

## 香港税务快讯 附带权益香港税务豁免条例草案刊宪



翘首以待、旨在为附带权益提供香港税务豁免的 [《2021 年税务（修订）（附带权益的税务宽减）条例草案》](#) 于 2021 年 1 月 29 日刊宪（条例草案）。根据条例草案，若符合条件，具资格附带权益将：

- 享有 0% 香港利得税税率；及
- 在计算香港薪俸税时，自受雇入息中全部剔除。

取决于立法程序，上述税务豁免将具追溯效力，并适用于在 2020 年 4 月 1 日或之后所收取或累算的具资格附带权益。

我们在下文总结了享受有关税务豁免须符合的主要条件：

### 具资格附带权益

税务豁免只适用于具资格附带权益，即根据条例草案的界定，为因提供投资管理服务而收取的利润关联回报，并满足其他条件<sup>1</sup>。

### 合资格附带权益支付人

具资格附带权益须由合资格附带权益支付人支付予或累算归于有关人士。根据条例草案，合资格附带权益支付人包括经核证投资基金<sup>2</sup>，及其

相联法团/合伙。

### 合资格附带权益收取者

合资格附带权益须由"合格人士"或"合格雇员"收取或累算归于该人。

- "合格人士"包括：
  1. 根据《证券及期货条例》获发牌/注册的法团/认可财务机构；或
  2. 向统一基金香港税务豁免条例(UFE)下定义之"合格投资基金"<sup>3</sup> 在香港提供投资管理服务，或安排在香港提供该等服务的人士（包括公司、合伙企业等）。
- "合格雇员"须符合以下条件：
  1. 受雇于合格人士（见上）；或受雇于合格人士（若为法团/合伙）的相联法团/合伙，**而该相联法团/合伙在香港经营业务**；及
  2. 为着或代表该合格人士提供投资管理服务以履行雇佣职责。

### 提供投资管理服务

合资格附带权益须**因为**在香港提供投资管理服务而产生。条例草案就投资管理服务提供了非尽列式的清单，当中包括筹措资金、就潜在投资进行研究及提供意见、取得/管理/处置财产或投资以及协助所投资实体筹集资金。

### 合资格交易

税务豁免只适用于**由合格私募股权交易的利润所衍生的**具资格附带权益。根据条例草案，合格私募股权交易一般指：

- 交易私人公司；
- 交易 UFE 所定义的合格特定目的实体(SPE)，而该 SPE 持有和管理符合 UFE 所定义的获投资私人公司，以及没有持有和管理其他属税务条例附表 16C 就 UFE 所指明的资产（16C 资产）；
- 交易获投资私人公司；或
- 以上交易的附带交易（不超过 UFE 所载的 5%门槛）。

另外，条例草案亦要求有关具资格附带权益须**衍生自按照 UFE 获得豁免的利润**。

### 实质活动要求

在**整段适用期间内**<sup>4</sup>，有关合格人士须在香港雇用税务局局长认为**足够数目的全职雇员**，及在香港承付税务局局长认为**足够的本地营运开支**，用以提供有关投资管理服务。无论如何，该合格人士在**每一有关年度**必须满足以下门槛：

- 在香港的合资格全职雇员平均人数 – 2 个或以上
- 每年在香港承付的本地营运开支 – 港币 200 万元或以上

## 前期核证和持续监察机制

- **前期核证** - 基金必须通过香港金融管理局（金管局）的核证程序；金管局会在确认基金符合相关资格后发出核证函。
- **独立审计证明** - 于分发资格附带权益的年度，获委聘的独立审计师须证明相关实质活动要求及其他有关条件在相关课税年度内已被满足；该审计师报告须存放在基金的本地办事处或由非居港基金的本地获授权代表保管，在有需要时以供查阅<sup>5</sup>。
- **申报及备存纪录** - 条例草案亦要求合资格人士及合资格附带权益支付人向税务局局长提供有关分发资格附带权益的资料，并备存充分纪录。

