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Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021
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Dear Sir,

Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021 (the Bill)

In response to the public invitation to make submission on the Bill, we would like to provide below our views thereof.

The Bill aims to (i) codify the existing interim assessing practice of the Inland Revenue Department (IRD) as regards the tax treatment applicable to a court-free amalgamation under the Companies Ordinance; (ii) specify the tax treatment applicable to the transfer or succession of specified assets without sale; (iii) provide a legal framework for the wider adoption of e-filing of tax returns in the near future; and (iv) enhance the current provisions for deduction of foreign tax paid in respect of certain income, profits or gains.

We welcome the introduction of the Bill and are pleased that the provisions of the Bill have taken on board some of the suggestions made by the Institute through the Joint Liaison Committee on Taxation and other forums during the consultation stage of this legislative exercise.

The following is our further comments on the detailed provisions of the proposed legislation contained in relevant parts of the Bill.

Part 2 - Amendments relating to Qualifying Amalgamation

We understand that the proposed amendments to the Inland Revenue Ordinance (IRO) under this Part of the Bill are modelled on the corresponding legislation in Singapore. However, the conditions governing the "across entities" utilization of pre-amalgamation tax losses sustained by both an amalgamating company and the amalgamated company post amalgamation are more restrictive than those under the corresponding legislation in Singapore.

"Post-entry" condition unduly restrictive and could be removed

Specifically, only those pre-amalgamation tax losses that were incurred after an amalgamating company and the amalgamated company became wholly owned subsidiary companies of a group

would be eligible to be considered for the "across entities" utilization post amalgamation, i.e., only those pre-amalgamation losses would be regarded as a "qualifying loss" under the proposed amendments and this restrictive condition is referred to below as the "post-entry" condition.

The Government's explanation for imposing the "post-entry" condition is to guard against taxpayers "from acquiring an unrelated or a non-wholly owned loss company to make use of the tax losses accumulated in that loss company before the acquisition so as to reduce the tax liabilities of the group through amalgamation".

However, the carry-forward of the tax losses sustained in a previous unrelated or non-wholly owned loss company would firstly need to satisfy that the sole or dominant purpose of the previous change in the ownership of the loss company was not for the utilization of the tax losses under sections 61B of the IRO. In addition, the "across entities" utilization of the pre-amalgamation tax losses post amalgamation would also need to satisfy the "main purpose" test under the proposed amendments.

We therefore submit that where the tax losses involved have already satisfied the two tests referred to above, i.e., there were commercial purposes for the previous change in the ownership of the loss company and for the amalgamation, there would not be sufficiently justifiable grounds to impose the "post-entry" condition for the "across entities" utilization of the pre-amalgamation tax losses post amalgamation.

The corresponding legislation in Singapore does not contain the "post-entry" condition and removal of this condition from the proposed amendments would put the competitiveness of Hong Kong's tax regime on par with that of the Singapore in this regard.

"Financial resources" condition unduly restrictive and could be removed

Where the pre-amalgamation tax losses were sustained by the amalgamated company, section 26(2) of the proposed new Schedule 17J to the IRO requires that the amalgamated company must have adequate financial resources (excluding internal group financing means) to purchase the amalgamating company other than through amalgamation. Otherwise, the pre-amalgamation tax losses would not be eligible to be considered for utilization to set-off against the profits of the amalgamating company post amalgamation.

The Government's explanation for imposing the "financial resources" condition is that "[w]hether or not a company has financial ability to acquire the business of the amalgamating company is one of the indicators to infer whether there is an intention for tax avoidance. In the commercial world, if the amalgamated company has incurred substantial losses in the past, it is difficult for it to carry out amalgamation with a commercial purpose unless it has sufficient financial resources…Such test has been included in the IRD's interim assessment practice statement since 2015 and it has operated smoothly without any problems".

We submit that whether the motive for an amalgamation is for commercial purposes or for the "across entities" utilization of the pre-amalgamation tax losses post amalgamation is already addressed by the "main purpose" test contained in section 26(3) of the proposed new Schedule 17J to the IRO.

In other words, the commercial rationale of why a company which has incurred substantial losses is involved in an amalgamation as the amalgamated company can already be examined through the "main purpose" prism of section 26(3) of the proposed new Schedule 17J to the IRO referred to above.

The imposition of the additional "financial resources" condition would only favor companies with large financial resources while those without the necessary financial resources would be screened out by this condition at the outset, even if they can demonstrate good commercial purposes for the amalgamation.

