



# Non-resident's Claim for Treatment under Double Tax Agreement with Mainland China-A Hong Kong Company's Perspective

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# Speaker

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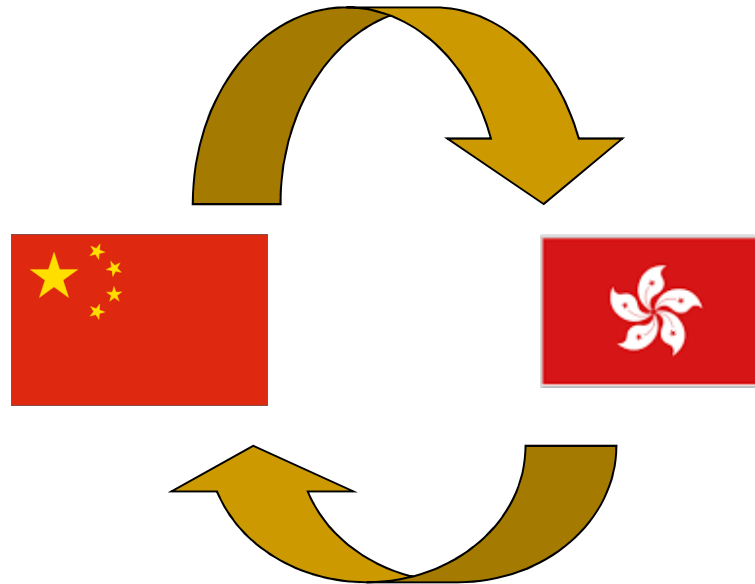
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# Background

- The “Arrangement between the Mainland China and the Hong Kong SAR for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income” (“ the Comprehensive Arrangement”) signed on 21 August 2006



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# Background

- An “arrangement”, not a “treaty”
  - Allocating taxing rights over income between HK and the Mainland
  
- HK: effective for year of assessment commencing on or after 1 April 2007
  
- Applies to the taxation of-
  - business profits
  - income from immovable property
  - income from investment
  - gains from alienation of property
  - income from employment, and more....

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# Business Profits

- Taxing Principle: HK v. Mainland China
- Permanent Establishment
- Computation of Business Profits--compute profits in accordance with their own relevant domestic law.

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# Income from Investment

- Both HK and the Mainland are given the right to tax the same item of investment income.
  - Dividends
  - Interest
  - Royalties

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# Applying for the Benefits under the Comprehensive Arrangement

## ■ Examples of Benefits

- Both sides eliminate double taxation by granting a tax credit
  - Only the final amount of tax charged and paid in the Mainland can be allowed as a credit against HK tax
  - If income derived by a HK resident from the Mainland does not arise in HK, not chargeable to tax in HK, thus the relevant tax paid in the Mainland not allowed as a credit (because of no double taxation!)
  
- Business Profits: profits of an enterprise of one side not taxable in the other side unless there is a PE in the other side, then may be taxed on that part of profits attributable to that PE



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# Applying for the Benefits under the Comprehensive Arrangement

- Dividends\*: taxed at 5% for qualifying co; 10% for others
  - Qualifying co.: where the beneficial owner is a company directly holding at least 25% of the dividend paying co.
  - Dividends income not chargeable to tax in HK
- Interest\*: taxed at 7%, unless exempted bodies/authorities
  - HK only taxes interest arising in HK (provision of credit test)
- Royalties\*: taxed at 7% in all cases, subject to exceptions
- \* Non-treaty jurisdictions or Unqualified HK resident: taxed at 10% in the Mainland
- Applicant must be resident in HK for the year of assessment concerned.

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## Who is a resident?

- In Mainland:
  - follows the Model Tax Convention of the OECD.
  
- In HK:
  - a company incorporated in HK; or
  - if incorporated outside HK, a company normally managed or controlled in HK.
  - “normally managed or controlled” = “central management and control”?
  - Totality of facts

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# Certification of HK Resident Status

- For a company incorporated in HK:
  - Normally no need to provide a Certificate of HK Resident Status (“CRS”) to the Mainland tax authorities
  
- For a company incorporated outside HK (and normally managed or controlled in HK):
  - Need to provide a CRS
  
- For a partnership, a trust or any other body of persons constituted in or outside HK:
  - Need to provide a CRS
  
- Issue of a CRS=guarantee that the applicant will be successful in its claim to benefits under the relevant DTA?

