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Hong Kong Tax Controversy Insight

Issuance of protective assessment under tax audit by the Inland Revenue Department (IRD)

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Tax investigation and tax audits can be highly complex and complicated. The time required to agree a settlement basis with the IRD could be prolonged due to a number of factors such as complexity and extensiveness of the subject issues, cooperativeness of the taxpayer in providing the requested information and the time required to gather and review the historical documents.

Due to the statutory time limit in Hong Kong for issuing tax assessments (see below for more details), as a revenue protection measure, it is common for the IRD to issue estimated assessments for the “time-bar” assessment year (generally referred to as “protective assessments”) in a tax or investigation situation.

In this insight, we will give an account of protective assessments and the actions that should be taken by taxpayers upon receipt of protective assessments.

What is protective assessment?

As introduced in our Hong Kong Tax Controversy Insight 2017 Issue No. 2, a field audit / investigation starts with gathering taxpayer's information, followed by conducting initial interview and reviewing documents to thoroughly understand the potential tax issues. This is usually followed by a negotiation process with the aim to reach a compromised settlement between the taxpayer and the IRD. The entire process could take months or even years to complete. Where the tax audit result could not be readily ascertained, for the purpose of protecting the Government's revenue, it is a common practice for the IRD to raise back years assessments during the course of tax audit or investigation pursuant to section 60 of the Inland Revenue Ordinance (IRO) in order to keep the assessment year open within the six-year statutory limitation for general tax audit cases or 10 years for cases of fraud or willful evasion.

For instance, in a general tax audit case, tax assessments for year of assessment 2016/17 cannot be issued after 31 March 2023. As such, protective assessments for this year must be issued before 31 March 2023, being the six-year statutory time-bar deadline.

How does the IRD formulate the basis for issuance of protective assessment?

Ongoing tax audit cases

For ongoing cases, the IRD would usually make reference to the facts and information gathered during the investigation process to come up with an initial settlement basis that is considered justifiable to the taxpayer. This initial settlement basis will form the basis for the estimated assessable profits in a protective assessment.

IRD may explain to the taxpayers about the facts and circumstances which have been considered in arriving at the basis for the protective assessment.

New tax audit cases

As shared in our Hong Kong Tax Controversy Insight 2017 Issue No. 1, the IRD can use different approaches to identify cases for tax audit, including examining prior year tax filings and researching on publicly available or IRD internal information. Taxpayers are highly recommended to regularly review their tax filing position, especially when there are significant changes in the mode of business operation.

For newly selected cases, the IRD would usually issue a notification letter together with protective assessments for the time bar year. Taxpayers will be informed of the initial covered period for the tax audit and they will be invited to arrange an initial interview with the IRD. Henceforth, a series of field audit and investigation work as aforementioned will be performed by the IRD.



What are the rights of taxpayers?

Lodgment of objection

The basis of formulating protective assessment could only represent the initial opinion or estimation of the IRD based on its preliminary fact-finding. Such basis is most likely tentative and subject to further revision as the taxpayers may have a different view toward the basis and they may be able to provide documentary evidence to defend the case.

Therefore, upon receipt of the protective assessment, taxpayers should consider lodging an objection against the protective assessment in order to keep the matter open and protect their own interest before the said assessment becomes final and conclusive under section 70 of the IRO.

It is important to note that written objection must be lodged within one month from the date of issue of the protective assessment, with the grounds of objection clearly stated in the objection application.

