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Vincent OOI

Singapore Management University, vincentooi@smu.edu.sg

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Tax Considerations for Funds Structuring in Asia

Vincent Ooi*

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Tax considerations play a major role in the decisions of fund managers of where to base their funds. The highly mobile nature of capital has resulted in tax competition, leading to several host jurisdictions for funds in Asia (Hong Kong, Singapore, Labuan, and the BVI) having very similar tax characteristics in terms of low effective corporate income tax rates; no capital gains taxes; no exit taxes; a single tier of taxation; and generally no withholding taxes. Other ways in which jurisdictions have attempted to distinguish themselves include a strong Double Tax Agreement network, certainty on the taxation of any carried interest, and offering a segregated portfolio company structure. Offering a segregated portfolio company structure is particularly important to promote local domiciliation of funds. Hong Kong is now the only one of the four jurisdictions in this study that does not offer such a structure.

Introduction

A wide range of considerations influence the decisions of fund managers when it comes to choosing a suitable jurisdiction in which to base their funds. Tax considerations can be particularly important, given that funds are potentially impacted by a broad range of taxes that can significantly affect the return for investors. As capital is highly mobile, tax policies in various jurisdictions in Asia have become increasingly competitive, with a clear trend in offering favorable tax rates to funds and fund managers opting to base their operations there. This article analyzes the tax policies across four jurisdictions: Hong Kong; Singapore; Labuan; and the British Virgin Islands (BVI). The first three places listed are major jurisdictions for funds structuring in Asia.[1] It is also common for funds to include structures in foreign jurisdictions such as the BVI that have flexible corporate structures. Thus, it would be productive to consider the tax policies of the BVI as well.

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* Vincent Ooi is Lecturer, School of Law, Singapore Management University, and a Ph.D. candidate at Downing College, University of Cambridge. He can be reached at vincentooi@smu.edu.sg.

[1] "Location: Where to Set Up Your Hedge Fund Business?", in Henri Arslanian, *Entrepreneurship in Finance: Successfully Launching and Managing a Hedge Fund in Asia* 39, 39 (2016).

The tax regimes for funds in these jurisdictions largely have the following similar characteristics: (1) low effective corporate income tax rates, (2) no capital gains tax, (3) no exit taxes, (4) a single tier of taxation, and (5) generally no withholding taxes. Especially in the face of strong competition for highly mobile capital, it is unlikely that any jurisdiction that does not match these important characteristics will be considered to be attractive by funds.

However, a jurisdiction that possesses these characteristics may still not be able to distinguish itself from the competition. As far as tax is concerned, funds will also consider the Double Tax Agreement (DTA) network of the potential host jurisdiction—in particular, whether there is a DTA between the host jurisdiction and the jurisdiction where most of fund investors are resident. The issue of taxation of fund managers and carried interests is also likely to be of considerable importance to fund managers.

The existence of a corporate structure that allows for segregated portfolios managed under a single corporate entity (generally known as a "segregated portfolio company") also seems to be an important factor in the competitiveness of a jurisdiction in attracting funds. Since Singapore's Variable Capital Company Act[2] came into force on January 14, 2020, Hong Kong is now the only one of the four jurisdictions in this study that does not have an equivalent. There is an increasing global trend toward "onshoring" funds to the jurisdiction where they are managed to satisfy substance requirements, and such a corporate structure is important in facilitating this.

Tax Considerations of Funds—Convergence of Positions

The income tax is, by far, the most important tax that funds have to consider. Transaction taxes such as stamp duties generally do not make up a large part of a fund's tax liabilities, and value added taxes are for the most part a nonissue. In terms of income tax, the considerations can be divided conceptually along a couple of lines: First, whether the tax liability falls on the fund, its investors, or the fund manager; second, at what point the tax liability arises, be it when income is earned, on disposition of assets, or on distribution to investors.

Following this framework, the considerations can be laid out as follows. For the fund: (1) corporate income tax, (2) capital gains taxes, (3) exit taxes, and (4) DTAs. For investors: (1) distributions of income, (2) withholding taxes, and (3) DTAs. For fund managers: (1) taxation of fund managers, and (2) taxation of carried interests. As stated in the introduction, for the following, each jurisdiction has more or less come to the same position: (1) corporate income tax, (2) capital gains taxes, (3) exit taxes, (4) distribution of income, and (5) withholding taxes.

