

FSTB releases consultation conclusion and latest legislative proposals on company re-domiciliation regime

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In brief

On 3 July 2024, the Financial Services and the Treasury Bureau (FSTB) released the consultation conclusion regarding its proposals to introduce a company re-domiciliation regime (Conclusion)¹. The Conclusion was published after receiving feedback regarding the FSTB's consultation paper on the design of the proposed regime and related amendments to the Companies Ordinance (CO) and Inland Revenue Ordinance (IRO) issued in March 2023. For further information on the consultation paper, please refer to our previous news flash².

The proposal has received broad support from a diverse array of respondents. Taking into account the feedback received, the FSTB has refined its proposal. Specifically, the latest legislative proposals incorporate several favourable recommendations from PwC's submission, including, among other things:

- clarifying that a non-Hong Kong company applying for re-domiciliation to Hong Kong must originate from a jurisdiction that permits outward re-domiciliation.
- relaxing the requirement on financial statements as proof of solvency.
- simplifying the requirement on members' consent.
- providing unilateral tax credits to re-domiciled companies that are subject to an exit tax in their original domicile if their actual similar profits are subsequently taxed in Hong Kong.
- streamlining regulatory approval for financial institutions re-domiciliation.

The FSTB is actively progressing with the legislative drafting process and is committed to introducing the amendment bill as early as practicable.

This news flash summarises the salient features of the latest legislative proposals and the comments made by the FSTB in response to the public consultation, and shares our insights on what these changes mean for companies aspiring to re-domicile to Hong Kong.

In detail

Salient features of the latest legislative proposals

Policy framework

The policy intent of the proposed company re-domiciliation regime is to provide a straightforward and simple route for non-Hong Kong companies to transfer their domicile. The legislation will explicitly state that re-domiciliation does not create a new legal entity and does not affect the property, rights, obligations, and liabilities, as well as the relevant contractual and legal processes, of the companies.

The FSTB's responses to the suggestions and enquiries concerning the scope and design of the proposed regime are summarised below:

- **Introducing only an inward regime for the current phase:** Some respondents have suggested the consideration of a two-way regime that would permit both inward and outward re-domiciliation, thereby providing greater flexibility for companies seeking to re-domicile. The FSTB has considered the practices of other jurisdictions and noted that each jurisdiction can tailor its re-domiciliation framework to align with specific policy objectives and development requirements. Furthermore, the need for outward re-domiciliation among local companies, as well as the implications of such a regime on the stability and development of the Hong Kong markets, remain to be ascertained. Consequently, the FSTB considers that it is appropriate to prioritise the introduction of an inward regime with a view to meeting the existing demand of the market as soon as practicable.
- **Reducing the types of covered companies from five to four:** The latest proposal will cover four types of companies that can be formed under the CO, namely (i) private companies limited by shares; (ii) public companies limited by shares; (iii) private unlimited companies with a share capital; and (iv) public unlimited companies with a share capital. Companies limited by guarantee without a share capital will not be included under the scope of the latest legislative proposal, as there appears to be no significant demand for their inclusion.
- **Changing to another company type during the re-domiciliation process is not allowed:** The FSTB has clarified that since companies retain their identities throughout the re-domiciliation process, they are not permitted to change their company type during the re-domiciliation application.

***Our observations:** While a two-way re-domiciliation regime is more comprehensive and offers more flexibility, it is understandable that the FSTB wishes to prioritise implementing an inward re-domiciliation regime, especially considering that the economic or other benefits of allowing outward re-domiciliation in Hong Kong are not immediately apparent.*

Eligibility criteria and application procedures

The Registrar of Companies (R of C) will be empowered to process applications for company re-domiciliation and to administer the proposed regime. To safeguard the integrity of Hong Kong's business environment, companies seeking to re-domicile to Hong Kong must meet specific criteria and requirements.

In response to feedback obtained during the public consultation, the FSTB has enhanced the eligibility criteria and procedures to facilitate companies' applications for re-domiciliation and business continuity.