On that footing, this condition may in certain circumstances give rise to outcomes that are inconsistent with the apparent anti-avoidance policy of the condition; that is the relevant criteria of distinction is not the motivation for the amalgamation, but the wholly arbitrary matter of whether the company has the financial resources.

The fact that the "financial resources" condition has been included in the IRD's interim assessment statement since 2015 does not necessarily mean that this condition should be retained in the proposed amendments.

Instead, the fact that many stakeholders requested this condition be removed during the consultation exercise for this proposed legislation indicates that this condition may not be operated smoothly without any problems.

We therefore submit that the "financial resources" condition be removed from the proposed amendments. Again, the corresponding legislation in Singapore does not contain the "financial resources" condition and removal of this condition from the proposed amendments would put the competitiveness of Hong Kong's tax regime on an equal footing with that of Singapore in this regard.

Explicit provision to deem an amalgamating company as being dissolved without liquidation

There are views that, as a matter of corporate law, an amalgamating company subsists within the guise of the amalgamated company even after the completion of an amalgamation. Such views have been taken by some legal and tax practitioners on the basis that, among other things, the Companies Ordinance provides that the amalgamating companies "continue as one".

While the Government does not appear to subscribe to such views, for the avoidance of doubt, it would be desirable to include an explicit provision in the proposed amendments to treat, for tax purposes, an amalgamating company as being dissolved without liquidation upon amalgamation. Otherwise, there could be legal arguments that the "across entities" utilization of the pre-amalgamated tax losses post amalgamation would not be subject to the conditions imposed under the proposed amendments.

In this regard, the Government has referred to the proposed new section 40AG of the IRO as serving the purpose of treating an amalgamating company as being dissolved without liquidation upon amalgamation for tax purposes. Section 40AG however reads as follows:

"For the purposes of this Ordinance, an amalgamating company in a qualifying amalgamation is treated as having ceased to carry on its trade, profession or business on the day immediately before the date of amalgamation."

It appears that "treating an amalgamating company as having ceased to carry on its trade, profession or business on the day immediately before the date of amalgamation" may not have the same effect as of "treating an amalgamating company as having dissolved without liquidation upon amalgamation". As such, a more explicit provision to achieve the said effect may be preferred in the proposed amendments.

Extension of the time limit to make an irrevocable election to three months

The time limit for making an irrevocable election under the proposed new section 40AM for the special tax treatment afforded under the proposed new Schedule 17J to the IRO is one month after the date of amalgamation. This timeline appears to be tight given that taxpayers may need to sort out lots of things in an amalgamation. We therefore propose the Government consider extending the time limit to three months after the date of amalgamation.

Part 3 – Amendments relating to specified assets

Paragraphs 8 and 9 of the Legislative Council Brief for the Bill indicate that the purpose of the proposed amendments is to enable the claw-back of deductions or allowances previously granted with respect to specified assets, the ownership of which passes from the taxpayer to a successor without sale.

Reference to sections 16J(5B), 38(4) and 39D(4) are made in footnote 9 to the briefing paper as instances where the provisions for the deemed disposal of assets at market value for tax purposes, as a means of clawing back tax deductions or allowances previously granted already exist under the current provisions of the IRO in certain limited circumstances.

Apparently, the Government considers that such deeming provisions should, subject to two exceptions, be extended to cover all other transfer or succession of specified assets without sale. The two exceptions are: the succession of specified assets (i) upon the death of a relevant person; and (ii) upon a qualifying amalgamation undertaken under the Companies Ordinance of Hong Kong where an election for the specified tax treatment under the proposed new Schedule 17J of the IRO has been made.

Under the proposed amendments, in all other situations referred to as "specified events", the specified assets will be deemed to have been sold by the transferor at market value, subject to capping the value at a certain amount, and purchased by the transferee at the same amount under the proposed new sections 40AS, 40AT and 40AU of the IRO.

We nevertheless doubt the rationale of applying the deeming provisions as contained in the proposed new sections 40AS, 40AT and 40AU to all the "specified events", where there is succession of specified assets without sale.

First, the existing deeming provisions as contained in sections 16J(5B), 38(4) and 39D(4) appear to all relate to an appropriation of assets for private or non-business use upon cessation of business (i.e., they codify elements of the rule in Sharkey v Wernher). In those circumstances, taxpayers could have disposed of the assets concerned but voluntarily chose to appropriate the assets for private or non-business use. Hence, there is an evident policy basis to deem the taxpayers to have disposed of those assets at market value for tax purposes: it promotes tax symmetry.

