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By fax (2121 0420) and by post

Hon Paul CHAN Mo-po, MH, JP  
Chairman,  
Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009  
Legislative Council  
Hong Kong SAR Government

18 September 2009

Dear Hon Paul Chan,

Comments on the Inland Revenue (Amendment) (No. 3) Bill 2009

We refer to your invitation for submission on the Inland Revenue (Amendment) (No. 3) Bill 2009 ("Bill") and our response is as follows.

PricewaterhouseCoopers believe having a wide tax treaty network is necessary for Hong Kong in maintaining its competitiveness in the global business environment. The Bill represents an important and significant step taken by the Hong Kong SAR Government towards implementing the internationally-accepted level of transparency and full disclosure of tax information. We welcome and commend the intended legislative changes to the existing Inland Revenue Ordinance removing the obstacles in the adoption of the more liberal 2004 OECD version of Exchange of Information article when concluding a Comprehensive Double Tax Agreement ("CDTA") by the HKSAR Government with other jurisdictions. This will enable the HKSAR Government to expedite the current and future CDTA negotiations.

Technically, the proposed amendments to the existing Inland Revenue Ordinance would empower the administration to collect the necessary information for the purpose of exchange of information under a CDTA. There are always concerns in the business community over the scope, privacy and confidentiality of the tax information exchanged. We are happy to see these concerns are addressed by the three levels of safeguards in the Legislative Council Brief dated 24 June 2009 ("Brief") in principle. While these safeguards should provide measures in ensuring the tax information exchanged is not put into improper use by other jurisdictions and in protecting the rights of taxpayers, especially the right to receiving notification and verifying the information that is going to be exchanged, we, however, have the following comments on the safeguards and their implementation:

*International Safeguards*

International safeguards listed under paragraph 9 of the Brief will be adopted in individual CDTAs or in "documents of record" in restricting the scope of the information exchanged, safeguarding against fishing expeditions and subsequent abuse of the information obtained through exchange.

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- These safeguards are important in restricting the scope of information exchanged and the use of the information exchanged. We agree it is important to confine the information exchanged to information on taxes covered by the relevant CDTAs as opposed to a wider scope as in the 2004 OECD model.
- Although we understand legally individual CDTAs will be implemented as subsidiary legislation, in order to provide certainty and clarity in making any CDTAs, we recommend, if practically feasible, that these safeguards be codified as part of the legislation (for example as a Schedule to the Inland Revenue Ordinance) or as subsidiary legislation. This codification will form the basis for the HK SAR Government in negotiation of CDTAs in the future.
- "Documents of record" presumably refer to any protocol to a CDTA exchanged between Hong Kong and other jurisdiction. If this is the case, it should be made it clear in the legislation (or subsidiary legislation) mentioned in the bullet point above.
- The above suggested legislation (or subsidiary legislation) should be considered concurrently with the current Bill.

#### *Domestic Safeguards*

Paragraph 10 of the Brief describes the safeguards that will be put in place domestically through subsequent subsidiary legislation. We would like to see these suggested domestic safeguards be enacted at the same time as the Bill so that the details of these domestic safeguards can be considered together with the Bill. Furthermore we would like to see clarifications on the following points in the subsidiary legislations:

- Item (b) of paragraph 10 of the Brief mentions "save in exceptional circumstances .....unduly delay ..... IRD has to notify and provide the person the information that the Department is going to transmit to the requesting party." While we believe it is imperative that the person has the right to be notified, we consider it is necessary to provide the interpretation of the terms "exceptional circumstances" and "unduly delay" in the subsidiary legislations. There should be an independent body, such as the Board of Review, to oversee and to determine whether the circumstances are "exceptional" or will cause "unduly delay" according to the proposed subsidiary legislation (see the next bullet point below).
- It is also important to make it clear the notification should be made prior to the exchange of information. Prior notification should not be made only under the conditions that (1) the requesting state has specified the exceptional circumstances such requirement and (2) consent of by an independent body, such as Board of Review. Please note that the later condition is similar to the consent of the Board of Review in the power of the Commissioner to require taxpayers to provide statement of assets and liabilities under section 51A.
- Item (c) of paragraph 10 of the Brief mentions "the person can verify the accuracy of the information with IRD. If IRD refuses to accept the proposed correction to the information, the person may seek a review by a higher authority (which we propose to be the Financial Secretary), whose decision on the matter shall be final." It should

make it clear that notification to taxpayers on their rights to verify and appeal should be given to them before the exchange of information takes place and provide them with a reasonable time period to exercise their rights. Also, the right to verification and appeal should not be only with respect to the accuracy of the information but also whether such information is complete and is within the scope of exchange under the CDTAs.

- The arbitration on any disagreement of the person should be handled by an independent body instead of Government officials such as Financial Secretary as proposed in the Brief. The Board of Review may well serve such purpose.

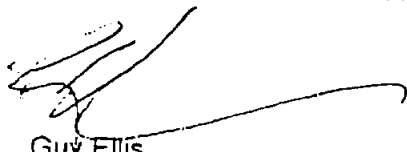
#### *Procedural Safeguards*

The Departmental Interpretation and Practice Note ("DIPN") that is intended to be issued for setting out the procedural safeguards by the Inland Revenue Department will definitely be of assistance to the taxpaying community at the administrative level.

- The procedural safeguards in the proposed DIPN should provide guidelines on the operations of the law. However the six items written in paragraph 11 of the Brief in our view should be part of the law. For example, the requirements that any request for exchange of information should be in writing and should be from the relevant competent authority of the requesting state should be incorporated into the law. We recommend incorporating as many of any necessary procedural safeguards as possible into the law.
- Nevertheless there should be a DIPN that provides practical guidelines on the procedural matters in ensuring both the international and domestic safeguards will be followed by the HK SAR Government and the rights of the taxpayers are protected.
- We support the issue of a DIPN on those practical guidelines on the legislation and would recommend that there will be a thorough consultation on the DIPN with the taxpaying community before its issuance.

If you have any questions on our submission, please feel free to contact me at [guy.ellis@hk.pwc.com](mailto:guy.ellis@hk.pwc.com) or Mr Fergus Wong, our technical director, at [ferqus.wt.wong@hk.pwc.com](mailto:ferqus.wt.wong@hk.pwc.com)

Yours faithfully,  
For and on behalf of PricewaterhouseCoopers Limited



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