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[2] Singapore Variable Capital Companies Act 2018 (No. 44 of 2018) (SVCCA).

Corporate Income Tax. A jurisdiction's effective corporate income tax rate is probably the single most important determinant of the location of funds. Fund income is effectively taxed at corporate income tax rates close to zero across all four jurisdictions in this study. In the case of Labuan and the BVI, this applies across most categories of general corporate taxes, whereas for Singapore and Hong Kong this is due to special tax incentive schemes that apply to funds. The location of the fund itself and where the fund manager conducts its operations will determine the exposure of the fund to corporate income tax.

Hong Kong. In Hong Kong, a flat corporate tax rate of 16.5 percent is applied to assessable profits. The territorial system of taxation is used. Tax is levied only on profits arising or derived from carrying on a trade, business, or profession in Hong Kong. The profits tax does not apply to profits that are sourced outside Hong Kong. The territorial principle does not differentiate between residents and non-residents.

For offshore funds such as non-resident individuals, partnerships, and trustees of trust estates or corporations, tax exemption applies to profits derived from transactions in securities, futures contracts, and foreign exchange contracts in Hong Kong, which are carried out by corporations and authorized financial institutions licensed or registered under the Securities and Futures Ordinance.[3] However, the non-resident entity must not carry on any other business in Hong Kong.[4] Other exemptions are also available, such as for certain interest income derived by non-financial institutions; for certain income of offshore or non-resident investment funds; and for mutual funds, unit trusts, and qualifying debt instruments.[5]

Hong Kong observed that the tax disparity caused by tax exemptions offered to offshore funds that were not available to onshore funds had created a disincentive for funds "to domicile and/or be managed in Hong Kong."[6] Hence Hong Kong introduced legislation to extend the exemptions to local funds, which took effect on April 1, 2019.[7] This was with the intention of "creating a level playing field for all funds operating in Hong Kong,"[8] and to

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[3] Hong Kong Inland Revenue (Amendment) (No. 2) Ordinance 2015 (Ord. No. 13 of 2015).

[4] Hong Kong Inland Revenue Ordinance (Cap. 112) (HKIRO), s. 20ACA.

[5] HKIRO, s. 26(1A)(a).

[6] Legislative Council Brief for Inland Revenue (Profits Tax Exemption for Funds) (Amendment) Bill 2018, available at https://www.legco.gov.hk/yr18-19/english/bills/brief/b201812072_brf.pdf (accessed June 30, 2020).

[7] Hong Kong Inland Revenue (Profits Tax Exemption for Funds) (Amendment) Bill 2018.

[8] The Government of Hong Kong Special Administrative Region Press Releases, "Inland Revenue (Profits Tax Exemption for Funds) (Amendment) Bill 2018 Gazetted," available at https://www.info.gov.hk/gia/general/201812/07/P2018120500594.htm) (accessed June 30, 2020).

address concerns over ring-fencing of the domestic tax system in light of BEPS Action 5.[9]

Singapore. Singapore taxes income that is either sourced in Singapore or received in Singapore at a flat rate of 17 percent regardless of whether a company is local or foreign. Even if a fund is incorporated overseas, if the fund management activities are conducted in Singapore, the income of the fund may be considered to be sourced in Singapore. Several tax incentive schemes exist under the Singapore Income Tax Act that may benefit funds.[10] They render "specified income" derived from "designated investments" by the fund exempt from tax. The term "designated investments" covers a wide scope of investments such as stocks, shares, securities, and derivatives but notably excludes immovable property in Singapore.[11]

Section 13CA: Offshore Fund Tax Exemption This exemption benefits Singapore fund management companies that manage funds located offshore and allows foreign investors in the offshore funds to be exempted from Singapore income taxes. Singapore investors may, however, be liable to pay a financial penalty if they hold more than a prescribed percentage in the fund. This is the only one of the three incentive schemes that does not require specific approval from the Monetary Authority of Singapore (MAS).

