

香港税务快讯

离岸收入豁免制度正在咨询中



香港政府近日发表咨询文件，就检讨和细化离岸收入豁免（foreign source income exemption "FSIE"）制度提出咨询，以解决欧盟就香港不就部分源自外地的被动收入征税或会构成双重不征税方面的顾虑¹。

FSIE 制度的主要内容

在建议的 FSIE 制度下，如满足以下条件，源自香港以外的离岸被动收入，包括利息、知识产权收入、股息以及与股份或股权有关的资本处置收益（以下统称为“离岸被动收入”）将被视同为源自香港的利润，并须缴纳利得税：

- 相关收入由跨国企业（multinational enterprise "MNE"）集团²的组成实体在香港获得；和
- 针对知识产权收入以外的离岸被动收入（即利息、股息及资本处置收益），该实体未能满足经济实质要求（economic substance requirement）；或针对知识产权收入，未能满足联结度规则（nexus approach）。

基于此，如满足建议的 FSIE 制度下的特定条件，以上离岸被动收入仍将享受免税。另外，离岸主动收入如符合现行的《税务条例》的规定依然有机会不被征税。相关收入的利润来源将继续根据现行原则确定和判定。建议的 FSIE 制度将不适用于个人纳税人。

涉及的离岸被动收入及相应的豁免要求

利息收入

- 实质经济活动在香港进行
 - 相关活动包括做出必要的战略决策，管理和承担主要风险。
- 充分性测试（Adequacy test）
 - 在香港雇用足够数量的合资格雇员；和
 - 在香港花费足够数额的营运开支。

股息收入和资本处置收益

- 实质经济活动在香港进行
 - 相关活动包括做出必要的战略决策，管理和承担主要风险。
 - 对于纯股权控股公司（pure equity holding company），可以适用简化经济实质测试（reduced substantial activities test）。简化的经济实质涉及的相关活动将只包括持有及管理其股权投资，以及遵守香港的公司法合规登记和资料递交规定。
- 充分性测试
 - 在香港雇用足够数量的合资格雇员；和
 - 在香港花费足够数额的营运开支。

如果不符合以上经济实质要求和充分性测试，但满足以下**参股豁免**（participation exemption）的规定，离岸股息收入和离岸资本处置收益仍可能获得豁免：

- 投资公司为香港居民³ 或是在香港设有常设机构的非香港居民；
- 投资公司持有被投资公司至少 5% 的股份或股权；和
- 被投资公司取得的收入中，不超过 50% 是被动收入。

参股豁免的规定中还增加了一些反滥用规则（anti-abuse rules），包括转换规则（switch-over rule），主要目的规则（main purpose rule）和反混合错配规则（anti-hybrid mismatch rule）。

知识产权收入

- 只有源自合资格知识产权资产的收入才可获得免税。
- 合资格的知识产权资产在范围上仅涵盖专利和其他在功能上等同于专利的其他知识产权资产。
- 根据建议的 FSIE 制度，源自不合资格的知识产权资产的收入，如与营销相关的知识产权资产（如商标、版权），将不能免税。
- 相关收入将根据联结度比率计算免税额，该联结度比率是指纳税人为研发相关知识产权资产而发生的合资格支出占总支出的比例。
- 合资格支出仅包括与知识产权资产直接相关的研发（R&D）活动支出（不包括外购获取知识产权资产而发生的成本）。
- 相关研发活动应由纳税人在香港进行、外包给非关联方在香港境内或境外进行、或外包给在香港的关联方在香港进行。

单边税收抵免

如果纳税人未能根据建议的 FSIE 制度或参股豁免（就股息和资本处置收益而言）获得豁免而导致在香港需要缴税，建议的 FSIE 制度将引入新的

单边税抵免规定以期解决双重征税问题。如果纳税人的外国税款是在尚未与香港签订全面避免双重课税协定（全面性协定）的税务司法管辖区内支付的，可享受单边税务抵免的政策。如果纳税人的外国税款是在与香港签订全面性协定的税务司法管辖区内支付的，则可根据现行《税务条例》申请外国税收抵免。

生效日期

新制度将于 2023 年 1 月 1 日起生效。

下一步

香港政府现正就咨询文件咨询专业人士及机构的意见，特别是关于避免双重征税、具体行政执行指引、具体合规要求等议题。咨询完成后，香港政府将进行立法起草工作。目前计划在 2022 年下半年将修订条例草案提交香港立法会审阅，预期 2022 年底在香港立法会通过该法案。