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## Certification of HK Resident Status

- Don't confuse with the definition of a “HK Service Supplier” under the Closer Economic Partnership Arrangement (CEPA) between HK and the Mainland---more restrictive as to the form of legal existence, years of operation required, and employment of HK staff etc..
- See further on Article 3 of Annex 5 to CEPA

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## Verification of HK Resident Status by the Mainland Tax Authorities

- A resident of HK can apply for relief under the Comprehensive Arrangement directly in the Mainland by producing the documentary evidence, e.g.
  - Certificate of incorporation
  - Certified extract of information on the Business Register
- Where the Mainland tax authorities could not ascertain the applicant's tax status:
  - Issue a referral letter

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## Streamlined measures

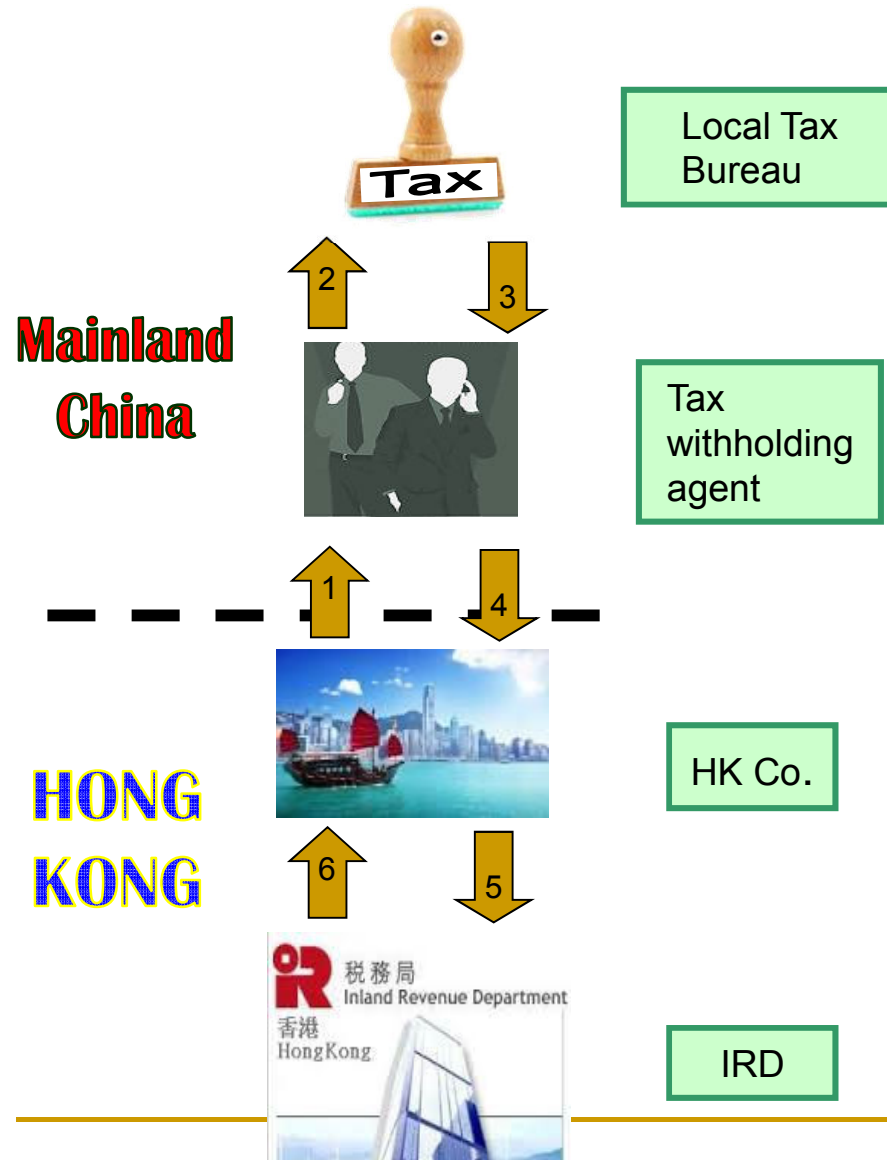
- Public Notice [2013] No. 53 issued by the State Administration of Taxation in the Mainland (“SAT”)
  - ***No need to provide a CRS except:***
    - ***Mainland tax authorities (“MTA”) find that the certificate of incorporation/certified extracts of business licence not sufficient***
    - ***Applicant not incorporated in HK but claims its place of management or control in HK***
    - ***Applicant applying the safe-harbour rule provided in Public Notice No. 30***

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# Streamlined measures

- MTA should:
  - issue the referral letter to the applicant upon request
  - process treaty applications upon submission of the CRS
  
- MTA could still:
  - request additional information
  - report to the SAT
  - assess group structure where both the parent company and its subsidiary are not incorporated in HK
  
- Will not affect MTA in reviewing and granting the treaty benefits under the Comprehensive Arrangement
- But the reality is.....

