

Hong Kong Tax Newsflash

Ruling mechanism to obtain early comfort on economic activity levels for foreign-source passive income exemption

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The Hong Kong SAR (HKSAR) government is currently in the process of reforming HKSAR's foreign-source income exemption (FSIE) regime in order to address the EU's concerns regarding Hong Kong's current territorial tax system. Please refer to our [Hong Kong Tax Newsflash \(Issue 155\)](#) for a summary of the proposed features of the FSIE regime.

Overview

Under the FSIE regime, interest, dividends, intellectual property (IP) income and disposal gains from shares that are received in Hong Kong can be deemed to be taxable, unless certain conditions are met. One of the most important conditions is that the entity conducts substantial economic activities in Hong Kong that are commensurate with the offshore income that is produced¹.

We understand that the use of safe harbors, even for groups that have their headquarters in Hong Kong, would not be consistent with the requirements of the EU. Similarly, we understand that a 'bright line' test with regard to the level of activity in Hong Kong, such as a fixed number of employees or a particular amount of expenditure, would not be

consistent with the requirements of the EU. The rationale for this is that the level of substantial economic activities required will differ depending on the offshore income earned by a particular entity. Therefore, in each case, judgement must be applied.

Ruling mechanism to obtain early comfort on economic activity levels

As companies tend to prefer certainty, the introduction of potentially subjective substantial economic activity requirements has caused a degree of consternation. This is felt both by inbound multi-nationals and Hong Kong headquartered groups alike. However, following its initial consultation which closed on 15 July 2022, the HKSAR government has continued to engage with stakeholders regarding the FSIE regime. As a result of that consultation, the HKSAR government recently confirmed that it will be possible for taxpayers to apply for an opinion of the Commissioner of Inland Revenue regarding the appropriateness of their substantial economic activities prior to 1 January 2023. This means that taxpayers should have a method to obtain comfort that their activity levels in Hong Kong are sufficient for the purposes of the FSIE regime, prior to it taking effect. We understand taxpayers will be able to apply for such an opinion once the FSIE bill is gazetted (which is anticipated to take place in late-October / early-November).

Unlike a ruling under section 88A of the Inland Revenue Ordinance, an opinion of the Commissioner is not legally binding on the Inland Revenue Department (IRD). A binding ruling cannot be issued until the FSIE regime comes into effect. However, taxpayers that have previously obtained an opinion of the Commissioner may apply for a binding ruling from 1 January 2023. Until then, an opinion of the Commissioner should provide comfort. The IRD anticipates providing an opinion of the Commissioner or binding ruling within a 1-month timeframe under normal circumstances.

The particulars required to obtain an opinion of the Commissioner and subsequently a binding ruling are still being determined. However, based on the consultation process to date there are a number of key areas that will need to be addressed. These areas are: the economic activities carried out in Hong Kong, the operating expenditure, turnover and profits of the relevant entity and details of outsourcing arrangements. If an outsourcing arrangement exists, the information will need to be provided in respect of the service provider under the outsourcing arrangement. The detailed information required for the application will be announced on the IRD's website when the FSIE bill is gazetted.

Applying for an opinion of the Commissioner or a ruling is not mandatory. However, taxpayers are encouraged to apply in order to obtain certainty with regard to their substance levels and facilitate their tax compliance.

We can assist in the preparation for the application for an opinion of the Commissioner. Please reach out to your Deloitte contacts for further information.

¹ The performance of substantial economic activities is not relevant for IP income which is assessed using a nexus ratio approach.

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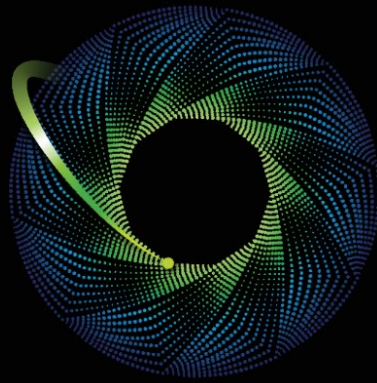
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香港税务快讯

提早确定离岸被动收入豁免制度下经济活动水平的机制

INspire HK 躍動香港

香港特别行政区政府目前正在改革其离岸被动收入豁免（FSIE）制度，以解决欧盟对香港现行地域来源征税制度的顾虑。请参阅我们的[香港税务快讯（第 155 期）](#)，了解有关拟议 FSIE 制度的特点。

概述

根据 FSIE 制度，除非满足某些条件，否则在香港收到的利息、股息、知识产权收入和股份的处置收益可被视为应课税收入。其中一个最重要的条件是该实体在香港从事的实质经济活动与所产生的离岸收入相称¹。

据我们了解，安全港的使用，即使是总部设在香港的集团，和有关香港活动水平的「明线」测试，例如固定的雇员人数或特定的支出金额，并不符合欧盟的要求。其理据是实质经济活动的要求水平将根据特定实体赚取的离岸收入而有所不同。因此，在每种情况下，都必须进行判断。

[提早确定经济活动水平的机制](#)

由于企业倾向喜欢确定性，引入潜在主观的实质经济活动要求已经引起了一定程度的忧虑。向境内投资的跨国企业和总部设在香港的集团都感受到了这一点。然而，在 2022 年 7 月 15 日结束的初步咨询后，香港特区政府继续就 FSIE 制度与持份者进行磋商。经咨询后，香港特区政府最近确认，纳税人可在 2023 年 1 月 1 日之前就其实质经济活动的适当性向税务局局长申请意见。这意味着纳税人有方法在 FSIE 制度生效前，一定程度确定他们在香港的活动水平足以满足 FSIE 制度的要求。据我们了解，一旦 FSIE 法案在宪报上公布（预计在 10 月下旬/11 月初），纳税人将能申请此类意见。

与根据《税务条例》第 88A 条作出的事先裁定不同，局长的意见对税务局不具法律约束力。具有约束力的裁定不能在 FSIE 制度生效之前发出。但是，先前已获得局长意见的纳税人可以从 2023 年 1 月 1 日起申请具有约束力的裁定。在此之前，局长的意见应该可以提供一定程度的确定性。在正常情况下，税务局预计会在 1 个月内提供局长的意见或具有约束力的裁定。

申请获得局长意见和随后具有约束力的裁定所需的详细资料仍在确定中。然而，根据迄今为止的磋商过程，有许多关键领域需要陈述。这些范畴包括：在香港进行的经济活动、有关实体的营运开支、营业额及利润，以及外判安排的详情。如果存在外判安排，则需要提供有关外判安排下的服务提供者的信息。申请所需的详细资料将于 FSIE 法案刊宪时在税务局网站公布。

申请局长的意见或裁定不是强制性的。但是，税务局鼓励纳税人作出相关申请以获得关于其实质活动水平的确定性，并便利其税务合规工作。

我们可以协助准备申请局长的意见。请联系您的德勤联系人以获取更多信息。

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