Secondly, and more importantly, if the assets were subsequently actually sold or disposed of within 12 months of the deemed disposal, taxpayers could apply to substitute the actual sale proceeds or compensation monies received for the market value of the assets previously adopted for tax purposes, and revise the previous tax assessment accordingly.

In other words, taxpayers in the above circumstances have a choice of either (i) appropriating the assets for private or non-business use and being taxed based on the deemed disposal of the assets at market value; or (ii) selling or disposing of the assets within 12 months after the cessation of business and being taxed based on actual sale proceeds or compensation monies received.

Where, however, the succession of specified assets without sale is concerned, the taxpayers have not chosen to appropriate the assets for private or non-business use. Typically, such assets simply vest on the successors by operation of law.

Given that (i) there is no appropriation of the assets by the taxpayers for private or non-business use; and (ii) no sale proceeds or compensation monies have been received by the taxpayers, the broad-brush default position of the proposed amendments of deeming the specified assets as having been sold and purchased by the transferor and transferee concerned at market value in all situations where a specified event occurs would not seem to be appropriate.

For example, structures comprising plant and machinery erected on land by a lessee would pass to the lessor upon the expiry of a land lease. Another example may be the succession of specified assets where the Hong Kong branches of two foreign companies are merged under a foreign law.

In the first example, instead of the relevant assets being deemed to have been sold at market value under the proposed amendments, depending on the factual circumstances of a case, the lessee may in fact have a case to claim that the remaining unrelieved tax costs in respect of the assets could be granted balancing allowances, e.g., effectively as an additional occupancy cost of the lessee during the term of the lease. Conversely, it may also not achieve a desirable tax outcome by deeming the lessor as having purchased the assets at market value in such circumstances.

In the second example, it does not seem to serve any policy objective to differentiate the tax treatment for succession of specified assets without sale upon the amalgamation or merger of the Hong Kong branches of two foreign companies under a foreign from that undertaken under the Companies Ordinance.

We therefore submit that instead of the broad-brush default position of the proposed amendments of deeming the transfer or succession of specified assets without sale in all situations where a specified event occurs as being sold by the transferor and purchased by the transferee at market value, a specific case-by- case approach should be adopted to cater for the different specified events as envisaged.

Such a specific case-by-case approach may better be undertaken by way of the Government detailing each of the different specified events as envisaged and why the application of the existing provisions of the IRO to such events may not achieve a desirable tax outcome. Further consultation for such a legislative exercise may be required.

For the present purposes of the proposed amendments, the Government may consider extending the special tax treatment under the proposed new Schedule 17J to the IRO to cover the merger of the Hong Kong branches of two foreign companies under a foreign law, i.e., treat such a merger as also a qualifying amalgamation under the proposed amendments.

As such, the deeming provisions under the proposed new sections 40AS, 40AT and 40AU of the IRO will then only apply where the taxpayers concerned have not elected for the special tax treatment under the proposed new Schedule 17J to the IRO for such a qualifying amalgamation.

Part 4 – Amendments relating to Furnishing of Returns

Penal provisions on service providers unnecessary and could distort the current working and professional relationship between taxpayers and their service providers

The proposed amendments to the IRO under this Part of the Bill are to cater for the wider adoption of e-filing of tax returns in the near future.

One major feature of the proposed amendments is that it envisages taxpayers may need to engage a service provider to do the e-filing of tax returns on behalf of them onto the relevant e-Portals of the IRD. This would be the case given that the e-tax returns may need to be submitted in certain prescribed electronic formats e.g., in the iXBRL format.

The conversion of a tax return including the supporting schedules and audited financial statements from the traditional formats e.g., in word or excel format into the prescribed electronic formats would require information technology (IT) knowledge and skills. As such, taxpayers may need to engage a service provider to do the conversion for them.

Furthermore, it is also envisaged that for the smooth operations of the e-portals, in addition to the aforesaid conversion of the formats of the relevant documents, service providers may also need to e-sign and e-file the tax returns on behalf of their clients.

As such, the Government considers that penal provisions on such service providers would need to be introduced into the IRO. We however have reservation on such an approach.

Firstly, the proposed amendments already (i) require a service provider "to obtain a confirmation (in a form specified by the Commissioner) from the taxpayer stating that the information contained in the return is correct and complete to the best of the taxpayer's knowledge and belief"; and (ii) provide that "engaging a service provider… does not itself constitute a reasonable excuse" of the taxpayer in the case the returns filed by a service provider on their behalf are incorrect.

