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18 September 2009

Ms Rosalind Ma
Clerk of Bills Committee
Legislative Council Secretariat
3/F., Citibank Tower,
3 Garden Road,
Central

CB(1)2622/08-09(14)

Dear Ms Rosalind,

RE: Submission on the consultation document regarding the Exchange of Information article

CPA Australia welcomes the opportunity to provide comments in response to the invitation to review the Inland Revenue (Amendment)(No 3) Bill 2009. In conjunction with this, we would like to release the findings of a recent tax survey on this proposed amendment to enable the adoption of a more expansive Exchange of Information (Eol) article in its comprehensive double taxation agreements (CDTAs) with other jurisdictions.

The Eol article currently adopted in Hong Kong's CDTA is based on the 1995 version of the Organization for Economic Cooperation and Development (OECD) Model Tax Convention which is more restrictive than the 2004 version now commonly adopted by most countries. Given the increasing international pressure on Hong Kong to adopt a more expansive Eol article in alignment with the international standard, a legislative proposal has been made recently to amend the relevant provisions of the Inland Revenue Ordinance to enable effective exchange of information. In addition, the government has also pledged that additional safeguards will be made to address the concerns over the privacy and confidentiality of tax information.

The tax survey was conducted from 6 August 2009 to 1 September 2009 and a total of 100 responses were received from a sample of CPA Australia members working in finance, accounting and business in Hong Kong. We hope that the HKSAR government will take our survey findings into consideration when finalizing the amendment.

SURVEY FINDINGS

Based on the survey conducted, below are some key findings:

1. Over 80% of the respondents believe that entering into more CDTAs will have a positive impact on Hong Kong's economic growth and competitiveness.
2. In the event of adopting the latest international standard for exchange of information in a CDTA, majority (70%) of the respondents suggested that Hong Kong should enter into CDTAs with the United States, Australia and United Kingdom. Other jurisdictions such as Japan, India, Brazil, Russia, EU, Italy, Canada, Taiwan, Singapore, Korea, etc. were also suggested by the respondents.

3. Nearly 80% said that they have concerns whether Hong Kong is black listed as a tax haven and economic or fiscal sanctions are imposed by other countries as a consequence of not entering into CDTAs.
4. Over 50% said they have enjoyed the tax benefits under CDTAs. Those who have not enjoyed the tax benefits under the CDTAs, 85% of them generally preferred to have tax benefits with the countries that they do business with or render services in.
5. Over 80% believe the EoI can help tax authorities to prevent tax evasion.
6. However, a large proportion (over 85%) of the respondents also said both their organisations and themselves would be concerned over the privacy and confidentiality of tax information exchanged under the expanded EoI.
7. Over 50% believe the additional safeguards pledged by the government are not sufficient to protect a person's right to privacy and confidentiality and prevent "fishing" expeditions. The suggested additional measures include granting more rights to taxpayers relating to the submission process.
8. 77% said they should apply prospectively if CDTAs are entered whereby 23% said they should apply both prospectively and retrospectively.

OUR COMMENTS

As a result of the survey, CPA Australia provides the following comments:

1. The adoption of the 2004 OECD version of an EoI in its existing and proposed future CDTAs in alignment with the international standard should reduce significantly the risks of Hong Kong being labeled as a tax haven and the possible international sanctions resulting from such a label.
2. The proposal should also facilitate Hong Kong's efforts to expand its CDTA network, which would in turn enhance business development between Hong Kong and CDTA partners and contribute positively to the economic development of Hong Kong.
3. The concerns over the privacy and confidentiality of tax information exchanged have to be adequately addressed and include the following measures:
 - a. Taxpayers should have the right to refuse to submit information and make an appeal to an independent party;
 - b. Taxpayers should have the right to object the IRD to abuse the information collected for the purpose specified in the request;
 - c. The IRD can only start collecting information from the taxpayers only if the requests are "necessary" and "foreseeably relevant"
 - d. The IRD must inform the taxpayer before submitting to the other jurisdiction and taxpayer is allowed a period to object.

4. We also recommend that references can be made from Australia's Tax Information Exchange Agreements (TIEAs) such as the agreement negotiated with Bermuda in late 2005. (Please refer to Appendix – Agreement between the Government of Australia and the Government of Bermuda on the exchange of information with respect to taxes.)

CPA Australia is one of the world's largest professional accounting bodies. Membership of the organisation currently stands at 122,000, of which more than 25,000 are based in Hong Kong, Singapore and Malaysia. The Hong Kong China Division has more than 11,000 members. For the past 50 years, our members have played an important role in enhancing professional, educational, business and trade opportunities between Hong Kong, Mainland China and Australia.

