humphrey* [1970] 1 HKTC 451, reimbursement of such non-deductible expense by his employer was income from employment subject to salaries tax.

Ms Cheung commented that based on the IRD's response, it was quite likely that those reimbursement costs on hotel quarantine expenses would be treated as taxable income to assignees. She asked whether there was any room for concessionary treatment. Ms Wong commented that the employee had an obligation to get himself to his place of work. Based on the legal authority, the hotel quarantine expenses would be private or domestic in nature. There was no room to maneuver from a legal point of view.

Mr Anthony Chan and Ms Vivian Lam asked, where an employer was responsible for bearing all the relocation expenses to Hong Kong for a new employee (including airfares and hotel quarantine expenses), and the employer directly contracted with and paid the airline and the hotel (i.e. the employer did not discharge the liability of the employee), whether the employee would still be subject to salaries tax in respect of the hotel quarantine expenses borne by the employer. The expenses should be regarded as being related to the start of the employee's employment and were not personal expenses. They asked whether there was a difference between this and the general tax treatment of business airfare expenses borne by the employer (which should be non-taxable according to DIPN 41).

Ms Wong commented that if an expatriate was required to come to Hong Kong to commence his employment, the hotel quarantine cost reimbursed by the employer would be for business purpose from the employer's perspective. Yet, it would be domestic or private in nature from the employee's perspective since it was concerned with a commencement of employment. This was similar to the employee being required to travel to office and the travelling expenses would be domestic or private in nature.

Ms Wong further said that if the employer did not reimburse the employee for the hotel quarantine costs, but instead paid to the hotel directly, the hotel quarantine expenses would be business expenses of the employer and not taxable perquisite. However, this would also raise another question of whether a place of residence was provided by the employer to the employee. If found to be in the affirmative, the employee would be assessed on the rental value. The rental value would be computed at 4% (for 1 room in a hotel) or 8% (for 2 rooms in a hotel) of the employee's total net income after deducting outgoings and expenses (except self-education expenses), or the rateable value if elected by the employee.

Mr Anthony Chan and Ms Vivian Lam queried the difference in tax treatment whereby, if the employer reimbursed the employee for the hotel quarantine expenses, the employee might be taxed at the full amount of the hotel quarantine expenses, whereas, if the employer paid for the hotel directly, the employee might be taxed on the "rental value". They also asked how the rental value could be ascertained when the quarantine accommodation was pre-employment. Ms Wong replied that the IRD needed to look at the facts of each case to ensure that there was no avoidance.

(ii) If the assignee is subsequently required to travel to work outside Hong Kong and the employer reimburses the cost of quarantine hotel overseas as well as in Hong Kong, when he returns to Hong Kong, will this benefit also be subject to salaries tax?

The IRD responded as follows–

- It was stated in paragraph 12 of DIPN 9 that allowances which were reasonable in amount and did no more than covering the employee's travelling, accommodation and related expenses incurred when he was working away from his usual base or place of residence as required by his employer would not be brought into charge as assessable income.

- When the assignee was relocated to Hong Kong, Hong Kong became his usual base or place of residence. If the assignee was required to travel abroad for business and the employer reimbursed the cost of quarantine hotel overseas and in Hong Kong, such reimbursement would not be subject to salaries tax if it was reasonable in amount.

(iii) If however, the assignee travels outside Hong Kong for home leave and the employer reimburses the cost of quarantine hotel in Hong Kong, will this benefit be subject to salaries tax? Does it make a difference whether the employee is required to work during the quarantine period?

The IRD responded that when the assignee travelled outside Hong Kong for home leave and returned to Hong Kong, the cost of quarantine hotel in Hong Kong on his return was a private or domestic expense of the assignee. On the authority of *Humphrey*, reimbursement of such non-deductible expense by his employer was income from employment subject to salaries tax. It did not make any difference whether the employee was required to work during the quarantine period.

Ms Cheung questioned why the tax treatment in this question, where the employee was required to work while in quarantine, would be the same as that in question (i), where there was no suggestion that the employee needed to work. Ms Wong pointed out that the originating cause for the quarantine was the employee going home on leave, so the expenses would be domestic or private in nature. If, for example, the employee needed to work for one hour, it would not be reasonable to say that the expenses were for business purposes. However, each case would need to be decided on its own facts and circumstances.

Mr Anthony Chan asked, where it was agreed that the expenses in a particular case were personal and domestic, and the cost of the quarantine hotel was reimbursed by the employer, whether this would be taxable on the basis of a rental value or a fully-taxable cash allowance. Ms Wong said that since the reimbursement in full was made by the employer to the employee, the terms of the employment would need to be examined to see if there were any clauses covering provision of hotel during quarantine period. In the absence of such clauses, it would be regarded as a pure cash allowance and fully taxable.

Ms Sarah Chan understood that, where business and leisure were mixed, it would be necessary to look at each case on its merits. However, it was considered that DIPN 16 “Taxation of fringe benefits” was issued a long time ago and she suggested that updates be provided in terms of the taxability of benefits or reimbursements.

Agenda Item A3 - Base Erosion and Profit Shifting Project (BEPS) 2.0 Initiative / Double Taxation Agreements (DTAs)

(a) Global Anti-Base Erosion (GloBE) Model Rules

(i) Under the GloBE Model Rules published by the Organisation for Economic Co-operation and Development (OECD) in December 2021, the location of an entity is determined as follows:

"(a) if it is a tax resident in a jurisdiction based on its place of management, place of creation or similar criteria, it is located in that jurisdiction; and
(b) in other cases, it is located in the jurisdiction in which it was created."

As the IRO considers whether a person is 'resident' for limited purposes only, rather than as a basis for the charge to tax, does the IRD consider that an entity satisfying one of the residency tests in the IRO will be sufficient for it to satisfy (a) above and be located in Hong Kong for the purposes of the GloBE rules? If so, have the other members of the Inclusive Framework agreed to this application of the GloBE rules?