As such, such service providers (i) are merely a service agent of the taxpayers to file the returns on their behalf after the contents of the returns have been reviewed and approved by the taxpayers; and (ii) will have no financial stakes in the returns so filed other than their normal professional service fees and, therefore, will have no motive to file incorrect returns on behalf of the taxpayers.

Conceivably, as far as the roles of the service provides are concerned, any incorrect returns so filed by the service providers would probably only be caused by some IT errors, either technically or inadvertently, e.g., by omitting some supporting schedules in the process of the electronic transmission of the documents etc.

In such a case, that IRD would have recourse against the taxpayers by way of imposing a penalty on the taxpayers concerned. This would be the case given that engaging a service provider does not itself constitute a reasonable excuse of the taxpayers for filing such an incorrect return. That means, notwithstanding the engagement of a service provider, taxpayers would still have an obligation to ensure that their service providers do what they entrust them to do and do it in a proper manner.

Where a taxpayer is penalized by the IRD in such a way, the taxpayer can normally claim damages against the service provider under the service contract entered into between them for the incorrect returns so filed by the service provider on their behalf.

On the above basis, we submit that the penal provisions on service providers as contained in the proposed new section 80K(4) of the IRO for filing an incorrect return on behalf of their clients would not be necessary. The existence of such penal provisions on service providers in the IRO could distort the current working and professional relationship between a taxpayer and their service providers, e.g.

limiting taxpayers' access or increasing the costs of taxpayers accessing to professional e-tax filing services.

Similarly, other penal provisions on service providers, including their failure to furnish returns on behalf of the taxpayers concerned and seeking a court order to compel the service providers to rectify such a failure would also be unnecessary. For all such failures, recourse of the IRD should be against the taxpayers as the principal rather than the service providers as agent.

Our above submission is further supported by the fact that the tax legislation of most jurisdictions including Singapore, the UK and Australia, which have widely adopted e-filing of tax returns for many years, do not appear to contain any specific penal provisions on service providers.

Any penal provisions on service providers would, in any case, be better considered later when the detailed features of the e-filing system and hence the roles of the service providers in it are clear

It appears that any justifications for introducing penal provisions on service providers are now based on the presumed practicalities that for the smooth operations of the relevant e-Portals of the IRD, service providers may need to e-sign and e-file the returns on behalf of taxpayers.

However, such a presumption may in time be invalidated by advanced IT and system developments. Conceivably, it is quite possible that in the near future while the preparation of a tax return, including the conversion of the relevant documents into the prescribed electronic formats, is performed by a service provider for client's review and approval, taxpayers may still be able to e-sign and e-file the returns on their own without affecting the smooth operations of the e-Portals.

We therefore submit that any penal provisions on service providers would, in any case, be better considered at a later stage when the detailed features of the e-filing system and hence the roles of the service providers in it are clear.

For example, it would appear that the need, if any, to introduce penal provisions on service providers in the envisaged scenario described above would be very different from the situation where service providers need to e-sign and e-file the returns on behalf of their clients.

Precise delineation of the roles of service providers that are to be governed by the penal provisions if such provisions are to be retained in any form in the proposed amendments

The proposed amendments provide that "a taxpayer may, in a case specified by the Commissioner, engage a service provider to **furnish** a return under section 51(1) for or on behalf of the taxpayer". What constitutes "furnishing a return" is however not defined in the proposed amendments.

It appears that if not for the envisaged practicalities for a service provider to e-sign and e-file a tax return on behalf of taxpayers, no IRO provisions would be needed for the engagement of service providers by taxpayers. For example, a taxpayer's current engagement of a service provider to prepare a tax return in paper format for their review and signature is not governed by any existing IRO provisions.

However, the term "furnishing a return" under the proposed amendments could possibly be broadly interpreted as including the preparation of a tax return for the taxpayer's review and signature. Such an interpretation would extend the penal provisions to cover a tax return preparer who does not sign and file the return on behalf of taxpayers. Presumably, this is not the legislative intent of the proposed amendments.

As such, we propose that, if the proposed penal provisions on service providers are to be retained in any form, in any case, it would only be that part of the roles of a service provider that e-sign and e-file a tax return on behalf of taxpayers that would be governed by the proposed penal provision. For that purpose, the roles of a "service provider" that are to be governed by the proposed penal provisions may need to be more precisely delineated in the proposed amendments.

Part 5 – Amendments relating to Deduction of Foreign Tax

The purpose of the proposed amendments to the IRO as contained in this Part of the Bill is to enhance the current provisions for deduction of foreign tax paid in respect of certain income, profits or gains.

