

# Hong Kong Tax Alert

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## Government states its latest legislative proposals for the company re-domiciliation regime

The Financial Services and the Treasury Bureau (FSTB) has recently released its Consultation Conclusion and Legislative Proposals in respect of its earlier consultation paper issued on the Proposed Company Re-domiciliation Regime in Hong Kong (the Conclusion).

The Conclusion summarizes and responds to the views received, outlining some refinements and changes to the original legislative proposals.

This alert summarizes the position taken by the FSTB in response to views received and its latest legislative proposals.

## Latest legislative proposals

### *Maintaining the legislative approach to inward re-domiciliation only*

Some respondents expressed the view that the proposed regime, instead of providing for inward re-domiciliation only, may allow for both inward and onward re-domiciliation to provide more flexibility for incoming companies.

In response, the FSTB indicates that the proposed regime is made in response to the perceived market demand, particularly that expressed by the insurance sector, that some overseas domiciled companies may wish to re-domicile elsewhere because of the increasing compliance costs in offshore jurisdictions. Such increased costs might be arising from requirements including the economic substance requirements for companies operating from certain tax haven jurisdictions and the global minimum tax imposed on large multi-national groups wherever they operate. However, the FSTB indicates that they are not aware of actual demand for local companies seeking to re-domicile elsewhere.

The FSTB considers it appropriate to prioritize an inward regime pursuant to Hong Kong's policy intent with a view to meeting the existing demand of the market as soon as practical. Similar approach is adopted in Singapore and Australia where an inward-only regime is in place to suit their policy objectives and development needs.

### *Reducing the types of companies that can re-domicile to Hong Kong from five to four*

Recognizing that there does not appear to be any demand for companies limited by guarantee to re-domicile, the FSTB indicates that the proposed regime in Hong Kong will now only cover four types of companies. They are (i) private companies limited by shares; (ii) public companies limited by shares; (iii) private unlimited companies with share capital; and (iv) public unlimited companies with share capital.

However, given that a re-domiciled company will retain its legal identity, a change in the company type through the re-domiciliation process will not be allowed.

### *Relaxing the date up to which financial statements are to be prepared and audited*

The financial statements to prove solvency are now proposed to be made up of no more than 12 months, instead of the previous three months, before an application for re-domiciliation is made.

Notably, such financial statements will only need to be audited if the law of the originating jurisdiction or any applicable regulatory rules require the statements to be audited.

### *Streamlining the requirements for members' consent*

Members' consent in the form of resolution (whether in a meeting or resolution in writing) passed by at least 75% of the eligible members will now only be required if neither the law of the original domicile nor the constitutional document of the applicant requires it to obtain consent from its members for the proposed re-domiciliation.

### *Relaxing the time limit for de-registration in the original domicile*

Instead of the original 60-day time limit for de-registration in the originating jurisdiction after obtaining a certificate of re-domiciliation in Hong Kong, the time-limit is now extended to 120 days. Applicants may also apply for an extension if needed.

### *New requirement on proof of solvency and compliance status*

Legal opinion is now required to support the solvency and compliance status of the applicant. The legal opinion should be provided by a legal practitioner who practices the law of the original domicile of the applicant and the opinion should opine on various matters including:

- (i) The applicant is duly registered, validly subsisting and not in liquidation in the original domicile
- (ii) Company type, permission and consent from members of the company for the proposed re-domiciliation, as well as intended re-domiciled company's type, name and adoption of the proposed articles of association
- (iii) The applicant's proposed re-domiciliation complies with the law of the original domicile

## **Unilateral tax credit now available where double taxation arises from re-domiciliation**

As a new measure not contained in the earlier consultation paper, unilateral tax credit will now be provided for re-domiciled companies in respect of the tax payable on actual profits derived in Hong Kong after re-domiciliation where similar profits have been taxed in an unrealized form by the company's original domicile upon exit.

