

David Gunson

10 August 2005

Clerk to Bills Committee (Attention Debbie Yau)
Legislative Council
8 Jackson Road
Central
Hong Kong

Dear Madam,

BILLS COMMITTEE ON
REVENUE (PROFITS TAX EXEMPTION FOR OFFSHORE FUNDS) BILL 2005

As promised, here are my written submissions. There are two points, which have been dealt with neither by the Consultation Paper nor the Bill.

TAX AVOIDANCE

- 1.1 Section 61A Inland Revenue Ordinance imposes a general test of tax avoidance. It is a “purpose” test. Motive being irrelevant, what is the “purpose” of a structure or transaction? If the primary purpose is to obtain a tax break, that is tax avoidance and illegal. If not, then not.
- 1.2 The “Arrowtown” tax avoidance stamp duty case FACV No. 4 of 2003 deals with the same concept where a tax law (stamp duty) does not specifically cover the tax avoidance point. Just because one qualifies for a tax break does not mean one automatically gets it. That is especially the case if obtaining the tax break (tax avoidance) is the primary purpose in the first place. That was what “Arrowtown” was all about.
- 1.3 The Bill imposes a particular tax avoidance test on a specific class of business. It does not exclude the tax avoidance laws in 1.1 and 1.2 above. That is a fault and leads to dispute instead of clarity. Does the particular exclude the general?
- 1.4 In other words, is the Bill including or excluding 1.1 and 1.2 tax avoidance concepts? It should do so. At present it does not.

SOURCE OF PROFIT

- 2.1 Rule 5 Inland Revenue Rules (Cap. 112A) specifies a general test of Profits Tax liability for non-resident persons deriving a Hong Kong-source profit.
- 2.2 The Bill specifies a particular profit source specific to a specific class of business. But the Bill does not say if the Rule 5 general test is included or excluded, nor the general case law on source of profit. That is a fault and leads to dispute instead of clarity.
- 2.3 The Bill should specify if Rule 5 and general case law on source of profit is included or excluded from the Bill’s tests of source of profit. At present it does not.

Yours faithfully,