If not, when would you consider a Hong Kong tax paying entity to satisfy the test in (a) above and be located in Hong Kong for the purposes of the GloBE rules?

This issue is particularly important as there are many entities that were created in foreign jurisdictions but carry on business in Hong Kong and may also be managed and controlled here.

The IRD responded that there was currently no definition of "Hong Kong resident person" provided for the general application of the IRO. To facilitate the implementation of the GloBE Rules, it would be necessary to explore whether specific provisions are required to determine tax residence in Hong Kong. Mr Lean explained that taxpayers within the scope of the GloBE rules would like to know whether the definition of "Hong Kong resident person" would be introduced under the IRO, such as by reference to the definition of "resident for tax purposes" in section 50AAC of the IRO. He said if any proposed definition would be inserted, it would be most helpful if the IRD would first consult the Institute as any new definition might have unintended consequences. To provide certainty to taxpayers, he hoped that any consultation would take place as soon as possible. Mr Benjamin Chan said that the current definition of "resident for tax purposes" in section 50AAC of the IRO was used for transfer pricing purposes and would not apply to the GloBE rules. Further exploration needed to be made in respect of the proposal to introduce a definition for determining residence under the GloBE rules.

(ii) Similarly, the GloBE rules define 'permanent establishment' where there is no applicable tax treaty in force as, "a place of business (including a deemed place of business) in respect of which a jurisdiction taxes under its domestic law the income attributable to such place of business on a net basis similar to the manner in which it taxes its own tax residents."

As Hong Kong operates a territorial tax system (taxing only profits that arise in or are derived from Hong Kong), does the IRD consider that Hong Kong would tax a non-Hong Kong tax resident entity on the income attributable to its place of business in Hong Kong, even though it will be only Hong Kong source profits that are taxable?

> The IRD responded that section 50AAK of the IRO provided that profits of a non-Hong Kong resident person attributable to its permanent establishment in Hong Kong are to be determined as if the permanent establishment were a distinct and separate enterprise. Given that the income attribution was based on the functions performed, assets used and risks assumed by the non-Hong Kong resident person through the PE in Hong Kong, in practice, it would be difficult for the person to establish that the profits attributable to a PE in Hong Kong did not arise from its profit-producing activities undertaken in Hong Kong.
>
> Mr Lean asked the IRD to clarify whether income attributable to a Hong Kong PE of a non-DTA entity for the purposes of Hong Kong's transfer pricing rules would also be attributable to a Hong Kong PE for the purpose of the GloBE rules. He considered that while the income so attributable would often be Hong Kong sourced, this would not necessarily always be the case. Mr Benjamin Chan replied that this would need to be considered further, as the OECD guidance was not available in this area. He understood that other jurisdictions had raised this issue with the OECD. However, in practice, there would be a doubt only where the PE suffered no tax at all in Hong Kong.
>
> Mr Lean also sought clarification on the interaction between the attribution of profits to Hong Kong under transfer pricing rules and source principle. Mr Benjamin Chan responded that IRD's stance was that it involved a '2-step approach': attribution of profits to the PE in accordance with separate enterprise principle and then determine the source of profits in accordance with the operation test. But in reality, it would be difficult to conclude that profits attributable to PE in Hong Kong did not arise in Hong Kong.

(b) Permanent establishment of non-Hong Kong resident persons

It is not clear how to determine whether a non-Hong Kong resident person has a permanent establishment in Hong Kong where that person is not taxable in its jurisdiction or is taxed on a basis different from the OECD Model Tax Convention definition of an entity's residence (i.e. "liable to tax in the territory by reason of the person's domicile, residence, place of management or any other criterion of a similar nature").

Section 50AAC(1) and (5) of the IRO provides that Schedule 17G, "has effect for determining whether a non-Hong Kong resident person has a permanent establishment in Hong Kong." Part 3 of Schedule 17G sets out the conditions for a non-DTA territory resident person to have a permanent establishment in Hong Kong. Paragraph 1(1) of Schedule 17G tells us that an expression used in the schedule (such as non-DTA territory resident person) should have the meaning it is given elsewhere in Part 8AA. Section 50AAC(1) (in Part 8AA) provides that a 'non-DTA territory resident person' means "a person who is resident for tax purposes in a non-DTA territory" and that ‘resident for tax purposes in relation to a non-DTA territory’ means “a person who, under the laws of the territory, is liable to tax in the territory by reason of the person’s domicile, residence, place of management or any other criterion of a similar nature...”

For persons in jurisdictions such as the British Virgin Islands or Cayman Islands that do not levy corporate income tax, they will not be non-DTA territory resident persons as defined and it is therefore not possible to determine whether they have a permanent establishment in Hong Kong. The same applies, for persons in Singapore where income tax is levied on a quasi-territorial basis (i.e. on income accruing in, derived from or received in Singapore) and for the US where Federal Income Tax is levied on US persons (e.g. citizens and corporations formed under the laws of the US; hence the specific inclusion of these groups in the definition of ‘resident’ in US DTAs).

Would the IRD confirm how to determine whether a non-Hong Kong resident person in a jurisdiction that is not a DTA territory or a non-DTA territory (as defined) has a permanent establishment in Hong Kong?

The IRD responded as follows –

- The definition of “resident for tax purposes” in relation to a non-DTA territory under section 50AAC(1) of the IRO was intended to cover tax residents of all territories (other than Hong Kong) which did not have CDTAs with Hong Kong.

- The definition was modelled on Article 4(1) of the OECD Model Tax Convention on Income and on Capital (2017) (MTC 2017) save for the second sentence which excluded persons who were only subject to tax in a jurisdiction in respect of income from sources in that jurisdiction. Such formulation aimed to ensure that all residents of jurisdictions adopting a territorial principle in their taxation would not be excluded from the definition. This was consistent with the OECD's interpretation as stated in paragraph 8.3 of the Commentary on Article 4 of the MTC 2017.

