Salaries Tax Tips

Andrew Halkyard offers a number of strategic tips to employers and employees when it comes to assessing salaries tax

'Holidaying' Employees

Many employers who provide holiday allowances for their staff are aware of the generous exemption provided in s 9(1)(a) of the Inland Revenue Ordinance (Cap 112) (IRO). It may not, however, be generally appreciated that in practice the scope of the exemption is particularly wide.

Specifically, it is understood that the Inland Revenue Department (IRD) allows at least the following expenses to qualify for exemption: travel costs (including car hire), local sightseeing tour costs, airport taxes, excess baggage costs, hotel accommodation costs and package tours. It is also understood that holiday allowances covering a taxpayer's spouse and children are accepted as falling within the exemption provided by s 9(1)(a).

For Owner/Occupier

The question has arisen concerning the IRD's assessing policy where the employer leases premises owned by its employee (or a relative) for use as the employee's quarter. In this case it is understood that the Commissioner accepts in principle that a taxpayer can wear both the hat of an employee and a landlord at the same time and that if the arrangement is a genuine, arm's length and reasonable one, it will not be challenged.

The Commissioner will take into account factors such as whether there is a duly stamped lease, whether the rent is at market value, whether the rental income is reported by the employee as liable to property tax, whether the rent paid is reasonable in relation to the overall employment package, and whether the housing benefit is provided for in the contract of employment. If the employer and employee are related the Commissioner may closely monitor the arrangement. (Source: minutes of meetings between representatives of the IRD and the Taxation Institute of Hong Kong on 24 January 1997 and the Hong Kong Society of Accountants on 17 January 1997)

In order for there to be any refund of rent, there must exist a legal relationship of landlord and tenant with the employee or office holder as tenant. This hurdle could not be overcome in *D33/97* 12 IRBRD 228, (1997) HKRC §80-523, where the taxpayer entered into a non-binding family or social arrangement with his parents (the owners of the relevant property) to take advantage of a housing benefit scheme offered to the taxpayer by his employer. In this case the Board stated that it was not enough for the taxpayer simply to rely upon the formal niceties of paying cheques to his parents, issuing receipts and completing property tax returns. In the event, the amount in dispute could not in law be classified as a 'refund of rent'.

Employees Receiving Stock Options

Sections 9(1)(d), 9(4) and 9(5) of the IRO govern the taxation of stock options. In short, the taxable event crystallises not when the option is granted nor when the stock is ultimately sold, but rather when the option is exercised or disposed of.

In most cases, these statutory rules are easy to apply. However, when applied to the so-called cross-border employee, their applicability has generated both comment and controversy.

According to an article published by the IRD in *The Hong Kong Accountant* (Sept/Oct 1997), the Department's position is that the taxation of gains from share option schemes is determined by whether the employee was employed in Hong Kong at the time the option was granted. This is regardless of where the employee worked during the following times: the vesting period, the additional holding period (if relevant) and at the date of the grant.

Although this is a clear and easily applied rule, it does create practical difficulties in terms of (1) the employer's reporting obligation where the employee has left Hong Kong prior to the exercise of the option; and (2) the Department's ability to collect tax from a person who has left Hong Kong permanently.

Since the IRD's article was published, it is understood that there has been a tendency on the Department's part to resolve the taxation of stock options for travelling employees by applying an apportionment formula. The formula seeks to bring to charge to salaries tax a portion of the gain realised from the exercise of a share option in accordance with a ratio which has the following elements:

- a numerator, which represents the period during which the employee was based in Hong Kong during the option period;
- a denominator, which represents the entire option period; and
- a further ratio, which takes into account the entitlement of the employee to days in/days out apportionment assessment (where applicable).

It is not clear at the time of writing whether this latter ratio is measured with respect to the year of exercise only or with respect to the total period of the employee's employment in Hong Kong during the holding period.

In light of these assessing practices, and the publicity (or lack thereof) accorded to them, it would not come as any surprise if the IRD were to seek either an amendment to the law or, as seems more likely, publish a Departmental Interpretation and Practice Note clearly setting out how an employee receiving stock options will be assessed.

Postcript

The payment in lieu of notice case, *EMI Group Electronics Ltd v Coldicott* [1997] STC 1372, referred to in the March 1999 issue of *Hong Kong Lawyer*, is final (see *Simons Tax Intelligence 1998*). Apparently, leave to appeal to the House of Lords was refused and the judgment of Neuberger J will stand.

The appeal to the Court of First Instance in *D 75/96* 12 IRBRD 19, (1997) HKRC §80-491 concerning the application in Hong Kong of *Sharkey v Wernher*, referred to in the May 1999 issue of *Hong Kong Lawyer*, has been decided in favour of the taxpayer: see *CIR v Quitsubdue Ltd* (HCIA No 5/98) (30 April 1999). It is not yet known whether the Commissioner will lodge a further appeal to the Court of Appeal.