## 我们的观察

我们欢迎条例草案的出台。我们相信这将有助推动香港私募基金行业的发展。

尽管如此，我们观察到条例草案有一些方面尚待解决：

- 条例草案似乎要求具资格附带权益须衍生自按照 UFE 获得豁免的利润 – **究竟相关利润依赖 UFE 获得豁免是否附带权益税务豁免的先决条件？** 若果附带权益衍生自由始至终不用在香港应税的利润（如：为离岸收益），附带权益税务豁免是否依然适用？
- 条例草案亦另外建议放宽 UFE 下"SPE"的定义，容许 SPE 除了获投资私人公司外，亦可持有和管理其他 16C 资产（如上市公司股票）。虽然如此，条例草案亦订明**就 SPE 而言，若有关交易利润衍生的附带权益要获得税务豁免，有关 SPE 不能持有和管理其他 16C 资产** – 这似乎代表虽然 SPE 持有和管理获投资私人公司外的其他 16C 资产不会令该 SPE 丧失 UFE 下的豁免，但却会令到衍生的附带权益未能受惠于税务豁免。
- 有关条例草案的立法会参考资料摘要提及到若果对冲交易属于合资格私募股权交易的组成部分，而该对冲交易的利润亦涵盖在合资格私募股权交易用以计算附带权益的累计损益，则该对冲交易所衍生的附带权益或可获税务豁免 – 但条例草案并没有具体条文明确涵盖对冲交易。
- 立法会参考资料摘要提及到有关独立审计证明的规定，但条例草案中并没有提到该规定。我们期望该独立审计证明机制的要求、程序等详情陆续出台。

在我们即将发布的另一文章“税务分析”中，我们会分享有关条例草案的更多洞察。同时，我们将及时向您通报有关税务豁免的最新立法进展。

## 注释:

- 1 例如该款项是在门坎回报率获满足的前提下，在支付投资回报之后收取或累算的、该款项仅在获得利润时产生，并参照该等利润而变动，而且对外部投资者的回报亦是参照该等利润而决定的。
- 2 一般指《证券及期货条例》下的"集体投资计划"，并经金管局核证。
- 3 至少有 5 名外来投资者并符合若干有关资本认缴和净收益派发规定的基金。
- 4 根据条例草案的定义，指自某人开始为经核证投资基金或指明实体（即创科创投基金公司）进行投资管理服务之日起，直至具备资格附带权益由该人收取（或累算归予该人）之日为止的期间。
- 5 稅務局可徵詢金管局的意見，以確定附带权益稅務豁免是否適用於某一納稅人。

如有任何疑问，请联系我们的专业服务团队：

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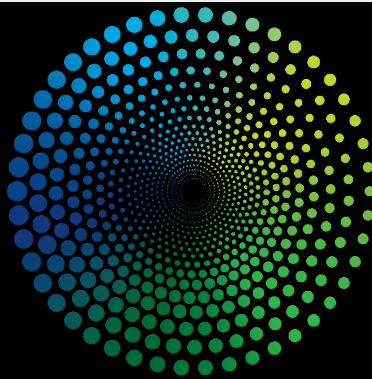
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## Hong Kong Tax Newsflash

### Draft legislation proposing Hong Kong tax exemption on carried interest gazetted



The long-awaited bill to introduce Hong Kong tax exemption on carried interest ([Inland Revenue \(Amendment\) \(Tax Concessions for Carried](#)

[Interest\) Bill 2021](#)) was gazetted on 29 January 2021 (the Bill). The Bill proposes that, subject to conditions, eligible carried interest shall be:

- **charged at 0% under Hong Kong profits tax;** and
- **fully excluded from employment income** for the purposes of Hong Kong salaries tax

Subject to legislative procedures, the tax exemption shall **apply retrospectively** to eligible carried interest received or accrued **on or after 1 April 2020**.

The key conditions for the tax exemption to apply are summarized as follows:

### Eligible carried interest

The tax exemption only applies to eligible carried interest, which is defined under the Bill as a **profit-related return** from the provision of investment management services, subject to fulfilment of other conditions<sup>1</sup>.

### Qualifying payer

The eligible carried interest shall be received by or accrued to the person concerned from a qualifying payer, which includes a certified investment fund<sup>2</sup>, and its associated corporation/partnership.

### Qualify recipients

The eligible carried interest shall be received by or accrued to a "qualifying person" or "qualifying employee", where:

- "Qualifying person" includes:
  1. a corporation or an authorized financial institution licensed/registered under the Securities and Futures Ordinance; or
  2. a person (broad enough to cover a corporation, partnership, etc.) which carries out investment management services for a "qualified investment fund" as defined under the unified Hong Kong tax exemption regime for funds (UFE)<sup>3</sup>.
- "Qualifying employee" is defined as an individual who is:
  1. employed by (i) a qualifying person (see above); or (ii) a qualifying person's associated corporation/partnership (if the qualifying person is a corporation/partnership), **provided that the associated corporation/partnership carries on a business in Hong Kong;** and

2. carrying out the employment duties by providing investment management services in Hong Kong for, or on behalf of, the qualifying person.

### Provision of investment management services

The eligible carried interest shall be arising from the provision of investment management services in Hong Kong. The Bill provides a non-exhaustive list of investment management services, which includes fund-raising, researching and advising on potential investments, acquiring, managing or disposing of property or investments, and assisting the investee entity to raise funds.

