

By Email

23 July 2020

Inland Revenue Department (IRD)

The Government of the Hong Kong S.A.R.

Attention: Mr. Wong Kuen-fai, Commissioner
Mr. Chiu Kwok-kit, Deputy Commissioner (Technical)
Mr. Tam Tai-pang, Deputy Commissioner (Operations)

ASIFMA Representation on Tax Implications for Companies and Individuals Arising from Temporary Remote Working Arrangements due to the COVID-19 Global Pandemic

Dear Mr. Wong, Mr. Chiu and Mr. Tam,

At the outset, the Asia Securities Industry & Financial Markets Association (“**ASIFMA**”¹) appreciates the relaxations announced on certain tax and regulatory filing deadlines by the Government of the Hong Kong S.A.R. in light of the COVID-19 global pandemic.

In an effort to stem the spread of COVID-19, jurisdictions around the world have taken a host of precautionary measures; limiting domestic and foreign travel, imposing lockdowns or otherwise restricting activities requiring physical contact. Similarly, organisations across the globe have rolled out business continuity plans (“**BCPs**”) which, *inter-alia*, include policies for employees to work from home or a remote location.

As a result of these actions, we note there has been an increase in employees working remotely from a jurisdiction that is not their normal place of work. For example, a person who normally works in their home jurisdiction (“**Home Jurisdiction**”), employed by a company resident in that Home Jurisdiction, may temporarily work remotely from a different jurisdiction (“**Host Jurisdiction**”). Such remote working arrangements may be planned or unplanned². These extraordinary force majeure situations are not

¹ ASIFMA is an independent, regional trade association with over 135 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, professional and consulting firms, and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region’s economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

² Unplanned remote working may include a scenario whereby the employee travelled to the Host Jurisdiction for a short-term visit (e.g. vacation or business trip) and due to COVID-19 travel restrictions they are prevented from returning to their country of employment. Planned remote working may include a scenario whereby the employee is temporarily working remotely from the Host Jurisdiction due to public health or other concerns in their Home Jurisdiction.

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created by businesses of their own volition, rather they are a result of unprecedented circumstances arising from public health concerns, stringent lockdown conditions and the general suspension of international travel as per directives of the Government of the Hong Kong S.A.R.

One of the unintended consequences of temporary remote working arrangements as described above may include the creation of a taxable presence, including permanent establishment (“PE”), in the Host Jurisdiction for companies resident in the Home Jurisdiction (e.g. an employee may inadvertently create a taxable presence in Hong Kong for themselves and/or their employer (“**Foreign Company**”) through the temporary presence of the employee in Hong Kong for reasons related to COVID-19, as outlined above.

The creation of a taxable presence, albeit unintended, could give rise to a number of adverse corporate income tax implications for Foreign Companies (which do not already have a taxable presence in the Host Jurisdiction), including a requirement to i) register with the tax authorities; ii) prepare and submit tax returns; and iii) pay tax. We believe that the constitution of a taxable presence in this context would be an unreasonable burden to impose on Foreign Companies.

Another potential consequence of the remote working arrangements described above includes the determination of tax residency for employees temporarily working in the Host Jurisdiction. If the employee were deemed to be tax resident in the Host Jurisdiction, this could give rise to adverse tax implications for the individual. Again, in the context of COVID-19, we consider this to be an unreasonable burden to impose on individuals. We would like to note that we expect temporary remote working arrangements to cease once international travel restrictions are removed, thus enabling the employees to make arrangements to return to their Home Jurisdiction.

We are writing to you to bring these concerns to your attention, with the sincere hope that the aforesaid situations do not result in unintended tax consequences for Foreign Companies and individuals. In this connection, we request that IRD consider issuing guidelines relaxing the rules relating to the constitution of a taxable presence or PE for Foreign Companies and tax residency rules for individuals in the context of COVID-19. Please see below our recommendations in this regard:

1. **Foreign Company:** We recommend that IRD issue suitable guidelines with respect to the unintended existence of PE / residency for Foreign Companies, where its employees are remotely working in Hong Kong either unplanned or planned, due to the COVID-19 global pandemic:
 - Where the Foreign Company is not resident in Hong Kong but the directors of the Foreign Company attend board meetings from Hong Kong held via electronic means (e.g. via video-conferencing, tele-conferencing, etc.) due, directly or indirectly, to COVID-19 travel restrictions or public health concerns regarding COVID-19, in such situation the said Foreign Company should not be regarded as resident in Hong Kong; and
 - Where the Foreign Company did not have a PE in Hong Kong before the impacts of COVID-19, but its employees are working in Hong Kong temporarily as a result, directly or indirectly, of COVID-19 travel restrictions or public health concerns regarding COVID-19, in such situations the temporary presence of the employee should not result in constitution of a PE or other taxable presence for the Foreign Company in Hong Kong. Even if the Foreign Company has a PE in Hong Kong before COVID-19, such similar presence should not increase attribution to the existing PE.

2. **Individual / Employee Temporarily Present in Hong Kong:** We recommend that IRD issue suitable guidelines with respect to the unintended residency of an employee who is not a resident of Hong Kong but is present in Hong Kong temporarily as a result, directly or indirectly, of COVID-19 travel restrictions or public health concerns regarding COVID-19, by excluding the periods of days mentioned below in determining the residency of the individual or calculating the individual income taxes:

- The period of temporary presence of the employee in Hong Kong; this should not be considered towards calculating the number of days present in Hong Kong for the purpose of determining the residency of the individual; and
- The period of temporary presence of the individual / employee in Hong Kong; this should not be considered as exercising any employment in Hong Kong, if he / she has been working remotely from Hong Kong.

Furthermore, the Organisation for Economic Cooperation and Development (“**OECD**”) and the tax authorities of certain jurisdictions, including Australia, the United Kingdom, the Republic of Ireland, Singapore, Malaysia and India have in recent months responded to industry concerns and clarified that they will take a flexible approach on a number of these issues where an individual is temporarily working remotely in these jurisdictions due to COVID-19.

ASIFMA also brought awareness to these issues at a conference call with HK SFC’s Licensing Department on 25 March 2020, as well as submitted a letter to the International Organisation of Securities Commissions (“**IOSCO**”) and Executives’ Meeting of East Asia and Pacific Central Banks (“**EMEAP**”) on 30 March 2020 and an email to HKMA on 20 April 2020 to raise awareness of these issues. Please refer to the attachments for your reference.

If you have any follow up comments or questions, please feel free to contact Patrick Pang at ppang@asifma.org or +852-25316520.

Yours sincerely,



Patrick Pang
Managing Director and Head of Compliance and Tax, ASIFMA