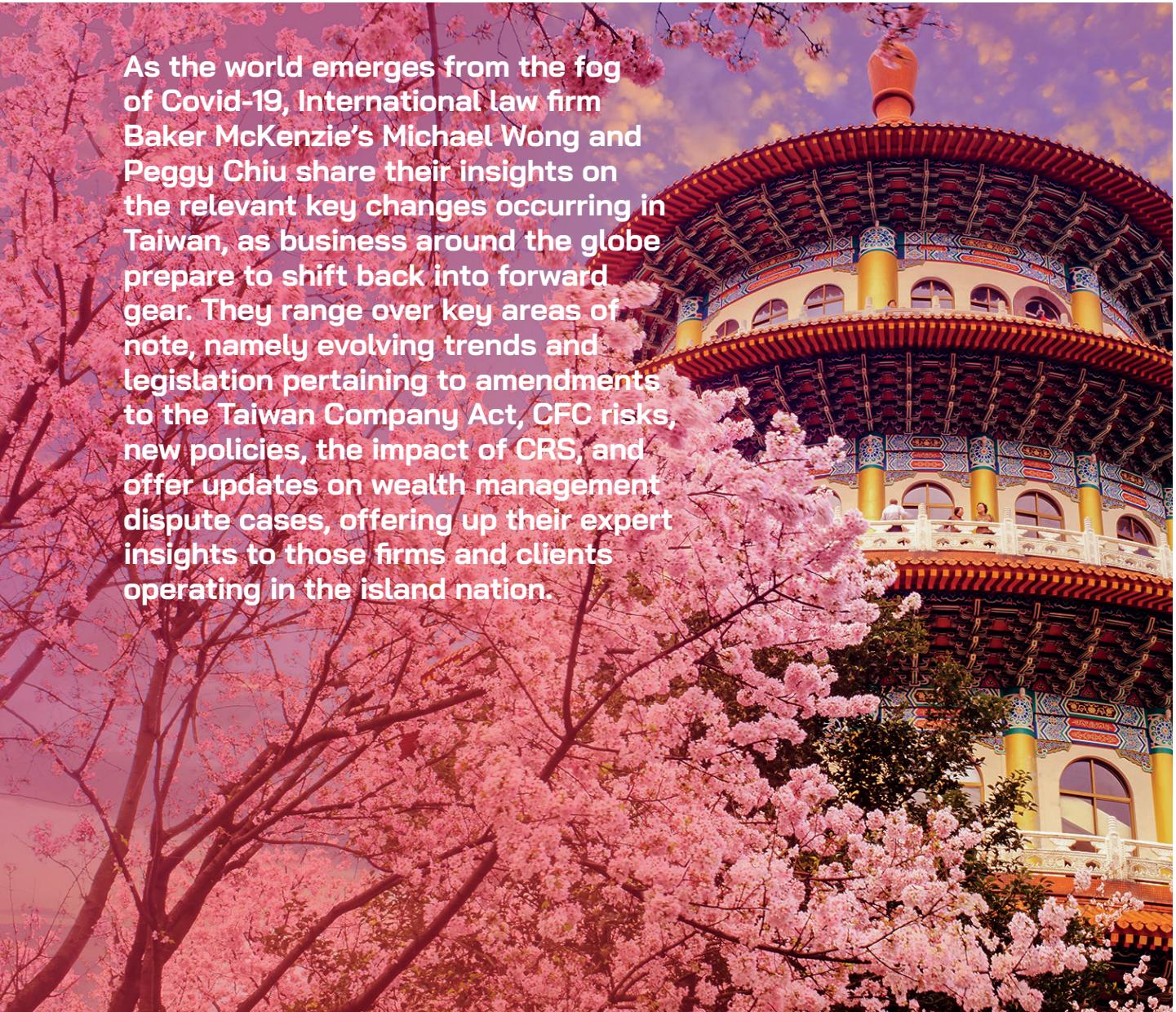


Baker McKenzie's Wong and Chiu Tell All on Taiwan – Tax, Reporting and Wealth Management



As the world emerges from the fog of Covid-19, International law firm Baker McKenzie's Michael Wong and Peggy Chiu share their insights on the relevant key changes occurring in Taiwan, as business around the globe prepare to shift back into forward gear. They range over key areas of note, namely evolving trends and legislation pertaining to amendments to the Taiwan Company Act, CFC risks, new policies, the impact of CRS, and offer updates on wealth management dispute cases, offering up their expert insights to those firms and clients operating in the island nation.

