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Hong Kong: Court of Final Appeal allows appellant's appeal in electing joint assessment of salaries tax under the IRO

What is the change?

Leung Chun Kwong v. Secretary for the Civil Service and Commissioner of Inland Revenue [2019] HKCFA 19 ("This appeal").

This appeal concerns equality under the law and involves applying the legal principles identified and applied in the recent decision of *QT v. Director of Immigration*. It arises in the context of a claim lodged by Leung Chun Kwong ("the appellant"), who is in a same-sex marriage that is recognized by the Registrar of Births, Deaths and Marriages of New Zealand, which entitles him to:

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1. Spousal medical and dental benefits under civil service regulations, and
2. Opt for joint assessment of the salaries tax under the Inland Revenue Ordinance (IRO).

This GES Newsflash focuses on the discussion under #2

The appellant is a Hong Kong permanent resident of Chinese nationality and began cohabiting with his homosexual partner, Mr. Scott Adams, in 2013. They were legally married in New Zealand and were issued a New Zealand marriage certificate.

In May 2015, the appellant sought to file his 2014/15 income tax return online using the e-filing system but was unable to enter Mr. Adams' name to elect for joint tax assessment, because it had the same prefix as his own name. The appellant claimed that he should be entitled to joint assessment election because he and Mr. Adams were legally married in New Zealand.

On 9 June 2015, the Commissioner of the Inland Revenue maintained that the appellant was not entitled to elect for joint assessment as their same-sex marriage did not fall within the meaning of section 2(1) of the IRO (the "Tax Decision").

On 28 April 2017, the Court of First Instance dismissed the appellant's application for judicial review of the Tax Decision as the appellant's right to equality was not engaged, and that his marriage was not a "marriage" for the purposes of the IRO as a matter of statutory construction of the IRO. The appellant appealed such a ruling to the Court of Appeal.

On 1 June 2018, the Court of Appeal dismissed the appellant's appeal against the Tax Decision and upheld the decision as to the statutory construction of the IRO, namely that "marriage" for the purposes of the ordinance meant only an opposite-sex marriage and not a same-sex marriage. The Court of Appeal nevertheless held that the Tax Decision might constitute indirect discrimination, but the IRO confining the availability of joint assessment election to heterosexual married couples was justified to achieve the legitimate aim of protecting and not undermining the status of marriage as understood in Hong Kong. The Court of Appeal granted the appellant leave to appeal.

Ruling of the Court of Final Appeal (CFA)

The CFA allows the appellant's appeal for the following reasons:

1. The CFA reckons the restriction of the financial benefits to opposite-sex married couples on the ground that heterosexual marriage is the only form of marriage recognized in Hong Kong law is circular, and it denies equality to persons of different sexual orientation who are accepted to be in a relevantly analogous position;
2. The CFA does not accept the proposition that heterosexual marriage would be undermined by the extension of the tax benefits to same-sex married couples and such an extension is not rationally connected to the legitimate aim of protecting the institution of marriage under Hong Kong law; and
3. The Commissioner of Inland Revenue is unable to justify the differential treatment, given that the appellant can demonstrate without any difficulty that he and Mr. Adams are parties to a same-sex marriage having the characteristics of publicity as a formal marriage and the exclusivity that distinguishes it from a mere relationship.

Deloitte's view

The ruling confirms the equality of rights for taxpayers under homosexual marriage to elect joint assessment. The wider implication could potentially be one opening the door for similar applications lodged by the population for other tax-related benefits – such as the married person's allowance or donations being claimed by a same-sex partner in a homosexual marriage – subject to further guidelines and interpretation notes to be issued by the Hong Kong Inland Revenue Department.

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Korea:
Update on mandatory enrollment in national health insurance for foreign nationals and overseas Koreans who resided in Korea for more than six months

What's in this update?

National Health Insurance Service (NHIS) has announced that foreign nationals and overseas Koreans who are not subscribed to Korean national health insurance, but who resided in Korea for more than six months as of July 16, 2019, will be mandatorily enrolled in national health insurance using the individually insured health insurance option beginning on July 16, 2019.

Therefore, foreign nationals and overseas Koreans who receive Class B earned income (*i.e.*, income received from a foreign employer outside of Korea for which the cost is not borne by a Korean entity), but who are not subscribed to national health insurance and have resided in Korea more than six months are now automatically registered for individually insured health insurance.

