ThinkBridge Financial Consultants

ThinkBridge Newsletter 2017 2nd Quarter
思倍捷咨询 2017 年二季度期刊

金融机构——税务实际执行与法规相抵触及境外税收抵免

不同税收管辖区对于国际和境外税收抵免的规定大相径庭，包括属地征税制度（甚少考虑在其他税收管辖区内的纳税情况）以及全球征税制度。在全球征税制度下, 如符合某些条件(例如只有根据当地税法而缴付的税款才予抵免, 被视为“自愿缴纳”的境外税款不予抵免), 境外缴纳的税款可抵免当地税款。

在当今经济形势下，税务机关正积极探索各种方式以提高税收，越来越关注全球金融机构是否在其所在地缴纳公平的税款，以及其境外税收抵免是否合理。这会使纳税人面临巨大挑战，对于亚太地区的纳税人而言尤其如此，因为该地区的税法存在不确定性且不断迅速演变，税务机关对于税法的解读和执行存在不一致的情况。

在很多情况下，税务机关依据其内部观点进行税务评估，纳税人因而提出上诉；双方为了避免诉诸法院, 会选择商议稍低的税额以结算。这样，纳税人便能避免费用高昂、旷日持久的法律纠纷，并能缓和与税务机关的关系。然而，尽管纳税人认为他们别无选择、只能上缴税款，但由于申诉未由法庭裁决，与税务机关协定缴纳的税款可能会被视为“自愿纳税”。此外，有些纳税人与税务机关商定按照某基础缴纳税款，而这实际上有悖于一般税法解释。以上对于在亚太范围绝大多数地区经营的纳税人来说都是一项挑战，而本文重点关注在香港的相关问题

Financial Institutions: Practice versus Law and Foreign Tax Credits

International and foreign tax credit rules vary significantly between jurisdictions. At one end of the spectrum, there are purely territorial systems, which rarely consider tax paid in other jurisdictions, and at the other end, there are worldwide systems, which grant relief for foreign taxes paid but make such relief subject to certain conditions (e.g. relief may be granted only for foreign tax where it is strictly required to be paid under local tax law and is not allowed where the foreign “tax” is considered to be a “voluntary payment”).

In the current economic climate where tax authorities are exploring every avenue to boost collection levels, increased focus is being placed on whether global financial institutions pay their fair share at home and whether relief claimed for foreign taxes paid abroad is properly claimed. This can create challenges for taxpayers, particularly in the Asia Pacific region, which has uncertain and rapidly evolving tax laws that are subject to inconsistent interpretation and enforcement by tax authorities.

In many instances, local tax officials will make an assessment based on their own internal view, which the taxpayer will decide to appeal. Rather than go to court, both parties may opt to negotiate a settlement for a lesser amount; this allows the taxpayer to avoid a costly and protracted legal dispute and appeases the tax authority. However, while the taxpayer may argue that it had little choice but to pay the tax; an agreement struck with a tax authority to pay a disputed amount still may be considered a voluntary payment of tax since the issue was not determined by the courts. There are other instances where taxpayers and tax authorities agree to pay tax on a certain basis, which actually differs from the commonly held interpretation of the law. This is a challenge for taxpayers across a majority of the Asia Pacific region; however, this article focuses specifically on the situation in Hong Kong.

正如亚洲其他众多税收管辖区一样，香港与英美等西方税收地区的税收方式有所不同。虽然香港属于普通法司法管辖区，其税法《税务条例》是以历史悠久（约十九世纪）的英国法律为基础，相对简略，印刷本不超过一英寸厚。如此简略的法规必然存在不明确之处，其中部分不明确之处由判例法填补，部分则由香港税务局（IRD）指引补充。然而，有趣的是，某些纳税人的实际处理方法与税法(按照一般解读)存在分歧，有些则有悖于香港税务局指引。

Like many other Asian jurisdictions, Hong Kong is somewhat different in its approach to tax than western jurisdictions, such as the UK and the US. While Hong Kong is a common law jurisdiction and its tax legislation, the Inland Revenue Ordinance (IRO), is based on old (circa 19th century) British legislation, the IRO itself is relatively brief (the hard copy form of the IRO is no more than an inch thick). Such a small body of legislation necessarily results in gaps and areas of uncertainty, some of which are plugged by case law and some of which are plugged by Inland Revenue Department (IRD) guidance. However, interestingly, there are a number of areas where the practice of certain taxpayers diverges from the commonly held interpretation of the law and, in some cases, IRD guidance.