We would be pleased to address any questions you may have from our survey findings and comments above. Meanwhile, if you require any further information, please contact Ms Deborah Leung, Director, CPA Australia Hong Kong China Division at 2202-2732 or fax to 2832-9167 or email to deborah.leung@cpaaustralia.com.au.

A copy of this submission will also be sent to Mr John Tsang, Financial Secretary and Prof KC Chan, Secretary for Financial Services and the Treasury Bureau, for reference.

Yours sincerely,



Loretta Shuen FCPA (Aust.)
President
CPA AUSTRALIA – HONG KONG CHINA DIVISION

Encl.

1. Full Report of "Hong Kong Exchange of Tax Information Survey"
2. Questionnaire of the Survey

cc. Hon Paul CHAN, MH, JP, Chairman of the Bills Committee

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA

AND

THE GOVERNMENT OF BERMUDA [AS AUTHORISED BY]
THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND

ON

THE EXCHANGE OF INFORMATION WITH RESPECT TO TAXES

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF BERMUDA [AS AUTHORISED BY] THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ON THE EXCHANGE OF INFORMATION WITH RESPECT TO TAXES

The Government of Australia and the Government of Bermuda (as authorised by) the Government of the United Kingdom of Great Britain and Northern Ireland,

Desiring to facilitate the exchange of information with respect to taxes,

Have agreed as follows:

**ARTICLE 1
OBJECT AND SCOPE OF THE AGREEMENT**

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8.

**ARTICLE 2
JURISDICTION**

A Requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

**ARTICLE 3
TAXES COVERED**

1. The existing taxes which are the subject of this Agreement are:

- (a) in Australia, taxes of every kind and description imposed under federal laws administered by the Commissioner of Taxation; and
- (b) in Bermuda, taxes of every kind and description.

2. This Agreement shall apply to any identical or substantially similar taxes imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The Agreement shall also apply to such other taxes as may be agreed in an exchange of letters between the Contracting Parties. The competent authorities of the Contracting Parties shall notify each other of

any substantial changes to the taxation and related information gathering measures covered by this Agreement within a reasonable time.

3. The Agreement shall not apply to taxes imposed by any states, municipalities, or other political sub-divisions, or possessions of a Contracting Party.

ARTICLE 4 DEFINITIONS

1. For the purposes of this Agreement, unless otherwise defined:

- (a) "Applicant Party" means the Contracting Party requesting information;
- (b) "Australia", when used in a geographical sense, excludes all external territories other than:
 - (i) the Territory of Norfolk Island;
 - (ii) the Territory of Christmas Island;
 - (iii) the Territory of Cocos (Keeling) Islands;
 - (iv) the Territory of Ashmore and Cartier Islands;
 - (v) the Territory of Heard Island and McDonald Islands; and
 - (vi) the Coral Sea Islands Territory.

and includes any area adjacent to the territorial limits of Australia (including the Territories specified in this subparagraph) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploration for or exploitation of any of the natural resources of the seabed and subsoil of the continental shelf;

- (c) "Bermuda" means the Islands of Bermuda;
- (d) "collective investment fund or scheme" means any pooled investment vehicle, irrespective of legal form. The term "public collective investment fund or scheme" means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed "by the public" if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;
- (e) "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;
- (f) "competent authority" means in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner and, in the case of Bermuda, the Minister of Finance or an authorised representative of the Minister;

- (g) "Contracting Party" means Australia or Bermuda as the context requires;
- (h) "information" means any fact, statement or record in any form whatever;
- (i) "information gathering measures" means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information;
- (j) "national" means:
 - (i) in the case of Australia, an Australian citizen or an individual not possessing citizenship who has been granted permanent residency status; and any company deriving its status as such from the law in force in Australia; and
 - (ii) in the case of Bermuda, any legal person, partnership, company, trust, state, association or other entity deriving its status as such from the laws in force in Bermuda;
- (k) "person" includes an individual, a company and any other body of persons;
- (l) "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company;
- (m) "publicly traded company" means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold "by the public" if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;
- (n) "recognized stock exchange" means any stock exchange agreed upon by the competent authorities of the Contracting Parties;
- (o) "Requested Party" means the Contracting Party requested to provide information;
- (p) "resident" means:
 - (i) in the case of Australia, a person who is a resident of Australia for the purposes of Australian tax; and
 - (ii) in the case of Bermuda, an individual who has the status of a legal resident of Bermuda; and a company, partnership, trust or association created under the laws of Bermuda;
- (q) "serious tax evasion" means willfully, with dishonest intent to defraud the public revenue, evading or attempting to evade any tax liability where an affirmative act or omission constituting an evasion or attempted evasion has occurred. It also includes intentionally obstructing, hindering, intimidating or resisting public officials. The tax offence must be of a serious nature. The tax liability must be of a significant or substantial amount, either as an absolute amount or in relation to an annual tax liability, and the conduct involved must either constitute a systematic effort or pattern of activity designed or tending to conceal pertinent facts from or provide inaccurate facts to the tax authorities of either Party, or constitute falsifying or concealing identity. The competent authorities shall agree on the scope and extent of matters falling within this definition; and
- (r) "tax" means any tax to which this Agreement applies pursuant to Article 3.

