

# Fiducia by ASIACITI TRUST

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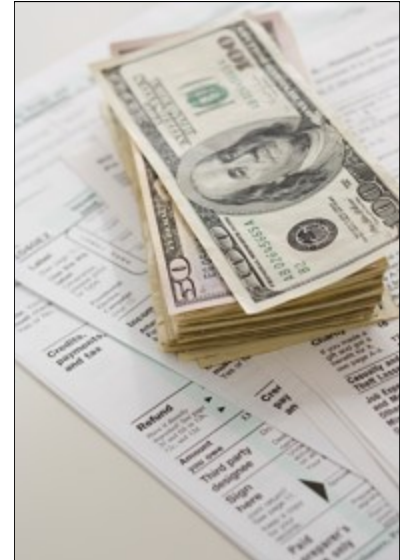
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## Implications of the “Hire” Act of 2010

The Hiring Incentives to Restore Employment Act of 2010 (“the HIRE Act”) was signed into law by President Obama, on 18 March 2010. Although the thrust of the Act is to create new jobs through tax incentives, it also contains provisions which were formerly part of the Foreign Account Tax Compliance Act of 2010. These provisions are intended to offset the projected revenue lost from the incentives in the Act by providing the Internal Revenue Service with “new tools to find and prosecute US individuals that hide assets overseas”.

The provisions of the Act that deal with Foreign Account Tax Compliance will have dramatic effects on most non-US financial institutions as well as trustees who invest through those institutions.



Some of the key provisions of the HIRE Act are as follows:

- A new withholding tax of 30% is imposed on payments to *Foreign Financial Institutions (FFI)* and certain *Non-Financial Foreign Entities* unless the FFI enters into an agreement with the IRS to report information about its US account holders on an annual basis.
- A requirement for FFIs to file certain returns electronically with the IRS.
- New disclosure rules for US persons with respect to *Foreign Financial Assets*.
- New rules applicable to foreign trusts under which (a) a foreign trust will be presumed to have a US beneficiary, (b) the use of trust property by a US beneficiary will be treated as a distribution, (c) minimum reporting requirements are imposed on US owners of foreign trusts, and (d) significant penalties are imposed for failing to comply with reporting requirements with respect to foreign trusts.

*Fiducia by Asiaciti Trust*  
is a quarterly  
publication providing  
industry news and  
updates to our clients  
and professional  
advisors.

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***The “Hire” Act of 2010 (continued)***

**THE NEW WITHHOLDING TAX**

Unless the FFI has entered into an agreement with the IRS to lodge annual reports regarding its US account holders, a US withholding agent must deduct 30% withholding tax from any *Withholding Payment* made to the FFI.

The definition of a FFI is extremely broad and includes not only banks but hedge funds and private equity funds. It may also include privately owned investment vehicles but probably does not include a non-US trustee which acts as a trustee of a discretionary trust where no US person has a vested interest.

A *Withholding Payment* includes:

- Interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations or emoluments from sources in the US.
- Any fixed or determinable annual or periodical gains, profits and income from sources in the US.
- Any gross proceeds from the sale of any property that could produce interest or dividends from sources within the US. The effect of this part of the definition is that, generally speaking, there would be an obligation to withhold 30% of the gross proceeds of sale of US source assets, regardless of cost base.

The new withholding tax will not apply to a FFI which is a *Qualified Foreign Financial Institution* (QFFI). To become a QFFI, the FFI must agree to:

- Obtain such information on each account holder as is necessary to determine which accounts are US-owned accounts.
- Comply with certain due diligence and verification procedures with respect to the identification of US-owned accounts.
- Report annually to the IRS the following information:
  - Name, address and TIN of each US account holder
  - Name, address and TIN of each substantial US-owner of any account holder that is a US owned entity (eg. a foreign trustee)
  - Account balance
  - Account number
  - Gross receipts and gross withdrawals
- Agree to comply with requests from the US Treasury Secretary to supply additional information in relation to a US-owned account when requested.

