



Hong Kong Tax Newsflash

Inland Revenue Department issued guidance on tax issues arising from the COVID-19 pandemic



The COVID-19 pandemic changes the ways in which businesses operate and people work. Such changes may also give rise to potential tax issues. The Inland Revenue Department (IRD) recently released its [guidance](#) on tax issues arising from the COVID-19 pandemic. The IRD's approach is generally in line with the guidelines released by the Organisation for Economic Co-operation and Development (OECD) in December 2020 and January 2021. This article highlights the IRD's views on the following tax issues:

Tax residence of companies

- A temporary change in the locations where senior management hold their meetings or conduct the business of a company due to the COVID-19 pandemic would not change the tax residence status of a company.
- The IRD would take into account all relevant facts and circumstances in assessing the company's residence status.
- In cases of dual residency, the place of residence determined by the tie-breaker rules under a tax treaty is unlikely to be affected by the

fact that the management cannot travel because of the public health measures.

- The above views are in line with the discussion in the 2020 Annual Meeting between the IRD and HKICPA.

Tax residence of individuals

- An individual would unlikely be regarded as a resident of the host jurisdiction where he/she temporarily remains due to the travel restrictions under COVID-19 pandemic.

Permanent establishment (PE)

- The exceptional and temporary change of the location where employees exercise their employment (e.g. working from home) due to the COVID-19 pandemic should not create new PEs for the employers.
- Temporary conclusion of contracts in the home of employees or agents because of the pandemic should not create PEs for the enterprises, unless they habitually did so before the pandemic.
- If the employees continue to work from home after the cessation of public health measures, further examination of the facts and circumstances would be required to determine whether a PE exists.

Income from employment

- Where a tax treaty is applicable, an individual resident in a non-Hong Kong jurisdiction working in Hong Kong and is stranded in Hong Kong due to COVID-19 pandemic, the additional days spent in Hong Kong would be disregarded for the purposes of the 183-day test under the employment income article of the relevant treaty under certain circumstances.
- Where no tax treaty is applicable, the IRD has no discretion to exclude the days of physical presence in Hong Kong for the purposes of the 60-day exemption rule. In other words, if a non-treaty jurisdiction resident exercises an employment in Hong Kong and spends more than 60 days in Hong Kong in a year of assessment due to COVID-19 pandemic (e.g. travel restrictions, quarantine requirements etc.), he cannot be fully exempt from salaries tax under sections 8(1A)(b)(ii) and 8(1B) of the Inland Revenue Ordinance.

Transfer pricing

- The IRD will generally follow the OECD's guidance on transfer pricing implications of COVID-19.
- Separate testing periods for the duration of the pandemic or loss-making comparables may be considered when performing a comparability analysis.

- Whilst a limited-risk entity is generally expected to earn an arm's length return, the IRD may accept such entities to incur losses, if such losses are incurred at arm's length.
- The receipt of government assistance may also be taken into account in evaluating the price of a controlled transaction.
- For existing advance pricing arrangements (APA), the IRD will continue to uphold unless a condition leading to the revocation, cancellation or revision of the APA has occurred.

The IRD's guidance is for general information only and the treatment for each case will be determined on its own facts and circumstances. Taxpayers are suggested to seek advice from professional tax advisers in case of uncertainty.

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