necessity had been duly established, the competent authorities shall consult as to the appropriate form of assistance.

Where the Applicant Party requests information with respect to a matter which does not constitute serious tax evasion, a senior official of its competent authority shall certify that the request is relevant to, and necessary for, the determination of the tax liability of the taxpayer under the laws of the Applicant Party.

5. The competent authority of the Applicant Party shall provide the following information to the competent authority of the Requested Party when making a request for information under this Agreement to demonstrate the relevance of the information sought to the request:

- (a) the identity of the taxpayer under examination or investigation and evidence that such taxpayer is a resident in, or national of, one of the Contracting Parties;
- (b) the nature and type of the information requested, including a description of the specific evidence, information or other assistance sought;
- (c) the tax purposes for which the information is sought and why it is relevant to, and necessary for, the determination of the tax liability of a taxpayer under the laws of the Applicant Party;
- (d) the period of time with respect to which the information is required for the tax purposes;
- (e) reasonable grounds for believing that the information requested is present in the jurisdiction of the Requested Party or is in the possession or control of a person subject to the jurisdiction of the Requested Party and may be relevant to the tax purposes of the request;
- (f) to the extent known, the name and address of any person believed to be in possession or control of the information requested;
- (g) a statement that the request conforms to the law and administrative practice of the Applicant Party and would be obtainable by the Applicant Party under its laws in similar circumstances, both for its own tax purposes and in response to a valid request from the Requested Party under this Agreement;
- (h) a statement that the Applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties;
- (i) where the request is directed at a person, other than the taxpayer, confirmation that only information in such person's possession or control that directly relates to the taxpayer need be provided.

6. Notwithstanding the provisions of Article 10 in particular, the competent authority of the Requested Party shall forward the requested information as promptly as possible to the Applicant Party. To ensure a prompt response, the competent authority of the Requested Party shall:

- (a) confirm receipt of a request in writing to the competent authority of the Applicant Party and shall notify the competent authority of the Applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request; and

2. As regards the application of this Agreement at any time by a Contracting Party, any term not defined herein shall, unless the context otherwise requires, have the meaning that it has at the time under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

ARTICLE 5 EXCHANGE OF INFORMATION UPON REQUEST

1. The competent authority of the Requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the Requested Party if such conduct occurred in the Requested Party.

2. If the information in the possession of the competent authority of the Requested Party is not sufficient to enable it to comply with the request for information, the Requested Party shall use all relevant information gathering measures to provide the Applicant Party with the information requested, notwithstanding that the Requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of the Applicant Party, the competent authority of the Requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4. Each Contracting Party shall ensure that its competent authority, for the purposes of this Agreement, has the authority to obtain and provide upon request:

- (a) information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity;
- (b) information regarding the legal and beneficial ownership of companies, partnerships and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees, beneficiaries and the position in an ownership chain.

This Agreement does not create an obligation on the Contracting Parties to obtain or provide:

- (i) ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties;
- (ii) information that is not present in the Contracting Party;
- (iii) information relating to a period more than six years prior to the tax period under consideration.

If information is requested relating to a person that is not a resident or national in one or other of the Contracting Parties, it also shall be established to the satisfaction of the competent authority of the Requested Party that such information is necessary for the proper administration and enforcement of the fiscal laws of the Applicant Party. Where such

- (b) if the competent authority of the Requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the Applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal.

ARTICLE 6 TAX EXAMINATIONS ABROAD

1. The Requested Party may allow representatives of the competent authority of the Applicant Party to enter the territory of the Requested Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the Requested Party shall notify the competent authority of the Applicant Party of the time and place of the meeting with the individuals concerned.
2. At the request of the competent authority of the Applicant Party, the competent authority of the Requested Party may allow representatives of the competent authority of the Applicant Party to be present at the appropriate part of a tax examination in the Requested Party.
3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Requested Party conducting the examination shall, as soon as possible, notify the competent authority of the Applicant Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the Requested Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Requested Party conducting the examination.