我们的评论

随着 FSIE 制度的检讨和细化，毫无疑问，香港的地域来源税收征税的原则可能不再像过去那样「简单」。建议的 FSIE 制度将引入诸多新的规定和概念，例如：知识产权收入的联结度规则，参股豁免，转换规则，反混合错配规则，单边税收抵免等。

虽然利润地域来源和经济实质要求在技术判断上属于不同议题，但如将两者整体考虑，如果相关的经济实质活动在香港进行，这将导致某些离岸申请受到影响。

此外，在建议的 FSIE 制度下，离岸资本处置收益以资本性收益作为技术依据而申请免税的方式可能不再适用。营销性相关知识产权资产（例如商标和版权）的离岸特许权使用费收入可能将无法在建议的 FSIE 制度下获得豁免。不过，值得注意的是，只有跨国企业集团在香港获得的离岸被动收入才属于建议的 FSIE 制度的范围。

跨国企业集团如有建议的 FSIE 制度所涉及的离岸被动收入，有必要检讨现有的投资控股架构及商业运作模式，并考虑作出合理调整，以寻求保持免税地位的机会。纳税人还应了解建议的 FSIE 制度中的具体合规要求，并确保保留相关信息和文件支持免税立场。德勤香港团队将在后续的跟进税务分析中提供有关建议的 FSIE 制度的详细分析和更多见解。请继续关注我们将出版的出版物。

¹ 2021 年 10 月 5 日，由于对于 FSIE 制度的审查，欧盟将香港列入其非合作税务管辖区观察名单。特别是，欧盟关注的是被动收入在公司没有经济实质活动下不征税的情况。请参考我们的[香港税务快讯（第一四十五期）](#)了解详情。

² 将采用《全球反税基侵蚀规则》中对跨国企业集团（即至少包括一个实体或常设单位且不在最终母公司管辖范围内的任何集团）的相同定义和其他相关术语。

³ 香港居民是指香港税务居民。就公司而言，指在香港注册成立的公司，或在香港境外注册成立，通常在香港管理或控制的公司。

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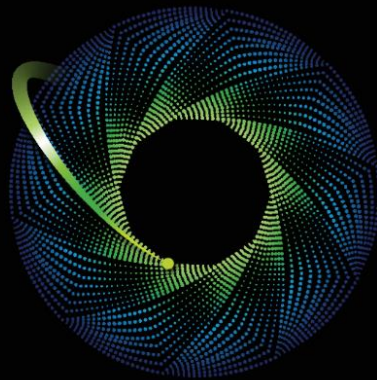
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Hong Kong Tax Newsflash

Proposed refinements to Hong Kong's foreign source income exemption regime for passive income



The Hong Kong government has recently released a consultation paper on the proposed refinements to Hong Kong's foreign source income exemption (FSIE) regime for passive income in order to address the European Union's concern¹.

Key features of the FSIE regime

Under the proposed FSIE regime, offshore passive income including interest, income from intellectual properties (IP), dividends and disposal gains in relation to shares or equity interest (collectively referred to as "offshore passive income") will be deemed to be sourced from Hong Kong and chargeable to profits tax, if:

- the income is received in Hong Kong by a constituent entity of a multinational enterprise (MNE) group²; and

- the recipient entity fails to meet the economic substance requirement (for non-IP income), or fails to comply with the nexus approach (for IP income).

In other words, in-scope offshore passive income will continue to be exempt from tax if certain conditions under the refined FSIE regime are met. Offshore active income will still be considered non-taxable under the existing Inland Revenue Ordinance (IRO). Source of profits will continue to be determined based on the prevailing principles. The refined FSIE regime will not be applied to individual taxpayers.

Exemption requirements for in-scope offshore passive income

Interest income

- Substantial economic activities are conducted in Hong Kong
 - Relevant activities include making necessary strategic decision, and managing and assuming principal risks.
- Adequacy test
 - Adequate number of qualified employees are employed in Hong Kong; and
 - Adequate amount of operating expenditures are incurred in Hong Kong

Dividend income & disposal gains

- Substantial economic activities are conducted in Hong Kong
 - Same as those for in-scope offshore passive interest income
 - For a pure equity holding company, a reduced substantial activities test can be applied. Such relevant activities will only include holding and managing its equity participation, and complying with the corporate law filing requirements in Hong Kong.
- Adequacy test
 - Adequate number of qualified employees are employed in Hong Kong; and
 - Adequate amount of operating expenditures are incurred in Hong Kong

If the taxpayer fails to meet the economic substance requirements, it may still get an exemption under **participation exemption** if the following conditions are met:

- The investor company is a Hong Kong resident person³ or a non-Hong Kong resident person that has a permanent establishment in Hong Kong;
- The investor company holds at least 5% of the shares or equity interest in the investee company; and
- No more than 50% of the income derived by the investee company is passive income.