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## ***The “Hire” Act of 2010 (continued)***

Note that the QFFI regime is in addition to the existing Qualified Intermediary regime. The new withholding tax will also apply to a *Non-Financial Foreign Entity* (NFFE) unless the NFFE provides the US withholding agent with:

- The name, address and TIN of each substantial US owner of the NFFE; or
- A certification that the NFFE does not have a substantial US owner

### **NEW RULES APPLICABLE TO FOREIGN TRUSTS**

There is now a presumption that, where a US person establishes a trust, the trust will have a US beneficiary unless the US person establishing the trust can demonstrate to the satisfaction of the US Treasury Secretary that:

- Under the terms of the trust, no part of the income or corpus of the trust may be paid or accumulated during the taxable year for the benefit of a US person.
- If the trust were terminated during the taxable year, no part of the income or corpus of the trust could be paid to or for the benefit of a US person.

Any uncompensated use of trust property by a US person is treated as a distribution of the fair market value of the use of the property to the US person. For example, if a beneficiary is allowed to live in an apartment rent free, the beneficiary will be treated as having received a distribution equal to the market value of the rent which could have been obtained had the property been rented on an arm’s length basis. Special problems will arise in respect of the use of trust assets such as art collections or other collectible investments.

There is a requirement for a US person who is treated as an owner of any portion of a foreign trust, to provide such information as may be required in relation to the trust, in addition to ensuring that the trust complies with its reporting obligations.

### **EFFECT OF THE ACT**

The effect of this legislation on non-US financial institutions which have US account holders (either directly or through non-US entities which are “owned” by US persons) will be dramatic in terms of compliance costs. It is probable that the number of non-US private banks servicing the US market will diminish having regard to the enormous compliance task that the new reporting requirements will create. Foreign collective investment structures in which US investors hold interests will face similar challenges.

## An Update on Hong Kong Double Tax Agreements

Since 2004 the Government of the Hong Kong SAR has negotiated and concluded a number of Double Tax Agreements ("DTAs") with strategic trading and investment partner countries. In general DTA's apply to provide relief in respect of taxes on income and property derived in the treaty partner countries. In the case of Hong Kong the applicable taxes are profits tax, interest tax, salaries tax and property tax.

The standard DTA defines a 'Permanent Establishment' ('PE') as a fixed place of business, place of management, branch, office, warehouse, workshop, mine, quarry or a building site if lasting over 6 months, or the provision of services in one jurisdiction for more than 180 days. Income derived from an operation deemed to be a PE is taxable in that jurisdiction even if the owner is a resident of the other jurisdiction. For the purposes of a DTA a Hong Kong resident is defined as an individual living in Hong Kong for 180 days or more; companies, trusts and partnerships will be resident if they are managed or controlled from within Hong Kong.



A brief overview of the DTAs that the Hong Kong SAR has signed to date is provided on page 7. A DTA has been successfully negotiated and initialed with Switzerland. The final agreement should be signed and ratified later this year. In addition, broad consensus has been reached on agreements with Austria, France, Hungary, Ireland, Japan and Liechtenstein.

### Use of Hong Kong - Luxembourg DTA for Investment from/to European Union

#### Investments into China from Europe

Dividends received by a Luxembourg company are in principle subject to corporate income tax in Luxembourg. However, Luxembourg domestic tax laws provide that dividends paid by a foreign company are fully exempted from income tax in Luxembourg if (i) the foreign subsidiary is subject to a comparable tax in its jurisdiction of incorporation; and (ii) the Luxembourg parent company has held shares representing at least 10% of the capital of the subsidiary (or shares acquired for an aggregate purchase price of EUR 1,200,000 or its equivalent) for a period of at least 12 months, (under the DTA the requirement to hold for such a period is waived).