Section 13R: Onshore (Singapore Resident Company) Fund Tax Exemption Scheme. This scheme benefits Singapore fund management companies that manage funds located onshore where the fund vehicle is incorporated in Singapore. To enjoy the benefits of this scheme the fund must seek specific approval from the MAS. Similar to the scheme in Section 13CA, Singapore investors may be liable for a financial penalty if they hold more than a prescribed percentage in the fund.

Section 13X: Enhanced-Tier Fund Tax Exemption Scheme. This scheme benefits funds domiciled both onshore and offshore and imposes no ownership restrictions with respect to Singapore investors as with the schemes in Sections 13CA and 13R. To enjoy the benefits of this scheme the fund must seek specific approval from the MAS. There are however further requirements to qualify for this scheme, such as a minimum fund size of S$50 million at the time of application and the need to file an annual tax return.

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[9] Id.

[10] Singapore Income Tax Act (Cap. 134, rev. ed. 2014) (SITA), ss. 13CA, 13R and 13X.

[11] Singapore Income Tax (Exemption of Income of Prescribed Persons Arising From Funds Managed by Fund Manager in Singapore) Regulations 2010, r. 2.

Labuan. A company incorporated under the Labuan Companies Act[12] may elect to be taxed under the Labuan Business Activity Tax Act[13] instead of the Malaysian Income Tax Act.[14] This election, once made, is irrevocable.[15] Such companies may be taxed at a rate of 0 percent, 3 percent, or 24 percent, depending on their activities and whether the "substance requirements" are met.[16] The "substance requirements" to be satisfied include an adequate number of full-time employees and amount of annual operating expenditures, with the minimum amount varying based on the type of Labuan entity.[17]

There are three potential tax rates that may be imposed, depending on the activities carried out and whether substance requirements are satisfied. First, Labuan entities carrying on a Labuan business activity that do not comply with the substance requirements would be taxed at a rate of 24 percent on their chargeable profits.[18] The Inland Revenue Board of Malaysia has clarified that a new definition of chargeable profits will be "determined through [a] practice note regarding this matter."[19]

It is worth noting that the statute specifies that "chargeable profits" of a Labuan entity carrying on a Labuan business activity that is a Labuan trading activity shall be the net profits as reflected in the audited accounts.[20] "Labuan trading activity" refers to "banking, insurance, trading, management, licensing and shipping operations."[21] This is potentially wider than the position adopted under the MITA (and the other jurisdictions considered in this article), since it potentially catches capital gains as well as other forms of income.

Second, as for companies that comply with the substance requirements, tax would be charged at a rate of 3 percent for Labuan entities carrying on a business activity that is a Labuan trading activity.[22]

Finally, Labuan entities that comply with the substance requirements and that carry on a Labuan non-trading activity would not be charged tax for

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[12] Labuan Companies Act 1990 (Act 441).

[13] Labuan Business Activity Tax Act 1990 (Act 445) (LBATA), s. 3A.

[14] Malaysian Income Tax Act 1967 (Act 53) (MITA).

[15] LBATA, s. 3A.

[16] Labuan Activity Business Tax (Requirements for Labuan Business Activity) Regulations 2018, r. 2B(1).

[17] Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018, Schedule.

[18] Labuan Business Activity Tax (Amendment) Act 2020 (Act A1614), s. 3.

[19] Chartered Tax Institute of Malaysia, "Memorandum on Issues Arising From Labuan Business Activity Tax (Amendment) Bill 2019," at 6 (Dec. 18, 2019), available at http://lampiran2.hasil.gov.my/pdf/pdfam/CTIM_Memorandum_on_Issues_Arising_from_LBAT_Amendment_Bill_2019_18122019.pdf (accessed June 30, 2020).

[20] LBATA, s. 4(2).

[21] LBATA, s. 2.

[22] LBATA, s. 4(1).

the year of assessment.[23] Thus, much will depend on the exact activities carried out by the funds.

