

立法會

Legislative Council

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Legal Service Division Report on Inland Revenue (Amendment) (No. 3) Bill 2009

I. SUMMARY

1. **Objects of the Bill** To amend the Inland Revenue Ordinance (Cap. 112) (the Ordinance) to facilitate the collection and disclosure of information concerning tax of a territory outside Hong Kong under arrangements made with the government of that territory for the avoidance of double taxation, and to provide for related matters.
2. **Comments** The Bill seeks to:-
 - (a) clarify that if a comprehensive avoidance of double taxation agreement (CDTA) made with a foreign territory contains a provision that requires disclosure of information concerning tax of that territory (i.e. an exchange of information (EoI) article), the CDTA shall have effect in relation to any tax of that territory that is the subject of that provision;
 - (b) enable Inland Revenue Department (IRD) to collect information concerning tax of a foreign territory for the purpose of EoI under a CDTA;
 - (c) enable a magistrate to issue search warrants for information concerning tax of a foreign territory for the purpose of EoI under a CDTA;
 - (d) provide that a person commits an offence if he, without reasonable excuse, gives any incorrect information in relation to any matter that affects his or another person's liability to a foreign tax covered by an EoI article under a CDTA; and
 - (e) amend the Personal Data (Privacy) Ordinance (Cap. 486) to provide that "tax" includes a foreign tax covered by an EoI article under a CDTA.
3. **Public Consultation** Most of the stakeholders consulted in 2008 indicated support for liberalization. Some organizations have raised concerns over privacy and confidentiality.
4. **Consultation with LegCo Panel** The Administration briefed the Panel on Financial Affairs on the proposed legislative amendments at the meeting on 4 May 2009.
5. **Conclusion** In view of the concerns expressed by some Members at the meeting of the Panel on Financial Affairs on 4 May 2009, Members may wish to consider setting up a Bills Committee to consider the Bill in detail.

II. REPORT

Objects of the Bill

To amend the Inland Revenue Ordinance (Cap. 112) (the Ordinance) to facilitate the collection and disclosure of information concerning tax of a territory outside Hong Kong under arrangements made with the government of that territory for the avoidance of double taxation, and to provide for related matters.

LegCo Brief

2. File Ref: FIN CR 12/2041/46 issued by the Financial Services and the Treasury Bureau dated 24 June 2009.

Date of First Reading

3. 8 July 2009.

Comments

Background

4. A comprehensive avoidance of double taxation agreement (CDTA) normally includes an exchange of information (EoI) article that provides for the exchange of information necessary for the carrying out of the agreement between the two contracting parties. The EoI article currently adopted in Hong Kong's CDAs is based on the 1995 version of the Organization for Economic Cooperation and Development (OECD) Model Tax Convention. According to this version, the Inland Revenue Department (IRD) may refuse to collect and supply the information requested by another contracting party if the Department does not need it for domestic tax purposes. Most economies have, however, adopted the OECD 2004 version of the EoI article. This version categorically states that the lack of domestic tax interest does not constitute a valid reason for refusing to collect and supply the information requested by another contracting party.

5. Hong Kong currently cannot adopt the 2004 version of the EoI article because under the Ordinance, IRD can only collect taxpayers' information for the ascertainment of liability, responsibility and obligation under the domestic tax law. In other words, IRD cannot collect any tax information unless it is for domestic tax purposes. According to the Administration, this legal constraint on IRD's information gathering power has been a major obstacle to Hong Kong's CDTA negotiations because most economies have adopted the 2004 version of the EoI article.

This constraint has reduced the number of Hong Kong's potential CDTA partners, and restricted the progress of negotiations.

6. According to paragraph 6 of the LegCo Brief, the inability to adopt the 2004 version of the EoI article has also caused negative perceptions on the transparency of Hong Kong's tax regime. At the London Summit held on 2 April 2009, G20 Leaders called on countries to adopt the international standard for exchange of information. After the Summit, the OECD published three lists identifying respectively tax jurisdictions which have substantially implemented the OECD standard, tax jurisdictions which have committed to the OECD standard but have not yet substantially implemented it, and tax jurisdictions which have not committed to the standard. The OECD did not put Hong Kong on any list, but pointed out its commitment to implement the OECD standard in a footnote to the lists. G20 Leaders also agreed to develop a toolbox of counter measures by the end of 2009 and review countries' implementation of the OECD standard at the next G20 Finance Ministers and Central Bank Governors Meeting to be held in November 2009.