- The term “tax resident”, as it spoke for itself, connoted a liability to taxation in the jurisdiction of residence. According to paragraph 8.11 of the Commentary on Article 4 of the MTC 2017, many jurisdictions considered that a person was liable to taxation in a jurisdiction even if the jurisdiction did not in fact impose tax on the person as certain requirements in the tax laws were satisfied. The IRD had adopted the same approach in construing the definition of “resident for tax purposes” in relation to a non-DTA territory.

- The above interpretation, however, did not apply to a company incorporated in a jurisdiction which did not implement any corporate income tax system (commonly referred to as “no or nominal tax jurisdiction”). As a matter of fact, such a company was usually managed or controlled in another jurisdiction and subject to taxation in that other jurisdiction. Where that other jurisdiction was Hong Kong, the company would be a Hong Kong resident person. It would not be necessary to consider whether the company had a permanent establishment (“PE”) in Hong Kong. All the Hong Kong sourced profits derived by the company from its trade or business carried on in Hong Kong, whether attributable to any PE in Hong Kong, would be subject to profits tax.

- If, however, that other jurisdiction was a jurisdiction other than Hong Kong, the definition of “resident for tax purposes” in relation to a DTA territory or a non-DTA territory would apply. As the company was a non-Hong Kong resident person, it would be necessary to determine whether the company had a PE in Hong Kong in accordance with the relevant DTA or Schedule 17G and if so, the company would be required to attribute its profits to the PE under section 50AAK.

Mr Lean understood that the definition of “resident for tax purposes” was largely modelled on Article 4(1) of MTC 2017 with slight adjustment. Mr Benjamin Chan commented that the definition of “resident for tax purposes” in relation to a non-DTA territory under section 50AAC(1) of the IRO was intended to cover most of the cases, including those situations involving dual residence.

Mr Lean acknowledged that the said definition would cover jurisdictions such as Singapore. However, it was a question of fact where a company was managed and controlled; and would be considered as a resident for tax purposes. Not all entities formed in tax havens were resident in another jurisdiction. For example, many multinational insurers were tax resident in Bermuda, which was an established international insurance centre, and were managed and controlled there. Therefore, the issue of determining whether such companies had a PE in Hong Kong still needed to be resolved.

Mr Lean noted that the IRD’s responses addressed the case of territorial tax systems and partly addressed the case of “no or nominal-tax jurisdictions” (i.e. tax havens), but did not address the position of U.S. companies (or companies in jurisdictions with similar tax systems) operating in Hong Kong. There were a number of precedent cases showing that the wording of the OECD MTC on tax residence would not cover residence based on citizenship or place of incorporation, such as for U.S. Federal Income Tax. Mr Benjamin Chan replied that the definition of “tax resident” as provided under the OECD MTC was widely adopted in double taxation agreements, yet it could only cater for the tax systems of most (not all) jurisdictions. He invited the Institute to share some relevant cases. He said that for cases involving rare situations, further exploration might be necessary to see how the definition of PE could apply.

(c) Tax credit claim of Hong Kong residents exercising employment in the Mainland under the HK-Mainland CDTA

Take the example of a Hong Kong resident individual employed under a Hong Kong employment contract by a Hong Kong employer, who is seconded to work for a Mainland subsidiary of the Hong Kong employer.

While the Hong Kong employer will continue to be the legal employer of the individual, the remuneration of the individual during the secondment period will, however, be borne wholly by the Mainland subsidiary. As the legal employer, the Hong Kong employer will continue to file employer's returns in Hong Kong, reporting the full amount of the remuneration to the IRD during the secondment period. The same full amount of the remuneration will also be reported and subject to individual income tax (IIT) in the Mainland.

In such a situation, where the individual renders services in Hong Kong during visits exceeding 60 days in total in any year of assessment during the secondment period, the full amount of the remuneration for that year of assessment will also be subject to salaries tax in Hong Kong.

In the above scenario, the general experience of tax practitioners is that IRD officers will tend to grant tax credit in Hong Kong only for the IIT paid in respect of the remuneration that is attributable to days of services rendered by the individual in the Mainland, but not in Hong Kong.

However, in respect of remuneration that is attributable to days of services rendered by the individual in Hong Kong, that part of the remuneration is also subject to double taxation in Hong Kong and the Mainland.

The question is why the IIT paid in respect of that part of the remuneration is not also creditable in Hong Kong under Articles 14 and 21 of the HK-Mainland CDTA and section 50 of the IRO?

Under Article 14 of the CDTA, the taxing right of the Mainland in the above scenario is to "such remuneration as is derived therefrom". Conceivably, the quoted phrase could refer to either (i) the full amount of the remuneration that is (a) borne by the Mainland subsidiary and, as such, regarded as being so derived by the individual from the Mainland; or (b) attributable to both services rendered in the Mainland and Hong Kong, the latter being regarded as incidental to the former; or (ii) only that part of the remuneration that is attributable to days of services rendered by the individual while the individual is physically present in the Mainland.

In the case of (i) above, the whole amount of the IIT paid, regardless of whether it is attributable to days of services rendered by the individual in the Mainland or in Hong Kong, would be paid in accordance with the provisions of the CDTA. As such, the IIT so paid should all be creditable in Hong Kong under Article 21 of the CDTA and section 50 of the IRO.

The Institute invites the IRD's comments on the above observation. If the IRD holds the view that (ii) above is the case, the Institute would request that the IRD consider communicating this to the State Taxation Administration, given that, generally, the local tax authorities in the Mainland appear to take the position in (i) above.

The IRD responded as follows –

- Pursuant to Article 14 of the Mainland-HK CDTA, income from employment derived by the Hong Kong resident was only taxable in Hong Kong unless the employment was exercised in the Mainland. If the employment was exercised in the Mainland, such remuneration as was derived therefrom might be taxed in the Mainland. According to paragraph 1 of the Commentary on Article 15 of the MTC 2017, employment was exercised in the place where the employee was physically present when rendering the employment services. Applying such internationally accepted interpretation, remuneration derived by the Hong Kong resident from employment services rendered in Hong Kong was not chargeable to IIT in the Mainland.

