

Hong Kong Tax Alert

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The 10 points to note for applying for the Commissioner's Opinion under the foreign-sourced income exemption regime



Summary

The Inland Revenue Department (IRD) has uploaded onto its website the standard form for making an application for the Commissioner's Opinion (CIR Opinion) on the economic substance (ES) requirements under the foreign-sourced income exemption (FSIE) regime, together with the related reference materials.

In this tax alert, we highlight the 10 key points to note for MNE groups wishing to apply for the CIR Opinion.

Further to our previous tax alert on the "Commissioner's Opinion as an interim measure to confirm compliance with the economic substance requirements under the revised FSIE regime"¹, the IRD has now released the following additional information about the CIR Opinion mechanism:

- Details of the CIR Opinion mechanism can be accessed via this [link](#)
- The standard application form (i.e. Form IR1297A), the Group Application Annex and the notes and instructions for filling in the form can be accessed via this [link](#)

The CIR Opinion is an interim measure introduced by the IRD to provide taxpayers with certainty on their compliance with the ES requirements under the FSIE regime before the new FSIE legislation comes into operation. We set out below the 10 key points that MNE groups wishing to apply for such an opinion should take note of. For the tax bill on the FSIE regime gazetted on last Friday and the IRD's administrative guidance on the regime issued on the same day, please refer to the IRD's website in this [link](#) and our tax alert in this [link](#).

The 10 key points to note for applying for a CIR Opinion

1. **Nature of the CIR Opinion** – The CIR Opinion is not mandatory and is not an advance ruling made under the Inland Revenue Ordinance. However, the Commissioner will apply the enacted ES requirements in accordance with the CIR Opinion provided that (1) the arrangements and parameters stated in the CIR Opinion are adhered to and (2) the enacted ES requirements are substantially the same as that proposed in the tax bill on the FSIE regime.
2. **Benefits of applying for the CIR Opinion** – MNE entities can rely on the CIR Opinion to report their compliance with the enacted ES requirements in their profits tax return and the application is free of charge.
3. **Timing of making an application** – An application can be made at any time between the gazettal of the tax bill on the FSIE regime (i.e. 28 October 2022) and before the coming into operation of the corresponding ordinance (i.e. 1 January 2023).
4. **Coverage of an application** - An application can cover a maximum of five years of assessment (YOAs) commencing from YOA 2022/23 or 2023/24.

¹ The tax alert can be accessed via this link: "[Commissioner's Opinion](#)" as an interim measure... - KPMG China ([home.kpmg](#))

5. **Basis of making an application** - An application can be made on an individual basis (i.e. for the applicant itself) or a group basis (i.e. for the applicant itself and the other MNE entities within the MNE group of which the applicant belongs to).
6. **Information to be provided in an application** – Taxpayers will need to provide information such as (1) the type(s) of specified foreign-sourced income concerned, (2) the estimated range of the total annual amount of all specified foreign-sourced incomes concerned, (3) the type(s) of specified economic activities carried out in Hong Kong, (4) the estimated range of the total number of qualified employees in Hong Kong and their post titles, (5) the estimated range of the annual amount of operating expenditures incurred in Hong Kong for the specified economic activities and (6) the details of the outsourcing arrangement (if any). Most of the above information is to be provided by clicking the relevant boxes in the application form.
7. For applications involving outsourcing of the specified economic activities, details of the outsourced entity (i.e. the entity that performs the specified economic activities on behalf of the applicant) and the outsourcing arrangement will need to be provided, and a copy of the service agreement in respect of the sourced activities will need to be submitted together with the application form.
8. For making a **group basis application**, all of the following conditions need to be met:
 - the specified economic activities of the applicant and the other MNE entities within the MNE group are outsourced to one outsourced entity under a single service agreement;
 - the applicant or its representative must obtain the written consents of the other MNE entities for the group application;
 - a copy of the service agreement needs to be submitted together with the application form; and
 - the written consents must be supplied on request to the Commissioner.In addition, an Annex (in Excel format) will need to be completed by (1) providing the particulars of each of the MNE entities covered in the bundle application, (2) indicating the nature and estimated range of the total amount of the specified foreign-sourced incomes concerned and (3) indicating the applicable specified economic activities (by answering Yes or No).
9. The Commissioner may not give an opinion if (1) the specified foreign-sourced income concerned is subject to an objection or appeal or (2) the applicant or any MNE entities with the MNE group (for a group basis application) is currently subject to a tax audit.
10. The application form has to be filled in electronically. However, signed paper copy of the application form (and hard copies of the completed Annex and relevant service agreement - if applicable) will need to be submitted to the IRD. An MNE entity may authorise a representative to make the application on its behalf.

KPMG observations

We note that the IRD has tried to simplify the information requested from taxpayers for making a CIR Opinion application (e.g. by only asking taxpayers to check the boxes provided in the application form and provide estimated ranges instead of exact figures of the number of qualifying employees and annual operating expenditure in Hong Kong). However, there is still considerable amount of information that needs to be provided for making an application.

In addition, for MNE groups that leverage on the ES of another group entity and outsource the specified economic activities to a group entity, the IRD requires that a copy of the relevant service agreement be submitted together with the application form. That may cause an issue for those MNE groups that do not have a formal service agreement in place for the outsourcing arrangement but just some internal written records (e.g. Board minutes) documenting the outsourcing arrangement.

MNE groups in Hong Kong that wish to make use of the CIR Opinion mechanism to obtain certainty on their compliance with the ES requirements under the FSIE regime should act swiftly (as there is only a short window for making such application) and consider how best to collect and present the information required for making an application.

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