



Hong Kong Tax Updates

Hong Kong Tax Cases

Nomura Funds Ireland plc v The Collector of Stamp Revenue DCSA 4/2017

Nomura Funds Ireland plc ("the appellant") is an investment company structured as an umbrella fund consisting of different sub-funds one of which is Nomura Funds Ireland - China Fund ("the Receiving Sub-Fund"). Nomura Luxembourg is an investment company incorporated in Luxembourg of which Nomura Funds - China Opportunities ("Merging Sub-Fund") is a sub-fund. The latter invested entirely in HK listed securities. By a Merger Proposal, Nomura Luxembourg and the appellant agreed that all the assets and liabilities of the Merging Sub-Fund would be transferred to the Receiving Sub-Fund as a contribution in specie, in exchange for shares in the Receiving Sub-Fund to be issued to the sole shareholder of the Merging Sub-Fund. The appellant claimed that Luxembourg law should apply to the merger instead of HK law. The appellant argued that first there was a merger under the Luxembourg Law and then the vesting of all assets and liabilities of the merging company in the merged company by operation of law. Expert opinions of two Luxembourg counsel were tendered which concluded that under Luxembourg Law, by virtue of the merger, the appellant succeeded to all the assets and liabilities of Nomura Luxembourg. The vesting of the said assets was not affected by the Merger Proposal. The appellant contended that as the said legal opinion was not challenged the said opinion constituted evidence of the true legal effects of the merger under its proper law. The judge rejected the contention of the appellant and found that the merger was effected by the Merger Proposal, not by Luxembourg law. The judge agreed that the difference between "transfer" (by voluntary acts) or "transmission" (by operation of law), if any, and in other contexts (such as companies law or succession law), is wholly irrelevant to the present case which simply concerns whether the Merger Proposal is a transfer within Head 2(3) of the First Schedule of the SDO. An instrument which effectuates a transaction whereby the beneficial interest in a HK stock passes otherwise than on a sale and purchase is chargeable to stamp duty under the said Head 2(3). The Merger Proposal implemented the transfer in beneficial interest in the HK securities and so should be chargeable with stamp duty.

Wong Suet Foon Shirly v The Collector of Stamp Revenue DCSA 5/2016

The Deceased acquired a property under a Tenants Purchase Scheme of the Hong Kong Housing Authority ("HKHA"). She died intestate leaving 5 surviving children. Letter of administration was granted to the appellant. Based on the wrong advice of the HKHA that only 2 children could



become the succeeding owner of the property under its policy or rules, the surviving children came to their own agreement that 3 of them would abandon and/or renounce their shares of the property. They did so under a Deed of Family Arrangement ("the Deed") leaving the appellant and one sister, Alice, as the beneficiaries and joint tenants of the property. Then the appellant as the administratrix, executed an Assent ("the Assent") thereby vesting the property unto the appellant and Alice as the only co-owners and joint tenants of the property. The Collector was of the view that the Deed and the Assent "operate as voluntary disposition inter vivos" to the extent that "the transfer of the property is in excess of the transferees' entitlement in the estate in accordance with Intestates' Estate Ordinance, and is/are chargeable with stamp duty as conveyance on sale by virtue of s.27(1) of the SDO. The Collector considered that ad valorem stamp duty at Scale 1 rates applied and since the transfer was not between close relatives, Scale 2 rates were not applicable. The appellant contended that no beneficial interest passed on the Assent, so the Assent is not chargeable to stamp duty by virtue of s.27(5). The judge ruled in favour of the Collector. The Assent clearly stated that the document was meant to be used as an assignment, hence of conveyance, of transferring the 60% shares entitled by the 3 other siblings to the appellant and Alice who was originally entitled to 40% of the property under the intestacy law. The Assent was not made under a will or trust so s.27(5) cannot confer exemption on it. The Assent conferred a substantial benefit on the appellant and Alice constituting a voluntary disposition within s.27(1) SDO. Scale 1 should be adopted because at no time did the 3 siblings have any beneficial interest in the property which was capable of being transferred. The judge ruled that the Assent but not the Deed is chargeable to stamp duty at \$16,650.

Report on Inland Revenue Board of Review Decisions

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D7/17 Insurance Agent

The Taxpayer entered into an Agency General Manager's Contract with Company C dated 19 July 2000 under which the Taxpayer was appointed as Manager to recruit, train and supervise agents from the company. He also entered into an Agent's Contract with Company C for selling insurance business, also dated 19 July 2000. Both contracts stated that there was no employer and employee relationship between the Taxpayer and Company C. The parent company of Company C was Company D. In 2007 Company G acquired substantial shareholdings in Company D from Company A. The sale of the shares yielded substantial profits to Company A. The latter paid a sum of \$30 million as an ex-gratia payment to the Taxpayer in appreciation of his leadership of his agency team



which remained stable and intact as at the time of the sale of Company D's shares thus ensuring the success of the said sale. Company A recognised that the attractive valuation of Company D's shares was owed to its loyal and capable management and agents. The Taxpayer argued that the sum was a gift, not a business receipt. The Board found that the sum was assessable to Profits Tax. Although the payment was voluntary, not being contractual, it was paid for services rendered. The Taxpayer failed to provide evidence to prove that the sum was totally unexpected. The sum was not merely a testimonial, a solarium or compensation for loss of a business relationship (*Simpson v Reynolds* [1975] 1 WLR 617 CA).

Departmental Interpretation and Practices Notes No. 5 (DIPNs 5) revised

The gist of the revisions are:

DIPN 5 Environmental Protection Facilities

With effect from 2018/19, deduction is granted in full in one year instead of over 5 years for environmental protection installations which mean installation, or part of any installation which forms part of a building or structure and specified in Part 2 of Schedule 17 of IRO. The latter specifies (a) installations such as solar water heating installations, thermal waste treatment installations etc, and (b) Energy efficient building installations (EEBIs) registered under the Hong Kong Energy Efficiency Registration Scheme for Buildings (HKEERSB) administered by the Electrical and Mechanical Services Department (EMSD). EEBIs include 4 types of central building services installations (i.e. lighting, air conditioning, electrical and lift and escalators). The building envelope itself is not a qualifying installation but Commercial Building Allowance or Industrial Building Allowance may be granted on the cost of construction as appropriate. For those EEBIs the registration process of which has not been completed under the HKEERSB, deduction will be allowed in the year of assessment in which the relevant capital expenditure was incurred by a taxpayer on the conditions that the taxpayer provides the required details about the application status for registration of the EEBIs and undertakes to take all reasonable steps to complete the registration. If the application is ceased, withdrawn or refused, profits tax or additional profits tax assessment will be raised to withdraw the deduction previously granted. Where an environmental protection installation in respect of which a deduction has been allowed is sold, the relevant proceeds of sale, not otherwise chargeable to profits tax and not exceeding the amount of deduction previously allowed, shall be treated as a trading receipt (s.16J).



香港稅務學會
THE TAXATION INSTITUTE OF HONG KONG



Reported by Mr HO Chi Ming FTIHK, CTA

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