Key modifications to the original eligibility criteria include:

- **Relaxing requirement on financial statements as proof of solvency:** The original requirement for submitting the latest audited financial statements dated no more than three months prior to the application date will be relaxed. Under the latest proposal, applicants may submit financial statements dated no more than 12 months prior to the application date. The requirement for these statements to be audited will depend on the regulations of the original domicile or the rules of the relevant regulatory bodies or stock exchange.
- **Providing legal opinion of due incorporation and continuing existence:** An applicant will be required to provide a legal opinion of a legal practitioner who practises the law of the original domicile of the applicant, specifying that the company is duly registered and validly subsisting in the original domicile and that the company is not in liquidation.
- **Furnishing legal opinion of compliance with the requirements of the laws of the original domicile:** An applicant will also be required to provide a legal opinion of a legal practitioner who practises the law of the original domicile of the applicant that the proposed re-domiciliation is allowed under that law (e.g., the law governing the applicant's original domicile must allow for outward re-domiciliation).
- **Simplifying requirement on company members' consent:** The criteria will be streamlined in accordance with the laws of original domicile or its constitutional documents of the applicants as we suggested. In the absence of such a requirement, the applicant must obtain members' consent by a resolution passed by at least 75% of the eligible members. This resolution can be passed either at a general meeting or in written form.
- **Reducing the list of documents:** A director certificate instead of separate certified true copy of various corporate documents will be accepted for application filings. We are grateful to the FSTB for accepting our suggestion in this regard.

Operational facilitation measures to be provided include:

- **Stipulating the policy intent on business continuity in the law:** We are pleased that the FSTB has adopted our recommendation to address legal concerns on existing contracts, as express provisions in the proposed legislation will provide certainty based on the policy intent that the re-domiciliation will not create a new legal entity, and will not affect the properties, rights, obligations and liabilities, as well as the relevant contractual and legal processes of the companies.
- **Extending the deregistration period:** The period for deregistration will be extended to 120 days following the issuance of the certificate of re-domiciliation, compared to the previous 60-day requirement. Applicants may also apply for an extension if needed.
- **Retaining company name and business registration number (BRN):** A re-domiciled company that was registered under the CO as a non-Hong Kong company with a business presence in Hong Kong prior to re-domiciliation will be allowed to retain its corporate or approved name in Hong Kong and BRN to continue operations seamlessly. We are pleased that the FSTB has adopted our suggestion in this respect.
- **Streamlining regulatory approval for financial institutions re-domiciliation:** Amendments will be made to the relevant ordinances and subsidiary legislation to ensure that re-domiciled financial institutions, such as banks and insurers, will be regulated and supervised as if they were locally incorporated institutions.

Relevant insurers and banks will be required to consult with their respective financial regulators in Hong Kong and undergo necessary assessments before submitting their re-domiciliation applications, to ensure a proper transition.

The FSTB has also indicated its intention to explore administrative arrangements to facilitate coordination between the Companies Registry and financial regulators.

Once all required documents are submitted, the R of C aims to approve applications within a two-week timeframe. Annex D to the Conclusion provides the updated list of documents necessary for a re-domiciliation application.

Our observations: *While there will be members' protection to shareholders holding in aggregate 75% or more in the issued share capital of companies re-domiciled to Hong Kong, minority shareholders who disagree with the company re-domiciliation will need to seek professional/legal support. Companies applying for re-domiciliation need to follow up with their contractual parties and/or creditors providing financial assistance and loans prior to making re-domiciliation applications. Going forward, parties in joint ventures should review their shareholders' agreements in conjunction with their legal advisors, and consider whether re-domiciliations are permitted or prohibited (and consider amending the agreement if this does not reflect their intention).*

For companies that have not been registered as non-Hong Kong companies with the R of C, we suggest that the FSTB consider implementing appropriate measures to enable the reservation of company names by applicants for company re-domiciliation, which are not already registered in the index of company names maintained by the R of C in Hong Kong, as part of the proposed administrative arrangements.

For companies that have been registered as non-Hong Kong companies with the R of C and those with shares listed on the Stock Exchange of Hong Kong, we suggest that the FSTB consider implementing appropriate measures for deeming the cessation of authorised representatives on a specified date. This would allow for timely notification and publication of announcement by the listed issuer. Also, we expect that administrative arrangements for existing registered non-Hong Kong companies with the R of C as regards annual return will be included in the bill.

