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11 September 2009

By fax 2121 0420 and post

Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009  
 Legislative Council  
 Legislative Council Building  
 8 Jackson Road  
 Hong Kong

Attention: Ms Amy Lee

Dear Sirs

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

In reply to your letter dated 20 July 2009, the Hong Kong Association of Banks (HKAB) would like to submit written comments on the Inland Revenue (Amendment) (No. 3) Bill 2009 (the Bill) on behalf of its members.

HKAB wishes to reiterate its support for Hong Kong in adopting the Exchange of Information (EoI) arrangement as contained in the OECD Model Tax Convention (2004 version) in a comprehensive avoidance of double taxation agreement (CDTA) in order to secure material benefits for Hong Kong. To this end, HKAB is agreeable to the Administration's legislative proposal of amending the Inland Revenue Ordinance to align Hong Kong's EoI arrangement with the international standard. HKAB has no comments on the detailed provisions in the Bill which is drafted generically to cater for future developments in EoI arrangements.

The key opportunity to protect Hong Kong's interest is during negotiations of specific CDTAs. When negotiating specific CDTAs following the enactment of the amendment legislation, HKAB urges the Government to consider the specific wordings / provisions suggested in its submission to the Financial Services and the Treasury Bureau dated 12 September 2008 (see copy attached) to avoid unintended 'expansion' of the EOI beyond that contemplated in the 2004 version.

Yours faithfully

Jennifer Cheung  
 Secretary

Enc.

*Chairman* The Hongkong and Shanghai Banking Corporation Ltd  
*Vice Chairman* Standard Chartered Bank (Hong Kong) Ltd  
 Bank of China (Hong Kong) Ltd  
*Secretary* Jennifer Cheung

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Incorporated by Ordinance, Cap. 364  
 根據條例第364章成立



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12 September 2008

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By Post

Revenue Division  
 Financial Services and the Treasury Bureau (Treasury Branch)  
 4/F., Main Wing, Central Government Offices  
 Lower Albert Road, Central  
 Hong Kong

Dear Sirs

**Liberalisation of Exchange of Information Article for  
 Comprehensive Double Taxation Agreements (July 2008)**

We are grateful for the opportunity to provide comments to the Hong Kong Government in further considering whether Hong Kong should agree to adopt Article 26 of the OECD Model Tax Convention (2004 version) set out in Annex B of the above consultation paper in its future Comprehensive Double Taxation Agreements (CDTAs) with other jurisdictions.

**General**

We continue, in principle, to be supportive of Hong Kong agreeing to adopt Article 26 of the 2004 OECD version where, in negotiation, this proves necessary in order to secure material benefits for Hong Kong. Given the concerns over the adoption of a more liberal exchange of information (EoI) arrangement as set out in paragraphs 11 to 13 in the consultation paper, including the erosion of confidentiality of taxpayer's information which we share, we consider it important that even if our tax legislation is amended to allow EoI without a domestic tax interest, the expanded EoI provision need not apply automatically to Hong Kong's existing CDTAs or to new CDTAs with treaty partners who do not require it. This necessitates flexibility be incorporated to meet the different requirements of CDTAs.

**Specific comments**

We would also urge the Government to consider very carefully the specific provisions of Article 26 and their potential implications for Hong Kong. After having taken into account the commentary of OECD on Article 26 (June 2004 update), we have the following specific comments on the text of Article 26:

Clause 1 – While 'fishing expedition' request is excluded from the purview of Article 26, (see paragraph 5 of the OECD commentary), during specific tax treaty negotiations, we support the word 'necessary' be used instead of 'foreseeably relevant' to avoid any doubts in the interpretation of this article. Furthermore, any

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request for information should pertain to taxes arising from, ideally, the year of the tax treaty coming into effect.

Clause 2 – Paragraph 12.2 of the OECD commentary states that the information received by a contracting state may not be disclosed to a third country unless there is an express provision in the bilateral treaty between the contracting states allowing such disclosure. We suggest that during specific tax treaty negotiations, the Hong Kong Government should insist on an explicit clarification that the treaty partner would not share the information which it may receive with another country with whom it may have information sharing obligations. This would ensure that Hong Kong does not end up indirectly sharing the information with a non-treaty country.

Clause 5 – While clause 3(a) of Article 26 prohibits exchange of information which is contrary to the laws of the requested treaty partner, clause 5 effectively overrides laws relating to banking secrecy / client confidentiality and casts an obligation to supply such information. We also note from paragraphs 22 to 26 of the OECD commentary that Austria, Switzerland, Belgium and Luxembourg have different degrees of reservation on clause 5. We would suggest that Hong Kong should also insist on excluding clause 5. Where any specific tax treaty negotiation proves necessary to include clause 5, however, its operation should be restricted to cases where the request for information is within the framework of a criminal investigation carried on in the requesting state in relation to tax fraud which leads to imprisonment.

#### Way forward

Paragraph 14 of the consultation paper states that before Hong Kong can adopt the 2004 version of the EoI article, the Inland Revenue Ordinance (IRO) needs to be amended to expand the information-seeking powers of the IRD where it has no domestic tax interest in it. Since this would represent a significant change, we trust that the Government will allow sufficient time for comments on the draft amendment legislation. In this regard, given the legal, technical and tax intricacies surrounding any request by treaty partner for information, we believe it is important that:

- (i) the IRD is appropriately resourced to administer the revised regime in ensuring that the provision of information to a treaty partner is within the scope of the IRO and the provisions of the CDTA signed, and
- (ii) appropriate legal process is legislated especially where such information is requested from a third party under clause 5 of Article 26, including a process for the Board of Review's consent before the IRD can serve a notice to require a person to furnish the information requested by a treaty partner.

Yours faithfully

  
Eva Wong  
Secretary