However, if foreign nationals and overseas Koreans neglected to pay their contributions for national health insurance without any legitimate exemption process, such nonpayment may result in disadvantages such as limited health insurance benefits when using hospitals and clinics as well as limited options when applying for all kinds of residence permits in Korea, including, but not limited to, visa extensions.

Enrollment procedure updates

Who is obligated: Foreign nationals and overseas Koreans who are not subscribed to national health insurance but resided in Korea for more than six months as of July 16, 2019. However, D-2 (*i.e.*, study abroad) and F-6 (*i.e.*, marriage immigrant) visa holders should mandatorily subscribe, regardless of their length of stay.

Insurance premium: The insurance premium is calculated based on each household's income and property. If the calculated premium is below the average premium of all subscribers, the average premium of KRW 113,050 per month (in 2019) will be imposed. However, a 50% discount is available for D-2 (*i.e.*, study abroad) visa holders.

Combined subscription of family as one household: An insurance premium may be paid as one household unit (including spouse and children under age 19 who are residing at the same address). In this case, the individual should prepare the following documents and visit the nearest NHIS branch office in the resident's jurisdiction:

- Alien registration card or domestic residence report; and
- Document proving family relations or marriage such as confirmation or Apostille required by the Ministry of Foreign Affairs of the respective country of citizenship (including Korean translation); documents issued outside of Korea are only valid for nine months from the issuance date.

Otherwise, family members will receive a notification when they reach six months residing in Korea, and they should go through the exemption procedures on an individual basis.

Payment date: The insurance premium should be paid on a monthly basis, with the following month's premium paid in advance on or before the 25th of each month. (Example: The insurance premium for August 2019 should be paid by on or before July 25, 2019.)

Current action required

NHIS released the second notification to affected foreigners and overseas Koreans in mid-June 2019.

Foreigners and overseas Koreans who are covered by foreign health insurance that provides the equivalent or more coverage than Korean national health insurance may apply for an exemption by submitting the following documents:

1. Application for the forfeiture of the individually insured health insurance option (*i.e.*, Pre-Determined Form);
2. Application for exclusion from national health insurance for overseas Koreans and foreign workers (*i.e.*, Pre-Determined Form);

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3. A copy of the certificate of foreign health insurance coverage that clearly states:
    a. The individual's name, date of birth, enrollment date, expiration date, and scope of coverage, and
    b. The enrollment date should be prior to the entrance date to Korea;
4. Korean translation of foreign health insurance coverage; and
5. A copy of alien registration card (ARC).

The exemption application will expire after one year. Thus, foreigners and overseas Koreans must apply for extensions every year if they plan to stay more than one year in Korea. NHIS is currently working on guidelines for this extension procedure and will announce updates once they are ready.

Deloitte's view

NHIS provided the guideline for exemption procedures for foreign nationals and overseas Koreans who are subjected to mandatory enrollment in national health insurance. The exemption may apply retroactively if the individual presents a copy of the certificate of foreign health insurance coverage that states the enrollment date, which must be prior to the entrance date to Korea.

The exemption application will last one year; thus, foreign nationals and overseas Koreans who are planning to reside more than one year in Korea are required to apply for extensions on an annual basis. An updated NewsFlash will be issued when NHIS shares guidelines for this extension.

Failure to pay the applicable contribution to national health insurance may put residence permits, including visa extensions, at risk for foreign nationals and overseas Koreans. Deloitte Korea is willing to go through the NHIS announcement and guidelines and assist eligible foreign nationals and overseas Koreans with filing their exemption applications with NHIS.

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South Africa:
Repeal of foreign employment income tax exemption

Overview

The 2019 Draft Taxation Laws Amendment Bill and the 2019 Draft Tax Administration Laws Amendment Bill were published for public comment on 21 July 2019.

Importantly, no references were made to section 10(1)(o)(ii) of the Income Tax Act 58 of 1962 (ITA). As a result, it can be inferred that the proposed amendment to section 10(1)(o)(ii) of the ITA will go into effect on 1 March 2020.