The BVI. The income tax rate is effectively zero in the BVI. Although all companies incorporated in the BVI are treated as resident and potentially subject to income tax under the BVI Income Tax Act,[24] the BVI Business Companies Act provides a general tax exemption for all BVI-domiciled corporate entities.[25]

Capital Gains Taxes. Capital gains may be taxed in two main ways. A jurisdiction may (1) impose a tax that specifically taxes capital gains, or (2) tax capital gains under an income tax. In many situations involving the acquisition and disposition of assets, there can be considerable overlap between taxes on capital gains and income taxes. The existence of taxes on capital gains is an issue of significant concern to funds as it has the potential to greatly increase their tax liabilities.

Generally speaking, all four jurisdictions considered in this article have for a long time not taxed capital gains in either form noted above. This has led to fine distinctions being drawn between income and capital gains. In particular, there is often litigation on whether a trade or business exists, such that receipts could be taxable as income rather than non-taxable as capital gains.

Singapore, Hong Kong, and the BVI do not impose a capital gains tax or consider capital gains to be taxable under the income tax. The Labuan tax system has recently been amended such that it could potentially tax capital gains. Capital gains are generally not taxable in Malaysia, so it was unexpected that Labuan chose to amend its legislation in that way.

Malaysia generally does not impose taxes on capital gains from the sale of capital assets with the exception of those related to land and buildings.
A real property gains tax applies to gains from sale of shares in a "real property company," which is a company where 75 percent or more of its tangible assets are real property or shares in a real property company. The tax rate for real property capital gains depends on the holding periods of the assets. For dispositions of real property within three years of acquisition, the rate is 30 percent; for dispositions within the fourth and fifth year, the rates are 20 percent and 15 percent, respectively; and for dispositions beyond the fifth year, the rate is 5 percent.[26] Capital losses may be used to offset capital gains from the sale of real property.[27]

[23] LBATA, s. 9.

[24] BVI Income Tax Act (Cap 206).

[25] BVI Business Companies Act 2004 (No. 16, 2004), s. 242(1).

[26] Real Property Gains Tax Act 1976 (Act 169) (Malaysia) Schedule 5.

[27] Real Property Gains Tax Act 1976 (Act 169) (Malaysia), s. 7(4)(a).

With recent amendments to the Labuan Business Activity Tax Act,[28] it is possible that capital gains may be taxed at a rate of 24 percent on Labuan entities that do not comply with substance requirements.[29] Capital gains may be taxed at a rate of 3 percent on Labuan entities that do comply with substance requirements and that engage in Labuan trading activities. As noted above, this will hinge on the Inland Revenue Board of Malaysia's definition of chargeable income.[30]

Exit Taxes. Exit taxes may be levied when a fund decides to dispose of assets held in the jurisdiction. None of the four jurisdictions considered in this study imposes exit taxes.

Distributions of Income. The potential tax liability that may arise when income is distributed by a fund (generally in the form of dividends) is an issue of concern to investors. Tax systems may provide for single- or double-tier taxation. Single-tier taxation occurs when income is taxed only once, either at the company level (subject to corporate income tax) or at the personal level when dividends are distributed (subject to personal income tax). Double-tier taxation occurs when income is taxed at both levels. Tax systems with double-tier taxation often have some kind of imputation mechanism to give credit for the tax already imposed so as to prevent double taxation.

All four jurisdictions considered in this article either do not tax dividend distributions at all (Labuan and the BVI)[31] or have extremely wide exemption provisions, which means that they effectively do not tax dividend distributions (Singapore and Hong Kong).[32]

Withholding Taxes. Conceptually, withholding taxes are imposed on payments made to non-residents. In order to facilitate tax collection, the payor is required by the tax authority in the jurisdiction to withhold part of the payment due to the payee and hand it over to the tax authority. This helps the tax authority avoid potential difficulties in enforcing tax obligations against nonresidents. For example, if withholding tax applies to dividend distributions in a jurisdiction, then investors in a fund will not receive the full amount due to them when a fund makes a distribution as some of that payment would have to be withheld.

As dividend payments to non-residents are generally not taxable in Singapore, Hong Kong, and the BVI, the issue of withholding tax on dividend distributions is typically not a major concern to fund investors. Investors in

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[28] LBATAA s. 2B.