在上述情况中，香港税务局可能会明确认可纳税人的处理方法，或者可能不提出质疑; 这或许是因为此等税务处理方法令纳税人和香港税务局互惠互利, 甚至可能带来超额征税，而非征收不足。这可能只是简单且相对稳定的税制产生的附带产品，目的是获得可接受的结果。下文将列举并讨论一些税务处理方法与法规或税务局指南存在分歧的例子。

In these instances, the IRD may explicitly approve of the taxpayer's practice, or it may simply choose not to challenge it, perhaps on the basis that the practice is mutually beneficial to both the taxpayer and the IRD and, in fact, may result in the over-collection, rather than the under-collection, of tax. This may merely be the by-product of simple and relatively static tax legislation, which is administered in a pragmatic fashion to achieve an acceptable result. Several examples of areas where practice may diverge from the law or IRD guidance are discussed below.

① Nice Cheer Investment—以公允价值或是否实现为基础– Fair value or realised basis

香港终审法院于2013年11月12日就Nice Cheer Investment v. Commissioner of Inland Revenue FACV 23/2012一案作出判决，裁定证券公允价值会计中的未实现收益无须纳税，但相应的未实现亏损获得扣除。香港税务局降低此裁决的重要性，认定其影响仅限于本案的特定案情，但同时宣布会尊重此裁决。一些从业者欢迎此裁决, 使其一直视为正确的法律解读得以澄清。然而，对于很多纳税人而言，尤其是银行和证券公司，此裁决意味着税法就证券公允价值会计损益的征税方式发生了巨大变化, 从对称征税变成非对称征税。

On 12 November 2013, Hong Kong's Court of Final Appeal held in Nice Cheer Investment v. Commissioner of Inland Revenue FACV 23/2012 that certain unrealised fair value accounting gains on securities were not taxable, whereas corresponding unrealised losses were deductible for tax purposes. The IRD downplayed the significance of the decision, stating that its impact was limited to the specific facts of the case, but announced it would respect the court's decision. Some practitioners welcomed the clarification of what they always considered to be the correct technical position. However, for many in the tax community, particularly banks and securities houses, the decision represented a step change in tax law from a position of taxing securities' fair value accounting gains and losses symmetrically, to asymmetrically.

从技术角度看，非对称征税的做法普遍有利于纳税人。这样的改变实际上意味着纳税人能够尽早确认税务亏损, 用以抵免将来的应税利润; 同时, 确认应税利润则基于利润实现原则。然而，从实际操作层面看，此裁决造成了一个潜在的问题，纳税人为了采用非对称征税, 需要调整内部系统和税务流程。

The creation of this asymmetry, from a technical perspective, was generally beneficial to taxpayers; it effectively meant the early recognition of tax deductible losses, which could be carried forward indefinitely, versus recognition of taxable profits on a realised basis. However, from a practical and operational perspective, the decision created a potential problem; following this asymmetrical basis of taxation would require systems and tax compliance process changes.

此问题的解决方法其实非常简单实际。香港税务局会尊重终审法院作出的裁决，并接受纳税人依据此裁决进行纳税申报，但同时也允许纳税人在公允价值损益对称征税的基准上进行纳税申报。一些纳税人选择按后者进行纳税申报，可能会将本应在未来纳税的利润转移至当期而加快税收，这或可增加香港整体的税收总额。

The answer to this problem was simple and practical. The IRD would respect the Court of Final Appeal's decision and accept taxpayers filing their tax returns in accordance with the decision, but the IRD would also allow taxpayers to file their tax returns on the basis that fair value gains and losses were taxable symmetrically. Filing on the latter basis, as some taxpayers chose to, may accelerate the payment of Hong Kong tax and shift profits that would have been taxable in future periods into the current period, or may increase the overall amount of Hong Kong tax payable.

