

Bills Committee on Inland Revenue (Amendment)(No. 3) Bill 2009
Follow-up to meeting on 26 November 2009

**Items The Revised Draft of the Inland Revenue (Disclosure of
(1)(a)&(1)(b) Information) Rules (“IRRs”)**

The revised draft of the IRRs (with changes in tracking mode) is summarised at Annex A

2. We hope that the revised draft of the IRRs could facilitate Members’ further deliberation on whether this set of procedural Rules should be subject to negative vetting or positive vetting.

Item (2)(a) Examples to Illustrate “Bona-fide” Requests

3. Whether a request is “bona-fide” would depend on whether it contains the necessary information set out in the Schedule of the IRRs, and this has to be determined on a case by case basis. In general, the request must be for tax purposes and if there is any information that the request is for other non-tax purposes (thus not bona-fide), we will not accede to the request. We do not consider it appropriate to set out hypothetical examples of “non-bona-fide” requests in the Departmental Interpretation and Practice Notes (“DIPN”) as it would risk over-generalisation.

Items Suggestions on the Drafting of the DIPN
**(2)(b), (c),
(d) & (e)**

4. We agreed with Members’ suggestions set out at Items 2(b), (c) and (e) and will revise the DIPN accordingly.

5. The last sentence of paragraph 25 of the DIPN only serves as a clarification and does not suggest that such information would be covered by the scope of information exchange (“EoI”). As we have explained in our letter dated 23 November 2009, the information exchanged under the EoI arrangement shall only be used for tax matters and shall not be disclosed to other authorities for other investigations or purposes, including anti-money

laundering investigations.

Item (3) Impacts and Benefits of the Comprehensive Avoidance of Double Taxation Agreement (“CDTAs”)

6. The benefits of CDTA are illustrated at Annex B.

**Outline of the Proposed Safeguards to be covered by the
Inland Revenue (Disclosure of Information) Rules**

If the Inland Revenue (Amendment)(No. 3) Bill 2009 is enacted, the Administration will propose to make a set of rules, tentatively known as the Inland Revenue (Disclosure of Information) Rules (the Rules) under section 49(6) of the Inland Revenue Ordinance (Cap. 112) (the Ordinance) to stipulate the level of authority required to approve a request for disclosure of information (disclosure request) made under a Comprehensive Avoidance of Double Taxation Agreement (CDTA) and the notification procedure. The main provisions of the Rules are set out in the ensuing paragraphs.

Commencement

2. The Rules will come into operation on the day appointed for the commencement of the Inland Revenue (Amendment)(No. 3) Ordinance 2009.

Approval of Disclosure Requests

3. A disclosure request may be approved only by the Commissioner of Inland Revenue (the Commissioner) personally, or an officer of the Inland Revenue Department not below the rank of chief assessor authorized in writing by the Commissioner personally.

4. The person mentioned in paragraph 3 above –

(i) may approve a disclosure request only if he / she is personally satisfied that the request complies with the following criteria -

- (a) the provisions of the relevant CDTAs; and
- (b) all procedures applicable to the request that may be specified in any instrument that amends or supplements the relevant arrangements.; and
- (c) ~~any other procedures that may be specified by the Commissioner.~~

(ii) may refuse the request if the request does not contain the particulars set out in the **Schedule**.

Information that may be Disclosed in Response to the Disclosure Request

4A. The Commissioner may disclose any information in response to a disclosure request only if the Commissioner is satisfied that the information does not relate to any period before the relevant arrangements that are applicable to the request come into operation.

Notification of Proposed Disclosure

5. With the exceptions set out in paragraphs 7 and 8 below, the Commissioner must, before any information is disclosed, by notice in writing given to the person who is the subject of the request, –

- (a) notify the person of the request and the nature of the information sought;
- (b) notify the person that he / she may, in writing, within 14 days after the notice is given, request a copy of the information that the Commissioner is prepared to disclose to the requesting government;
- (c) notify the person that he / she may request the Commissioner to amend the information on the grounds that –
 - i. the information does not relate to the person; or
 - ii. the information is factually incorrect,within ~~14~~ 21 days after a copy of the information is given by the Commissioner under paragraph 5(b) above.

