

Introduction

1. This booklet provides a brief explanation of how The Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation on Income (“the Arrangement”) applies to an *individual*. For more detailed information, please refer to Departmental Interpretation & Practice Note No. 32. This booklet has no legal binding effect and does not affect a person's right of objection or appeal to the Commissioner of Inland Revenue (“the Commissioner”), the Board of Review or the Courts.
2. The Arrangement applies to income derived from Hong Kong in any year of assessment commencing on or after *1 April 1998* and to income derived from the Mainland on or after *1 July 1998*.

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1 Who is a resident “individual”?

An individual is generally considered to be a Hong Kong resident if he is *liable to tax* in Hong Kong and is:

- (1) of or above the age of 18 years, or under that age if both his parents are deceased; and
- (2) a permanent or temporary resident.

In this regard a “*permanent resident*” means an individual who *ordinarily resides* in Hong Kong. A “*temporary resident*” means an individual who stays in Hong Kong for a period or periods amounting to *more than 180 days in the year of assessment* or for a period or periods amounting to *more than 300 days in 2 consecutive years of assessment* (one of which is the year of assessment in respect of which the claim is made).

Generally an individual “ordinarily resides” in Hong Kong if he has a permanent home in Hong Kong where he or his family lives.

2 What are "personal services"?

Pursuant to Article 3 of the Arrangement, “personal services” basically fall into 2 main categories:

- (1) independent personal services;
- (2) dependent personal services.

3 What are “independent personal services” ?

The term “*independent personal services*” :

- (1) generally refers to professional services or activities exercised by an individual independently, e.g., scientific, literary, artistic, educational and teaching activities,

as well as the professional activities of physicians, lawyers, engineers, architects and accountants; and

- (2) does *not* include professional services performed as an *employee*.

4 What are “dependent personal services” ?

The term “*dependent personal services*” refers to an *employment* exercised by an individual with an employer.

5 Is a Hong Kong resident who derives income from the exercise of professional services both in Hong Kong and the Mainland required to pay Profits Tax in Hong Kong and/or Individual Income Tax in the Mainland ?

According to the Inland Revenue Ordinance (Cap.112) (“IRO”), an individual who carries on a trade, profession or business in Hong Kong is subject to Profits Tax in respect of income arising in or derived from Hong Kong from that trade, profession or business.

Under the Arrangement, if a Hong Kong resident :

- (1) has a *fixed base* regularly available in the Mainland for the purpose of performing his activities ; *or*
- (2) stays in the Mainland for a period or periods *exceeding in the aggregate 183* days in the calendar year concerned,

income derived by him from the Mainland will be subject to Individual Income Tax. Likewise, income derived by a Mainland resident from services rendered in Hong Kong will be accorded similar treatment.

6 How is the period of stay calculated ?

Both the Mainland and Hong Kong tax authorities calculate the period of stay on a *calendar year* basis, i.e., the number of days of stay from 1 January to 31 December each year.

7 How is income derived from professional services rendered in Hong Kong by a Mainland resident assessed to Profits Tax ?

Where a Mainland resident renders professional services in Hong Kong and stays in Hong Kong for *more than 183 days*, the income arising therefrom will be assessed to Profits Tax by reference to the year of assessment in which it accrues to him. For example, in the calendar year 1 January to 31 December 1999, he stays in Hong Kong for more than 183 days, viz during the period 1 January to 31 July. Income derived by him during the period 1 January to 31 March 1999 would be assessed in the year of assessment 1998/1999 and income derived during the period 1 April to 31 July 1999 would be assessed in the year of assessment 1999/2000.

If the accounting date adopted by him falls on any other date within a year of assessment, the basis period will be the year ending on the accounting date that falls within that year of assessment.

8 Is a Mainland resident who derives income from employment in Hong Kong subject to Salaries Tax ? In what circumstances is the Mainland resident exempt from Salaries Tax ?

Salaries and wages derived by a Mainland resident from an employment exercised in Hong Kong are subject to Salaries Tax. The Mainland resident will be exempt from Salaries Tax if the following *3 conditions* are satisfied:

- (1) the stay in Hong Kong is for a period or periods not exceeding in the aggregate *183 days* in the calendar year concerned;
- (2) the remuneration is paid by, or on behalf of, an employer who is not a resident of Hong Kong;
- (3) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in Hong Kong.

9 Is a Hong Kong resident posted by his Hong Kong employer to the Mainland for more than 183 days required to pay Salaries Tax in Hong Kong and/or Individual Income Tax in the Mainland ?

As the Hong Kong resident is being employed in Hong Kong, income derived by him from the Hong Kong employment is chargeable to Salaries Tax. If the Hong Kong resident is present in the Mainland for *more than 183 days*, income attributable to services rendered by him in the Mainland is also chargeable to Individual Income Tax. (Please also refer to Questions 14 to 18 for tax credit.)

10 How are directors' fees taxed ?

Directors' fees derived by a Hong Kong resident in his capacity as a member of the board of directors of a company which is resident in the Mainland may be taxed in the Mainland. Likewise, directors' fees received by a Mainland resident from a company resident in Hong Kong will be taxed in Hong Kong.

