



International Chamber of Commerce - Hong Kong, China 國際商會 - 中國香港區會

The world business organization

By Email : yhcheung@legco.gov.hk and by Hand

1 September 2009

The Hon Paul Chan Mo-po, MH, JP
 Chairman of the Bills Committee on
 Inland Revenue (Amendment) (No. 3) Bill 2009
 Legislative Council Secretariat
 Legislative Council Building
 8 Jackson Road
 Central
 Hong Kong

Dear Mr. Chan,

Inland Revenue (Amendment) (No. 3) Bill 2009

Thank you for your invitation to present our views on the above.

2. We appreciate the trend to enter into double taxation agreements with other tax jurisdictions by Hong Kong. A pre-condition to this it seems, is the protocol for exchange of information in spirit with OECD 2004 article on exchange of information. To our understanding, the Bill seeks to amend the Ordinance so that the provisions of the OECD 2004 article may be put into effect.
3. It is a fact that tax regimes in different countries differ, but the cost and benefit of entering into double taxation agreements have to be kept in balance, and to take into account the conditions of the local economy.

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4. While extending the breadth and depth of exchange of information, Hong Kong as an international business centre, should ensure that:
- a) the investor's legitimate interest is safeguarded,
 - b) individual privacy and confidentiality should be respected,
 - c) the provision of exchange of information should not be arbitrary or abused;
and
 - d) there should be a review mechanism for any agreement entered into.

5. We have noted the safeguards in the Brief, but we should like to draw your attention to the following issues which should be addressed:

- i) The Bill seems to provide more power to the Administration than what the OECD 2004 Exchange of Information article requires. Clause 3(2) contains the phrase "despite anything in any enactment." By itself, it seems to mean the proposed Section 49(1A) shall override either laws or ordinances, eg. the Bill of Rights Ordinance. Paragraph 3 of the OECD article states

"In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting Party state the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State,
- (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State";



It is acknowledged that the same phrase already appears in Section 49(1). It should be noted however that the ambit of OECD2004 article is much broader than OECD 1995 article for which Section 49(1) was apparently written into the Ordinance. If the Administration should identify any provision in any other ordinance which is inconsistent to observing OECD 2004 article, it can always put the issue before the LegCo to seek an amendment to that particular ordinance. For these reasons too the current Section 49 (1) should be reviewed, given that the Administration is proposing to amend that Section at the same time.

- ii) Paragraph 10(a) of the LegCo Brief states that a directorate officer of IRD can decide to accede to an exchange of information request.

It is proposed that the authority should rest with an Assistant Commissioner of Inland Revenue or above. Reference may be made of Section 61A of the IRO.

- iii) Paragraph 10(b) of the LegCo Brief makes reference to "exceptional circumstances" under which IRD would not have to notify and provide the person concerned the information that IRD is going to transmit to the requesting party.

It is proposed that the features of such circumstances be set out more specifically. Indeed, the IRD should notify in the first instance the person in question the request from an overseas tax jurisdiction on receipt of such a request.

- iv) Paragraph 10(c) of the LegCo Brief states that the person concerned can verify the accuracy of the information with IRD, and if IRD refuses to accept his proposed correction, he may seek a review by a higher authority whose decision shall be final.



It is proposed that such a review should be conducted by a panel set up similar to the Board of Review for the purposes of the IRD, instead of the Financial Secretary proposed by the Administration. Moreover, it is assumed that the decision of the panel may still be subject to judicial review.

- v) Paragraph 11(c) of the LegCo Brief refers to the means available to the requesting party to obtain information that would give rise to "disproportionate difficulties".

It is proposed that these difficulties should be illustrated.

- vi) With reference to Clause 5 of Section 5 1(4AA), it should be clarified if the information IRD collated for or transmitted to the requesting party will also be adopted or transplanted for use in the administration of tax within Hong Kong's tax regime.
- vii) It should be confirmed that the contents of the OECD 2004 article and the subsequent enactment of the Bill do not affect the legal privilege of a person in the relationship with his lawyer.
- viii) It is proposed that the Bill if enacted will have no retrospective effect, ie. it does not apply to transactions or actions of any person before the enactment date of the Bill.
- ix) It should be clarified that the current seven years' limitation of action will be applicable in respect of the requirement of the Bill.
- x) Paragraph 10 of the LegCo Brief says that "subsequent to the introduction of this Bill, we will proceed to propose a set of rules under Section 49(b) of IRO...".



As these rules are material to the purpose and substance of the Bill, it is proposed that LegCo and parties being consulted on this Bill should consider the Bill together with these draft rules during the second reading stage of the Bill.

- xi) To evaluate the operation of Comprehensive Double Taxation agreements, and in particular the part on exchange of information, it is proposed that the Administration should provide the LegCo a regular report on the implementation of such agreements.
- xii) While these agreements seek to avoid double taxation, it is not clear if there is any provision for the avoidance of double penalty.

Yours sincerely,

A handwritten signature in black ink, which appears to read 'C. Lewis', is positioned above the printed name.

Christopher Lewis

Secretary