Request for holdover of payment of tax in dispute

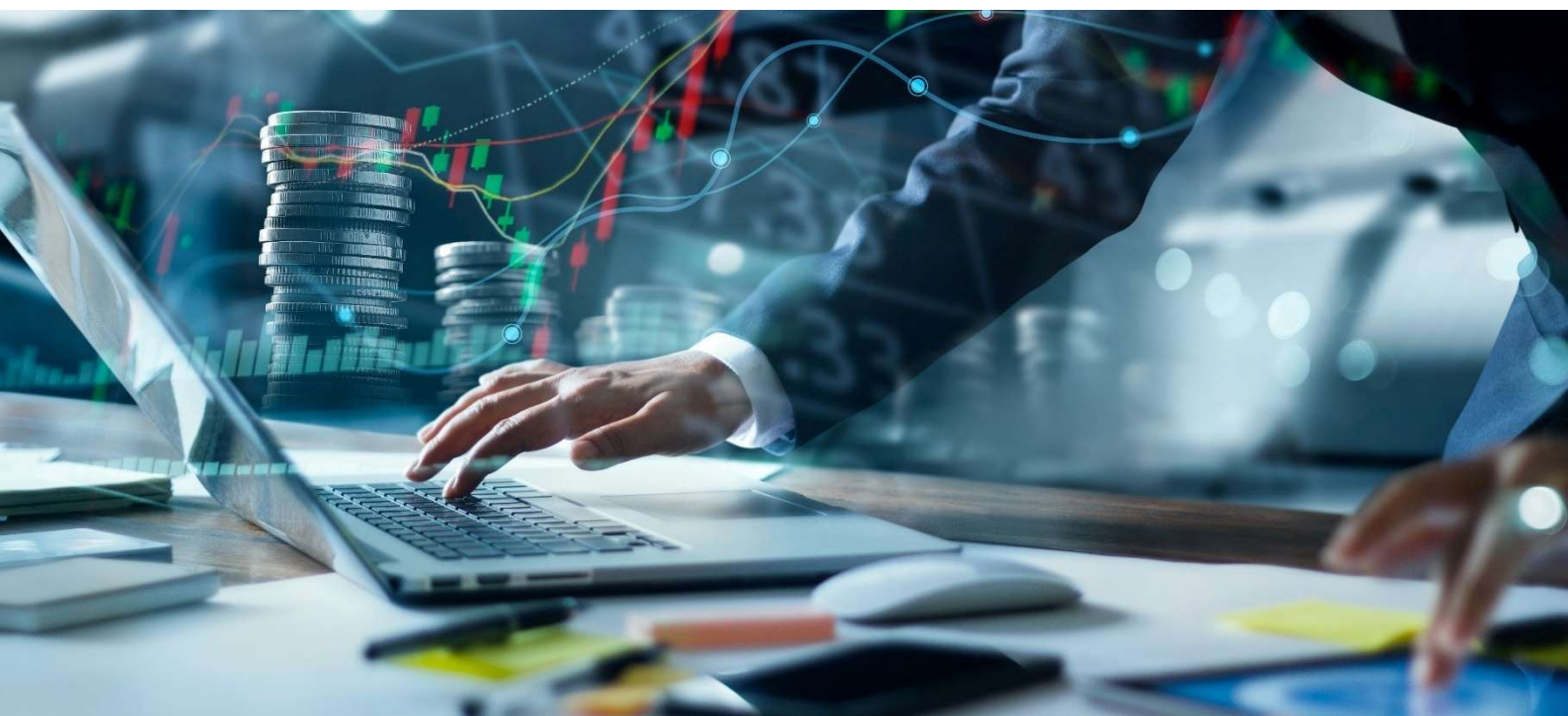
Once a valid objection is lodged, it is possible for taxpayers to request for a particular course of action regarding the holdover of tax in dispute. Nonetheless, it is at the Commissioner's sole discretion to decide whether to allow the payment of the tax in dispute to be held over pursuant to section 71(2) of the IRO. The following table summarizes the IRD's policy on the issuance of stand-over orders:

Type of stand-over orders	Circumstance that the request of stand-over order would be allowed	Payment when the tax in dispute is discharged	Payment when the tax in dispute is payable
Unconditional stand-over	The objection is immediately apparent to the Commissioner that should be allowed forthwith.	No further action.	Tax payable with judgement interest on tax payable at a rate specified by the Chief Justice.
Conditional stand-over - Purchase of tax reserve certificates (TRC)	The objection has some merits but it is not completely in favor of the taxpayer.	TRC will be refund with interest.	TRC will be used to settle tax payable with remaining unused amount be refunded with interest.
Conditional stand-over - Banker's undertakings in lieu of the purchase of TRC	To the satisfaction of the Commissioner that the purchase of TRC would cause financial hardship to the taxpayer.	Bank undertaking will be returned.	Tax amount being held over with judgement interest on tax payable at a rate specified ⁱ by the Chief Justice.

Based on our practical experiences, it has been observed that purchase of TRC is the most preferable option to the IRD. In addition, it is worth noting that as reiterated in a recent Court of First Instance decision, the Judge clearly pointed out that the IRD must identify a possible positive basis on the assessment raised and explain why it is not immediately apparent that the taxpayer has not made the assessable profit in the assessed amount before ordering a conditional holdover upon purchase of TRC. In other words, the basis of the protective assessment issued by the IRD ought to be realistic and justifiable to taxpayers with known facts and evidence before ordering for a conditional holdover. Although purchase of TRC may impose cash flow hardship to taxpayers, doing so can protect the taxpayers from charging high judgment interest in case tax is payable at the closure of the tax audit or investigation. Taxpayers should consider their individual circumstances and strike a balance for their best interest.

Conclusion

Lodging objection against the protective assessment and requesting for holdover of tax payment are part of the negotiation process with the IRD in reaching a compromised tax audit result. The way on how taxpayers defend their tax position in objections involves technical analysis and may affect the tax audit results. Taxpayers are highly recommended to seek professional advice from tax consultants in this respect for an early finalization of tax audit.