② 证券交易和经纪利润及亏损来源—境内或境外
Source of securities trading and brokerage profit and loss – Onshore or offshore

香港税制仅针对在香港产生的利润课税，这使得利润来源成为最具争议的问题之一，必须根据每个案的本身事实情况而定。自从香港终审法院在2007年就ING Baring Securities (Hong Kong) Limited v. Commissioner of Inland Revenue FACV No. 19（以下简称“ING Barings”）一案判决纳税人胜诉，则为确立在香港以外的证券交易所从事证券交易所得佣金收入及贸易利润应视为海外利润提供了香港最高法院的权威依据；且此观点在香港税务局指引2中也有所表明。但有部份银行及证券公司仍继续以上述利润的全部或部分来源于香港为依据填报纳税申报表（相应扣除赚取这些利润所产生的费用）。正如包致金法官在ING Barings一案中的陈述：利润来源存在“主张不同合理观点的空间”，因此有论据去支持利润来源自香港的观点。例如：采用作业验证法及考虑在香港筹集的资金来论证产生利润的贸易活动并不完全位于香港以外。虽然有这些论据，但是技术层面仍倾向于归纳这些利润源自海外。如果纳税人企业有盈利，以利润源自香港作为课税依据可能会增加税款。

Hong Kong only taxes Hong Kong-sourced profits. Accordingly, the source of profits is one of Hong Kong's most hotly contested areas and is considered a question of fact to be determined on a case-by-case basis. However, since the 2007 decision of the Court of Final Appeal in ING Baring Securities (Hong Kong) Limited v. Commissioner of Inland Revenue FACV No. 19 (ING Barings), where the IRD lost to the taxpayer, there has been authority from Hong Kong's highest court, that commission income and trading profit from a securities transaction executed on a stock exchange outside of Hong Kong, should be considered foreign source, and this view is supported in IRD guidance 2. However, a number of banks and securities houses continue to file their tax returns on the basis that such profits are wholly or partly onshore (with a corresponding deduction of expenses incurred to earn those profits). As Mr. Justice Bokhary stated in ING Barings, the source of profits is a question for which there is "room for reasonable minds to differ" and, as such, arguments have and can be constructed in support of an onshore filing position; for example, the use of the "operations test" and consideration of funding raised in Hong Kong, to argue that the activity that giving rise to the profit does not occur exclusively outside Hong Kong. However, while these arguments have been made, the technical position appears to be in favour of the treatment of those profits as offshore, and provided the taxpayer's businesses are profitable, adopting an onshore basis of taxation is likely to result in the payment of additional tax.

③ 香港公司合并规则—亏损处理 Hong Kong amalgamation rules – Treatment of losses

众所周知，以香港为基地的银行分支机构、子公司或证券公司一般均存在结转亏损。造成此类亏损的原因很多，如受2007年全球金融危机及其后几年经济形势的影响，经纪佣金收入的整体下降，贸易营商环境苛刻而成本并未下降甚至有所上升，以及转让定价政策而造成亏损加剧(虽然转让定价政策是按照经合组织标准，但是可能不太适用于亏损企业)。

2014年，香港出台新规，允许不需通过法院进行公司合并。起初纳税人以为这新规是一大福利，能通过合并多间子公司而降低成本和运用结转亏损；然而，在缺乏相关税法的前提下，香港税务局于2015年12月30日发布了针对不需通过法院进行公司合并的税务指引（于2016年12月16日更新）。

It is fairly common knowledge that Hong Kong-based bank branches, subsidiaries and securities houses have a reasonable amount of carried forward losses. Such losses may have been incurred during the global financial crisis of 2007 and subsequent years, or are simply the result of an overall drop off in brokerage income, difficult trading conditions and a static or increasing cost base, sometimes exacerbated by transfer pricing policies which, while in line with OECD standards, are not well suited to loss-making businesses.