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填報薪俸稅的秘訣

賀雅德向填報薪俸稅的僱主和僱員提供一些策略性的秘訣

僱員的「假期津貼」

很多向職員提供旅遊津貼的僱主都知道，《稅務條例》（第 112 章）第 9(1)(a) 條賦予了頗為「慷慨」的豁免。但大家可能不太清楚的，是此等豁免的實際範圍比條文所訂的更要來得廣闊。

具體來說，我們知道稅務局視為可豁免支出的開支，至少包括以下各項：旅行費用（包括租車）、當地觀光團費用、機場稅、行李過重費用、酒店住宿費用和旅行團費。據了解，納稅人的配偶和子女的旅遊津貼，亦列入第 9(1)(a) 條的豁免之內。

業主/ 佔用人須知

若僱主租用僱員或其親屬擁有的物業作為該僱員的宿舍，稅務局的評估政策又是如何呢？在此情況下，據理解，稅務局局長原則上接受納稅人可同時擔當僱員和業主的角色；此外，若果有關安排是真實的、基於各自獨立利益而作出的以及合理的話，便不會受到質疑。

就此而言，稅務局局長考慮的因素包括：是否存在著已妥為加蓋印花的租約、租金是否市值、僱員有否上報租金收入以繳付物業稅、在整體僱用條件的背景下所交租金的金額是否合理，以及在僱用合約中有否訂明提供住屋福利。若僱主和僱員之間有親屬關係，稅務局局長或會較密切地監察有關安排。（資料來源：稅務局代表分別在 1997 年 1 月 24 日和 1997 年 1 月 17 日與香港稅務學會代表及香港會計師公會代表開會的會議紀錄）

若要獲得退還租金，必須存在著以僱員或在職人員作為租客的業主與租客法律關係。在 *D 33/97* 12 IRBRD 228，(1997) HKRC §80-523 一案，納稅人與其父母（有關物業的業主）作出了一個不具約束力的家庭或社交安排，從而得享僱主向納稅人提供的住屋福利計劃。稅務上訴委員會指出，納稅人單是依賴形式上的細節例如開支票給其父母、發給收據和填交物業稅申報表並不足夠。最後，受爭議的有關數額在法律上不能被界定為「租金的退還」。

接受股票期權的僱員

《稅務條例》第 9(1)(d)，9(4) 和 9(5) 條是有關股票期權的徵稅。簡單來說，須繳稅的情況並不是發生在批予期權或股票最終被賣出之時，而是當期權被行使或處置的時候。

在大部分的情況下，這些法定規則的運用都是相當容易的。但當規則應用於所謂的跨境僱員時，就引來了很多批評和爭論。

根據稅務局在 *The Hong Kong Accountant* (1997 年 9/10 月號) 刊出的一篇文章，當局的立場是，對股票期權計劃中獲利的徵稅，乃取決於僱員在獲批予期權時是否受僱於香港。僱員在下列期間的工作地點並不列入考慮因素：歸屬階段、繼續持有階段（若有關的話）和批予當日。

這無疑是一條既清晰又容易應用的規則，但在實際執行時卻出現以下困難：（一）當僱員在行使期權前已離開香港時，僱主的呈報責任；及（二）稅務局向已永久離開香港的人追收稅款的能力。

自稅務局的文章刊出之後，我們了解到當局傾向採用一種分攤的方程式去決定向時常出國僱員徵收股票期權的稅項。該方程式的作用，是根據一個比率向部分從行使股票期權所獲的利潤徵收薪俸稅，而該比率包含了下列各項元素：

- 分子，代表僱員於期權生效期間駐守在香港的日子；
- 分母，代表整個期權生效期間；及
- （若適用的話）另一個比率，考慮到僱員可享有根據在港與不在港日子的比例分攤評估的權利。

在撰寫本文時，對於後者比率應該是以行使期權該年還是以僱員受僱的總年期計算的問題，當局還未有定案。

基於上述的評估習慣，以及它們受大眾的關注（或欠缺關注），若稅務局尋求修訂有關法例或出版一套部門釋義與實務說明以清楚解釋接受股票期權的僱員會如何被評稅（以後者的可能性較大），是絕不會令人感到意外的。

後記

筆者在《香港律師》1999 年 3 月號撰寫的文章中，提及了一宗有關代通知金的案件 *EMI Group Electronics Ltd v Goldicott* [1997] STC 1372。該案的判決已是最終決定（見 *Simons Tax Intelligence 1998*）。案中向英國上議院上訴的許可申請已被拒絕，而 Neuberger J 的判決將繼續有效。

此外，筆者在《香港律師》1999 年 5 月號撰寫的文章中，談論到有關在香港引用 *Sharkey v Wernher* 一案時曾提及 *D 75/96* 12 IRBRD 19, (1997) HKRC §80-491 一案。案中稅務局局長向原訟法庭提出上訴，結果是維持原判，即納稅人勝訴：見 *CIR v Quitsubdue Ltd* (HCIA No 5/98) (1999 年 4 月 30 日)。至於稅務局局長會否再向上訴法庭提出上訴，現時仍是未知之數。

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