New additional restrictive conditions for the Hong Kong branch of a non-Hong Kong resident

However, for the Hong Kong branch of a non-Hong Kong resident person, the enhancement will only be granted subject to the fulfilment of certain new additional restrictive conditions.

The new additional restrictive conditions are that only foreign taxes paid by the Hong Kong branch of a non-Hong Kong resident person that are unrelieved from double taxation in the residence jurisdiction of the non-Hong Kong resident person will be allowed a tax deduction in Hong Kong.

We consider that these new additional restrictive conditions could pose many conceptual and practical issues, probably resulting in the Hong Kong branches of non-Hong Kong resident persons not being able to avail themselves of the benefit of the proposed amendments in many cases.

Conceptually, where an income concerned is tax exempt in the residence jurisdiction of the non-Hong Kong resident person, then none of the foreign taxes paid by the Hong Kong branch in respect of the income would be deductible under the proposed amendments. This could be the case given that in a sense the amount of foreign taxes paid by the Hong Kong branch could be said to be fully relieved from double taxation in the residence jurisdiction as the income concerned would not be doubly taxed in the source jurisdiction and the residence jurisdiction..

Similarly, where the transaction from which an income is derived, in respect of which foreign taxes are paid by the Hong Kong branch, results in a loss position; or the business operations of the non-Hong Kong resident person as a whole are in an overall tax loss position in the residence jurisdiction, then no tax would be payable in the residence jurisdiction in respect of the income concerned. As such, the foreign taxes paid by the Hong Kong branch in respect of the income would also not be deductible under the proposed amendments, given that there would not be double taxation of the income concerned in the source jurisdiction and in the residence jurisdiction.

Where the income concerned is also chargeable to tax in the residence jurisdiction, and relief from double taxation is to be granted in the residence jurisdiction by way of a tax credit of the foreign taxes paid by the Hong Kong branch against the taxes payable in respect of the same income in the residence jurisdiction, then the foreign taxes paid could also, in many cases, be fully relieved from double taxation in the residence jurisdiction.

Such an outcome could be the case given that foreign withholding taxes are generally levied at a rate significantly lower than the applicable tax rates in the residence jurisdiction of most non-Hong Kong resident persons, thereby resulting in the foreign taxes paid being fully creditable or utilized in the residence jurisdiction. This outcome, i.e. no foreign taxes paid are unutilized or unrelieved from double taxation in the residence jurisdiction, would also result in the Hong Kong branches of such non-

Hong Kong resident persons not being able to avail themselves of the benefit of the proposed amendments.

However, if the legislative intent is to grant tax deduction for foreign taxes paid by the Hong Kong branch of a non-Hong Kong resident person where the Income concerned is (i) tax exempt in the residence jurisdiction; or (ii) not otherwise taxable in the residence jurisdiction. e.g. because of an overall tax loss position of the non-Hong Kong resident person as a whole in the residence jurisdiction, then the proposed amendments may create some apparently anomalous situations.

For example, the deductibility of foreign taxes paid by the Hong Kong branch of a non-Hong Kong resident person in Hong Kong would then depend on the method for the relief from double taxation adopted in the residence jurisdiction, e.g. by way of a tax exemption or a tax credit system. Such a distinction would not seem to be justified given that the two systems could achieve the same result in terms of relief from double taxation in the residence jurisdiction.

Furthermore, where foreign taxes paid by the Hong Kong branch of a non-Hong Kong resident person are to be relieved from double taxation in the residence jurisdiction by way of a tax credit, the amount of the foreign taxes paid that would be unrelieved from double taxation in the residence jurisdiction would depend on the applicable tax rate of the residence jurisdiction.

Conceptually, the higher the applicable tax rate of the residence jurisdiction, the smaller the amount of foreign taxes paid would be unrelieved from double taxation in the residence jurisdiction, and hence deductible in Hong Kong under the proposed amendments.

However, it is not entirely clear why the amount of foreign taxes paid deductible under the proposed amendments by the Hong Kong branches of different non-Hong Kong resident persons would need to depend on the applicable tax rates of the residence jurisdictions concerned, other things including the operating results of such Hong Kong branches being similar.

Practically, under a tax credit system for the relief from double taxation, the calculation of how much foreign taxes paid by the Hong Kong branch of a non-Hong Kong resident person are unrelieved from double taxation in the residence jurisdiction could be very complicated.