- In case of Hong Kong residents, the double taxation relief under Article 21 of the Mainland-HK CDTA was only available to tax paid in the Mainland in accordance with the provisions of the CDTA. In this connection, double taxation could only be relieved under Article 21 for tax payable in the Mainland in respect of remuneration derived from the exercise of employment in the Mainland. No double taxation could be relieved under Article 21 for tax payable in the Mainland by the Hong Kong resident in respect of remuneration derived from the exercise of employment in Hong Kong or income derived from services rendered by the person in Hong Kong. It had to be pointed out that double taxation relief under Article 21 was expressly stated to be "subject to the provisions of the tax laws of the Hong Kong Special Administrative Region relating to the allowance of a deduction and a credit for tax paid in any territory outside the Hong Kong Special Administrative Region". In other words, the operation of Article 21 was subject to sections 50 and 50AA(2) of the IRO. Section 50AA(2) provided that the amount of any relief from double taxation granted must not exceed the amount of relief that would be granted had all foreign tax minimization steps been taken. The Hong Kong resident should take tax minimization steps in the Mainland in the first place.

- The IRD considered that such remuneration as was derived from the exercise of employment in the Mainland under Article 14 of the Mainland-HK CDTA referred to that part of the income attributable to days of physical presence of the Hong Kong resident in the Mainland. It was also the IRD's understanding that under the IIT law and regulations in the Mainland, where a Hong Kong resident was employed in Hong Kong and concurrently held a position in the Mainland, that person was chargeable to IIT only on the part of the person's income attributable to services rendered in the Mainland. If the person rendered services both in and outside the Mainland, such income was generally computed by time apportionment by reference to the number of work days in the Mainland. In this connection, only the IIT payable in the Mainland on such income was to be allowed as a credit against tax payable in Hong Kong.

- The tax treatment of each Hong Kong resident's case should be based on its own facts and circumstances. Regarding any deviation from the above interpretation leading to taxation in the Mainland on income attributable to days of physical presence in Hong Kong, the Hong Kong resident was advised to consult the Mainland tax authorities. In case the Hong Kong resident was exposed to taxation not in accordance with the provisions of the Mainland-HK CDTA, the person might present his case to the IRD for mutual agreement procedure (MAP) within specified time limit pursuant to Article 23 of the CDTA.

Ms Tang sought clarification of the IIT treatment in the Mainland. It seemed to be the IRD's understanding that where a Hong Kong resident was employed in Hong Kong and concurrently held a position in the Mainland, that person was chargeable to IIT on a time-apportioned basis if the person rendered services in both the Mainland and Hong Kong. Ms Tang said tax practitioners' understanding was, however, that if remuneration was fully borne by the Mainland entity, even if part of the services might be rendered by the person in Hong Kong, the entire income would be subject to tax in the Mainland. The number of days spent by the employee in the Mainland was irrelevant.

Ms Canice Chan said the Mainland generally shared the interpretation in the Commentary on Article 15 of the MTC 2017 in implementing CDTAs, and the IIT treatment as stated by the IRD was based on the provisions contained in Circular 2019 No. 35 jointly issued by the Ministry of Finance and the STA. She took note of the Institute's concerns regarding whether the Hong Kong resident's income should be wholly taxed in the Mainland. She said the tax treatment of each Hong Kong resident's case would be considered based on its own merits, having regard to the facts and circumstances. If a circumstance arose such that the Hong Kong resident had been exposed to taxation not in accordance with the Mainland-HK CDTA, the IRD would suggest the taxpayer consult the Mainland tax authorities and present the case to the IRD for MAP if necessary. This would be the most appropriate way to resolve the double taxation issue.

Ms Tang commented that it would be helpful if the general concerns of the Institute could be relayed to the Mainland tax authorities, as it would not be practical for all individual taxpayers to pursue their cases through MAP.

Agenda Item A4 – Stamp Duty

(a) Advance rulings regime for stamp duty

We note that the number of court cases related to stamp duty has been increasing in the last few years. Many stamp duty payers would also like to improve certainty in terms of how a provision in the Stamp Duty Ordinance (SDO) applies to a contemplated arrangement. However, there is no advance ruling regime available for stamp duty cases as there is for profits tax and salaries tax cases. An instrument, only if properly executed, can be submitted to the Stamp Office for adjudication, in order to determine whether it is chargeable to stamp duty and the amount payable, if any. Since the instrument has already been given effect, the adjudicated stamp duty liability would be final and conclusive which may not be the desired or expected outcome of the parties to the transaction.

To minimize disputes between the Stamp Office and stamp duty payers, and to provide greater certainty in relation to transactions, especially corporate restructurings, would the IRD consider establishing a regime similar to advance rulings for stamp duty cases?

The IRD responded as follows–

- Stamp duty was chargeable on instruments, wherever executed, specified in the First Schedule to the SDO. An adjudication mechanism was provided under section 13(1) of the SDO, whereby the Collector might, and shall if he is required by any person upon payment of the adjudication fee to do so, express his opinion with reference to any executed instrument upon the following questions:

  (a) whether the instrument was chargeable with any stamp duty;
  (b) if the instrument is so chargeable, what amount of stamp duty was chargeable thereon.

- Furthermore, a set of Stamp Office Interpretation and Practice Notes containing the Department's interpretation and practices in relation to the SDO had been issued for the information of duty payers. In the recent appeal cases, other than valuation disputes, the duty payers and the Stamp Office held different views on the interpretation of provisions under the SDO which had to be decided by the court. It seems that it might not be possible to minimise disputes by introducing an advance ruling mechanism under the SDO.

<u>Agenda Item A5 – Departmental Policy and Administrative Matters</u>

(a) Advance rulings on permanent establishment

In accordance with section 1 in schedule 10 to the IRO, the Commissioner may, upon application made by a person, make a ruling on how a provision of the IRO applies to the applicant. While the definition of "permanent establishment (PE)" of a DTA territory resident should be referred to the relevant provisions under the DTA concerned, the DTAs are incorporated as the subsidiary legislation under the IRO and given effect according to section 49(1A) of the IRO. Would the IRD please confirm, therefore, that the PE issues of a DTA territory resident can be covered by the existing advance rulings regime?