This means that for tax years commencing on or after 1 March 2020, only the first ZAR1 million of foreign remuneration will be exempt from tax in South Africa, even if an individual otherwise meets the requirements of section 10(1)(o)(ii) in relation to that remuneration.

What's new?

South African tax residents are taxable on their worldwide income. However, remuneration for services rendered outside South Africa is exempt from South African tax if the individual spent more than 183 full days (including a continuous period of more than 60 full days) outside South Africa in any 12 month period during which those services were rendered.

If a South African tax resident does not meet the requirements of the exemption, the resident will remain taxable in South Africa on any remuneration earned outside the country. However, section 6quat of the ITA allows South African

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tax residents to receive a rebate (*i.e.*, foreign tax credit) for any foreign taxes paid on income earned outside of the country, which may offset the taxes payable in South Africa (with certain restrictions).

After 1 March 2020, if a South African tax resident earns remuneration of more than ZAR1 million in a tax year from employment performed outside South Africa, the portion of the foreign remuneration above ZAR1 million will be included in the resident's South African taxable income for that tax year and taxed at the resident's marginal tax rate, even if the resident complies with section 10(1)(o)(ii).

This may increase the South African tax liability for the resident, if he or she did not pay taxes on that remuneration at a similar or higher tax rate in a foreign jurisdiction.

How does this impact employers?

If an employee is subject to payroll tax withholdings on his or her remuneration in South Africa (due to the impact of the amendment) and in the country where the services were rendered, such dual withholding may lead to cash-flow constraints. The South African National Treasury announced it will introduce legislation to allow the utilization of foreign tax credits when determining South African PAYE, which should alleviate cash-flow difficulties.

However, the abovementioned Bills do not include any such proposed provisions.

Deloitte's view

The amendment will only affect individuals who are South African tax resident as of or after 1 March 2020. As such, individuals working outside South Africa should carefully consider their personal circumstances to determine if they will remain South African tax resident after 1 March 2020.

In this regard, it should be noted that it is not a requirement to emigrate for exchange control purposes, which is often labeled "financial emigration", in order to cease South African tax residency. In addition, having South African citizenship and/or a South African passport does not, *per se*, make a person a South African tax resident.

Unfortunately, the Bills do not provide an indication on how employers will be able to alleviate the cash-flow impact of double payroll tax withholding. Employers are encouraged to seek guidance from their advisers on current solutions available and to keep a look out for any communication from the South African Revenue Service in this respect.

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Taiwan:
Visa-free travel policies to continue for Brunei, the Philippines, Russia, and Thailand

What is the change?

Taiwan has announced that it will extend visa-free travel policies for nationals of Brunei, the Philippines, Russia and Thailand.

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What does the change mean?

Nationals of the four countries may continue to visit Taiwan without a visa for stays of up to 14 days for tourism or business.

- **Implementation time frame:** The visa-free programs have been extended through July 31, 2020.
- **Visas/permits affected:** Visa waivers.
- **Who is affected:** Nationals of Brunei, the Philippines, Russia and Thailand travelling to Taiwan for short-stay business or tourism.
- **Impact on processing times:** Visa waivers eliminate the need to apply for and receive a visa before travel.

Additional information

Taiwan first announced visa-free travel policies for nationals of Brunei and Thailand in 2016 and added the Philippines in 2017. Last year, Taiwan renewed the program for the three countries and expanded it to include Russia. The program has now been extended until July 31, 2020.

Visa-free entry requirements have not changed. Travelers must have a passport with at least six months' validity from the date of entry; a return or onward ticket (plus any required visas for the destination country); proof of accommodations, the host's contact information or details of an event or meeting and a completed arrival card.

Deloitte's view

Russia and Thailand is aimed at facilitating business travel, strengthening economic ties and encouraging investment. While the waiver will benefit a number of travelers from these countries, those who intend to stay more than 14 days must still obtain the appropriate visa.

United States:
Tax Treaty Updates: New treaty protocols ratified by Senate

What is the update?

