Agenda item A2 - Salaries tax issues

(a) Simple apportionment approach for splitting source of restricted share income upon change of employment

In the case of stock options with a vesting period spanning over a period when an individual changes from a non-Hong Kong employment to a Hong Kong employment or vice versa, it is confirmed in paragraphs 56 and 57 of DIPN 38 that a simple apportionment would apply to split the stock option gains into two portions, one attributable to the period of Hong Kong employment and the other attributable to the period of non-Hong Kong employment.

In paragraphs 66 and 67 of DIPN 38, examples of apportionment are provided for an individual holding a non-Hong Kong employment with restricted shares that are (i) granted prior to and vested during Hong Kong assignment and (ii) granted during and vested after Hong Kong assignment.

Would the IRD confirm if the above simple apportionment approach for splitting the source of stock option income would also be applicable to that of restricted share income, in the case of change of employment (from a non-Hong Kong employment to a Hong Kong employment or vice versa) during the vesting period of the restricted shares?

Mr Chiu advised that paragraphs 56 and 57 referred to situations whereby the stock options were derived from both the non-Hong Kong employment and Hong Kong employment i.e. employment within a group of companies. If the stock options were attributable to a particular source, the question of apportionment would not arise.

Mr Chiu explained that benefits from restricted shares granted to an employee, subject to time basis apportionment of his assessable income, would also be apportioned. The apportionment method, based on the days in Hong Kong in the year of assessment in which vesting took place, was explained at paragraphs 63 and 64 of DIPN 38.

Mr Chiu further explained that for inbound or outbound employees having a non-Hong Kong employment, the apportionment method for share awards was further refined to take into account the days in the vesting period before transferred to or transferred outside Hong Kong. Reference was made to Examples 12 and 13 at paragraphs 66 and 67of DIPN 38.

Mr Chiu summarised that where an employee changed from a Hong Kong employment to a non-Hong Kong employment or vice versa, the stock awards would also be split into two portions, one attributable to the period of Hong Kong employment and the other attributable to the period of non-Hong Kong employment.

(b) 60-day exemption

Section 8(1A)(b)(ii) provides exemption from salaries tax in respect of income derived from services rendered by a person who renders outside Hong Kong all the services in connection with his employment. In determining whether or not a person renders all services outside Hong Kong, section 8(1B) provides that no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment. (This exemption is commonly known as the "60-day exemption".) The Institute would like to seek the IRD's clarification on its general practice in applying the 60-day exemption in cases involving a change of employment during the year of assessment. For example, an employee may have visited Hong Kong during a year of assessment, spending a limited number of days here (i.e., not exceeding 60 days) under an employment. He then returns to Hong Kong to take up another employment. In these circumstances, the Institute would like to know the IRD's view in respect of the tax position of the employee for that year of assessment, and what factors would need to be considered in determining the employee's tax position.

Mr Chiu advised that in Decision *D30/03*, the Board of Review explained that section 8(1B) provided a statutory relief that exempt a person from salaries tax in circumstances where that person's connection with Hong Kong during the tax year was not significant and could be disregarded for assessment purposes. Per the decision, section 8(1B) did not refer to "visits not exceeding a total of 60 days in the basis period for the year of assessment for each separate employment" but to "visits not exceeding a total of 60 days in the basis period for the year of assessment". Further, in *So Chak Kwong v. CIR* 2 HKTC 174, Mortimer J (as he then was) said that the words "not exceeding a total of 60 days" qualified the word "visits" and not the words "services rendered" in section 8(1B).

(c) Implication of Board of Review case D45/09

The Institute would like to seek the IRD's view on the decision of the Board of Review in the case D45/09. Specifically, the Board in that case reached a conclusion that transit days in Hong Kong would be regarded as days "present in Hong Kong" for the purpose of section 8(2)(j) (which provides exemption from salaries tax in respect of income derived from services rendered as master or member of the crew of a ship, or as commander or member of the crew of an aircraft, who was present in Hong Kong on not more than (i) a total of 60 days in the basis period for that year of assessment; and (ii) a total of 120 days falling partly within each of the basis periods for two consecutive years of assessment, one of which is that year of assessment.) The Institute would like to know if the IRD would consider granting any administrative interpretation/ concession to avoid transit days, where a person may be present in Hong Kong for a few hours only, from being counted towards the 60 or 120 days.

Mr Chiu advised that the IRD agreed with the interpretation of the Board of Review regarding section 8(2)(j). The provision was clear and unambiguous and transit days should be counted as days present in Hong Kong. The IRD would assess air crew or sea crew to salaries tax according to the decision. Ms Macpherson said that it would be difficult to take advantage of the exemption and asked whether the IRD would be prepared to give an administrative concession. CIR replied that he did not see any grounds for doing so.