The IRD responded as follows–

- Since DTAs had been incorporated as part of the IRO, tax matters in relation to the PE article of DTAs were also covered by the existing advance ruling regime.

- However, paragraph 2(a) of Schedule 10 to the IRO clearly stated that the Commissioner might decline to make a ruling if the application would require the Commissioner to determine or establish any question of fact. Paragraph 3(d) of Schedule 10 further provided that the Commissioner should not make a ruling if he considered that the applicant had not provided sufficient information in relation to the application.

- Though whether a PE existed was a question of fact, the IRD would make effort to deal with such advance ruling applications as expeditiously as possible provided that complete and correct information reflecting the full picture of the case was supplied in the applications. In fact, the IRD had made a ruling that a representative office of a non-Hong Kong resident person constituted a PE in Hong Kong. Please see the published Advance Ruling Case No. 66 for reference.

(b) Issues related to electronic filing ("e-filing")

(i) Timing of issuing assessments

When e-filing of profits tax returns is implemented, all taxpayers will be required to file tax returns annually. Will the IRD, in turn, aim to issue assessments / refunds / statements of loss annually? Currently, some taxpayers may not receive refunds on a very timely basis. As for temporary file (i.e. Category 22) cases, taxpayers often do not receive any statement of loss for number of years.

The IRD responded as follows–

- It was the IRD's plan to take forward the project on e-filing of profits tax returns (the e-Filing Project) by two phases. The first phase which enhanced the existing eTax Portal to enable more businesses to voluntarily e-file profits tax returns together with financial statements and tax computations in inline eXtensible Business Reporting Language (iXBRL) format would be launched in April 2023, whilst the second phase with the aim of implementing mandatory e-filing of profits tax returns through the newly developed Business Tax Portal by specified categories of taxpayers would start from 2025.

- Depending on the actual circumstances, including whether taxpayers and tax practitioners had sufficient time to get familiar with the new iXBRL filing requirements after the roll-out of voluntary e-filing in 2023, the IRD would consider extending mandatory e-filing gradually to cover other classes of businesses or entities at a later stage. The ultimate goal was to achieve full-scale implementation of mandatory e-filing by 2030 tentatively.

- Issue of assessments and statements of loss to all taxpayers (including "inactive" corporations and partnership businesses with departmental file number prefix 22 or 95 which were generally dormant or had no assessable profits for several years) would not be possible unless full-scale mandatory e-filing could be implemented in 2030. Given the limited resources available, the IRD had no plan to issue notices of assessments and statements of loss to all "inactive" corporations and partnership businesses annually at the moment. For cases of tax refunds, it was our current practice to issue assessments as soon as possible after all the doubtful issues had been resolved.

- Taking this opportunity, the IRD would like to appeal to the Institute to encourage its members to e-file profits tax returns together with financial statements and tax computations in iXBRL format through our enhanced eTAX Portal next year. Any feedback from the Institute was welcome.

(ii) Document requiring wet-ink signature

Due to the COVID-19 pandemic and increasing awareness of environmental protection, it is common for clients to sign documents (e.g. tax representative appointment letters, extension letters, and compound offer reply slips) and send the scanned copy to the tax representative for onward submission to the IRD. Our understanding is that scanned copies have been accepted by the IRD in some cases, but not in others.

- Can the IRD clarify what types of documents require a wet-ink signature and in what situations, or circumstances, scanned copies are acceptable?

- Is a wet-ink signing chop of a natural person（個人簽名章）acceptable?

- More generally, will IRD consider the use of e-signatures ahead of the full implementation of e-filing, and also for documents other than profits tax returns, e.g. tax representative appointment letters bearing e-signatures. We understand that some auditors are receiving requests from clients to be able to sign financial statements with DocuSign. Would the IRD consider accepting audited financial statements and tax representative appointment letters bearing directors' / taxpayers' e-signatures (e.g. using software such as DocuSign)?

The IRD responded as follows–

- Transmission of documents through facsimile was generally acceptable except for certain specified documents such as tax returns. Details of exception cases were listed on the IRD's website (www.ird.gov.hk/eng/pol/fti.htm). Apart from those specified documents listed on the IRD's website, scanned copies of documents bearing a wet-ink signature were also acceptable. Examples included objection letters, written requests for extension of time, holdover applications, etc.

- A wet-ink signing chop of a natural person（個人簽名章）was only acceptable for cases where the taxpayer could not write, provided that the taxpayer's affixing of the wet-ink signing chop was witnessed by an individual other than his or her spouse or a minor. The witness should sign and date, and state his or her full name and Identity Card number beside his or her signature.

- Under the Electronic Transactions Ordinance (Cap. 553) (ETO), electronic records submitted by the public to the IRD were acceptable. However, they had to conform to the prescribed format, manner and procedure as set out on the IRD's website (www.ird.gov.hk/eng/ese/esi.htm). For those electronic records requiring signatures, only digital signatures supported by recognised certificates issued by certification authorities recognised by the Government Chief Information Officer under the ETO were acceptable. Currently, there were two recognised certification authorities under the ETO in Hong Kong, namely the Postmaster General (Hongkong Post Certification Authority) and Digi-Sign Certification Services Limited.

- On the other hand, section 2(5) of the IRO provided that a reference to the act of signing a tax return included a reference to (a) the affixing of a digital signature to; or (b) the inclusion of a password with, the return for the purpose of authenticating or approving it. Section 51AA(6)(b) further provided that the Commissioner might by notice published in the Gazette specify requirements as to how a digital signature was to be affixed to, or a password was to be included with, a return furnished under that section.

