

BRIEFING

PROFITS TAX EXEMPTION FOR OFFSHORE PRIVATE EQUITY FUNDS – IMPLICATIONS ON SFC LICENSING REQUIREMENTS

LEGISLATIVE BACKGROUND

The Hong Kong Government gazetted the Inland Revenue (Amendment) (No.2) Ordinance 2015 (the “Ordinance”) on 17 July 2015, extending the profits tax exemption to private equity funds which previously may not have been available to them. The Ordinance will take retrospective effect, applying in respect of tax chargeable for any year of assessment commencing on or after 1 April 2015.

Below are the three key changes:

1. The definition of “securities” (relevant to determining whether a transaction is a “specified transaction”) has been broadened to include shares of excepted private companies.

“excepted private company” is broadly a private company incorporated overseas, which does not within three years prior to the relevant transaction (a) carry on business through or from a permanent establishment in Hong Kong; (b) hold Hong Kong immovable property, or a direct or indirect interest in a private company with a direct or indirect holding of Hong Kong immovable property above a threshold of 10% of the company’s own assets and (c) hold a direct or indirect interest in a private company carrying on business through a Hong Kong permanent establishment above a threshold of 10% of the company’s own assets.

The change effectively means that, whereas prior to the legislative amendments the profits tax exemption for offshore funds have been

largely confined to funds which are hedge fund type funds, with the amendments such exemptions are extended to private equity type funds.

2. Prior to the legislative amendments, the profit tax exemption for offshore funds required transactions to be carried out through or arranged by an SFC-licensed or registered authorized financial institutions or corporation. With the legislative amendments, exemptions would also apply to offshore funds which are "Qualifying Funds".

A "qualifying" fund means a fund complying with the following conditions:

- (a) at all times after the final closing of sale of interests-
 - (i) the number of investors exceeds 4; and
 - (ii) the capital commitments made by investors exceed 90% of the aggregate capital commitments; and
 - (b) the portion of net proceeds arising from the fund's transactions to be received by the originator (and its associates) must not exceed 30% of the net profit.
3. Hong Kong and offshore incorporated special purpose vehicles (SPV) may be exempted from profit tax derived from transactions in securities in an interposed SPV or an excepted private company.

IMPLICATIONS FOR SFC LICENSING REQUIREMENTS

If your existing business was one that involved the management of an offshore fund which invests primarily in offshore private companies (ie private equity type funds), then you may have up to now structured the management of such fund in such a way that one or more regulated activities (eg the management of such fund) have been conducted outside of Hong Kong (eg in order not to trigger the requirements for a SFC Type 9 (asset management) license). The reason for doing so hitherto may have been (i) because you do not want your activities in Hong Kong to trigger Hong Kong SFC licensing requirements; and/or (ii) because you do not want your

activities in Hong Kong to be conducted in such a way that your offshore fund may be subject to profits tax in Hong Kong.

With the legislative changes, the reason stated in (ii) above largely becomes redundant and hence if that has been a main driver in the way you operate your fund management business, it may be worthwhile to re-examine your *modus operandi* to see if you may wish to move more activities onshore to Hong Kong. There may be some practical benefits in doing so but it may also trigger SFC licensing requirements or may have other SFC licensing implications.

For further details on how we can assist you, please contact us at: info@altquest.com.hk

This material is for general information only and is not intended to provide legal advice.

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簡報

離岸私募基金豁免利得稅 – 證監會發牌規定的影響

立法背景

香港政府於 2015 年 7 月 17 日在憲報刊登《2015 年稅務（修訂）（第 2 號）條例》（下稱「該條例」），把之前可能未適用的利得稅豁免延伸至私募基金。該條例將具追溯效力，適用於 2015 年 4 月 1 日或之後任何課稅年度可予徵收的稅項。

三項主要修訂如下：

1. 「證券」的定義（與決定某交易是否屬於「特定交易」有關）已擴大至包括例外私人公司的股票。

「例外私人公司」概括地指於海外成立的私人公司，在相關交易前的 3 年內沒有(a)透過或從香港的常設機構經營業務；(b)持有香港不動產或在私人公司持有直接或間接的權益，而該私人公司本身資產價值的 10%或以上屬於其直接或間接地持有的香港不動產；及(c)直接或間接地持有私人公司，而該私人公司本身資產價值的 10%或以上屬於香港常設機構經營的業務。

這項修訂實際上的意思是，修訂法例前，離岸基金的利得稅豁免主要局限於對沖基金類別的基金；修訂法例後，上述豁免延伸至私募基金類別的基金。

2. 修訂法例前，相關交易必需通過獲證監會發牌的公司或註冊認可財務機構或公司進行或由其安排，離岸基金方可獲得利得稅豁免。而修訂法例後，利得稅豁免將同樣適用於屬「符合資格的基金」的離岸基金。

「符合資格」的基金指符合以下條件的基金：

- (a) 於權益出售最終截止日後的所有時間內：
 - (i) 有多於 4 名的投資者；及
 - (ii) 由投資者作出的資本認繳額超逾資本認繳總額的 90%；及
 - (b) 發起人(及其相聯者)收取基金交易產生的淨收益部份不得超逾純利的 30%。
3. 於香港及境外成立的特殊目的公司可能獲豁免支付於中間特殊目的公司或例外私人公司的證券交易中產生的利得稅。

證監會發牌規定的影響

倘若您現在的業務涉及管理主要投資在境外私人公司的離岸基金(即:私募類別的基金)，到目前為止您可能以這樣的方式組織該基金的管理— 將一項或多項的受規管活動(例如: 該基金的管理)安排在香港以外的地方進行(例如:為了避免觸及證監會第 9 類牌照(提供資產管理)的要求)。到目前為止，以上述方式進行的原因可能是 (i) 因為您不希望您於香港的活動牽涉香港證監會的發牌規定；及/或 (ii) 因為您不希望您於香港的活動以一種使您的離岸基金可能要繳納香港利得稅的方式進行。

隨着法例被修改，上述第(ii)項的原因很大程度上已變得冗餘。所以如果這是以往



您營運您的基金管理業務之主要障礙，現在可能值得重新檢查您一貫的做法以考慮您是否希望將更多活動安排到香港在岸進行。這種做法雖然有實際益處，但亦可能會觸及證監會的發牌規定或有其他證監會的發牌影響。

關於我們可以怎樣協助您的進一步詳情，請以電郵(info@altquest.com.hk)聯絡我們。

本資料謹提供一般資訊，並沒有意圖提供法律意見。

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