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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 scheme 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 exercised or disposed of, 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 three 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.
Postscript

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的秘訣

僱員的「假期補貼」

很多僱員提供旅遊津貼的僱主都知道，《薪俸條例》第 9(1)(a) 條賦予了僱員的假期補貼，但大家可能不太清楚，是此等補貼的實際範圍比條文所訂的更廣及範圍。

具體來說，我們知道稅務局視為可豁免支出的津貼，至少包括以下各項：旅行費用（包括租金）、當地觀光費用、機場稅、行李運送費用及旅行團費。據了解，各項津貼的配偶及子女的旅遊津貼，亦列入第 9(1)(a) 條的豁免之內。

業主/ 用人階層須知

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，據了解，稅務局原則上接受僱員在可豁免薪俸稅的僱員的角色；此外，若購房或租用是真實的，基於各自獨立利益而作出的合理安排，便不會受到質疑。

在此情形下，稅務局原則上的考量的具體包括：是否真有那麼多僱員的住宿，所租用的房產的市場價值、租金是否公道、僱員有否在租金外收入以繳付物業稅、屋稅、以及其他補貼？若僱員在征用條件的背景下的所租交易的合理性，及在僱用合約中有否廉價或提供屋宇福利。若僱員和僱員之間有親密關係，稅務局將會會由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 日與香港僱員會代表及香港會計師公會代表開會的會議記錄）

若要獲得延後補貼，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，從而得享僱主向僱員人提供的住宿福利計劃，稅務局原則上將不接受該安排。稅務局指出，納稅人是按義務形式的安排與外在支出相同的獲益。僱員與其父母的關係，以及僱員與僱主的關係，事實上並無不同。

接受股票期權的僱員

《薪俸條例》第 9(1)(d), (4) 和 (5) 條有關股票期權的稅務。簡單來說，須從稅局的情況並不是發生在在購股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，這些薪俸稅規則的適用都是相當容易的。但當規則應用於所謂的延遲騰讓時，便引來了很多批評和爭論。

根據稅務局在 The Hong Kong Accountant (1997, 9/10月) 刊出的一文，當僱主的章程，會規定當期權計劃中時，稅務局的判詞是，當股票期權計劃未獲稅務批准時，那些稅務局人批准的期權時，受僱員工在香港出售期權時，僱員在下述期間內不確定因素：銷售期權的期權的行使及受益人。若股票期權計劃在法律上成立，則會免除徵稅責任。

這規定是一條既清晰又容易應用的規則，但在實際執行時卻出現了問題：（一）當僱員在行使期權前已離開香港時，僱員的承擔責任；（二）僱員在永遠離開香港的人收入稅時的稅款分配。

自稅務局的文章刊出後，我們了解到當局傾向採用一種分攤的方程式去決定向當局作出銀行的方程式去決定向兼職僱員徵收稅款的稅款。該方程式的作用，是根據一個比率向部分從業

使股票期權所獲的利潤徵收薪俸稅，而該比率包含下列各項因素：

- 分子，代表僱員於期權生效期間駐守在香港的日數；
- 分母，代表整個期權生效期間；及
- (若適用的) 另一個比率，考慮到僱員享有的受雇期間的評估權利。

在撰寫本文時，對於僱員期權該款還是以僱員受雇的年期按計算的原則，當局仍未作定案。

基於上述的評估習慣，以及它們受大眾的關注（或欠缺關注），若僱務局向僱員要求有關的證明時，一 postpone the date of the assessment at the expiry of the contract，僱員將會由進行期權的僱員的單獨所得而進行預期利潤的評估。

Rev減


此外，筆者在《香港律師》1999 年 5 月號刊載的文章中，討論到有關在香港引 | Sharkey v Wernher 一案時曾提及及 D 75/96 12 IRBRD 19, (1997) HKRC §80-491 一案，案中稅務局重新考慮法庭的裁定，結果是維持原判，即納稅人無須支付 CIR v Quitsubdue Ltd (HCIA No 5/98) (1999 年 4 月 30 日)，至稅務局局長會否再向上訴法院提出上訴，現時仍未有之數。

賀雅德

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