A few anti-abuse rules are added to the participation exemption regime, including switch-over rule, main purpose rule and anti-hybrid mismatch rule.

IP income

- Only income from a qualifying IP asset can qualify for tax exemption.
- Qualifying IP assets only cover patents and other IP assets which are functionally equivalent to patents.
- Income from non-qualifying IP assets such as marketing-related IP assets (e.g. trademark, copyright) are not qualified for tax exemption under the refined FSIE regime.
- The relevant income will be tax-exempt based on a nexus ratio which is defined as the qualifying expenditures as a proportion of the overall expenditures that have been incurred by the taxpayer to develop the IP asset.
- Qualifying expenditures only include research and development (R&D) expenditures (exclude acquisition costs of IP asset) that are directly connected to the IP asset.
- The relevant R&D activities should be undertaken by the taxpayer in Hong Kong, outsourced to unrelated parties to take place inside or outside Hong Kong or outsourced to resident related parties to take place in Hong Kong.

Unilateral tax credit

If a taxpayer fails to get an exemption under the refined FSIE regime or participation exemption (for dividends and disposal gains) and hence chargeable to tax in Hong Kong, a new unilateral tax credit is introduced to relieve double taxation. If foreign tax is paid in a jurisdiction which has not entered into a comprehensive avoidance of double taxation agreement (CDTA) with Hong Kong, a unilateral tax credit may be granted. If the foreign tax is paid in a jurisdiction with a CDTA with Hong Kong, the taxpayer may claim foreign tax credit according to the existing IRO.

Effective date

The new regime will be effective from 1 January 2023.

What's next

The government is seeking comments from professional practitioners and institutions on the consultation paper, in particular the topics about double taxation relief, administration guidance, compliance requirements, etc. After the consultation, the drafting of legislative changes will proceed. The plan is to introduce the amendment bill for reading in the Legislative Council in the 2nd half of 2022 and target to pass the bill by the end of 2022.

Our comments

With the refinements to the FSIE regime, there is no doubt that Hong Kong's territorial source principle of taxation will no longer be as "simple" as it used to be. New concepts such as nexus approach for IP

income, participation exemption, switch-over rule, anti-hybrid mismatch rule, unilateral tax credit will be introduced.

Although the source of profits and economic substance requirement will be considered in separate contexts, it appears that certain offshore claims may be affected if the required economic activities are carried out in Hong Kong. Capital argument for offshore disposal gains may no longer be available. Offshore royalty income for marketing-related IP assets (e.g. trademark and copyright) may not be able to get an exemption under the refined FSIE regime. Nevertheless, it is worth noting that only offshore passive income received in Hong Kong by MNE groups will fall within the scope of this new regime.

MNE groups with in-scope offshore passive income should review the existing investment holding structures and operating models and consider making adjustments in order to preserve the tax exemption status. Taxpayers should also understand the associated compliance requirements and ensure relevant information and documents are kept. We will provide detailed analysis and more insights on the refined FSIE regime in a separate Tax Analysis. Please stay tuned for our upcoming publication.

¹ On 5 October 2021, EU included Hong Kong in its watchlist of non-cooperative tax jurisdictions as a result of the FSIE regimes review. In particular, they are concerned with the non-taxation of passive income where the income recipient has no substantial economic activity. Please refer to our previous [Hong Kong Tax Newsflash \(Issue 145\)](#) for details.

² The same definition of MNE group (i.e. any group that includes at least one entity or permanent establishment that is not located in the jurisdiction of the ultimate parent entity) and other related terms in the Global Anti-Base Erosion Rules would be adopted

³ A Hong Kong resident person means a person who is a resident for tax purposes in Hong Kong. In relation to a company, it means a company incorporated in Hong Kong or, if incorporated outside Hong Kong, normally managed or controlled in Hong Kong.

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