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AMENDMENTS TO TAIWAN COMPANY ACT

The Taiwan Company Act was amended on August 1, 2018. New provisions allow non par-value shares and more flexibility on preferred shares and shareholders' agreements. These provisions may in time create new planning opportunities for the wealth management sector. This is most likely completely unforeseen by the lawmakers, but come about because of several unrelated developments since 2018.

These developments are: (1) the economic substance requirements of tax havens are beginning to make an impact on Taiwan clients as agents ramp up their due diligence inquiries; (2) many wealthy Taiwan families living offshore have returned to seek shelter in Taiwan due to Covid-19 and are starting to think about estate planning; and (3) the Taiwan government is going to allow an offshore banking unit (OBU) account to be opened by Taiwanese companies for credit line purposes at the end of 2020. Currently a Taiwan resident would need to establish an offshore company to open an OBU account to enjoy certain tax benefits.

These unrelated events, taken together, may now encourage a Taiwan client to re-examine the relative pros and cons of an onshore structure versus an offshore structure. This does not mean offshore planning is less attractive, but perhaps there are now fewer incentives to restructure Taiwan situs assets to offshore. There may still be hesitation about repatriating money kept offshore, but the Taiwan government has tried hard to encourage the repatriation of offshore funds by enacting a tax amnesty law in 2019. (See details below.)

What are the amendments?

The relevant amendments to the Company Act are to: (1) lift the restrictions on the par-value of shares of a company limited by shares; (2) allow a flexible preferred share option; and (3) permit shareholders to enter into a shareholders' agreement or a trust to exercise votes.

In the past, private companies might have issued shares with a very low par value, but it had to be



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above zero. The paid-in capital above the par-value is the capital surplus. Now, companies can issue non par-value shares and choose to convert all their existing shares with a par-value into non par-value shares. Such conversion cannot be reversed. Companies who use non par-value shares have to state all the capital as paid-in capital on book (without any surplus being recorded) and the shareholders' rights are calculated based on the number of shares held on a pro-rata basis. We believe that this will make it more flexible for families to re-arrange ownership of a family holding company for estate planning purposes, particularly through a combination of common and preferred shares. It may also allow the transfer of non-bankable assets (e.g., Taiwan real estate) in an estate tax efficient manner by the use of a corporate structure. In addition, wealth owners may now consider putting "succession" documents (such as a non-binding family constitution) into a family company (such as in the by-laws of a holding company or by way of a voting agreement between the shareholders) and thereby legally bind family members.

TAKING POTENTIAL CFC RISKS SERIOUSLY

Taiwan has a controlled foreign corporation (CFC) regime, but such legislation has not come into effect for purposes of personal income tax.

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When will the CFC rules apply to individuals?

The CFC rule was incorporated into Article 43-3 of the Income Tax Act since July 2016 and Article 12-1 of the Income Basic Tax Act since May 2017 (CFC Rules) but has not yet come into effect. The Executive Yuan has the full discretion to determine when the CFC Rules will come into effect, but the fact they have not become effective since 2016/2017 makes them seem a remote risk to many HNWIs in Taiwan. However, this complacency may be short lived. In 2019, the Legislative Yuan passed a tax amnesty law valid from 2019 to 2021 to encourage the repatriation of foreign-held funds back to Taiwan. The Legislative Yuan also passed a resolution declaring that the tax authority should review the CFC Rules again after the tax amnesty legislation has been in effect for a year and report to the Executive Yuan the effective date for its approval.

How do the CFC Rules impact on estate planning?

If the CFC Rules become effective, foreign corporations controlled by Taiwanese may be deemed to be conduits and therefore be looked through for tax purposes. We are not sure if the effective date will be postponed due to the Covid-19 pandemic. However, we recommend that the CFC Rules be seriously considered in the context of estate planning.