In addition, it is also unclear what kind of evidence is required to be provided to the IRD to prove the amount of foreign taxes unrelieved from double taxation in the residence jurisdiction that is claimed for a tax deduction in Hong Kong.

Furthermore, conceivably, when a tax return is due for filing in Hong Kong, taxpayers may, in many cases, not yet be able to quantify the amount of the unrelieved foreign taxes paid that can be claimed for a tax deduction in Hong Kong, e.g. the corresponding tax return in the residence jurisdiction is not yet due for filing.

That means in many cases taxpayers would not know in advance whether any or how much of the foreign taxes paid by the Hong Kong branch would be tax deductible in Hong Kong under the proposed amendments. This element of tax uncertainty would not be conducive to Hong Kong offering a predictable and favorable business environment to non-Hong Kong resident persons that have branch operations in Hong Kong.

The above conceptual and practical issues of the proposed amendments would most widely be felt by the Hong Kong branches of foreign banks. This would be the case given that they often pay foreign

withholding taxes in respect of their interest income derived overseas and the same interest income would likely also be chargeable to tax in Hong Kong.

Considering offering a concessionary tax treatment along with the proposed amendments

It is understood that, as a concession, Singapore branches of non-resident banks have been allowed a tax deduction in Singapore for foreign tax paid on interest derived from loans provided to overseas borrowers.

For Hong Kong, to mitigate the above conceptual and practical issues, in parallel with the proposed amendments, the Government may consider adopting the Singapore approach of offering a concessionary tax treatment for foreign tax paid on interest derived from loans made by the Hong Kong branch of a foreign bank to overseas borrowers.

The conditions under which such a concessionary tax treatment is granted could be different from those under the proposed amendments, e.g., the granting of a tax deduction under such a concessionary tax treatment cannot result in the taxpayer concerned incurring a tax loss from the transaction. Taxpayers would then have the option of claiming a tax deduction for the foreign tax paid either under the proposed amendments or under the concessionary tax treatment being offered.

Offering such a concessionary tax treatment to Hong Kong branches of foreign banks would put the competitiveness of Hong Kong's tax regime as an international banking center on par with that of Singapore.

Conceivably, such a concessionary tax treatment can also be extended to cover foreign withholding taxes on royalties and management and technical service fees derived by the Hong Kong branches of non-Hong Kong resident persons from their licensing of IP rights or rendering of management and technical services to overseas entities.

The definition of what constitutes a "specified tax" should be as inclusive as possible

In respect of non-interest types of income e.g., royalties and technical service fees, to be deductible under the proposed new section 16(1)(ca) of the IRO, the foreign taxes paid have to be a "specified tax".

The term 'specified tax" is defined under the proposed amendments as follows:

"specified tax means tax imposed by a territory outside Hong Kong on a person that is (a)…; (b) charged on a certain percentage of income received or receivable by the person from that territory without deduction for the outgoings and expenses (whether or not they were incurred in the production of the relevant income) when computing the amount of tax charged to the person in that territory…"

However, where only a percentage, say 80% rather than 100% of the income is taken into consideration when computing the amount of tax charged, the question is whether the 20% deduction from the income in this example would be regarded as being a "deemed deduction of the outgoing and expenses". If so, the foreign tax charged based on 80% of the income would potentially not be a "specified tax" deductible under the proposed amendments.

We consider that where foreign taxes are paid by a Hong Kong resident person in a jurisdiction that does not have a tax treaty with Hong Kong (i.e., a non-DTA jurisdiction), Hong Kong has a choice of granting unilateral relief from double taxation either by way of a tax credit or a tax deduction,

regardless of whether the foreign taxes charged are on a gross income or on a deemed profit or on an actual profit basis.

As such, we submit that in relation to foreign taxes paid by a Hong Kong resident person in a non-DTA jurisdiction, the definition of "specified tax" should be as inclusive as possible and should cover foreign taxes paid that are charged on a gross income or on a deemed profit or on an actual profit basis.

Such an inclusive definition of "specified tax" would help promote Hong Kong as a hub for IP licensing and as a regional management and technical service center insofar as Hong Kong resident taxpayers are concerned.

Where foreign taxes on non-interest types of income are paid by the Hong Kong branch of a non-Hong Kong resident person, the concessionary tax treatment referred to above could conceivably also be extended to cover such types of foreign taxes.

We trust the above would be of use to the Bills Committee in its deliberation on the Bill. Should you wish us to elaborate on any of the above, please contact us.

Yours sincerely,

For and on behalf of
The Taxation Institute of Hong Kong

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