6. The request for correction of information in paragraph 5(c) above must be made in writing, with grounds for the request and accompanied by any supporting documentary evidence.

7. Notification is not required if the Commissioner has reasonable grounds to believe that –

- (a) all the addresses of the person known to the Commissioner are inadequate for the purpose of giving the notification; or
- (b) the notification is likely to undermine the chance of success of the investigation in relation to which the request is made.

8. If the Commissioner is under a tight time constraint to disclose the information to the requesting government 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, prior notification is not required but the Commissioner must notify the person at the same time when the information is disclosed. The review procedures set out in paragraphs 9 to 11 below will continue to apply in this scenario.

Request to Commissioner for Amendments

9. If the person makes a request for amendment of the information, the Commissioner may fully approve, partially approve or refuse the request. The Commissioner has to notify the person of the Commissioner's decision, with reasons of the refusal (if applicable) and a copy of the information that has been so amended (if applicable).

Request to Financial Secretary for Directions

10. Where the Commissioner partially approves or refuses a request for amendment under paragraph 9, the person may request the Financial Secretary to direct the Commissioner to make the amendment. The request has to be made in writing, within 14 days after the Commissioner's notice in paragraph 9.

11. The Financial Secretary may fully approve, partially approve or refuse the request and his decision shall be final. The Financial Secretary has to notify the person of his decision, with reasons of the refusal (if applicable) and a copy of the information that has been so amended (if applicable).

Schedule

1. The identity of the competent authority.
2. The purpose of the disclosure request and the tax type concerned.
3. The identity of the person who is the subject of the disclosure request.
4. A statement of the information requested for including its nature, the relevance of the information to the purpose of the disclosure request, and the form in which the competent authority wishes to receive the information from the Commissioner.
5. The ground for believing that the information requested is held by the Commissioner or is in the possession of a person in Hong Kong.
6. The name and address of any person believed to have possession of the information requested for.
7. A statement that the disclosure request is in conformity with the laws and administrative practices of the requesting government, that the competent authority is able to obtain the information under its laws or in the normal course of its administrative practice, and that the disclosure request is in conformity with the relevant arrangements.
8. A statement that the requesting government has pursued all means available in its own territory to obtain the information including getting the information directly from the person in relation to whom the information is requested.
9. The tax period for which information is requested.
10. The period within which the requesting government wishes the disclosure request to be met.
11. Any other information that may assist the Commissioner in giving effect to the disclosure request.

Key Benefits of CDTAs

**(Using the CDTA between
Mainland China and Hong Kong for illustration)**

The CDTA between the Mainland and Hong Kong provides that the same income will not be doubly taxed and provides preferential treatments for indirect income such as dividends, interest and royalties.

On business income

- Unless a Hong Kong company is carrying on business through a permanent establishment on the Mainland, its business income from the activities in the Mainland will only be subject to tax in Hong Kong (the Corporate Tax rate is 16.5% in Hong Kong while the corresponding Enterprise Income Tax rate is 25% in the Mainland for the year 2008/09).
- If part of the profits of a Hong Kong company is attributable to its permanent establishment on the Mainland and is charged to Mainland tax, the Mainland tax paid can be credited against the tax payable in Hong Kong.
- Hong Kong companies deriving profits in the Mainland from international shipping transport enjoy tax exemption on the Mainland.

On capital gain

- Hong Kong residents¹ deriving gains in the Mainland from the alienation of shares or other property under certain conditions enjoy tax exemption on the Mainland.

On indirect income

Hong Kong companies which receive dividends, interest and royalties from Mainland enterprises are subject to withholding tax. Under the

¹ Include company residents and individual residents

CDTA -

- the withholding tax rate for dividends is reduced to from 10% to 5% for a Hong Kong company holding at least 25% of the capital of the Mainland enterprise;
- the withholding tax rate on interest is reduced from 10% to 7%; and
- the withholding tax rate for royalties is also reduced from 10% to 7%.

The adoption of the latest international standard for EoI would enable Hong Kong to sign more CDTAs with our major trading partners and would enable Hong Kong residents and companies to enjoy similar tax benefits as above.