[29] Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018.

[30] CTIM (n. 19).

[31] BVI Business Companies Act 2004, s. 242(1)(b), and LBATA, s. 9 read with s. 2.

[32] SITA, s.13(1)(za) and HKIRO, s. 26(a).

Labuan companies benefit from specific rules that exempt non-residents from withholding tax on a variety of payments, including dividends.[33]

Summary. The considerations listed above largely relate to the effective tax rates levied by the host jurisdictions on a fund and its investors across a range of potential tax events. Clear signs of convergence can be seen across all four jurisdictions in this study, with all the jurisdictions offering an effective tax rate of nearly zero. It would appear that this is the norm for host jurisdictions, and jurisdictions that do not offer similar tax rates would be unlikely to be able to attract many funds to locate there. However, given that the various jurisdictions have more or less converged to the same position with respect to effective tax rates, it is difficult for these jurisdictions to differentiate themselves and make themselves more attractive to funds based on these considerations alone.

As a matter of tax policy, reducing the effective tax rate for funds is one of the easiest steps that a jurisdiction can take to make itself more attractive for funds. Some of the other methods that jurisdictions have used to distinguish themselves may not be quite so easy to replicate successfully.

Jurisdictions' Attempts to Distinguish Their Tax Benefits

Double Taxation. A fund's investors are quite often resident in jurisdictions other than the fund's host jurisdiction. In fact, there are often attempts to ring-fence tax benefits offered to fund investors such that they are limited to foreign investors and not available to domestic investors.[34] Wherever investors are resident in a jurisdiction different from the fund's host jurisdiction, double taxation issues may arise. Income is generally taxed where it is earned (sourced) and may also be taxed by the jurisdiction where the recipient of the income is resident. Double Tax Agreements are designed to reduce or eliminate the burden of double taxation.

The DTA network of the host jurisdiction is an issue of considerable importance to funds, which will largely be concerned with whether an applicable DTA exists between the host jurisdiction and the country of residence of the majority of its investors. Jurisdictions seen to be tax havens often will have few DTAs in force with other jurisdictions. As such, they might not be attractive to funds even if their effective tax rates are low, since the lack of an applicable DTA would mean that their investors might be heavily taxed on distributions in their jurisdictions of residence.

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[33] Income Tax Act (Exemption) (No. 22) Order 2007, and Income Tax Act (Exemption) (No. 4) Order 2012.

[34] See the "financial penalty" prescribed under SITA, ss. 13CA and 13R, and the exclusion of onshore funds from tax incentives in Hong Kong just recently removed by the Hong Kong Inland Revenue (Profits Tax Exemption for Funds) (Amendment) Bill 2018 (both discussed above).

Hong Kong. As of the time of writing, Hong Kong has signed 43 DTAs, which include two agreements with Mainland China and Macau as separate jurisdictions.[35] Negotiations are underway for 14 new DTAs.[36]

Singapore. Singapore enjoys a wide network of DTAs, with 60 comprehensive DTAs and seven limited DTAs in force.[37]

Labuan. Labuan enjoys Malaysia's wide network of 74 tax treaties, with 25 still under negotiation.[38] However, a growing number of countries have specifically excluded Labuan from the tax treaty benefits enjoyed by Malaysia. As of this writing, the list stands at 13: Australia, Chile, Germany, Japan, India, Indonesia, Luxembourg, the Netherlands, Seychelles, South Africa, Spain, Sweden, and the United Kingdom.

The BVI. While the BVI itself is not party to any Double Tax Agreements,[39] it enjoys the extension of certain tax treaties by the United Kingdom.[40] This includes ones with Japan and Switzerland, although they are rarely used in practice.[41] The BVI, however, has signed an increasing number of tax information exchange agreements, which stands at 28 at the time of writing.[42]

Taxation of Fund Managers. One of the considerations of fund managers would be their potential tax liabilities on the income they receive for performing their duties. While the effective income tax rate of fund manager income is not as important a consideration as the effective tax rate for the fund

[35] Inland Revenue Department, Comprehensive Double Taxation Agreements Concluded, available at https://www.ird.gov.hk/eng/tax/dta_inc.htm (accessed June 30, 2020).