### Qualifying transactions

The tax exemption only applies to eligible carried interest **arising from profits earned from a qualifying transaction in private equities (PE)**, which generally means a transaction:

- in a private company;
- in a qualifying special purpose entity (SPE) (as defined under the UFE) that holds and administers investee private companies (as defined under the UFE) and no other assets of a class specified in Schedule 16C to the IRO for the purposes of the UFE (Schedule 16C Assets);
- in a investee private company; or
- incidental to the carrying out of a transaction above, subject to the 5% threshold under the UFE

Meanwhile, the Bill also requires that the relevant profits giving rise to the eligible carried interest shall be **exempt from profits tax in accordance with the relevant provisions under the UFE**.

### Substantial activities requirements

During the entire applicable period<sup>4</sup>, the qualifying person shall, in the opinion of the Commissioner of the Inland Revenue, have **adequate** (i) **full-time employees in Hong Kong**; and (ii) **operating expenditure incurred in Hong Kong**, for carrying out the investment management services concerned. In any event, the below thresholds shall be met **for each relevant year** during the applicable period:

- Average number of full-time qualified employees in Hong Kong – 2 or more
- Annual operating expenditure in Hong Kong – HK\$2 million or more

### Upfront certification and ongoing monitoring mechanism

- **Upfront certification** – the fund has to go through a certification process administered by the Hong Kong Monetary Authority (HKMA); HKMA will issue a letter of certification if it is satisfied that the relevant criteria are met.

- **External verification** – in a year where there is a distribution of eligible carried interest, an external auditor should be engaged to verify that the substantial activities requirements and other relevant conditions are fulfilled in the relevant years of assessment; the auditor's report should be kept at the fund's local office or with a non-resident fund's local authorized representative for inspection if needed<sup>5</sup>.
- **Reporting obligations and retention of records** – the Bill imposes obligations on a qualifying person and qualifying payer to provide information to the IRD in relation to the distribution of eligible carried interest and maintain sufficient records.

### Our observations

We welcome the introduction of the Bill, which we believe would help promote the development of PE industry in Hong Kong.

With the above said, we observe a few unresolved areas of the Bill:

- The Bill seems to require the eligible carried interest to arise from profits that are tax-exempt under the UFE – **it is unclear whether reliance on the UFE is a prerequisite for the tax exemption on carried interest to apply**, and whether the carry exemption still applies if the carried interest is arising from profits that are non-taxable in Hong Kong in the very first place (e.g. being offshore sourced).
- The Bill separately proposes to expand the definition of SPE under the UFE to **allow an SPE to hold and administer, *apart from investee private companies*, Schedule 16C Assets (e.g. listed shares) also**. Yet, the Bill also stipulates that **for the tax exemption to apply on carried interest arising from a transaction in SPE, the SPE shall hold and administer no other Schedule 16C Assets** – this seems to suggest that while holding Schedule 16C Assets other than investee private companies would not taint the SPE from the tax exemption under the UFE, it would taint the exemption on carried interest arising from a transaction in SPE.
- The Legislative Council Brief accompanying the Bill (Legislative Brief) mentions that carried interest derived from hedging transaction may be tax-exempt if the hedging transaction would form part and parcel of the qualifying PE transaction and the profits on the hedging transaction are embedded in the profits or loss on the qualifying PE transaction for the calculation of carried interest – however, the Bill does not contain any specific provision to expressly cover hedging transactions.
- The requirement regarding the verification by an external auditor is mentioned in the Legislative Brief, but the Bill is silent on such verification requirement. More details about the requirements, procedures, etc. regarding the verification mechanism should be expected.

We will provide more detailed insights on the Bill in an upcoming publication, Tax Analysis. Meanwhile, we will keep you updated of the latest legislative developments regarding this tax exemption regime.

#### Notes:

1 For example, the sum is received or accrued after the payment of a return on investments subject to the fulfilment of the hurdle rate, the sum is to be, or may be, received or accrued only if there are profits, and the sum that is to be, or may be, received or accrued is variable by reference to those profits, where the returns to external investors are also determined by reference to those profits.

2 Generally means a "collective investment scheme" under the Securities and Futures Ordinance and is certified by HKMA.

3 It means a fund having at least 5 external investors, and meeting certain requirements over capital commitments and distribution of the net proceeds.

4 Defined in the Bill to mean the period beginning on the day on which a person begins to carry out investment management services for a certified investment fund or a specified entity (i.e. the Innovation and Technology Venture Fund Corporation) and ending on the day on which eligible carried interest is received by, or accrued to, the person.

5 The Inland Revenue Department may seek advice from HKMA for ascertaining whether the tax exemption applies to a taxpayer.

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