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

Your ref CB1/BC/10/08

Our ref AAM/GL

CB(1)260/09-10(05)

2 November 2009

Dear Mr Chan

Bills Committee on Inland Revenue (Amendment)(No. 3) Bill 2009 (“the Bill”)

Thank you for your letter of 21 October 2009 inviting KPMG’s views on the following documents relating to the Bill:-

- (a) Outline of the proposed safeguards to be covered by the Inland Revenue (Disclosure of Information) Rules (“the Outline”); and
- (b) Departmental Interpretation and Practice Notes (“DIPN”) - Implementation Details of Exchange of Information Provisions under Comprehensive Double Taxation Agreements (Extract of the part on “Administrative Guidelines”).

At the outset, we would like to express our agreement to the prudent safeguards which are proposed to put in place to protect taxpayers’ right to privacy and confidentiality of information exchanged. Specifically, we note that the Administration will include in the Rules procedures for notifying taxpayers of any disclosure request made by an overseas government and also allowing taxpayers to request amendments to the information to be exchanged. These measures are best practice for information exchange which is not currently widely adopted internationally.

By adopting these safeguard measures as currently proposed, we believe that they not only serve to allay concerns about Hong Kong adopting the latest Exchange of Information standard, but also means that Hong Kong is adopting the best practice on protecting taxpayers’ right.

Inland Revenue (Disclosure of Information) Rules (“the Rules”)

We would like to provide our comments on certain aspects of the Rules.

Procedures for complying with a disclosure request

In respect of the procedures with which a disclosure request must comply, we understand that it has always been the Administration's intention to set out the procedures in legislation (primary or subsidiary). In this regard, we consider the proposed procedures which are currently set out in the DIPN are appropriate and comprehensive. While the DIPN is meant to provide guidance on how the procedures would be administered and followed, we would suggest that the detailed procedures are laid down in the Rules so as to give a legally binding effect for the procedures (e.g. as envisaged under paragraph 4(c) of the Outline).

Notification

We note that Paragraph 5 of the Outline sets out the notifications which should be made to the person who is the subject of a disclosure request. Specifically, it provides that the person may in writing, request within 14 days from when he is notified, amendments to the information that the Commissioner of Inland Revenue ("CIR") is prepared to disclose to the requesting government.

We appreciate that the 14-day time limit may be set in order for the IRD to meet the standard response time of 90 days set by the OECD. However, given that taxpayers may need to collate information to verify the accuracy of the information and to provide evidence to the CIR to support the amendment request, a 14-day period may not be sufficient. We would therefore request the Administration to consider if a longer period of time could be allowed for taxpayers to make the amendment request.

Review of amendment request

Paragraphs 10 and 11 of the Outline provide that, in situation where the CIR refuses to accept a request for amendment of the information, the matter is to be reviewed by the Financial Secretary. Whilst the impartiality of the Financial Secretary is not in doubt, for the same reasons as laid down in our submission of 18 September 2009, we would like to reiterate our view that it would be more appropriate for such a review to be made by a District Judge.

Circumstances where notification is not made

We note from the Outline that, in certain circumstances where the CIR considers appropriate, notification is not required to be made to the person who is the subject of a disclosure request. In particular, the following circumstances are stated in the Outline:-

- the notification is likely to undermine the chance of success of the investigation in relation to which the request is made; and
- the failure of disclosing the information within the time constraint will likely frustrate the efforts of the requesting government in enforcing its tax laws.

In this regard, in order to enable taxpayers to fully understand the relevant legislative intent, we would suggest that the Administration provide examples of the circumstances (e.g. in the DIPN) under which the CIR would not serve the notification.

Departmental Interpretation and Practice Notes

Part (b) of the DIPN makes reference to protocols, memoranda of understanding, agreed minutes of meetings, or exchanges of correspondence which treaty parties may enter into subsequent to the signing of the relevant agreement. In this regard, we would like to seek the Administration's confirmation that such protocols, etc. will be made available as public documents.

The Administration has indicated that the information exchange will not take place retrospectively and will only apply to information coming into existence after the relevant comprehensive double tax agreements ("CDTA") have been signed. Given that this approach is not consistent with the commentary made by the OECD¹, in order to give effect to the intention of the Administration, we would suggest that:-

- (i) the Administration, when negotiating a CDTA, seek to include an appropriate provision to ensure that any exchange of information to be made under the CDTA would only have prospective effect; and
- (ii) specify such intention in the DIPN.

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In closing, we would like to thank the Bills Committee again for giving us the opportunity to comment on the documents and to re-iterate our support for the Bill.

Yours sincerely



Ayesha Macpherson
Partner in charge, Tax Services
Hong Kong SAR
KPMG China

cc:

Mr Noel Sung, Clerk to Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009

¹ Paragraph 10.3 of Article 26 of the OECD Model Taxation Convention on Income and Capital refers.