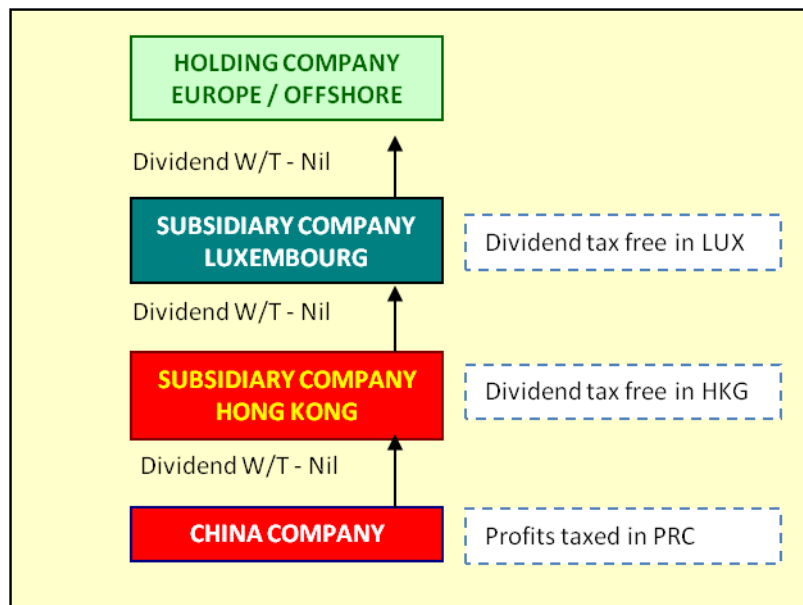
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### ***An Update on Hong Kong Double Tax Agreements (continued)***

Where the foreign company has its residence outside the EU, the Luxembourg tax authorities consider that a foreign corporate income tax is comparable to the Luxembourg income tax to the extent that (i) the tax is not optional; (ii) the nominal tax rate is at least 50% of the Luxembourg corporate income tax rate (as the Luxembourg corporate income tax rate is 21%, the foreign tax rate must not be less than 10.5%); and (iii) the rules and criteria to determine the taxable basis are similar to those applicable under Luxembourg tax law.

When commenting on the DTA the Luxembourg government, indicated that the Hong Kong territorial taxation system should not hinder the application of this tax regime. However, satisfaction of the "place of effective management" test will be a material factor in determining that the subsidiary is a Hong Kong resident for the purposes of the DTA.

It should also be noted that it is not necessary that the Hong Kong subsidiary effectively pay a 10.5% tax in Hong Kong. It is sufficient for it to be subject in principle to such tax.



#### **Luxembourg Entities**

Luxembourg offers a number of regulated and unregulated investment vehicles for tax effective structuring of investments into Europe. All of these entities are entitled to avail of the benefits of the Hong Kong – Luxembourg DTA. The most commonly used entities will be the SOPARFI or the *Société de Gestion de Patrimoine Familial* ('SPF')

### ***An Update on Hong Kong Double Tax Agreements (continued)***

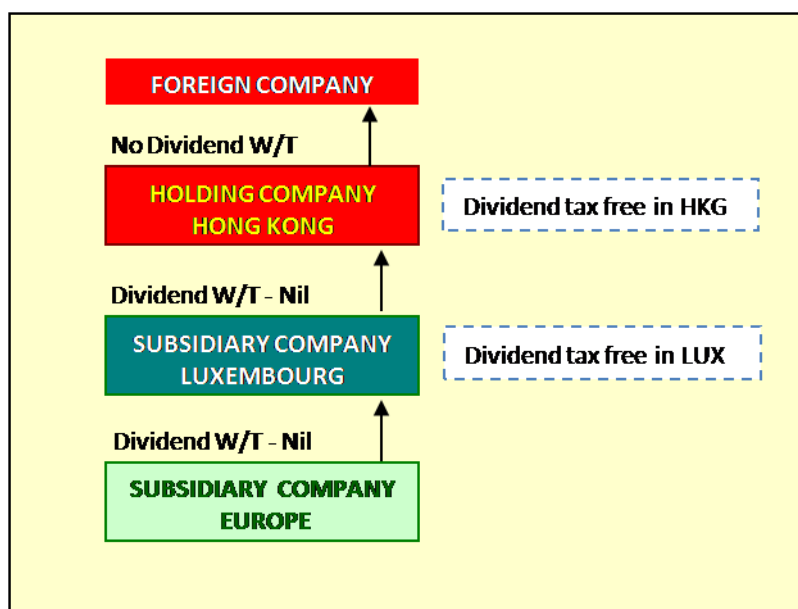
which replaced the popular 1929 holding company. The SPF which is used in private wealth management, must limit its activities to the acquisition, holding, management and disposal of financial assets and must not conduct any other form of commercial activity. The SPF may hold participations in other companies, or voting rights. A SPF can therefore have a subsidiary in Hong Kong but may not be involved in the management of that subsidiary.