- As mentioned in Agenda Item A5(b)(i) above, a new mode of voluntary e-filing of profits tax returns would be launched in April 2023. By that time, businesses would be able to submit their financial statements and tax computations in iXBRL format electronically through the enhanced eTax Portal. The e-return filer needed to use his eTAX Password, MyGovHK Password, recognised personal digital certificate or "iAM Smart" account with digital signing function to sign the return. For filing of profits tax returns in paper form, only audited financial statements bearing the director's and auditor's hand-written signatures were acceptable.

Mr Yeung said that based on the IRD's response, it seemed that a wet-ink signing chop was only acceptable for an individual fulfilling certain criteria. He asked whether directors needed to sign the audited accounts individually, or whether they could use their personal chops. He noted that, in some places overseas, directors could use software, such as DocuSign, to sign the financial statements.

CIR said that the requirements for signing financial statements and tax returns had already been explained and such requirement would be applied to all taxpayers across the board. The IRD could not relax the requirement for certain groups of taxpayers according to their preference. Similarly, the prescribed means of electronic signatures had to be adopted. The IRD was in the process of developing a tax service provider portal. It was hoped that the new electronic services and additional means of communicating with the IRD would be more convenient to taxpayers and tax practitioners in the future.

(iii) E-filing of applications

As tax administration is moving into a digital era, will the IRD consider accepting e-filing of documents other than tax returns, for example, applications for HK CoR status, and applications for stamp duty relief under sections 45/29H(3) of the SDO?

In respect of the latter in particular, certain stamp duty payers based overseas experienced difficulty in arranging documents with original wet signatures during the COVID-19 lock-down period, and would appreciate the convenience of e-signing and e-submission of the relevant documents. This would involve (i) accepting an e-signature on the application form and/or relevant supporting documents; and (ii) accepting the e-filing of a PDF file of the application package including the e-signed documents.

The IRD responded as follows–

Applications for HK CoR status

- The IRD was always committed to improving operational efficiency and enhancing the digital services.

- At present, the IRD had allowed electronic filing of certain forms via the "iAM Smart" website (https://www.iamsmart.gov.hk/en/) or its mobile app. Among others, users registered for "iAM Smart+" could complete, sign and submit applications for HK CoR online.

- That said, the IRD would continue to explore other means to facilitate more users to submit their applications for HK CoR electronically. As mentioned in Agenda Item A5(d) of the 2020 Annual Meeting, the IRD would soon create three interconnected portals, namely Business Tax Portal (for corporate taxpayers), Individual Tax Portal (for individual taxpayers) and Tax Services Portal (for tax representatives). It was the IRD's plan to make use of the said portals to provide additional avenues for the public to submit application for HK CoR electronically. As a result, in addition to the "iAM Smart+" platform, the portal users would also be able to file the application for HK CoR online in the future.

Applications in relation to stamp duty

- The ETO provided the legal framework for the recognition of electronic records and signatures, giving them the same legal status as their paper counterparts. Section 3 of the ETO, however, excluded the following matters set out in Schedule 1 to the ETO from the application of sections 5, 5A, 6, 7, 8 and 17 of the ETO so that they could not be executed electronically:

  (a) The making, execution or making and execution of any instrument which was required to be stamped or endorsed under the SDO other than a contract note to which an agreement under section 5A of the SDO relates.

  (b) Any deed, conveyance or other document or instrument in writing, judgments, and lis pendens referred to in the Land Registration Ordinance (Cap. 128) by which any parcels of ground tenements or premises in Hong Kong might be affected.

  (c) Any assignment, mortgage or legal charge within the meaning of the Conveyancing and Property Ordinance (Cap. 219) or any other contract relating to or effecting the disposition of immovable property or an interest in immovable property.

(d) Statutory declarations.

- For applications for stamp duty relief under sections 45 and 29H(3) of the SDO, the following documents must be presented to the Stamp Office together with the application: (a) the executed instrument such as assignment or agreement for sale and purchase for immovable property in Hong Kong and instrument of transfer for Hong Kong stock; and (b) a statutory declaration in support of the application.

- Given that the requisite supporting documents for applications for the stamp duty relief were not permitted under the ETO to be executed electronically, the Stamp Office has no plan to extend e-services to include such applications.

(iv) E-filing of employer's returns

Following the webinar on the e-filing of profits tax returns project, presented by the IRD on 27 November 2021, there is a clearer timeline for implementing the voluntary e-filing and mandatory e-filing (by multinational enterprises) of profits tax returns by April 2023 and 2025 respectively. The Institute would like to ask whether the IRD will be refining the current online submission process for employers' returns.

Currently, there are two modes of online submission of data files under the Employer's Return e-Filing Services. One is "Online Mode" and the other is "Mixed Mode".

"Online Mode" allows only the Authorized Signer (e.g. a human resources (HR) staff of the employer company) to make the submission using his/her own eTax account. As a consequence, the personal eTax accounts of relevant HR staff are being used for both personal and business purposes, which causes privacy and confidentiality concerns.

While the new "Mixed Mode" allows employers to submit certain employer's return data files without the need to use the Authorized Signer's personal eTax account, not all the submission procedures under this mode can be completed electronically. For example, a paper Form BIR56A is still required to be signed and submitted with a control list. This causes inconvenience when the Authorized Signers reside outside Hong Kong and defeats the purposes of having the electronic system in the first place.

Before any refinements to the above two modes are made, would the IRD be prepared to provide more information under the FAQ section on its website to address the employers' concerns about data privacy and information disclosure under the "Online Mode", as outlined above?

Further, the Institute would also like to ask whether the IRD will consider letting employers, or their tax representatives, set up their own designated eTax accounts to handle the submission of employers' returns in the longer term.

The IRD responded as follows–

- The Employer e-Filing Services under eTAX only allowed the Authorised Signer, as the representative of the employer, to complete and submit an employer's return together with a data file containing IR56 records, if applicable, through his or her personal eTAX account via "Online Mode" to the IRD. There should be no one except the Authorised Signer himself or herself privy to his or her own tax information as well as the employer's information in the capacity of the return filer when conducting the filing transaction by using his or her own eTAX account. Besides, the current Employer e-Filing Services under eTAX did not permit subsequent retrieval of the submitted employer's returns and data records. Therefore, the perceived privacy and confidentiality issues should not be a matter of concern. The IRD would provide information of the above in the form of frequently asked questions on its website to better address the employer's concerns.