Hong Kong office

Jasmine Lee, Managing Partner, Hong Kong & Macau
 27/F One Taikoo Place, 979 King's Road, Quarry Bay, Hong Kong
 Tel: +852 2846 9888 / Fax: +852 2868 4432

Non-financial Services				Financial Services	
Ernst & Young Tax Services Limited Wilson Cheng Tax Leader for Hong Kong and Macau +852 2846 9066 wilson.cheng@hk.ey.com		Ernst & Young Tax Services Limited Martin Richter Deputy Tax Leader for Hong Kong and Macau +852 2629 3938 martin.richter@hk.ey.com		Ernst & Young Tax Services Limited Paul Ho Tax Leader for Hong Kong +852 2849 9564 paul.ho@hk.ey.com	
Greater China Tax Controversy Co-leader Hong Kong Tax Controversy Leader		Greater China Tax Controversy Co-leader China Tax Controversy Leader		Greater China Tax Policy Leader	
Ernst & Young Tax Services Limited Wilson Cheng +852 2846 9066 wilson.cheng@hk.ey.com		Ernst & Young (China) Advisory Limited Carrie Tang +86 21 2228 2116 carrie.tang@cn.ey.com		Ernst & Young Tax Services Limited Becky Lai +852 2629 3188 becky.lai@hk.ey.com	
Business Tax Services / Global Compliance and Reporting					
Hong Kong Tax Services					
Wilson Cheng +852 2846 9066 wilson.cheng@hk.ey.com		Tracy Ho +852 2846 9065 tracy.ho@hk.ey.com		Jennifer Kam +852 2846 9755 jennifer.kam@hk.ey.com	
Ada Ma +852 2849 9391 ada.ma@hk.ey.com		Ricky Tam +852 2629 3752 ricky.tam@hk.ey.com		May Leung +852 2629 3089 may.leung@hk.ey.com	
Leo Wong +852 2849 9165 leo.wong@hk.ey.com		Joy Chen (Family Office) +852 2846 9688 joy.chen@hk.ey.com		Karina Wong +852 2849 9175 karina.wong@hk.ey.com	
China Tax Services					
Ivan Chan +852 2629 3828 ivan.chan@hk.ey.com		Lorraine Cheung +852 2849 9356 lorraine.cheung@hk.ey.com		Sam Fan +852 2849 9278 sam.fan@hk.ey.com	
Carol Liu +852 2629 3788 carol.liu@hk.ey.com		Becky Lai +852 2629 3188 becky.lai@hk.ey.com			
Payroll Operate			Accounting Compliance and Reporting		
Vincent Hu +852 3752 4885 vincent-wh.hu@hk.ey.com			Ernest Wong +86 21 2228 5808 ernest.wong@cn.ey.com		Cecilia Feng +852 2846 9735 cecilia.feng@hk.ey.com
International Tax and Transaction Services					
International Tax Services		Transfer Pricing Services			
Jo An Yee +852 2846 9710 jo-an.yee@hk.ey.com		Sangeeth Aiyappa +852 2629 3989 sangeeth.aiyappa@hk.ey.com		Martin Richter +852 2629 3938 martin.richter@hk.ey.com	
				Kenny Wei +852 2629 3941 kenny.wei@hk.ey.com	
Transaction Tax Services					
David Chan +852 2629 3228 david.chan@hk.ey.com		Jane Hui +852 2629 3836 jane.hui@hk.ey.com		Eric Lam +852 2846 9946 eric-yh.lam@hk.ey.com	
				Qiannan Lu +852 2675 2922 qiannan.lu@hk.ey.com	
People Advisory Services					
Robin Choi +852 2629 3813 robin.choi@hk.ey.com		Mary Chua +852 2849 9448 mary.chua@hk.ey.com		Christina Li +852 2629 3664 christina.li@hk.ey.com	
				Jeff Tang +852 2515 4168 jeff.tk.tang@hk.ey.com	
				Winnie Walker +852 2629 3693 winnie.walker@hk.ey.com	
				Paul Wen +852 2629 3876 paul.wen@hk.ey.com	
Asia-Pacific Tax Centre					
Tax Technology and Transformation Services		International Tax and Transaction Services			Indirect Tax
Agnes Fok +852 2629 3709 agnes.fok@hk.ey.com		US Tax Desk			Shubhendu Misra +852 2232 6578 shubhendu.misra@hk.ey.com
Robert Hardesty +852 2629 3291 robert.hardesty@hk.ey.com		Jeremy Litton +852 3471 2783 jeremy.litton@hk.ey.com		Peggy Lok +852 2629 3866 peggy.lok@hk.ey.com	
Albert Lee +852 2629 3318 albert.lee@hk.ey.com		Winona Zhao +852 2515 4148 winona.zhao1@hk.ey.com			Andy Winthrop +852 2629 3556 andy.p.winthrop@hk.ey.com
		Operating Model Effectiveness			Tax and Finance Operate
		Alice Chung +852 3758 5902 alice.chung@hk.ey.com		Edvard Rinck +852 2675 2834 edvard.rinck@hk.ey.com	
					Tracey Kuuskoski +852 2675 2842 tracey.kuuskoski@hk.ey.com

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