After a delay of almost nine years, the Senate has now approved four new treaties/protocols with Spain, Switzerland, Japan and Luxembourg. The new treaties/protocols address various topics, including withholding taxes on transactions between US and foreign companies, and taxation of both individual and corporate taxpayers to avoid double tax situations. Each country protocol deals with amendments to a few or several articles within the tax treaty, however, all include an amendment to the article related to the "Exchange of Information" between the US tax authorities and other countries, which has been the major reason for holding up the protocols. Some of the additional changes to the articles address reducing withholdings and/or assist in resolving tax disputes. More specifically:

1. **Spain:** The Spain protocol includes amendments to several articles of the treaty including a focus on investment income of Dividends, Interest, Royalties, and Capital Gains, Limitation on Benefits, and Pensions. The update to the pension provision will be impactful to international employees to avoid a double tax situation. The Spain protocol will enter into force three months following the date the US and Spain notify each other that their respective ratification procedures have been satisfied.
2. **Luxembourg:** The protocol amendments for Luxembourg relate to the Exchange of Information article, updating how information may be obtained, who is required to provide information and how it may be used. The Luxembourg protocol will enter into force on the date the US and Luxembourg notify each other in writing that their respective ratification procedures have been satisfied and would have effect for exchange of information requests made on or after the date the protocol enters into force with regard to tax years beginning on or after January 1, 2009.
3. **Japan:** Similar to Spain, the Japan protocol includes amendments to several of the treaty articles including Residency, Interest, Real Property, Gains, Directors' Fees, Mutual Agreement Procedure, Exchange of Information and others to be deleted. It would require the Japanese and US revenue authorities to give limited

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assistance to one another in the collection of taxes. This protocol will enter into force on the date the US and Japan exchange instruments of ratification.

4. **Switzerland:** The protocol amendments for Switzerland include Dividends, Mutual Agreement Procedure and Exchange of Information. The treaty also prohibits banks from denying a request for information relevant to stop tax evasion. The protocol will enter into force upon the exchange of instruments of ratification by the US and Swiss governments.

The ratification of the four tax protocols by the Senate on July 16 and July 17, 2019 details which country has the authority to tax which income to avoid having individual taxpayers paying taxes both in the country where they are working and their home country. These protocols are intended to make the US a more attractive place for companies in these countries to do business and increase activity of global mobility programs.

Further updates anticipated

In addition to the tax protocols, there are also three other income tax treaties with Chile, Hungary and Poland that are still awaiting consideration by the Senate Foreign Relations Committee. According to the Treasury, each of these treaties will require modifications to reflect changes made under the Tax Cuts and Jobs Act, however, there is still momentum to move these treaties forward for approval this calendar year.

The Hungary and Poland income tax treaties have been effective since 1979 and 1974, respectively, and the pending treaties would include significant changes to bring them into conformity with modern US tax treaty policy. In relation to Hungary, Article 2 has been updated to broaden the types of taxes covered under the treaty. Additional changes relate to residency and an expansion of the details on business profits, dividends, interest and capital gains. The treaty also added a few new articles for associated enterprises, directors' fees, entertainers and sportsmen, pensions and income from social security and limitations on benefits.

The Poland treaty expands the article on general scope as well as the details related to residency. Similar to the Hungarian treaty, the Poland treaty also expands the articles related to dividends, interest, capital gains and new articles were added for branch profits, directors' fees, entertainers and sportsmen, pensions/social security/annuities/alimony/child support, other income, and limitations on benefits.

In relation to Chile, this tax treaty would be the first implemented between the US and Chile. The treaty details primarily follow the US treaty model, with a few adjustments to some articles including an additional article specifically related to the taxation of Capital represented by real property.

Should these treaties be approved, this would be a benefit to individuals who may be eligible to be taxed at a reduced rate or exempt from US income taxes on certain items of income they received. Continue to watch for further developments this year.

Background

As tax treaties are negotiated between the US and other countries, both countries must ratify the treaty for it to be approved. In the US, the approval process requires the US Senate to vote to approve the treaty, followed by ratification by the President. While social security treaties, commonly referred to as Totalization Agreements, have been approved by the Senate, new income tax treaties have been on hold since 2011 due to concerns in the Senate on information disclosure provisions within the treaties/protocols.

Deloitte's view

As mentioned, ratification of these income tax treaties has been on hold for many years. With this recent action by the Senate, there is momentum for further ratification of treaties going forward. This will likely impact how multi-national companies manage their international businesses and how they manage their international assignee populations. When planning for an assignment, careful review of an applicable treaty should be completed to reduce potential costs related to the assignment.

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