- That said, the IRD well understood that users might be cautious to use personal eTAX accounts to manage businesses' tax compliance matters. With a view to promoting e-filing of tax returns, the IRD was prepared to provide dedicated tailor-made portal services for different groups of users, including, inter alia, the development of Business Tax Portal for businesses and Tax Services Portal for service providers in 2025 tentatively. It was the IRD's plan that, upon implementation of the new tax portals, employers and service providers, who on behalf of their clients (subject to legislative amendments), could file employer's returns on-line through their own businesses' portal accounts directly. As such, the current need to use the Authorised Signer's personal eTAX account to log in eTAX and file employer's return on behalf of the employer would then be dispensed with. During the transition period, the "Mixed Mode" submission service would, however, be maintained as an alternative return filing method to allow time for registration of tax portal accounts by the businesses concerned.

(c) Lodgement of profits tax returns and filing deadlines for 2021/22

The Institute would ask the IRD to share the latest statistics on tax return filing and information on the 2021/22 tax filing deadlines.

The IRD responded as follows–

Four tables at Appendix A showed the lodgement statistics for 2020/21 Profits Tax Returns in respect of corporations and partnerships.

- Table 1 showed that the IRD issued some 2,000 less returns in the 2020/21 bulk issue exercise and around 26,000 returns were not filed by the due dates.

- Table 2 showed the filing position under different accounting date codes.

- Table 3 showed the progressive filing results. The lodgement rate for "D" code returns by the deadline had dropped to 75% in the absence of postponement of the filing deadline. Though there were slight improvements in the lodgement rates for "M" code returns (with 2% to 6% increase in graduated lodgement rates and 2% increase in the overall lodgement rate by the deadline), the graduated lodgement rates were still significantly below the lodgement standards. Tax representatives were urged to improve their performance this year.

- Table 4 was a comparative analysis of compliance with the block extension scheme.

Bulk Issue of 2021/22 Profits Tax Returns

The 2021/22 Profits Tax Returns for “active” files were bulk-issued on 1 April 2022. The extended due dates for filing 2021/22 Profits Tax Returns were as follows–

Accounting Date Code	Extended Due Date	Further Extended Due Date if Opting for e-Filing
“N” code	30 June 2022	14 July 2022
“D” code	30 August 2022	14 September 2022
“M” code	15 November 2022	29 November 2022
“M” code – current year loss cases	31 January 2023	31 January 2023 (same as paper returns)

Despite the above extension, the IRD appealed to tax representatives to file as many returns as possible well before the extended due dates.

PART B – MATTERS RAISED BY THE IRD

Agenda Item B1 – Investigation and Field Audit: Discrepancies Detected by Field Audit

The IRD responded as follows–

Appendix B was compiled to illustrate the specific problem areas detected in corporations with tax audits completed during the year ended 31 December 2021. Comparative figures for the years 2019 and 2020 were included.

Field Audit teams uncovered discrepancies in 324 corporation cases, of which 272 carried clean auditors' reports. Amount of discrepancies detected in the clean report cases accounted for 92% (2020: 88%) of the total discrepancies detected in the year 2021 and total tax of $937 million was recovered from these cases. Average understatement per clean report case was $22.80 million (2020: $19.79 million) while tax undercharged per clean report case was $3.4 million (2020: $3.0 million).

In 2021, discrepancies resulted mainly from over-claiming of purchases and expenses, incorrect claims of offshore profits and adjustment of technical items. In the majority of cases, the discrepancies were detected after examining the business ledgers and source documents.

In 2021, there was no case in which the IRD considered that the auditor should have detected the irregularities through statutory audit.

Agenda Item B2 – Date of Next Annual Meeting

The date of the next meeting would be agreed between the Institute and the IRD in due course.

Lodgment of Corporations and Partnerships Profits Tax Returns

Table 1
Lodgment Comparison from 2018/19 to 2020/21

		Y/A 2018/19	Y/A 2019/20	Y/A 2020/21	Comparison 2019/20 and 2020/21
1.	Returns issued on 1 April or 4 May	195,000	204,000	202,000	-1%
2.	Returns not filed by due date				
	"N" code	3,200	2,700	3,300	22%
	"D" code	7,600	7,200	8,300	15%
	"M" code	10,500	12,400	14,700	19%
		21,300	22,300	26,300	18%
3.	Compound offers issued	9,800	5,400	6,900	28%
4.	Estimated assessments issued	4,600	8,800	11,600	32%

Table 2
2020/21 Detailed Profits Tax Returns Statistics

	"N"	"D"	"M"	Total
Total returns issued	23,000	70,000	109,000	202,000
Failure to file on time	3,300	8,300	14,700	26,300
Compound offers issued	800	2,500	3,600	6,900
Estimated assessments issued	1,600	3,500	6,500	11,600

Table 3

Represented Profits Tax Returns - Lodgment Patterns

Code	Lodgment Standard	Y/A 2020/21	Y/A 2019/20
D - extended due date on			
30 September 2020	100%	-	81%
16 August 2021	100%	75% (1)	-
M - 31 August	25%	14%	11%
M - 30 September	55%	19%	17%
M - 31 October	80%	34%	28%
M - extended due date on			
30 November 2020	100%	-	72%
15 November 2021	100%	74% (2)	-

Notes: (1) 29% lodged within a few days before 16 August 2021 (13% lodged within a few days before 30 September 2020 for Y/A 2019/20)

(2) 25% lodged within a few days before 15 November 2021 (21% lodged within a few days before 30 November 2020 for Y/A 2019/20)

Table 4

Tax Representatives with Lodgment Rate of Less Than 74% of "M" Code Returns as at 15 November 2021

1,478 tax representatives have "M" code clients. Of these, 673 (46%) firms were below the average performance rate of 74%. An analysis of the firms, based on size, is as follows-