In 2014, Hong Kong introduced new rules allowing for the court-free amalgamation of companies. The rules were initially thought to be a boon for taxpayers looking to rationalise multiple subsidiaries in an attempt to cut costs and to utilize potentially trapped losses. However, despite there being no legislation specifically released to cover the treatment of losses upon amalgamation, on 30 December 2015, the IRD issued its own guidance (updated on 16 December 2016), which espoused the view that a strict (and relatively unlikely) fact pattern would need to exist before losses could be carried forward to, and effectively pooled in the new entity.

ThinkBridge Newsletter 2017 2nd Quarter

思倍捷咨询 2017 年二季度期刊

该指引要求在将亏损结转至新的公司之前，须满足（几乎不可能满足的）非常严格的条件。相关法律的空缺即意味着，目前对于如何处理不需通过法院进行公司合并情形下的亏损还没有明确答案，但可以合理地说，目前香港税务界别对此持有不同的观点。没有出乎意料之外，在各种可能的观点中，香港税务局指引中的处理方法（已被一些纳税人采用的）是最不利于纳税人的。该处理方法或会导致公司无法利用亏损结转，甚至造成缴纳的税款超过香港税法要求的情况。

The absence of specific legislation means that, for now, there is no clear answer on how losses should be treated under a court-free amalgamation, and it is reasonable to say that there are a number of competing views in the Hong Kong tax community. However, perhaps unsurprisingly, the IRD guidance that is being followed by a number of taxpayers appears to be at the less favourable end of the spectrum of possible interpretations, and may result in the forfeiture or practical inability of companies to utilise losses. Again, this may result in more tax being paid in Hong Kong than required under applicable law.

思倍捷观察和建议 ThinkBridge Observation and Comments

随着各税务机关之间信息披露水平不断提高、交流日渐密切，对纳税人税务事项的稽核日趋严格，纳税人可能会详细复核所缴税款是否均为法律所规定，或是否已超出法律规定的范围。这可能会造成下列影响：

1. 识别境外税收抵免的风险，以及通过改变在香港或母公司所在地的纳税申报依据以应对此类风险的机会；
2. 调整纳税申报方法，使其在符合香港税法规定的同时对纳税人更有利，从而减低在香港缴纳的税款。

由于以上强调的问题并非仅出现在香港，纳税人也可能希望把其纳税申报方法与亚太区内的适用税法作出比较。

以上提及的问题是否会对公司造成影响最终将取决于多种因素，其中包括：母公司所在地的国际及国外税收抵免规定、母公司的税务概况及其香港分支机构或子公司的纳税申报状态。

With the increasing level of information disclosure and exchange between tax authorities and scrutiny to which taxpayer's affairs are being subject, they may wish to undertake an exercise to examine whether tax paid is in accordance with, or is possibly more than that required by applicable law. This may lead to:

1. The identification of risks to FTC claims and the opportunity to address those risks either by changing the basis of filing in Hong Kong or in the parent jurisdiction
2. The opportunity to make cash tax savings in Hong Kong, by adjusting the method of filing to one which is in accordance with the local tax law and is more favourable to the taxpayer

Taxpayers may also wish to consider their tax filing position compared to applicable tax law across Asia Pacific as the issues highlighted above are not unique to Hong Kong.

Whether the issues discussed above are of concern will ultimately depend on a number of factors, including the international and foreign tax credit rules of the parent jurisdiction, the tax profile of the parent company and tax filing position of the Hong Kong branch or subsidiary.

上海总部:
宝华中心 9 楼 03-06 单元
上海市广中西路 355 号
电话: 86 (21) 6375 8318

Shanghai Office:
Unit 03 -06， 9F
BaoHua Center
No. 355 GuangZhong Xi Road
Shanghai, PRC

Tel: 86 (10) 6375 8318

北京分公司:
金泰国际大厦 A0310 室
朝阳区广渠路 11 号院 1 号楼
电话: 86 (10) 8591 0792

Beijing Office:
Unit A0310,
Golden Prosperity Center
Building No.1, Compound
No.11, Guang Qu Rd.
Beijing, PRC
Tel: 86 (10) 8591 0792

- Financial Outsourcing
- Financial Advisory for M&A
- Risk Management
- Tax Advisory Service

www.think-bridge.com