[36] Inland Revenue Department, Negotiations in Progress, available at https://ird.gov.hk/eng/tax/dta3.htm (accessed June 30, 2020).

[37] Ministry of Finance, "Tax Treaties (Double Taxation Agreements)" (Dec. 4, 2017), available at https://www.mof.gov.sg/MOF-For/Individuals/Tax-Treaties-Double-TaxationAgreements (accessed June 30, 2020).

[38] Inland Revenue Board of Malaysia, "Double Taxation Agreement," available at http://www.hasil.gov.my/bt_goindex.php?bt_kump=5&bt_skum=5&bt_posi=4&bt_unit=1&bt_sequ=1&bt_lgv=2 (accessed June 30, 2020).

[39] Michael J. Burns & James McConvill, "Navigating the Highs and Lows of the British Virgin Islands as an International Offshore Financial Centre: The Strengths, Weaknesses, Opportunities and Threats," 7 Original L. Rev. 105, 110 (2011).

[40] Wolters Kluwer, "British Virgin Islands: Double Tax Treaties," available at https://www.lowtax.net/information/british-virgin-islands/british-virgin-islands-double-tax-treaties.html (accessed June 30, 2020).

[41] Id.

[42] Government of the British Virgin Islands, "Tax Information Exchange Agreements," available at http://bvi.gov.vg/tiea (accessed June 30, 2020).

itself, some jurisdictions have nevertheless chosen to provide some incentives to fund managers.

Hong Kong. There are no special incentives for fund managers in Hong Kong. Income arising in or derived from managing a fund in Hong Kong is liable for corporate profits tax. With the recent introduction of a two-tier profits tax regime, the applicable rate stands at 8.25 percent for the first HK$2 million of profits and 16.5 percent for profits above that amount.[43]

Singapore. Income derived from managing/advising a fund is subject to corporate income tax, which stands at 17 percent. However, the Financial Sector Initiative–Fund Management Award administered by the MAS provides approved Singapore fund managers a concessionary tax rate of 10 percent instead of 17 percent.[44] This applies to income derived from either fund management or the provision of investment advisory services.[45]

The MAS has clarified that typical recipients of the incentive are licensed banks holding a Capital Markets Services license that employ more than 100 staff, of which at least 70 percent constitute FSI qualifying professionals in "front and middle office functions."[46] The minimum assets under management of such banks typically stands at S$250 million.[47]

Labuan. Special tax incentives are enjoyed by fund managers in Labuan. Until 2020, directors of Labuan entities who are non-residents enjoy a tax exemption on fees,[48] and non-residents who are employed in a managerial capacity also receive a 50 percent tax exemption.[49] There is a 65 percent tax exemption on income derived from provision of professional services such as legal, accounting, financial, or secretarial services.[50]

The BVI. Technically, there are no special incentives for fund managers in the BVI. The general position in the BVI is that a payroll tax is imposed on any actual remuneration paid by an employer to every employee

[43] Hong Kong Inland Revenue (Amendment) (No.3) Ordinance 2018, Schedule 8B, s. 2.

[44] SITA, s. 43Q.

[45] Singapore Income Tax (Concessionary Rate of Tax for Financial Sector Incentive Companies) Regulations 2017 (No. S 239), r. 7.

[46] Monetary Authority of Singapore, "Financial Sector Tax Incentive Schemes," available at https://mas.gov.sg/schemes-and-initiatives/financial-sector-tax-incentive-scheme (accessed June 30, 2020).

[47] Id.

[48] Malaysia Income Tax Act Income Tax (Exemption) (No. 7) Order 2011.

[49] Malaysia Income Tax Act Income Tax (Exemption) (No. 8) Order 2011.

[50] Malaysia Income Tax Act Income Tax (Exemption) (No. 6) Order 2011.

and deemed employee.[51] Payroll tax is levied on both the employer and employee. "The employer pays a tax of 2 percent or 6 percent of the gross salary paid, and the employee pays 8 percent, in excess of USD 10,000 per annum. In many cases, fund managers operate outside the BVI even if the funds are BVIdomiciled. As such, fund managers do not attract payroll taxes in the BVI.