Both the SOPARFI and the SPF are tax exempt entities under Luxembourg tax law with the SOPARFI being used for corporate investments and the SPF for private wealth portfolio investment.

#### **Investments into Europe from outside the EU**

As Hong Kong does not impose a tax on dividend income or capital gains, and does not levy a dividend withholding tax, a Hong Kong company is an ideal investment holding vehicle. When combined with an underlying Luxembourg subsidiary company and the application of the DTA, the Hong Kong company has unrivalled attraction as a holding vehicle for investment into Europe.

The combination of Luxembourg participation regime and the European Union parent – subsidiary regime, exempts the Luxembourg company from income tax on dividends received from its subsidiary entities in Europe. The DTA then reduces the Luxembourg dividend withholding tax to 0% when dividends are paid onto the Hong Kong parent company. This is illustrated by the following chart.



Please contact our Hong Kong office at [hongkong@asiacititrust.com](mailto:hongkong@asiacititrust.com) for more details on the above subject.

## Overview of the DTAs the Hong Kong SAR has signed to date

Country	Effective	Withholding taxes levied by Treaty partner		
		Royalties	Interest	Dividends
<b>Belgium</b>	Jan 2004	7 %	10 %	0 % if equity stake ≥ 25% 5 % if equity stake ≥ 10% 10 % all others
<b>Thailand</b>	Sept 2005	5 % copy rights 10 % patents/designs 15 % all others	0 % Government/TEI * 10 % all others	10 %
<b>PRC (China)</b>	Jan 2007	7 %	0 % Government/TEI 7 % all others	5 % if equity stake ≥ 25% 10 % all others
<b>Luxembourg</b>	Jan 2008	3 %	0 %	0 % if equity stake ≥ 10% or EUR1.2 mn investment 10 % all others
<b>Vietnam</b>	Jun 2009	7 % patents/designs 10 % all others	0 % Government & TEI 10 % all others	Currently there is no WHT in Vietnam; 10% will be limit for any future introduction
<b>Brunei</b>	Mar 2010 **	5 %	5 % Bank/Fin.Institut. 10 % all others	0%
<b>Indonesia</b>	Mar 2010 **	5 %	10 %	5 % if equity stake ≥ 25% 10% all others
<b>Netherlands</b>	Mar 2010 **	3 %	0 %	0 % if equity stake ≥ 10% 10% all others

\* Tax Exempt Institution

\*\* signing date; still needs ratification by both countries

### Asiaciti Trust European Seminar Dates

Please be advised of the dates and locations of this year's European Seminar Program:

Zurich, Switzerland:	14 September, 2010
Geneva, Switzerland:	17 September, 2010
Lugano, Switzerland:	22 September, 2010
London, United Kingdom:	27 September, 2010
Luxembourg:	29 September, 2010
Lausanne, Switzerland:	30 September, 2010

Further details on the seminar topics will be included in the next issue of Fiducia and will also be available at [www.asiacititrust.com](http://www.asiacititrust.com)

## About Asiaciti Trust Group

Asiaciti Trust is an independent trustee and fiduciary services business group offering specialist services internationally to both private clients and corporations. Established as a corporate identity in 1978, Asiaciti Trust has its foundations in chartered accountancy practices which date back to 1886. Asiaciti Trust is one of the most recognised and professionally respected names in the international fiduciary services industry.

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