ARTICLE 7 POSSIBILITY OF DECLINING A REQUEST

1. The competent authority of the Requested Party may decline to assist where:
 - (a) the request is not made in conformity with this Agreement;
 - (b) the Applicant Party has not pursued all means available in its own jurisdiction, except where recourse to such means would give rise to disproportionate difficulty;
 - (c) the disclosure of the information requested would be contrary to the public policy of the Requested Party;
 - (d) the request is directed at a person, other than the taxpayer, in respect of information that does not relate specifically to the tax affairs of the taxpayer; or
 - (e) the Applicant Party would not be able to obtain the information (i) under its own laws for purposes of administration or enforcement of its own tax laws or (ii) in response to a valid request from the Requested Party under this Agreement.

2. The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in paragraph 4 of Article 5 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.

3. The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications:

- (a) are communications between a professional legal adviser and a client made in connection with the giving of legal advice to the client;
- (b) are communications between a professional legal adviser and a client, professional legal adviser acting for the client and another person, or the client and another person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
- (c) include items enclosed with or referred to in such communications and made:
 - (i) in connection with the giving of legal advice; or
 - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when the items are in the possession of a person who is entitled to possession of them.

4. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed by the taxpayer.

5. The Requested Party may decline a request for information if the information is requested by the Applicant Party to administer or enforce a provision of the tax law of the Applicant Party, or any requirement connected therewith, which discriminates against a national of the Requested Party as compared with a national of the Applicant Party in the same circumstances.

ARTICLE 8 CONFIDENTIALITY

Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the Requested Party.

**ARTICLE 9
SAFEGUARDS**

The rights and safeguards secured to persons by the laws or administrative practices of the Requested Party remain applicable. The rights and safeguards may not be applied by the Requested Party in a manner that unduly prevents or delays effective exchange of information.

**ARTICLE 10
ADMINISTRATION COSTS OR DIFFICULTIES**

Incidents of costs incurred in providing assistance (including reasonable costs of third parties and external advisors in connection with litigation or otherwise) shall be agreed by the Contracting Parties.

**ARTICLE 11
NO PREJUDICIAL OR RESTRICTIVE MEASURES**

1. Neither of the Contracting Parties shall apply prejudicial or restrictive measures based on harmful tax practices to residents or nationals of either Contracting Party so long as this Agreement is in force and effective.
2. A "prejudicial or restrictive measure based on harmful tax practices" is a measure applied by one Contracting Party to residents or nationals of either Contracting Party on the basis that the other Contracting Party does not engage in effective exchange of information and/or because it lacks transparency in the operation of its laws, regulations or administrative practices, or on the basis of no or nominal taxes and one of the preceding criteria.
3. Without limiting the generality of paragraph 2 the term "prejudicial or restrictive measure" includes the denial of a deduction, credit or exemption, the imposition of a tax, charge or levy, or special reporting requirements.

**ARTICLE 12
MUTUAL AGREEMENT PROCEDURE**

1. The competent authorities of the Contracting Parties shall jointly endeavour to resolve any difficulties or doubts arising as to the interpretation or application of this Agreement.
2. In addition to the endeavours referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually determine the procedures to be used under Articles 5 and 6.
3. The competent authorities of the Contracting Parties may communicate with each other directly for the purposes of this Article.
4. The Contracting Parties may also agree on other forms of dispute resolution.

**ARTICLE 13
ENTRY INTO FORCE**

The Government of Australia and the Government of Bermuda shall notify each other in writing through the diplomatic channel of the completion of their constitutional and legal procedures for the entry into force of this Agreement. This Agreement shall enter into force on the date of the last notification, and shall thereupon have effect:

- (a) from 1 January 2006 with respect to serious tax evasion relating to taxable periods beginning on or after 1 January 2006 or, where there is no taxable period, all charges to tax arising on or after 1 January 2006; and
- (b) from 1 January 2008 with respect to all other matters covered in Article 1 relating to taxable periods beginning on or after 1 January 2008, or where there is no taxable period, all charges to tax arising on or after 1 January 2008.

**ARTICLE 14
TERMINATION**

1. Either Contracting Party may terminate the Agreement by serving a notice of termination by letter to the competent authority of the other Contracting Party.
2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Contracting Party.
3. A Contracting Party shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

Done at Washington on the

day of November two thousand and five

**For the Government of
Australia**

**For the Government of
Bermuda** [as authorised by] the Government
of the United Kingdom of Great Britain and
Northern Ireland