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September 23, 2009

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**Submission to the Legislative Committee by the Hong Kong Trustees' Association on the draft
Inland Revenue (Amendment) (No. 3) Bill 2009**

The Hong Kong Trustees' Association represents both corporate and private trustees in Hong Kong. On behalf of our members, we wish to comment on the proposed amendments to the current tax legislation in Hong Kong as set out in the Inland Revenue (Amendment) (No. 3) Bill 2009 ('HK Bill'). We understand that the purpose of these amendments is to facilitate compliance with the exchange of information ('EOI') provisions to be introduced into the tax treaties which Hong Kong has already entered into and the new comprehensive double taxation agreements that Hong Kong will enter into in the future ('CDTA').

Reference is made in this note to Legislative Council Brief (File Ref: FIN CR 12/2041/46) (the 'Brief') produced by The Financial Services and the Treasury Bureau ('FSTB') on 24 June 2009 and the Paper for the House Committee Meeting on 10 July 2009 (the 'Paper') produced by the Legal Service Division of Legislative Council ('LegCo') on 8 July 2009.

We have sighted, and agree with, the views of, and position taken by, STEP Hong Kong in their submission on this subject matter. Essentially:-

1. **Judicial Process**

1.1 We note that the HK Bill proposes no judicial safeguards to the EOI. According to the LegCo Brief, prudent safeguards will be introduced by subsidiary legislation to protect an individual's right to privacy and confidentiality as summarised below:

(a) **Restrictions in terms of scope**

- Information will only be conducted on a case-specific basis, in response to legitimate requests. There will be no "wholesale exchange" of information.
- Only information on taxes covered by the CDTA will be exchanged.
- The requesting party must satisfy the IRD that the information requested is 'necessary' or 'foreseeably relevant'.

(b) **Restrictions in terms of usage**

- The requesting party must treat the information as secret information.
- The requesting party must not share the information with a third party (including a third jurisdiction) regardless of domestic disclosure laws.
- The requesting party must only use the information provided for the purposes specified in the request.

(c) **Restrictions imposed by domestic laws of the requesting party**

- The requested party is not obliged to supply information that they could not have under its own laws.

(d) **Domestic Safeguards**

A series of domestic safeguards will be introduced through subsidiary legislation. A set of safeguards will be set out under Section 49(6):

- The decision on whether to consent to an EOI request has to be made by a directorate officer of the IRD.
- In turn the IRD has to notify the person about whom the information is being sought (i.e. the impacted person) that is to be transmitted and provide such information to them.
- The impacted person can verify the accuracy of the information with the IRD, and if the IRD refuses to accept the proposed correction then the

person can appeal to a higher authority (proposed to be the Financial Secretary), whose decision shall be final.

IRD will issue a 'Departmental Interpretation and Practice Note' setting out requirements that the requesting party should:

- Be the competent authority of the requesting state;
- Make the EOI request in writing;
- Confirm that it has pursued all means available in its own territory to obtain the information;
- Confirm that the request is in conformity with the laws and administrative practices of the requesting party; and that the requesting party could obtain the information if it were within its own jurisdiction;
- State grounds for believing that the information is in Hong Kong, or in the possession of a person in Hong Kong; and
- Provide specified background information, and reasons for the request.

It is difficult to comment on the proposals when no draft subsidiary legislation has been provided at this stage. It is also worth noting that a DIPN issued by the IRD is not legally binding.

We understand that the domestic safeguards to notify the impacted person, as set out in (d) above, only applies to persons residing in Hong Kong and does not extend to such persons outside of Hong Kong.

1.2 The HK Bill proposes to implement wide enabling legislation with detailed matters and procedures being dealt with by the Administration by subsidiary legislation and IRD practice statements that may not be subject to the same public consultation. An individual's right to privacy and confidentiality is an important area of international law and ought to be protected by statute. We propose that the protection of confidentiality be enshrined in primary legislation.

1.3 Whilst it would seem that there will be a process implemented by which an impacted person will be notified of an EOI request in relation to their information and will be able to verify and correct information to be provided under the EOI process, it is not clear that this will extend to judicial supervision of the bona fides of the EOI request and the manner of implementation more generally. In this respect the proposed process incorporates less checks and balances than may be contemplated, particularly as Hong Kong does not currently have legislation protecting confidential information.

- 1.4 We propose that Hong Kong have a non-official body, i.e. a judicial or, at least a quasi-judicial body, to supervise EOI requests. It is important to ensure that proper checks and balances are in place and that these checks and balances are properly recorded before Hong Kong imports foreign tax systems so that people know what is going on. This is important for Hong Kong's territorial integrity. Hong Kong will also be at risk of losing customers to other jurisdictions where stronger safeguards for protecting confidential information have been put in place because of the lack of confidence and transparency in the non-judicial process that is currently proposed under the HK Bill.
- 1.5 Confidential information in a trustee-beneficiary or banker-client relationship should be protected. Whilst Hong Kong does not currently have the legislation to protect this information, duties of confidentiality imposed by common law apply even without any statutory provisions. Information that is subject to such duties of confidentiality should be protected and it should make no difference whether this information is protected by statute or common law. It is important that investors, settlors and beneficiaries know that duties of confidentiality will continue to exist and be protected by judicial checks. It is also important that trustees, banks and other members of the financial community know that proper judicial procedures are in place to monitor exceptions to their own duties of confidentiality.

2. Legal professional privilege

- 2.1 The HK Bill has no additional provisions dealing with the safeguard of information that is subject to legal privilege. There is existing provision in section 51(4A) of the IRO to protect privileged information, which will apply to the powers of the IRD as expanded by the HK Bill. It should be noted that section 39A(2) of the Legal Practitioners Ordinance ('LPO') extends solicitor-client privilege to a 'foreign lawyer' and his client to the same extent as it exists between a Hong Kong solicitor and his client. However for this purpose a 'foreign lawyer' is a lawyer who has registered as such as permitted by section 39A(1) of the LPO. Therefore privilege is not extended under this legislation to a foreign lawyer who is not so registered. It follows that there is cause for concern that materials held in Hong Kong that represent legal advice of persons other than Hong Kong solicitors or registered foreign lawyers may not qualify for express privilege under the IRO for the purposes of collection of information for EOI purposes.
- 2.2 It is important that consideration is given to the extension of legal professional privilege to cover international advice.

3. Notification

Consideration should also be given to the potentially harmful consequences of Hong Kong discriminating against foreign business by excluding any obligation to inform an impacted foreign

person of an EOI request for their confidential information. This may impact the perception of Hong Kong as an international financial centre for foreign investors.

We would be pleased to engage in further discussions with you on our submissions.

Yours faithfully

HK Trustees' Association

Executive Committee

Hong Kong Trustees' Association