



HONG KONG BAR ASSOCIATION

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25 September 2009

Ms Amy Lee
Clerks to the Bills Committee
Legislative Council
8 Jackson Road
Hong Kong

CB(1)2682/08-09(06)

Dear Ms Lee,

Re: Inland Revenue (Amendment) (No 3) Bill 2009

I refer to your letter dated 20 July 2009.

The Hong Kong Bar Association commented on the proposals, now contained in the captioned Bill, in a letter dated 22 September 2008 to the Administration. A copy of that letter is enclosed herewith for your reference.

I note that the Bar's comments have not been taken up by the draftsman of the Bill. The Bar maintains its comments and asks the Bills Committee to consider them in its consideration and scrutiny of the Bill.

The Bar will not be sending any representatives to the meeting on 8 October 2009.

Yours sincerely,

Russell Coleman, S.C.
Chairman

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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Financial Services & the Treasury Bureau
The Treasury Branch
Central Government Offices,
Lower Albert Road,
Hong Kong
Attn.: Mr. Kenneth Cheng
Your Ref.: FIN CR 10/2041/46

By Fax (2530 5921)
& By Hand

22 September 2008

Dear Sirs,

Re: Liberalisation of Exchange of Information Article for Comprehensive Double Taxation Agreements

Thank you for your letter dated 28 July 2008 in respect of the captioned matter.

The Bar's position on this matter can be summarized as follows:

1. Under the 2004 version of the OECD Exchange of Information Article ("EOI Article"), a contracting state is required to obtain requested information even if the contracting state in question does not need that information for her own tax purposes.
2. This requirement, which did not exist in the 1995 version of the EOI Article, is repugnant to principle 1 ("DPP1" of the data protection principles set out in Schedule 1 to the Personal Data (Privacy) Ordinance

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郭榮聲

(Cap. 486) ("PD(P)O") insofar as the relevant information relates to living individuals (though not in respect of information involving non-living individuals or corporations, etc. to which the PD(P)O does not apply).

3. Under DPP1, personal data shall not be collected unless the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data. The assessment of tax levied in a place outside the Hong Kong SAR is not a function or activity of the Inland Revenue Department ("IRD"). This cannot be got around by saying that the IRD is not going to "use" the data, since the expression "use" is defined in the PD(P)O to include "disclose" and "transfer". Thus, any collection of information for this purpose by the IRD would not be directly related to its function or activities.
4. We appreciate that DPP1 or even provisions in the PD(P)O can be amended if the Legislature thinks fit to do so. In other words, we accept that if there is good reason to adopt the 2004 version of the EoI Article, the issue of repugnancy summarized above can be dealt with by appropriate legislative amendments.
5. The question therefore boils down to whether a sufficient case has been made out for adopting the 2004 version of the EoI Article and thus justifying the necessary legislative amendments. This question is not purely a question of law, but involved political, economical and other policy considerations.
6. From the legal policy point of view, we do not see a sufficient case has been made out to adopt the 2004 version of the EoI Article.
7. We have considered the arguments for and against liberalisation of EoI cogently set out in paragraphs 9 to 13 inclusive of the note attached to your letter under reply. We certainly see the force of the argument that Hong Kong should not be seen to be lagging behind the international trend. We also see the benefit that may be brought about by having more comprehensive double taxation agreements ("CDTs").
8. However, looking at the matter in the round, we do not think the arguments in favour of liberalization are strong enough to overwhelm the arguments against liberalization of EoI. Amongst others, it is important to note that there is no guarantee that other jurisdictions would agree to

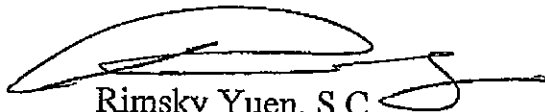
enter into CDTs with the Hong Kong SAR just because we agree to adopt a more liberal EoI Article. Besides, the liberalisation of EoI would compromise the confidentiality of taxpayers' information and thus may undermine investors' confidence in Hong Kong, which will lead to a deterioration of the competitiveness of the Hong Kong SAR. Last but not least, it is highly pertinent to note that our taxation system is territorial-based.

9. These considerations, as well as the potential erosion of personal privacy (which is a fundamental human right that should not be let go without a good and legitimate reason), lead us to the view that no good reason has yet been made out for adopting the 2004 version.

I trust the above have explained out position sufficiently. Should your Bureau have any other queries, we would be obliged to assist further.

Best Regards.

Yours sincerely,



Rinsky Yuen, S.C.
Chairman