Carried Interest. Fund managers are often remunerated through an arrangement known as a carried interest. This provides that they are to receive a percentage of the profits of the fund. The crucial tax question is whether this carried interest is in the nature of income or capital gains, which can result in a considerable difference in the overall tax liability of the fund managers.

There are no specific guidelines on the taxation of carried interests in Singapore, the BVI, or Labuan.

In Hong Kong, carried interest that can be attributed to a fund manager is subject to a profits tax of 16.5 percent. This stems from the Inland Revenue Department's position that carried interest is a form of "performance fee" that hence can be charged to individual fund managers.[52] This is assessed based on the extent of the service being rendered in Hong Kong.[53] This position, however, may see changes in the near future as Hong Kong has announced plans to introduce tax concessions for carried interests, subject to fulfilment of certain conditions.[54] If such plans come to fruition, Hong Kong's attractiveness of Hong Kong as a destination for private equity funds may increase.

Summary. There has been less uniformity in terms of the considerations listed in this section. Jurisdictions have adopted different approaches and policies to present themselves as the most attractive host jurisdiction for funds. All but one of all the considerations listed above are internally determinable as a matter of policy by the jurisdiction in question. It is only the DTA network that cannot be unilaterally adjusted, and this would appear to be one of the most important considerations for funds.

In this sense it is interesting to note that in the highly competitive world of funds, there has not been convergence on all the considerations that can be internally determined. One might expect that all jurisdictions would have started to offer concessionary rates of tax to fund managers and provide certainty as to carried interests. The continued existence of divergence in tax

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[51] Government of the Virgin Islands, "Your Guide to Payroll Tax," available at http://www.bvi.gov.vg/content/your-guide-payroll-tax (accessed June 30, 2020).

[52] Hong Kong Inland Revenue Department, Departmental Interpretation and Practice Notes No. 51: Profits Tax- Profits Tax Exemption for Offshore Private Equity Funds, at 73, available at https://www.ird.gov.hk/eng/pdf/dipn51.pdf (accessed June 30, 2020).

[53] Id. at 75.

[54] Hong Kong Legco Debates (Feb. 26, 2020) (Paul MP Chan, Financial Secretary) at 62), available at https://www.budget.gov.hk/2020/eng/pdf/e_budget_speech_2020-21.pdf (accessed June 30, 2020).

policies when it comes to funds suggests that there may be non-tax considerations that offset the tax considerations in the decision of where to base a fund.

Segregated Portfolio Companies

One major consideration that has both tax and non-tax implications is the availability of suitable corporate structures for fund structuring. An increasing emphasis on substance requirements has meant that funds have incentives to "onshore" funds to the jurisdiction where they are managed. This has created pressure to move away from the traditional model of establishing the fund in an offshore jurisdiction such as the BVI and increased the importance of having suitable corporate structures in the host jurisdiction.

In response to this, Hong Kong and Singapore have recently passed legislation to offer such new corporate structures. Labuan and the BVI have long offered such structures. Crucially, while Hong Kong offers the openended fund company and new limited partnership funds structure, these are not segregated portfolio companies, leaving it as the only jurisdiction in this study without such a structure.

A segregated portfolio structure offers significant benefits, since it allows funds to ring-fence different investment portfolios while only being required to incorporate and register as a single company. It is generally possible to achieve ring-fencing in jurisdictions that do not offer such a structure, but this is often complicated and expensive.

Hong Kong. As noted above, Hong Kong offers two possible fund strategies, summarized below.

Open-Ended Fund Companies. An open-ended fund company (OFC) is structured such that investment funds are established in the form of a company, but investors are provided with the flexibility to trade funds via the creation and cancellation of shares.[55] This arrangement enables the diversification of Hong Kong's fund domiciliation platform and enhances its fund manufacturing capabilities, which enables Hong Kong's asset management industry to be developed.[56]

Selection of investment fund vehicles is also widened under the OFC scheme. This scheme, in effect since July 31, 2018, allows private OFCs to take advantage of the profits tax exemption provided by the Inland Revenue (Amendment) (No. 2) Ordinance 2018.[57] Securities and Futures Commission-

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[55] The Government of the Hong Kong Special Administrative Region Companies Registry, available at https://www.cr.gov.hk/en/ofc/overview.htm (accessed June 30, 2020).