# Overview of the Application Procedures



- 1 & 2) Prepare and submit an application form “Non-resident’s claim for treatment under Double Taxation Agreement” to the Mainland Tax Bureau
- 3 & 4) Issue the “Referral Letter”
- 5) Prepare and submit the form “Application for Certificate of Resident Status” to HK IRD, together with the Referral Letter
- 6) Issue the Certificate normally within 1 month



非居民享受税收协定待遇审批申请表

Non-resident's claim for treatment under Double Taxation Agreement(DTA) (for approval)  
填报日期Date 年 月 日Y/ M/D

1 纳税人名称 Taxpayer's name					2 纳税人纳税识别号 Taxpayer's tax identification number				3 纳税人类型 Type of taxpayer		<input type="checkbox"/> 企业 Enterprise <input type="checkbox"/> 个人 Individual	
4 纳税人境内地址 Address in China					5 境内联系电话 Telephone number in China				6 境内邮政编码 Postal code in China			
7 纳税人境外地址 Address in home country					8 境外联系电话 Telephone number in home country				9 境外邮政编码 Postal code in home country			
10 序号 No.	11 项目 Item	12 所得类型 Type of income	项目	所得类型	13 纳税方式 Approach of tax payment	14 支付人或扣缴义务人名称 Name of payer or withholding agent	15 支付人或扣缴义务人纳税识别号 Tax identification number of payer or withholding agent	16 申请适用税收协定及条款 Applicable DTA and articles	17 是否属于关联交易 An associated transaction or not	18 收入额或应纳税所得额 Amount of gross income or taxable income	19 减免税额 Tax deduction or exemption	20 备注 Additional information
21 符合享受税收协定待遇规定条件的理由 Reasons for enjoying treatment under DTA												
22 本次 申请附报资料清单 List of documents attached to this application form		(1)										
		(2)										
		(3)										
		(4)										
		(5)										
23 与本次申请享受税收协定待遇有关但以前提交过的资料清单 List of documents that have been submitted before		(1)										
		(2)										
		(3)										
		(4)										
		(5)										
24 声明 Declaration		<p>我谨声明以上呈报事项准确无误。I hereby declare that the above information is true and correct.</p> <p>纳税人印章或签字 Stamp or signature of taxpayer: 年 月 日 Y/M/D</p> <p>代理人印章或签字 Stamp or signature of attorney: 年 月 日 Y/M/D</p>										
25 纳税人居民身份证明 (由纳税人为其居民的缔约对方税务主管当局或其授权代表填写, 或另附由该税务主管当局或其授权代表出具的专用证明) Applicant's Certificate of Resident Status (to be filled out by the competent authority or its authorized representative of the other contracting party of which the applicant is a resident, or a separate certificate issued by such authority or representative could be attached)		<p>Certification</p> <p>We hereby certify that ___ (applicant's name) is a resident of ___ (name of the other contracting party) according to the provisions of Paragraph ___ of Article ___ in the ___ (name of law).</p> <p>Stamp or signature of the competent authority or its authorized representative: Date (y/m/d)</p>										
26 主管税务机关或其授权人印章或签字:		<p>税务所(或税源管理科)意见</p> <p>管理 员: 年 月 日 Y/M/D</p> <p>所 长: 年 月 日 Y/M/D</p> <p>市(州)意见</p> <p>经 办 人: 年 月 日 Y/M/D</p> <p>处(科)长: 年 月 日 Y/M/D</p> <p>局 长: 年 月 日 Y/M/D</p> <p>县(区)局意见</p> <p>经 办 人: 年 月 日 Y/M/D</p> <p>科 长: 年 月 日 Y/M/D</p> <p>局 长: 年 月 日 Y/M/D</p> <p>省局意见</p> <p>经 办 人: 年 月 日 Y/M/D</p> <p>处 长: 年 月 日 Y/M/D</p> <p>局 长: 年 月 日 Y/M/D</p>										

