



## Hong Kong Tax Newsflash

### Draft legislation on tax deductions for spectrum utilization fees gazetted

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The Bill<sup>1</sup> which seeks to provide new tax deductions for spectrum utilization fees (SUFs) was gazetted on 1 December 2023. The aim of the Bill is to encourage telecommunications network operators to invest in infrastructure more actively for providing better communication services to companies and the public. In order to obtain the right to use radio spectrum through auctions for providing communication services, telecommunications network operators pay SUFs in a lump sum or by annual instalments (which are currently not tax deductible). The Bill proposed that tax deduction of SUFs will be allowed by spreading over the spectrum assignment term (generally 15 years). The new deduction would apply to SUFs to be paid by the future assignees in respect of radio spectrum, starting from the commencement date of the legislation. In other words, there is no retrospective effect and the SUFs in relation to past auctions would not be tax deductible.

#### Background

Currently, lump sum SUFs are regarded as capital in nature and not deductible for profits tax purposes based on the Court of Appeal decision in *China Mobile Hong Kong Company Limited v. Commissioner of Inland Revenue* [2022 HKCA 1637]<sup>2</sup>. This creates a non-symmetric tax treatment where the business income is taxable but the relevant expenditures are not deductible. In particular, it raised concern in the

telecommunications sector, as SUFs are regulatory payments that are required to be made for entering the telecommunications business.

To address the industry's concern and to encourage telecommunications network operators to invest further and more actively in telecommunications infrastructure, the Financial Secretary proposed in the 2023-24 Budget to allow tax deductions for SUFs to be paid by the future assignees in respect of radio spectrum.

### Key features

The Bill proposed to amend the Inland Revenue Ordinance as follows:

- **Full tax deduction:** A full tax deduction would be allowed for SUFs (including one-off lump sum payment or payment by annual instalments) to the extent that the capital expenditure is incurred in the production of profits for the use of radio spectrum for carrying on a business.
- **Timing of deduction:** The tax deduction for SUFs payable other than by annual instalments (e.g. lump sum) would be spread over the spectrum assignment term (generally 15 years). SUFs payable by annual instalments would generally be deductible in the year when the SUFs instalment is payable, provided that the spectrum has been put into use.
- **No retrospective effect:** The deduction is not applicable to SUFs in relation to past auctions i.e. prescribed before the date on which the ordinance comes into operation, no matter they are already paid or to be paid.
- **Not applicable to SUFs reimbursed:** SUFs reimbursed by way of grant, subsidy or similar financial assistance would not be tax deductible.
- **Miscellaneous matters:**
  - Where the use of the spectrum is transferred from a preceding assignee to a subsequent assignee, the subsequent assignee is deemed to incur the SUFs and may claim deduction for the remaining years of assessment.
  - A transfer of spectrum on a swap (i.e. exchange of radio spectrum) does not affect the deduction. It would be treated as if the transfer had never occurred.
  - If the SUFs have been deductible but subsequently released, the amount released would be treated as a trading receipt at the time of the release.

### What's next

The Bill will be introduced to the Legislative Council for first reading on 6 December 2023. The tax deduction for SUFs will become effective upon enactment of the Bill.

## Our comments

We are pleased that the Government has addressed the industry's concern and adopted stakeholders' recommendations to provide tax deductions for SUFs. It will improve Hong Kong's competitiveness and business environment for the telecommunications sector. However, the tax deduction would not apply retrospectively. This is probably because of the Court of Appeal decision which affirmed the position that lump sum SUFs were non-deductible. Telecommunications network operators who plan to bid for the spectrums should closely monitor the progress of the Bill.

<sup>1</sup> [Inland Revenue \(Amendment\) \(Tax Deductions for Spectrum Utilization Fees\) Bill 2023](#)

<sup>2</sup> Please refer to our [Hong Kong Tax Analysis Issue H98/2020](#) and [Issue H111/2022](#) for details.

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### Authors

#### Doris Chik

Tax Partner

+852 2852 6608

[dchik@deloitte.com.hk](mailto:dchik@deloitte.com.hk)

#### Carmen Cheung

Senior Tax Manager

+852 2740 8660

[carmcheung@deloitte.com.hk](mailto:carmcheung@deloitte.com.hk)

#### Kiwi Fung

Tax Manager

+852 2258 6162

[kifung@deloitte.com.hk](mailto:kifung@deloitte.com.hk)

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### Global Business Tax Services

#### National Leader

#### Andrew Zhu

Tax Partner

+86 10 8520 7508

[andzhu@deloitte.com.cn](mailto:andzhu@deloitte.com.cn)

#### Hong Kong

#### Raymond Tang

Tax Partner

+852 2852 6661

[raytang@deloitte.com.hk](mailto:raytang@deloitte.com.hk)

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