

How to Count the Period of Stay in China for Income Tax Purpose?

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Nowadays, it is very common for Hong Kong residents to perform employment duties both in Hong Kong and the Mainland China. To avoid the problem of double taxation, the governments of the two sides signed "the Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation on Income" ("the Agreement") on 11th February 1998 laying down the rules and right to tax an employee working in both jurisdictions.

Pursuant to the Agreement, a Hong Kong resident who performs employment duties both in Hong Kong and the Mainland China can be exempted from Chinese Individual Income Tax ("IIT") if ALL of the following three conditions are satisfied:-

1. the Hong Kong resident stays in the Mainland China for a period or periods **not exceeding** the aggregate 183 days in the calendar year concerned; and
2. the income is paid by, or on behalf of, an employer who is **not** a resident of the Mainland China; and
3. the income is **not** borne by the employer who has a permanent establishment or a fixed base in the Mainland China.

The conditions (2) and (3) above are straightforward and can be easily determined. However, confusion arises from time to time regarding the correct way of counting the periods of stay. To clarify the issue, the Hong Kong Inland Revenue Department ("IRD") published a booklet ("the Booklet") on 11th December 2003 after consultation with the Chinese State Administration of Taxation. A copy of the Booklet can be downloaded at: http://www.ird.gov.hk/eng/pdf/dt_agree_e.pdf

It is important to note from the Booklet that the principle in counting the periods of stay for determining the chargeability to IIT of a Hong Kong resident is very different from that for calculation of his or her IIT liabilities.

The Period of Stay in Deciding the Chargeability to IIT

Pursuant to paragraphs 17 and 18 of the Booklet, both the Mainland China and Hong Kong tax authorities calculate the period of stay **on a calendar year basis** (i.e. from 1st January to 31st December each year). In deciding the aggregated periods of stay, the "**days of presence**" are counted. "Days of presence" mean any day in which a Hong Kong resident is physically present in the Mainland China (i.e. including the day of arrival and the day of departure and the days on weekends and public holidays).

The Period of Stay in Calculating the IIT Liability

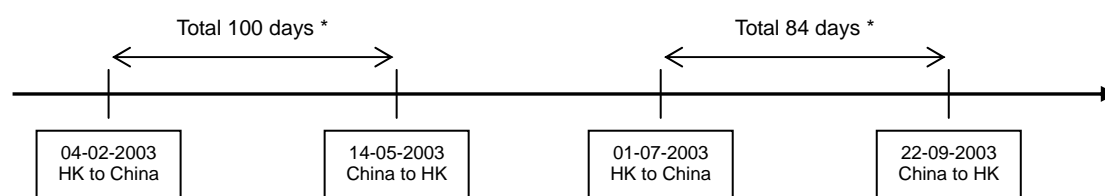
However, if both the Mainland China and Hong Kong apply the above principle to calculate the tax liabilities of a Hong Kong resident in their jurisdictions, there will be problem of double taxation. To address this issue, it is clarified in the Booklet that, for

tax computation purposes, the aggregate periods of stay in a year of assessment is the total number of days in *each* period of stay where the number of days is counted under the rule of “**days of presence minus one day**”. In other words, for each period of stay,

$$\boxed{\text{The period of stay in calculating IIT liabilities}} = \boxed{\text{The day of presence in deciding the chargeability}} - 1 \text{ day}$$

An Illustrative Example on Counting the “Period of Stay”

Mr. Au, a Hong Kong resident employed by a Hong Kong incorporated company, was assigned to perform his duties both in Hong Kong and in the Mainland China. The following is a summary of his traveling schedule during the year of 2003:



* Including days of arrival and departure.

1. The total number of days in determining his chargeability to IIT:
 $= 100 + 84$
 $= 184 \text{ days}$

Since Mr. Au stays in the Mainland China more than 184 days, he will be chargeable to IIT on the income earned during the period of stay in the country.

2. The total number of days in calculating his IIT liability:
 $= (100 - 1) + (84 - 1)$
 $= 182$

Accordingly, 182 days (not 184 days) will be used to apportion the annual income of Mr. Au when calculating his IIT liability in the Mainland China for the year 2003.

Remarks

The method of counting the “period of stay” is a critical issue in determining both the chargeability and liabilities of a Hong Kong resident working in the Mainland China. The above-mentioned booklet should have clarified most, if not all, the confusions about the correct principle of counting the number of days.