Hong Kong (SAR) Tax Alert

April 2023 | Issue 8

Salaries Tax – Dual employment arrangement

Summary

In late March 2023, the Hong Kong Board of Review published decision D18/22 addressing the tax implications of a dual employment arrangement. The decision found substantially in favour of the taxpayer and is noteworthy for its acceptance of dual employment arrangements, recognition that commercial reality means separation of dual employments may not be clearcut and the approach taken to apportion income to services rendered in Hong Kong focussing on workdays.

Background

An individual held a Hong Kong employment with Company B. During a restructure of the company, his roles were split into two employments with Company C (in Hong Kong) and Subsidiary F (in City G).

The Board was asked to consider whether the two employments should be regarded as a single employment, and, if not, whether any of the services for Company F were rendered in Hong Kong and subject to Hong Kong tax. The Board was also asked to consider whether the arrangement was artificial, fictitious or had the sole or dominant purpose of tax avoidance.

The Board held the two employments to be separate – one a Hong Kong-located employment: the other, not. It also held that the arrangement was "commercial and was motivated by realistic business considerations, so much so that a well-informed bystander would not say that 'that would not happen in the real world'".

In addressing the question of apportionment, the Board was of the view that the employments were sufficiently interwoven that it was "quite implausible" that a C-level executive spending the majority of time in Hong Kong would not "address his mind to [Subsidiary F] business during the entirety of any stay in Hong Kong".

Therefore, in the absence of contractual allocation, apportionment needed to be considered. The Board stated that apportionment is a matter of "impression" and used a methodology based on time spent in Hong Kong. Although acknowledging the days-in days-out (DIDO) approach preferred by the Inland Revenue Department, the Board favoured an approach that excluded non-workdays and recognised that only part of each day would have been dedicated to rendering services to Subsidiary F. In doing so, income from employment with Subsidiary F attributed to Hong Kong was less than it would have been under the DIDO method.

KPMG comment

This decision is relevant to any employer who has employees holding dual roles under separate employments with different entities, and any individual who holds such roles. Such arrangements have become increasingly common as employees are asked to "double hat", particularly where those roles involve duties for different group entities in different tax jurisdictions.

This decision is welcome as it offers guidance on the requirements for a dual employment to be effective and goes someway to addressing the misapprehension that dual employment arrangements are artificial or uncommercial.

The decision makes clear that there are some minimum requirements such as "discernible and different duties" performed for each entity. There is considerable nuance to the question of whether employment arrangements are separate. The Board, however, tempered some of the strict separation criteria argued for by the Inland Revenue Department in accepting that commercial reality may cause those roles to overlap, but that this does not prevent them from being two separate employments – each to be considered on its own merits to determine the tax treatment in Hong Kong. This contrasts to a previous Board decision in 2001 (Case D67/01) where operational overlaps and a lack of substance led to a conclusion that there was only one employment and that the second employment was artificial.

Apportionment raises several issues that need to be considered in the context of the specific circumstances of a particular arrangement – but the approach taken by the Board appears to be quite generous to the taxpayer, reducing the income treated as Hong Kong sourced (and taxable) compared to a pure DIDO approach as commonly applied in practice by Inland Revenue Department.

Although only published in March 2023, the decision was handed down in November 2022. Therefore, the period for the Inland Revenue Department to lodge an appeal to the decision has elapsed.

Action points arising from the decision include:

- Dual employment arrangements should be reviewed to ensure continued compliance with the principles in this decision.
- Employers with employees who double-hat for different group entities, hold regional and local roles or have previously concluded that a dual employment arrangement was too difficult should revisit whether dual employment arrangements might now be more relevant to help address some of the challenges of managing tax compliance as new ways of working become more common.

kpmg.com/cn/socialmedia

For more KPMG Hong Kong (SAR) Tax Alerts, please scan the QR code or visit our website:
https://home.kpmg/cn/en/home/services/tax/hong-kong-tax-services/hong-kong-tax-insights.html

For a list of KPMG China offices, please scan the QR code or visit our website:
https://home.kpmg/cn/en/home/about/offices.html.