[56] Id.

[57] Asset and Wealth Management Activities Survey 2017, Securities and Futures Commission of Hong Kong, available at https://www.sfc.hk/web/EN/files/ER/PDF/2017%20Asset%20and%20Wealth%20Management%20Activties%20Survey_e.pdf (accessed June 30, 2020).

authorized public OFCs are entitled to the same profit tax exemption as other SFC-authorized funds.[58]

The New Limited Partnership Funds. Hong Kong will soon introduce a Limited Partnership Funds (LPF) structure. According to the Hong Kong Legislative Council Brief on the Limited Partnership Fund Bill, the purpose of the LPF is to meet the needs of investment funds. This is because the existing Limited Partnerships Ordinance (Cap. 37) "does not have provisions which allow flexibility in capital contributions and distribution of profits, or allow a fund to have the necessary contractual flexibility, or provide a straightforward dissolution mechanism."[59]

Singapore. The Singapore Variable Capital Companies Act of 2018 introduced a new corporate legal vehicle in Singapore effective on January 14, 2020.[60] The Singapore Variable Capital Company (SVCC) caters to fund-specific needs by providing a flexible legal structure.[61] It purports to encourage funds managed in Singapore to be domiciled locally, and is claimed to provide "significant cost economies and fewer cross-border administrative and compliance hurdles."[62] Singapore recognizes that tax treatment is an important consideration in the choice of jurisdiction for domiciliation and management of funds,[63] and part of the intent of the SVCC is that "VCCs would also be able to avail themselves of Singapore's competitive tax regime."[64]

Labuan and the BVI. Labuan offers the Protected Cell Company (PCC), while the BVI offers the Segregated Portfolio Company (SPC).[65] These structures are similar to the SVCC.

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[58] Id.

[59] Hong Kong Legislative Council Brief: Limited Partnership Fund Bill, s. 5.

[60] SVCCA, s. 1. Per s. 1, the SVCCA came into force when the Minister made the Variable Capital Companies Act 2018 (Commencement) Notification 2020 in the *Gazette*.

[61] Indranee Rajah, "Variable Capital Companies Bill (2018)," available at https://www.mas.gov.sg/news/speeches/2018/Variable-Capital-Companies-Bill-2018 (accessed June 30, 2020).

[62] Id. at 8.

[63] Monetary Authority of Singapore, "Consultation Paper on the Proposed Framework for Singapore Variable Capital Companies," at 2.6 (Mar. 23, 2017), available at http://www.mas.gov.sg/~/media/MAS/News%20and%20Publications/Consultation%20Papers/Consultation%20Paper%20on%20the%20Proposed%20Framework%20for%20SVACC%202.pdf (accessed June 30, 2020).

[64] Rajah, supra note 61, at 11.

[65] The SPC structure is also available in Bermuda and the Cayman Islands.

Conclusion

This article has laid out the key considerations of funds when choosing a host jurisdiction. It has shown that there has been considerable convergence in terms of the tax features of the major host jurisdictions in Asia, with all four jurisdictions offering similar effective tax rates that are close to zero. However, it has also shown that there is still divergence as the four jurisdictions' tax policies do differ in some ways.

This article has also highlighted the importance of the availability of suitable fund structures in host jurisdictions, particularly in light of the increasing emphasis on substance requirements. This has led to most major host jurisdictions in Asia offering corporate structures that facilitate fund structuring. At the moment, Hong Kong, although it does offer some suitable corporate structures, remains the only one of the four jurisdictions in this study that does not offer a segregated portfolio company structure. This may put it at a slight disadvantage as compared to other jurisdictions. In light of the overall trend of convergence in the tax policies of the four jurisdictions, it may not be surprising to see Hong Kong considering offering such a structure in the near future.