Tax arrangements

Respondents primarily expressed their views on three related issues: transitional tax matters, tax residency, and stamp duty. The FSTB has provided the following responses:

- **Transitional tax matters:** To provide certainty to the re-domiciled companies on their profits tax liabilities after re-domiciliation, the IRO will be amended to address transitional tax matters in a comprehensive manner with reference to comparable jurisdictions' arrangements. These amendments will cover elements that may have occurred before re-domiciliation but would have to be considered for tax assessment after re-domiciliation, such as fair deduction for trading stock, specified types of expenditures, depreciation allowances etc.

- **Tax benefits or credits:** Recognising that a company may be charged a tax by its original domicile in respect of its unrealised profits upon re-domiciliation to Hong Kong (commonly known as 'exit tax'), the FSTB has adopted our recommendation to provide unilateral tax credits for re-domiciled companies if the re-domiciled company's actual similar profits are also taxed in Hong Kong.

As regards other tax benefits, the FSTB has stated that it hopes to leverage Hong Kong's current strengths and policies to encourage companies from outside Hong Kong to re-domicile to Hong Kong.

- **Tax residency:** The FSTB considered that clarification of the tax residency of a re-domiciled company for the general purposes of the IRO would not be necessary. The FSTB reasoned that under the IRO, the determination of the Hong Kong profits tax liabilities of a company does not depend on its domicile or residency.
- **Stamp duty:** The FSTB clarified that no stamp duty liabilities will arise from the re-domiciliation process as the re-domiciliation process will not entail any transfer of a company's asset or change in the beneficial ownership of a company's asset.

Our observation: *While there will generally not be adverse tax implications upon re-domiciliation where the original domicile levies no substantial taxes (e.g., the Cayman Islands and the British Virgin Islands), a re-domiciled company may suffer double taxation if the original domicile imposes an exit tax on unrealised profits and those profits are subsequently realised and taxed in Hong Kong. We are pleased that the Government has adopted our recommendation to allow a unilateral tax credit for taxes against the Hong Kong profits tax payable, which will mitigate the potential tax burden associated with the move.*

Regarding tax residency, the concerns raised by the respondents pertain to whether a re-domiciled company, having only changed its domicile to Hong Kong, will be considered as a company incorporated in Hong Kong for the purposes of defining 'tax resident' under the IRO, as well as in the context of the global minimum tax/domestic minimum tax rules and tax treaties. It would be helpful for the FSTB to revisit and address these concerns.

As for the stamp duty implications, we welcome the FSTB's confirmation that the re-domiciliation process itself will not give rise to any stamp duty liabilities. However, it remains unclear whether the transfer of shares in re-domiciled companies is required to be registered in Hong Kong (i.e., same as a Hong Kong-incorporated company), which could potentially trigger Hong Kong stamp duty. We hope that the FSTB will shed lights on this matter in due course.

Legislative timeline

The FSTB has indicated that they have proceeded to prepare the amendment bill based on the latest legislative proposals with a view to submitting it to the Legislative Council as early as practicable.

The takeaway

In light of the increasingly stringent regulatory requirements for companies registered in jurisdictions with no or only nominal tax, coupled with the implementation of a global minimum tax, the effectiveness of reducing taxation costs by domiciling overseas may be diminishing. Consequently, it is an opportune moment for Hong Kong to establish an inward re-domiciliation regime. This would enable companies that were initially domiciled abroad for tax or other reasons to re-domicile to and operate in Hong Kong.

We also appreciate the FSTB's willingness in considering and adopting the respondents' feedback in developing a more attractive company re-domiciliation regime. We believe that the enhanced regime will reinforce the efforts of the Hong Kong SAR Government to attract enterprises from around the world.

For a more detailed discussion on how your business may benefit from the proposed company re-domiciliation regime, please do not hesitate to contact us.

Endnotes

1. The Conclusion and the accompanying blog entry can be accessed via these links:
<https://www.fstb.gov.hk/en/blog/blog030724.htm>
https://www.fstb.gov.hk/fsb/en/publication/consult/doc/ConsultationConclusionOnCompanyRe-domiciliationRegime_e.pdf
2. Our news flash on the consultation paper can be accessed via this link:
<https://www.pwchk.com/en/hk-tax-news/2023q2/hongkongtax-news-jun2023-8.pdf>

Let's talk

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