		Current Year Performance				Last Year Performance			
	No. of clients per firm	Total No. of firms	No. of firms below the average of 74%	No. of non-compliance cases	% of total non-compliance cases	Total No. of firms	No. of firms below the average of 72%	No. of non-compliance cases	% of total non-compliance cases
Small size firms	100 or less	1,384	630	5,758	71%	1,371	628	6,161	66%
Medium size firms	101 - 300	87	43	2,320	29%	94	53	2,827	30%
Large size firms	over 300	7	0	0	0%	8	3	354	4%
		1,478	673	8,078	100%	1,473	684	9,342	100%

Appendix B

Analysis of Completed FA Corporation Cases for the years ended 31 December 2019, 2020 and 2021

	Number			Discrepancy Amount by Nature			Tax Undercharged by Nature		
Auditor's Report = Unqualified	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
Sales omitted	56	48	49	87,277,778	62,167,273	59,993,235	12,402,793	7,890,853	8,081,873
Purchases overstated	19	15	11	30,670,937	49,026,448	37,955,961	4,581,073	7,299,611	7,955,046
Gross profit understated	41	37	33	68,371,415	814,659,600	72,549,382	10,127,025	131,892,653	9,854,050
Expenses over-claimed	106	114	87	76,721,908	150,828,962	176,744,684	9,619,700	22,507,369	26,977,704
Technical adjustments	96	82	76	51,724,969	29,484,527	109,962,323	5,348,928	3,029,692	16,310,509
Offshore income / profits disallowed	22	12	18	95,199,663	88,132,024	146,747,692	13,345,928	13,848,818	23,187,921
Other	115	123	89	130,411,069	167,135,665	400,211,845	17,518,009	25,620,300	63,003,826
TOTAL	455*	431*	363*	$540,377,739	$1,361,434,499	$1,004,165,122	$72,943,456	$212,089,296	$155,370,929
TOTAL NUMBER OF CASES	300*	307*	272*						
AVERAGE AMOUNT PER CASE				$1,801,259	$4,434,640	$3,691,784	$243,145	$690,845	$571,217

FOR AUDIT YEAR ONLY

* in one case there may be more than one type of discrepancy

		Total Discrepancy for All Years			Total Tax Undercharged for All Years		
		2019	**2020**	**2021**	**2019**	**2020**	**2021**
Other statistics for the above cases:	**TOTAL AMOUNT**	**$3,380,807,219**	**$6,075,473,883**	**$6,202,914,132**	**$484,329,841**	**$930,164,546**	**$937,065,123**
	AVERAGE AMOUNT PER CASE	**$11,269,357**	**$19,789,817**	**$22,804,831**	**$1,614,433**	**$3,029,852**	**$3,445,092**

	Number			Discrepancy Amount by Nature			Tax Undercharged by Nature		
Auditor's Report = Qualified	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
Sales omitted	11	26	9	44,782,052	33,239,140	6,424,396	7,258,723	4,838,005	790,808
Purchases overstated	4	2	8	6,603,750	19,463,392	14,993,386	655,574	2,780,627	1,619,219
Gross profit understated	23	10	12	33,132,243	13,887,085	31,601,863	4,742,030	1,982,706	4,945,834
Expenses over-claimed	21	27	16	6,887,763	7,699,017	5,811,526	875,955	925,575	410,850
Technical adjustments	16	14	13	12,670,487	7,455,642	12,234,165	1,603,781	832,436	1,472,301
Offshore income / profits disallowed	1	5	1	57,332,058	26,240,002	2,740,572	9,439,789	4,169,345	341,874
Other	26	23	18	58,017,071	41,969,334	15,961,407	8,804,451	3,900,107	2,117,314
TOTAL	102*	107*	77*	$219,425,424	$149,953,612	$89,767,315	$33,380,303	$19,428,801	$11,698,200
TOTAL NUMBER OF CASES	67*	68*	52*						
AVERAGE AMOUNT PER CASE				$3,275,006	$2,205,200	$1,726,295	$498,213	$285,718	$224,965

FOR AUDIT YEAR ONLY

* in one case there may be more than one type of discrepancy

		Total Discrepancy for All Years			Total Tax Undercharged for All Years		
		2019	**2020**	**2021**	**2019**	**2020**	**2021**
Other statistics for the above cases:	**TOTAL AMOUNT**	**$1,131,854,905**	**$808,236,856**	**$512,489,520**	**$165,748,299**	**$118,534,361**	**$69,062,275**
	AVERAGE AMOUNT PER CASE	**$16,893,357**	**$11,885,836**	**$9,855,568**	**$2,473,855**	**$1,743,152**	**$1,328,121**

	2019	2020	2021
TOTAL NUMBER OF CASES	367	375	324

		Total Discrepancy for All Years			Total Tax Undercharged for All Years		
		2019	**2020**	**2021**	**2019**	**2020**	**2021**
Other statistics for the above cases:	**TOTAL AMOUNT**	**$4,512,662,124**	**$6,883,710,739**	**$6,715,403,652**	**$650,078,140**	**$1,048,698,907**	**$1,006,127,398**
	AVERAGE AMOUNT PER CASE	**$12,296,082**	**$18,356,562**	**$20,726,554**	**$1,771,330**	**$2,796,530**	**$3,105,331**

Extracts of Analysis in Appendix B

		2020	2021
(a)	No. of corporation cases with discrepancies uncovered	375	324
(b)	No. of corporation cases in item (a) carried clean auditor’s reports	307	272
(c)	Total discrepancies detected in all cases	$6,884m	$6,715m
(d)	Total discrepancies detected in clean auditor’s report cases	$6,075m	$6,203m
(e)	Percentage of (d) over (c)	88%	92%
(f)	Total tax uncovered in clean auditor’s report cases	$930m	$937m
(g)	Average understatement per clean auditor’s report case	$19.79m	$22.80m
(h)	Tax undercharged per clean auditor’s report case	$3.0m	$3.4m