

The latest regulations on Individual Income Tax (IIT) and IIT rebate policies in the Mainland to improve the talent mobility in the Greater Bay Area (Continued I)

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In brief

In the second plenary meeting (“the Meeting”) of the leading group for the development of the Guangdong-Hong Kong-Macao Greater Bay Area (“GBA”) held on 1 March 2019, the following two measures were proposed: 1) the day of arrival, the day of departure as well as same-day trip will not be counted as a day of residing in the Mainland; and 2) 9 cities in Guangdong Province will provide IIT rebate to overseas high-end talents and talents in short supply (collectively “qualified overseas talents”) (the “IIT rebate policy”). On 14 March 2019, the Ministry of Finance (MoF) and the State Administration of Taxation (SAT) issued 3 circulars, namely: the *Public Notice Regarding the Criteria for Determining the Days of Non-China-Domiciled Individuals Residing in China* (the MoF, SAT Public Notice [2019] No.34, hereinafter referred to as “Public Notice 34”), the *Public Notice regarding IIT Policies for Non-Resident Individuals and Resident Individuals without a Domicile in the Mainland* (the MoF, SAT Public Notice [2019] No. 35, hereinafter referred to as “Public Notice 35”), and the *Notice Regarding Preferential IIT Treatment for the GBA* (Caishui [2019] No.31, hereinafter referred to as “Caishui No. 31”). All three circulars take effect from 1 January 2019.

In the previous China Tax and Business News Flash Issue 11, we preliminarily discussed the eligible scope and unclear issues of the two measures proposed in the Meeting. In Issue 13, we further analysed the IIT implication with the release of Public Notice 34 and Public Notice 35. In this Issue, we will continue our discussion on the IIT impact brought by these three circulars on non-China-domiciled foreign individuals who are required to travel across the borders in the GBA, including the IIT rebate policies.

In detail

1. New criteria for determining the number of days residing in the Mainland as stipulated in Public Notice 34

The tax residency status of a foreign individual (including Hong Kong and Macao citizens) and his/her IIT liability in the Mainland depend on the number of days that he/she resides in the Mainland.

1.1 New criteria for the determination of the tax residency status in the Mainland

As we discussed in Issue 11, Public Notice 34 stipulates that if an individual is physically present in the Mainland for 24 hours in one day, that day should count towards a day of residing in the Mainland; if an individual is physically present in the Mainland for less than 24 hours in one day, that day should not be counted as a day of residing in the Mainland. We understand that the “24 hours” refers to the period of time from 0:00 am to 24:00 pm of a calendar day.

For example, Mr. Li is a Hong Kong citizen who does not have a domicile in the Mainland and is employed by a company in Shenzhen. Mr. Li goes to work in Shenzhen from Hong Kong every Monday morning, and returns to Hong Kong every Friday night (before 24:00 pm). He does not travel to the Mainland on weekends. There are 52 weeks in a year:

- Under the previous counting method (i.e., the day of arrival, the day of departure as well as any other day(s) when a same-day trip(s) was (were) taken should be counted as one day.), Mr. Li resides in the Mainland for 260 days (5 days per week*52 weeks) per year, which exceeds 183 days. Therefore Mr. Li is considered as a resident individual in the Mainland,



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and he needs to spend more than 30 consecutive days within the same tax year outside the Mainland in any six consecutive years in order to enjoy the IIT exemption on his non-China sourced income (the “6-year rule”).

- According to the new policy of Public Notice 34, as Mr. Li resides in the Mainland for less than 24 hours on Monday and Friday, only Tuesday, Wednesday and Thursday are counted as days of residing in the Mainland. Since Mr. Li only resides in the Mainland for 156 days (3 days per week*52 weeks) per year which does not exceed 183 days, he is not considered as a resident individual in the Mainland. Mr. Li’s income, if any, sourced from overseas and paid by an overseas entity/individual is exempt from IIT.

In addition, Public Notice 34 also clarifies that the counting of the six years commences from calendar year 2019, and the previous cumulative years of residing in the Mainland (in 2018 and before) are cleared. For the detailed calculation method under the “6-year rule” and its implication, please refer to our China Tax and Business News Flash Issue 13.

1.2 New criteria applies to “IIT exemption treatment of residing in the Mainland for not more than 90 days” under the IIT Law

As discussed in Section 1.2 of China Tax and Business News Flash Issue 11, the new criteria for determining the days of residing in Public Notice 34 also applies to “IIT exemption treatment of residing in the Mainland for not more than 90 days” under the IIT Law. In practice, such IIT exemption usually applies to foreign individuals employed by overseas employers who are required to travel to the Mainland frequently. With not more than 90 days residing in the Mainland in a tax year under the new policy stipulated in Public Notice 34, their wages and salaries sourced from the Mainland and paid by their overseas employers and not borne by an establishment or place which the employer has in the Mainland are exempt from IIT.