11 How is the income of artistes and athletes taxed ?

Separate provisions apply to income derived by artistes and athletes. Income derived by such individuals is taxed where their activities are

performed. A Hong Kong resident artiste or athlete who performs activities on the Mainland will be subject to Individual Income Tax on income derived from these activities. Similarly, income derived from the performance of activities in Hong Kong by an artiste or athlete who is a Mainland resident will be chargeable to Profits Tax in Hong Kong. The income subject to tax may accrue to the artiste or athlete, or to any other person, such as a company or an enterprise.

12 How is income derived from a building site, a construction, assembly or installation project taxed ?

A building site, a construction , assembly or installation project or supervisory activities in connection therewith carried out by a Mainland resident in Hong Kong for *a period exceeding 6 months* will be regarded as constituting a permanent establishment in Hong Kong, and any profits derived therefrom will be subject to Profits Tax. Profits from a project that does not last for more than 6 months will not be subject to tax in Hong Kong. Similarly, a Hong Kong resident who has a project in the Mainland that does not last for more than 6 months would also not be regarded as having a permanent establishment in the Mainland and accordingly will not be subject to tax there.

If a Mainland resident who works in Hong Kong for the building site, or the construction , assembly or installation project is paid by the permanent establishment in Hong Kong, or his remuneration being borne by it, exemption by reason of “period or periods of stay not exceeding 183 days” is not applicable. All the income accrued to him from Hong Kong is chargeable to Salaries Tax.

13 How are items of passive income, such as gains from immovable property, rent and gains of a capital nature, taxed in the Mainland?

The chargeability of the above items of income derived by a Hong Kong resident from the Mainland will depend on whether they are derived from activities carried on through a fixed base. Thus, if the derivation of the above items of income is substantially connected with a fixed base situated in the Mainland, they would be regarded as part of the business profits of the fixed base and be subject to Individual Income Tax. If this is not the case the income will be subject to Withholding Tax.

14 Pursuant to the Arrangement, how is double tax relief applied for in respect of “personal services” ?

A *Hong Kong resident* who has rendered “personal services” both in the Mainland and in Hong Kong can apply for relief in the form of a tax credit under Section 50 of the IRO in respect of tax paid in the Mainland on the income which has been doubly taxed on both Sides.

15 How is tax credit claimed for ?

A *Hong Kong resident* may claim for a tax credit by completing the respective column of his Tax Return - Individuals for the relevant year of assessment, or in writing not later than **2 years** after the end of the relevant year of assessment. Details should be provided of the income on which relief is being sought, the nature of the tax paid in the Mainland and the amount of tax credit claimed. Copies of the Mainland notice of assessment and evidence that the tax has been paid and is not subject to further adjustment are required to be submitted with the application.

Any adjustment to the amount of income doubly taxed or the amount of tax paid subsequent to the lodgement of the claim *must be notified* to the Commissioner *in writing* so that corresponding revision can be made.

16 Can tax credit be allowed for any other taxes paid in the Mainland ?

A tax credit is only allowed for taxes covered in the Arrangement. For individuals, tax credit only applies to Individual Income Tax.

17 Are there any restrictions on the amount of tax credit ?

- (1) The credit is not to exceed the amount of tax payable in respect of that income computed in accordance with the provisions of the IRO. Any excess of tax paid over the tax credit is not available for set-off against the tax of other years.
- (2) If a loss is incurred or there are no assessable profits in Hong Kong in the relevant year of assessment, no tax will be payable in Hong Kong and it follows that no tax credit will be allowed in respect of the tax paid in the Mainland.
- (3) Disputes on the amount of tax credit are subject to the normal objection and appeal procedures of the IRO.

18 Apart from tax credit, is there any other relief applicable to income from “dependent personal services” ? How can an application be made ?

Section 8(1A)(c) of the IRO provides that income which has been charged to tax of substantially the same nature as Salaries Tax in the territory where the services are rendered is exempt from Salaries Tax.

A person who has paid Individual Income Tax may lodge an application for exemption from Salaries Tax when filing the tax return, or may apply for revision of the assessment in accordance with Section 70A of the IRO.

19 How is "certification of resident status" applied for ?

When applying for benefits under the Arrangement, an applicant may be required to substantiate his resident status. In such a situation he may apply for a certificate of resident status from the competent authority of the Side where he is resident. If he is unable to produce such a certificate he will be denied the benefits of the Arrangement.

In the case of a Hong Kong resident who is required to substantiate his resident status, the Mainland tax authority will first issue a *referral letter* to the applicant for forwarding to the Department. This, together with a properly completed "*Application for Certification of Resident Status*", is to be submitted to the Department. The latter form can be obtained from the Department.

The Department will examine the information supplied and if it is sufficient, issue a "*Certificate of Hong Kong Resident Status*". If the application is rejected, the applicant will be notified accordingly.

20 How can enquiries be made on any other matters in relation to the Arrangement ?

For enquiries on matters in relation to the Arrangement, please write to:

The Senior Assessor (Double Taxation)
Inland Revenue Department
GPO Box 132
Hong Kong