NEW TAIWAN POLICIES

Mr Tien-Mu Thomas Huang is the new Financial

Supervisory Commission (FSC) Chairman from May 20, 2020. He continues the previous Chairman Wellington Ku's policy to encourage fund repatriation and onshore wealth management. In addition, due to his special background in the trust area, he wants to promote Trust 2.0, which may promote Taiwan trust structures as a new area. We believe it is too early to evaluate the impact of this, but we believe that, due to the political situation in Hong Kong, low interest rates (and high gift tax exemptions) in the US and possible new FSC policies in the near future, there may be new planning opportunities that should be considered. This is certainly true for funds that are now located in Hong Kong which may migrate back to Taiwan or seek shelter in Singapore, and particularly if there are US beneficiaries involved.

CRS IMPACT

Regulations Governing the Implementation of the Common Standard on Reporting and Due Diligence for Financial Institutions (CRS) came into effect in 2019. These authorize the Ministry of Finance (MOF) to require financial institutions to conduct due diligence on their clients and collect relevant information for tax purposes (Tax Information). Pursuant to existing tax treaties and agreements with other foreign governments, the MOF can further exchange this Tax Information with foreign governments.

Because Taiwan has not been able to join the CRS multilateral network, the Taiwan government has taken a country-by-country approach in the interim. According to MOF, financial institutions in Taiwan have been conducting due diligence on their clients to ascertain whether they are tax resident in Japan or Australia, and MOF will exchange this Tax Information with Japan and Australia in September 2020. The CRS will have significant impact on taxpayers who have foreign bankable assets because MOF will likely work with more foreign governments to obtain more Tax Information in this regard. Based on the Tax Information it receives, MOF may further investigate the source of income earned by Taiwan residents, and taxpayers who have not reported their foreign incomes pursuant to the Alternative Minimum Tax (AMT) regime will be subject to investigation for their tax violations.

The immediate impact of the country-to-country approach will be felt by Taiwan residents who have investments (such as real estate) in Japan and

Australia that produce rental incomes and who further invest that income into bankable assets. Whether any particular income will result in an actual Taiwan tax liability will vary from case to case depending on the overall income of the taxpayer. However, this is likely to lead to other inquiries from the tax office such as the source of funds and records of prior compliance.

WEALTH MANAGEMENT DISPUTE CASES UPDATE

Court disputes involving offshore investment structures

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We have recently come across court cases where disputes have arisen in relation to the control and ownership of a tax haven company that owns an underlying company in Mainland China. Often, the legal title is registered in the name of a nominee or a relative. Now there may be commercial or family reasons for the business to relocate from the Mainland. Where the company holds underlying real estate in Mainland China that has significantly appreciated in value, obvious tax and other issues will arise.

TAIWAN WILLS – ASCERTAINING CAPACITY

Chang Yung-Fa was a very wealthy individual who founded the Evergreen Group, including Evergreen

Marine Corporation which was one of the biggest maritime transportation companies in the world and EVA Air, one of the largest airlines in Taiwan. According to Forbes' list of billionaires in 2008, Chang the 17th wealthiest person in Taiwan with a net worth of USD1.3 billion.

An inheritance battle began between the children of his two families after he passed away in 2016. Chang had two wives and have four children with his first wife (First Family) and one child with his second wife (Second Family). After Chang's passing, the First Family took over the management of the Evergreen Group by corporate action, and the child from the Second Family, Chang Kuo-Wei, was excluded from the management and went on to found StarLux Airlines in 2018.

However, the inheritance battle did not end there. Two years before Chang died, he prepared a will on December 17, 2014 stating that all his savings and shares, as well as the real estate, were to go to Chang Kuo-Wei, the youngest son. The First Family disputed the legality of Chang's will and sued.

In March 2020, the Taiwan District Court ruled in Chang Kuo-Wei's favour. This case might be appealed. According to the Taiwan Taipei District Judgment 2018 Jung-Jia-Ji-Su-Tz No. 18, the court focused on the following two legal issues: did Chang have capacity when he made the will; and did the will comply with the legal requirements under the Taiwan Civil Code?

The court determined that, although the hospital records showed that Chang had some mental problems, they did not result in him having no legal capacity to make a will. Moreover, witnesses testified that Chang was still capable of speaking and writing. Therefore, the court ruled that Chang had the capacity to make the will.

This case reveals how a court enquires into the capacity of a testator and how it weighs the evidence of the testator's medical history and the testimony of witnesses. It is also a reminder that executing a will, while important, is not of itself sufficient, because the testator should also take into consideration the actual ownership of controlled companies and other assets, and whether there is an overall estate plan that can be carried out legally and practically at the end of the day. ■