1.3 New criteria does not apply to the “IIT exemption treatment for not more than 183 days of presence” under Double Tax Agreements/Arrangements (DTAs)

For foreign individuals who ordinarily reside in Hong Kong or Macao and are employed by Hong Kong or Macao employers, if they are required to travel frequently to the Mainland and reside in the Mainland for more than 90 days in a tax year under the new policy stipulated in Public Notice 34, they cannot enjoy the “IIT exemption treatment of residing in the Mainland for not more than 90 days” under the IIT Law. In that respect, they would normally try to use the “IIT exemption treatment for not more than 183 days of presence” under the Article of Dependent Personal Services (Income from Employment) in DTAs. However the new policy for counting the “days of residing” in Public Notice 34 does not apply to the counting of “not more than 183 days of presence” under DTAs. Therefore, in counting the “days of presence”, the policy of “the day of arrival, the day of departure as well as any other day(s) when a same-day trip(s) was (were) taken should be counted as one day” should still be followed.

2. Impact of Public Notice 35

Public Notice 35 clarifies issues related to IIT for non-resident individuals and resident individuals without a domicile in the Mainland from the perspectives of DTAs and local IIT Law, respectively. The policy changes included in Public Notice 35 also have an impact on foreign individuals working in the GBA. Please refer to our China Tax and Business News Flash Issue 13 for the detailed analysis on below issues:

- The method for calculating “the number of days working in the Mainland in the current month” for the purpose of computing the taxable income sourced from the Mainland by non-China-domiciled individuals holding dual-employment positions in both Mainland and overseas, or employed by overseas employers and required to travel to the Mainland;
- Determination of the IIT obligations in the Mainland on wages and salaries obtained by non-China-domiciled individuals working across borders;
- “Time-apportionment method” for calculating IIT liability in the Mainland on wages and salaries of non-China-domiciled individuals has changed from “taxation before allocation” to “allocation before taxation”;
- Specific IIT treatment for multiple-month bonus and equity incentives received by non-resident individuals;
- Detailed tax collection and administration regulations on non-China-domiciled individuals applying the use of tax treaties.

3. Caishui No.31: IIT rebate policy to be implemented in nine cities in the Guangdong Province of GBA

Caishui No. 31 clarifies the scope of IIT rebate policy in nine cities in the Guangdong Province of the GBA. The main contents of Caishui No. 31 are as follows:

- Guangdong Province and Shenzhen Municipality will provide IIT rebates to overseas (including Hong Kong, Macao and Taiwan) high-end talents and talents in short supply who work in the GBA based on the difference in individual income tax burden between the Mainland and Hong Kong. The rebates are exempt from IIT.
- Measures of identifying the qualified overseas high-end talents and talents in short supply who work in the GBA and the detailed IIT rebate policy would be implemented in accordance with the relevant regulations of Guangdong Province and Shenzhen Municipality.
- This IIT rebate policy is only applicable to nine cities in the GBA, which include Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen and Zhaoqing.

- The above IIT rebate policy shall be effective for five years from 1 January 2019 to 31 December 2023. The IIT rebate policy previously implemented in Qianhai and Hengqing are abolished from 1 January 2019.

According to the description of the IIT rebate policy applicable to the nine cities in Caishui No. 31, it will be similar to the IIT rebate policy in Qianhai (that is, the rebate will be based on the difference in individual income tax burden between the Mainland and Hong Kong). However, as the relevant implementation rules, including talents identification catalogue and IIT rebate measures, have not yet been released, there are still many issues to be clarified, such as:

1. Whether the nine cities in Guangdong Province will separately release their respective talents identification catalogue and rebate measures;
2. Which types of IIT taxable income can be included in the IIT rebate scope: only income items such as wages and salaries, personal service income, etc., which are included in the comprehensive income under the IIT Law, or also include other taxable income items under the IIT Law such as business operation incomes, income from transfer of property, etc.;
3. Whether there is a minimum requirements for the number of working days in the GBA;
4. How to determine the IIT rebate amount? Whether it will draw on the current IIT rebate policies of Qianhai and provide IIT rebates on the portion of actual IIT payment in Qianhai exceeding 15% of their taxable income;
5. Whether the IIT rebates for different region and industries will be provided on an annual basis or more frequently.

The takeaway

Public Notice 34 and Public Notice 35 apply to all foreign individuals, including but not limited to those who work in or travel to the GBA. While Caishui No. 31 only apply to overseas high-end talents and talents in short supply working in the nine cities in the Guangdong Province.

The coming into force of the three circulars simultaneously will have a huge impact on the IIT liability of foreign individuals working across borders in the GBA. Employers and employees should conduct a comprehensive analysis of the possible implications of individual and corporate taxes in the Mainland, Hong Kong and Macao based on their specific business models, employment arrangements as well as labour dispatch strategies, and assess whether there is a need to adjust the current employment arrangements and employees' work schedule in different locations, etc.

Regarding the implementation of the IIT rebate policy of Caishui No. 31, we will pay close attention to any follow-up regulations to be released and timely share our observations with you.



Let's talk

For a deeper discussion of how this issue might affect your business, please contact a member of

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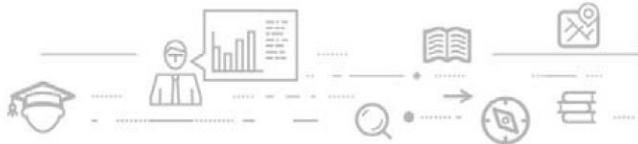
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