



Hong Kong Tax Newsflash

Apportionment method for calculating exempted income for salaries tax purpose



On April 14, 2021, the Court of First Instance (CFI) concluded that for the purpose of calculating "exempted income" under Section 8(1A)(c) of the Inland Revenue Ordinance (IRO), income attributed to weekends and statutory holidays in the secondment location for non-work purposes during the secondment period should also qualify for income exemption, irrespective of where the Taxpayer physically happened to have been. In addition, any apportionment method should be justified by its facts and circumstances.

Case background

- The Taxpayer was an employee of a Hong Kong company and was seconded to Mainland China (the PRC) between August 1, 2014 and March 31, 2015.
- The Taxpayer had a work base in the PRC during the secondment period.
- There was no provision in the secondment letter stating any contractual allocation between services rendered in Hong Kong and services rendered in the PRC.

- The Taxpayer occasionally had to return to Hong Kong for work and spent more than 60 days in Hong Kong during a year of assessment. As such he was not eligible to claim full income exemption under Section 8(1A)(b)(ii) in conjunction with Section 8(1B).
- The Taxpayer was entitled to statutory public holidays in the PRC.
- The Taxpayer visited Hong Kong on Saturdays, Sundays, statutory PRC holidays and during annual leave; all were for non-work purposes.
- The Inland Revenue Department (IRD) adopted the "day in, day out" approach in calculating income qualifying for income exemption under section 8(1A)(c). Under the approach adopted by the IRD, income in relation to the Taxpayer's days spent in Hong Kong for non-work purpose was not exempt from salaries tax.
- The Board of Review (BoR) did not agree with the "day in, day out" approach adopted by the IRD and viewed that the approach was *"arbitrary and led to injustice"*. In the case of the Taxpayer, the Saturdays, Sundays and PRC statutory holidays that the Taxpayer spent in Hong Kong for non-work purposes should not be counted against his claim under section 8(1A)(c) of the IRO as the Taxpayer did not render any services in Hong Kong during these holidays.

The CFI's judgement

- In line with the BoR's view, the CFI considered that the facts and situation did not justify that the "day in, day out" basis as being a fair approach in calculating the amount of income qualifying for income exemption under section 8(1A)(c).
- When deciding the apportionment for income exclusion, regard can be given to any contractual attribution, and time apportionment is not impermissible if the facts and evidence justify its adoption.
- In the present case, the approach agreed by the CFI is that the part of the Taxpayer's income allocated to weekends and PRC statutory holidays should qualify for exclusion for the purpose of section 8(1A)(c), irrespective of where the Taxpayer physically was over those weekends and PRC statutory holidays.
- The CFI agreed with the BoR's approach and dismissed the appeal from the IRD.

Our comment

We should note that the CFI's apportionment approach for calculating exempted income under Section 8(1A)(c) of the IRO may vary from the IRD's existing practices (i.e. "day in, day out"). In general, the CFI's approach may give a taxpayer, who is on secondment overseas but physically spends weekends/holidays in Hong Kong, a greater extent of tax relief. The apportionment method will be based on the facts and circumstances of each case and this would be a good reference point.

Tax Newsflash is published for the clients and professionals of Deloitte Touche Tohmatsu. The contents are of a general nature only. Readers are advised to consult their tax advisors before acting on any information contained in this newsletter.

If you have any questions, please contact our professionals:

Authors

Esti Chui

Tax Director

+852 2852 5682

echui@deloitte.com.hk

Jennifer Lam

Senior Tax Manager

+852 2852 1639

jelam@deloitte.com.hk

Global Employer Services

National Leader

Tony Jasper

Tax Partner

+852 2238 7499

tojasper@deloitte.com.hk

Get in touch



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms, and their related entities (collectively, the “Deloitte organization”). DTTL (also referred to as “Deloitte Global”) and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

Deloitte is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax and related services. Our global network of member firms and related entities in more than 150 countries and territories (collectively, the “Deloitte organization”) serves four out of five Fortune Global 500® companies. Learn how Deloitte’s approximately 330,000 people make an impact that matters at www.deloitte.com.

Deloitte Asia Pacific Limited is a company limited by guarantee and a member firm of DTTL. Members of Deloitte Asia Pacific Limited and their related entities, each of which are separate and independent legal entities, provide services from more than 100 cities across the region, including Auckland, Bangkok, Beijing, Hanoi, Hong Kong, Jakarta, Kuala Lumpur, Manila, Melbourne, Osaka, Seoul, Shanghai, Singapore, Sydney, Taipei and Tokyo.

The Deloitte brand entered the China market in 1917 with the opening of an office in Shanghai. Today, Deloitte China delivers a comprehensive range of audit & assurance, consulting, financial advisory, risk advisory and tax services to local, multinational and growth enterprise clients in China. Deloitte China has also made—and continues to make—substantial contributions to the development of China’s accounting standards, taxation system and professional expertise. Deloitte China is a locally incorporated professional services organization, owned by its partners in China. To learn more about how Deloitte makes an Impact that Matters in China, please connect with our social media platforms at www2.deloitte.com/cn/en/social-media.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms or their related entities (collectively, the “Deloitte organization”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser.

No representations, warranties or undertakings (express or implied) are given as to the accuracy or completeness of the information in this communication, and none of DTTL, its member firms, related entities, employees or agents shall be liable or responsible for any loss or damage whatsoever arising directly or indirectly in connection with any person relying on this communication. DTTL and each of its member firms, and their related entities, are legally separate and independent entities.

© 2021 Deloitte Touche Tohmatsu in Hong Kong, Deloitte Touche Tohmatsu in Macau, and Deloitte Touche Tohmatsu Certified Public Accountants LLP in the Chinese Mainland. All rights reserved.

To no longer receive emails about this topic please send a return email to the sender with the word “Unsubscribe” in the subject line.