7. While the international community has generally accepted that Hong Kong should not be compared to those jurisdictions which seek to attract tax evading foreign capitals through zero or nominal tax rates, complicated and opaque tax rules, as well as bank secrecy laws, the Administration considers that any negative perceptions on the transparency of Hong Kong's tax regime would harm Hong Kong's reputation as an international financial centre, and could lead to sanctions imposed by other economies.

8. After consulting the business and professional sectors on the liberalization of EoI under CDTAs in 2005 and 2008, the Financial Secretary announced in the 2009-2010 Budget that the Government would put forward legislative proposals by the middle of this year to align Hong Kong's EoI arrangements with the international standard.

The Bill

9. The Bill seeks to amend the Ordinance to enable Hong Kong to adopt the latest international standard for EoI in a CDTA. It amends the relevant provisions of the Ordinance to enable IRD to collect and disclose a taxpayer's information in response to requests made by our CDTA partners for their own tax purposes. The proposed amendments are summarized as follows:-

- (a) clause 3 amends section 49 of the Ordinance to clarify that if a CDTA made with a foreign territory contains a provision that requires disclosure of information concerning tax of that territory (i.e. an EoI article), the CDTA shall have effect in relation to any tax of that territory that is the subject of that provision;

- (b) clause 5 amends section 51 of the Ordinance to enable the powers provided to IRD for the purposes of obtaining information concerning a person's tax liability under the Ordinance to be exercisable for the purposes of obtaining information in regard to any matter that may affect a person's liability, responsibility or obligation under the laws of a territory outside Hong Kong concerning tax of that territory;
- (c) under section 51B of the Ordinance, a magistrate may issue a warrant in respect of a person if the magistrate is satisfied that there are reasonable grounds for suspecting that the person has made an incorrect return or supplied false information having the effect of understating the person's income or profits chargeable to tax under the Ordinance. Clause 6 adds section 51B(1AA) to the Ordinance to enable the magistrate to exercise the same power if the magistrate is satisfied that there are reasonable grounds for suspecting that the person has made an incorrect return or supplied false information having the effect of understating the person's income or profits chargeable to tax of a territory outside Hong Kong; and
- (d) clause 7 provides that a person commits an offence if he, without reasonable excuse, gives any incorrect information in relation to any matter that affects his or another person's liability to a foreign tax covered by an EoI article under a CDTA.

10. As a result of the proposed amendments to section 49 of the Ordinance, the Bill proposes to amend section 58 of the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO) to provide that the word "tax" in section 58(1)(c) of PDPO includes a foreign tax covered by an EoI article under a CDTA.

11. If enacted, the Bill will come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

12. According to the LegCo Brief, the Administration will include the most prudent safeguards acceptable under the OECD 2004 version to protect an individual's right to privacy and confidentiality of the information exchanged in adopting the OECD 2004 version of EoI article in Hong Kong's CDTAs. These include incorporating safeguards in individual CDTAs by way of subsidiary legislation and providing for additional statutory procedural safeguards in handling an EoI request by IRD. Furthermore, the Administration stated that IRD will issue a Departmental Interpretation and Practice Note setting out the procedural safeguards IRD must adopt in processing EoI requests. Members may refer to paragraphs 9 to 11 of the LegCo Brief for further details.

Public Consultation

13. According to paragraph 17 of the LegCo Brief, the business and professional sectors on the liberalization of EoI under CDTAs were consulted in 2005 and 2008. While views were divided in the 2005 consultation exercise, most of the stakeholders consulted in 2008 indicated support for liberalization so as to expand Hong Kong's CDTA network. Some organizations have raised concerns over privacy and confidentiality.

Consultation with LegCo Panel

14. The Administration briefed the Panel on Financial Affairs on the proposed legislative amendments under the Bill at the meeting on 4 May 2009. Members expressed concerns on various matters including measures and mechanism in place for handling requests for information, impact of the legislative proposal on the protection of personal privacy and on business enterprises' interests in making investments in Hong Kong, the proposed extension of IRD's power to gather information from taxpayers and provide the information to contracting parties, and whether additional resources would be required for IRD to collect the requested information.

Conclusion

15. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the concerns expressed by some Members at the meeting of the Panel on Financial Affairs on 4 May 2009, Members may wish to consider setting up a Bills Committee to consider the Bill in detail.

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