One Country, Two (Taxation) Systems

Andrew Halkyard examines the new arrangement between the HKSAR and the Mainland to help residents avoid the potential burden of double taxation

At least since the late 1980s those interested in Hong Kong taxation law have debated whether Hong Kong should endeavour to enter into comprehensive double taxation agreements with targeted partners. Although it was appreciated that, by and large, instances of double taxation were more theoretical than practical, the one area where concern was continually expressed related to cross-border activities involving the Chinese Mainland (the Mainland).

Hong Kong professional and commercial groups, most notably the Hong Kong General Chamber of Commerce and the Hong Kong Society of Accountants, supported the view that some form of agreement was needed to resolve concerns of double taxation between Hong Kong and the Mainland. However, notwithstanding the lobbying of such organisations, the conventional wisdom appeared to be that no formal agreement between the Mainland and Hong Kong could ever be concluded in the taxation arena, given the practical and political difficulties that would need to be overcome under the 'One Country, Two Systems' concept. How could Hong Kong ever conclude a 'treaty' with the Mainland?

It came as no small surprise, therefore, when the Financial Secretary announced in the 1998-99 Budget Speech that the Hong Kong Special Administrative Region had made an arrangement with the taxation authorities of the Central People's Government for avoidance of double tax between the Mainland and Hong Kong. The arrangement, which is set out in a memorandum signed in Hong Kong on 11 February 1998, covers matters such as shipping, aviation, land transportation, permanent establishments, services, and personal taxation. It applies to direct taxation of certain income and profits derived by individuals and enterprises.

Its key provisions, relating to matters such as permanent establishment protection, taxation of dependent employees, and individuals providing independent services, are all based on standard OECD-model treaty language. With one exception, it does not apply to indirect taxation. One further feature of the arrangement is that it concentrates on active income; it is silent on passive income (such as royalties, interest, dividends, and capital gains), which is typically subject to withholding tax. There is no provision in the arrangement for the exchange of information.

Perhaps more surprising is that the arrangement appeared to have been finalised with impressive speed. Apparently, only two formal meetings between representatives of the respective taxation authorities were needed for this purpose. Most recently, in June 1998 the Hong Kong Inland Revenue Department issued Departmental Interpretation and Practice Notes No. 32 entitled 'Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation on Income'. Around the same time, the State Administration of Taxation issued its own interpretation notice of the relevant articles of the arrangement. These notices contain general reference material to assist in understanding the arrangement, set out the interpretation of its provisions from the perspective of both sides, and the practice which the respective taxation authorities will adopt in applying it.

The notices also explain the criteria on which residence will be determined in accordance with the arrangement (the arrangement only applies to a 'resident' of Hong Kong or the Mainland) and include the application form to be used when applying for a residence certificate.

The degree of commitment by the Mainland to dealing with the issue of double taxation, which until recently was (and may still be) more academic than pressing, should be highly encouraging to Hong Kong's business and financial communities. By easing concerns, providing greater certainty, and lowering the tax liability of Hong Kong residents working and enterprises operating in the Mainland, this arrangement helps establish a firm foundation for future co-operation between the Mainland and Hong Kong on trade and other economic matters. From a Hong Kong taxation perspective, it is one of the most significant developments to have occurred for a very long time. From a broader international law perspective, the Mainland has adopted a flexible and innovative approach — a standard treaty template has been used to regulate jurisdiction to tax within different parts of the People's Republic of China. This augurs well for effectively implementing the autonomy promised to Hong Kong under the challenging rubric of 'One Country, Two Systems'.

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一國、兩（稅）制

香港特別行政區與中國大陸作了新安排，以協助居民避免雙重稅務的潛在包袱。賀雅德對此安排作探討

自八十年代末期，關心香港稅法的人士已就香港應否竭力與目標夥伴訂立具體的雙重稅務協議這問題進行了辯論。大致來說，雙重稅務的情況一般被認為是比較理論性而非實務性，但有一種情況一直備受關注，那就是有關跨越中港兩地的活動。

很多香港的專業及商業團體 — 特別是香港總商會及香港會計師公會 — 均認為有需要訂立某種形式的協議，以消除對於香港及中國大陸之間出現雙重稅務的憂慮。儘管這些團體努力游說，但一種普遍的看法是，鑒於「一國兩制」原則所帶來的種種實務上及政治上的困難，在稅務上而言香港及中國大陸根本無法簽訂正式協議。香港怎麼可以與中國大陸簽訂一份「條約」呢？

… 中國大陸確是採取了既靈活且創新的作法 …

因此，當財政司司長於 1998-99 年度財政預算案中，宣布香港特別行政區已與中央人民政府稅務當局作出安排，以避免中港兩地之間出現雙重稅務時，我們大可不用作何驚訝。該項安排是載明於一份於 1998 年 2 月 11 日在香港簽署的備忘錄內。該安排的範圍遍及船務、航空、陸路運輸、永久性機構、服務業、以及個人稅務，而適用於個人及企業得到的某些收入及利潤上的直接稅項。

該安排的主要條文（即有關保護永久性機構、受供養僱員及提供獨立服務的人士的稅收等事宜），均仿效經濟合作與發展組織（OECD）的標準條約用語。除了一種例外情況以外，該安排不適用於間接稅項。該安排的另一特點，是它著重於「動態」收入，並未有提及到「靜態」收入（例如權利金、利息、股息及資本收益），這些「靜態」收入一般來說是受預扣稅所規範。該安排也未就資料的交換訂下明文。

也許令人更值驚奇的，是該項安排看來是以非常快的速度定案。各稅務當局顯然只開過兩次正式會議便已達成安排。於 1998 年 6 月，香港稅務局發出了《部門釋義與實務說明第 32 號》，題為「中國大陸與香港特別行政區就避免雙重入息稅收上的安排」。與此同時，國家稅務行政機關也發出了通知，以解釋該安排的有關條文。這些通知的內容，包括了總括性的參考材料，以協助了解該安排、從雙方的角度對有關條文作釋義、以及各稅務當局於運用該安排時將會採取的作法。

上述通知對於根據該安排來決定居住地的準則，也作了解釋（該安排只適用於香港或中國大陸的「居民」），並包括申請居住證明書時須使用的申請表格。

直到不久前，中國大陸在處理雙重稅務問題上，一直是研討多於落實。但此項最近的安排，對香港的工商及金融界應發揮極為振奮的作用。該安排不僅消除了種種憂慮及提供了更大的確定性，還減輕了在中國大陸工作的香港居民及在當地運作的企業的稅務負擔，這一切替中港兩地未來的經貿合作建立了穩健的基礎。從香港稅務的角度來看，該安排實是多年來最值得注意的發展之一。而從一個較廣泛的國際層面來看，中國大陸確是採取了既靈活且創新的作法 — 即運用了一套標準條約範例來規範中華人民共和國不同的稅務管轄法域。這對於有效體現「一國兩制」這個富挑戰性的構思所承諾賦予香港的高度自治來說，無疑是一個好的兆頭。

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於香港大學教授稅務法，
並為麥堅時律師行的顧問

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