香港特別行政區  
居民身分證明書  
(公司或其他團體)  
適用於與中國內地訂立的  
關於對所得避免雙徵稅的安排

*Hong Kong Special Administrative Region  
Certificate of Resident Status  
(Company or Body of Persons)  
Under the Arrangement with the Mainland of China  
For the Avoidance of Double Taxation on Income*

證件編號 : \_\_\_\_\_  
檔案編號 : \_\_\_\_\_

Serial No. : \_\_\_\_\_  
File No. : \_\_\_\_\_

證明書

Certification

茲證明 \_\_\_\_\_  
根據現存資料，在 \_\_\_\_\_ 課稅年  
度，為香港特別行政區稅務居民。

On the basis of the information available, I am  
satisfied that \_\_\_\_\_ is a  
resident of the Hong Kong Special Administrative  
Region for the purposes of the Arrangement with the  
Mainland of China for the Avoidance of Double  
Taxation on Income for the Year of Assessment  
\_\_\_\_\_.

香港特別行政區  
稅務局局長  
( \_\_\_\_\_ 代行)  
日期

\_\_\_\_\_   
for Commissioner of Inland Revenue  
Hong Kong Special Administrative Region

Date

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# An Excerpt from a Service Contract of a HK Resident Company.....

## “Taxation 稅款

All fees and other amounts due to HK Ltd pursuant to this Agreement are net of any tax and government deductions. HK Ltd shall not be responsible for any taxes whatsoever in connection with this Agreement. Client shall be responsible for all sales tax, tariffs, value-added taxes, licensing fees, permits, duties, or other government withholding imposed upon services and products provided. No deduction shall be made from the fees to HK Ltd on account of such taxes and fees.”

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## Recent Development

- 1. In HK: Revised form “Application for Certification of Resident Status” (effective 1 Feb 2015)**
  - Separate forms for the DTA with the Mainland and the DTA with other jurisdictions
  - Same form applies irrespective of the place of incorporation
  - Extensive disclosures

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# Recent Development

- **New disclosures--all applicants**
  - Location of headquarters?
  - Location of main branches?
  - Management and other staff (number; fixed place of residence)?
  - Beneficial owner of the income?
  - Income: all are passive or derived outside HK?
  - Any overseas business activities?
  - Any payroll reporting to IRD?
  - Place of central management and control?

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## Recent Development

- New disclosures--applicant incorporated or established in HK with less than 2 members AND neither a statutory corporation/body nor part of listed group
  - Number of staff and their duties?
  - Business commencement date?
  - Key management: Nationality, residential address, responsibilities and place of duties?
  - Minutes of management meeting: what matters discussed?
  - Any bank accounts maintained in HK?
  - Any fixed assets purchased?
  - Bank balance?

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# Recent Development

- New disclosures—applicant incorporated/established outside HK
  - Same as above; plus
  - Formulation of strategic policies
  - Determination of business directions
  - Setting work plans
  - Decision on mode of financing
  - Implementation of management policies
  - Evaluation of business performance

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## Recent Development

2. **In the Mainland: Shuizonghan [2013] No. 165 ("Circular 165") issued by SAT on 12 April 2013**
  - Clarify the beneficiary ownership rules---dividends received by Hong Kong holding companies pursuant to the Comprehensive Agreement
  - Guoshuihan [2009] No. 601 ("**Circular 601**") to define the term "beneficiary owner": tax treaty treatment of dividends, interests, and royalties
  - Circular 601 specifies certain factors in determining beneficiary owners, which usually lead to unfavorable results when reviewing applications by foreign holding companies. Circular 165 helps mitigate these unfavourable factors--for dividends received by Hong Kong holding companies.
  - Circular 165 only applies to "Hong Kong" holding companies, extendable to other jurisdictions or income?



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# Conclusions and Actions

- Review the business models and the organisation structure
- Proper use of HK holding company for foreign investments into China
- Multiple-level holding structure acceptable
- Keep proper documentary evidence
- Caveats:
  - Majority of holding company's management not ordinarily reside in the Mainland
  - Major financial and operational decisions not made/approved by personnel working in the Mainland
  - Holding company's board meetings held in HK
  - Books and records of holding company kept in HK



**QUESTIONS?  
THANK YOU !**