## **Policy intent to be expressly reflected in the proposed legislation**

The FSTB states that the proposed legislation will expressly provide that re-domiciliation will not create a new legal entity and will not affect the property, rights, obligations and liabilities, as well as the relevant contractual and legal processes of the companies.

Re-domiciled companies will generally have the same rights as any locally incorporated companies and will have to comply with the relevant requirements under the Companies Ordinance (CO).

## **Specific measures for financial institutions**

The FSTB indicates that it will propose amendments to the Insurance Ordinance (Chapter 41), Banking Ordinance (Chapter 155) and relevant subsidiary legislation to ensure that insurers and authorized institutions (AIs) which re-domicile to Hong Kong and complete their de-registration from its original place of domicile will be regulated and supervised as if they were locally incorporated insurers and AIs.

Insurers and AIs incorporated outside Hong Kong will also be required to approach their respective regulators in Hong Kong prior to making the re-domiciliation application to the Companies Registry (CR), such that necessary assessment on their capability in fulfilling the regulatory requirements applicable to locally incorporated insurers and AIs can be conducted in advance.

In addition to the legislative amendments, the FSTB will explore administrative arrangements to facilitate coordination between the CR and financial regulators.

## **Facilitation measures for non-Hong Kong companies already registered in Hong Kong**

To ensure business continuity such as continuity of bank accounts and payment gateways etc., the FSTB will make specific arrangements under the CO and the Business Registration Ordinance (Chapter 310) to allow registered non-Hong Kong companies to retain their company name in use to carry on business in Hong Kong (i.e., its corporate name or approved name as defined in the CO) and business registration number after re-domiciliation. The simultaneous business registration arrangement between the CR and the Inland Revenue Department will also apply to company re-domiciliation applications.



## Commentary

We welcome the FSTB in accepting many of the views and submissions made in response to the earlier consultation paper in refining its legislative proposals for the company re-domiciliation regime.

However, the FSTB has not addressed several issues raised by some respondents. This includes whether (i) a re-domiciled company would, by virtue of its re-domiciliation, be treated as if it were incorporated in Hong Kong and therefore qualify as a Hong Kong resident for most of Hong Kong's tax treaties; and (ii) the transfer of shares of a re-domiciled company would attract stamp duty in Hong Kong.

In fact, other than for treaty purposes, the tax treatment of certain income or relief under various provisions of the Inland Revenue Ordinance (IRO) also depends on whether a company is incorporated in Hong Kong, e.g. section 23B for shipping businesses and sections 50AAA and 50AAAB for unilateral tax credit.

While the proposed legislation can specifically deem a re-domiciled company to be a company incorporated in Hong Kong for the purposes of the IRO, whether such a deeming provision could apply in the tax treaty context is less clear given the bilateral nature of a treaty.

Similarly, whether such a deeming provision can make a re-domiciled company a tax resident of Hong Kong for the purposes of the global minimum tax of the Base Erosion and Profit Shifting initiative of the Organization for Economic Co-operation and Development (OECD) may also be unclear. Clarification of this by the government with the OECD may be needed.

As regards to the stamp duty issue, given such a company is required to comply with the CO, presumably including effecting any transfer of shares to be registered in Hong Kong, stamp duty would appear to be payable on the transfer of shares of a re-domiciled company.

There are views that to make the proposed re-domiciled regime more attractive, Hong Kong may consider waiving the stamp duty in respect of the transfer of shares in a re-domiciled company. However, whether granting such a waiver is appropriate on the grounds of principle and fairness may be debatable.

Inevitably, clarifications should also be made as to how the applicable provisions of the CO are to be interpreted in the case of a re-domiciled company, for example, whether a re-domiciled company's directors must prepare its first set of financial statements from the first day of the financial year or the date of re-domiciliation pursuant to section 379 of the CO if these two days are different.

It is expected that the proposed legislation will be tabled before the Legislative Council in the last quarter of this year. Clients who contemplate to re-domicile to Hong Kong or have any questions on the issue can contact their tax executive.



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