

For discussion on
4 February 2013

Legislative Council Panel on Financial Affairs

Exchange of Tax Information Arrangements

Purpose

This paper briefs Members on the detailed legislative proposals to enhance the exchange of information (“EoI”) arrangements for tax purposes.

Latest Development

2. At the Panel meeting on 5 November 2012, we informed Members that it had been and would continue to be the Administration’s policy to expand Hong Kong’s network of comprehensive avoidance of double taxation agreements (“CDTAs”) with our trading and investment partners so as to facilitate the flow of trade, investment and talent between Hong Kong and the rest of the world, as well as to enhance Hong Kong’s position as an international business and financial centre. We also updated Members on the latest position of our CDTA programme. As at late January 2013, we have signed CDTAs with 27 jurisdictions, of which 11 are the top 20 trading partners of Hong Kong. A list of jurisdictions with which we have signed CDTAs is at **Annex**. In all the CDTAs signed, we have incorporated an article on EoI in fulfilling Hong Kong’s international obligation of enhancing tax transparency and preventing tax evasion.

Justifications for Enhancing the EoI Arrangements

Facilitating the conclusion of further CDTAs

3. As indicated at the Panel meeting in November 2012, while our efforts to expand Hong Kong’s CDTA network since 2010 have

yielded fairly satisfactory results thus far, our negotiations with various jurisdictions have revealed an emerging need for enhancing our EoI arrangements in respect of our restrictive position in the area of tax types and limitation on disclosure in order to strive for a further breakthrough in our future CDTA negotiations. Despite our repeated efforts, some of the jurisdictions that we have approached, particularly a number of major trading partners of Hong Kong like Australia, Germany, Russia and the United States, have yet to be convinced of the case for pursuing a CDTA with us and are adopting a wait-and-see attitude. By providing flexibility in the coverage of tax types and relaxing the limitation on disclosure for EoI under the CDTA framework, we could stand a better chance of persuading the key jurisdictions to commence CDTA negotiations with Hong Kong.

4. On tax types, we have so far sought to restrict EoI to taxes covered by the CDTAs only (i.e. income taxes or taxes of similar character). Even among those jurisdictions with which we have successfully concluded CDTAs, some of them such as the Netherlands, the United Kingdom, France, Japan, Mexico and Italy did raise grave concerns during negotiations on our restrictive position in the coverage of tax types for EoI. This restrictive stance inevitably frustrates CDTA partners' investigation of tax evasion cases concerning tax types other than income taxes.

5. As for limitation on disclosure, we now adopt a highly stringent approach and will not entertain any request for any information relating to a period before the provisions of the relevant CDTA have taken effect. This, however, has posed practical problems and fallen short of meeting our CDTA partners' practical requirements. Information generated prior to the effective date of the relevant provisions of the CDTA may in fact be foreseeably relevant to the tax assessments after the relevant provisions of the CDTA came into effect. Similar to the case with tax types, we find the current arrangement not desirable in terms of enhancing tax transparency and combating tax evasion.

Complying with the latest international EoI standard

6. At the Panel meeting in November 2012, we briefed Members that, on the international front, there have been increasing aspirations to enhance tax transparency with a view to preventing and combating fiscal evasion. As one of the members of the Global Forum on Transparency and Exchange of Information for Tax Purposes (“the Global Forum”) of the Organisation for Economic Cooperation and Development (“OECD”), Hong Kong is now undergoing a two-phase peer review of the Global Forum which evaluates jurisdictions’ compliance with the international EoI standard. Phase 1 peer review on Hong Kong was completed in October 2011 which affirmed our efforts in enhancing tax transparency and that Hong Kong could enter into the Phase 2 peer review. However, the Global Forum recommended that Hong Kong should put in place a legal framework for entering into Tax Information Exchange Agreements (“TIEAs”)¹ as the latest international standard is that a jurisdiction should make available both CDTA and TIEA as instrument for EoI.

7. In December 2012, the Global Forum launched the Phase 2 peer review on Hong Kong, which would evaluate Hong Kong’s implementation of the EoI standard in practice and examine whether Hong Kong has taken forward the recommendations proposed by the Global Forum during the Phase 1 peer review. As advised by the Global Forum, whether Hong Kong could pass the Phase 2 peer review will largely hinge on the availability of a legal framework for TIEAs. Failing the Phase 2 peer review, Hong Kong may run the risk of being labeled as an uncooperative jurisdiction, which is highly undesirable for Hong Kong’s international reputation and may in turn undermine our position and competitiveness as an international business and financial centre. Other jurisdictions may also impose unilateral sanctions on Hong Kong.

8. Given the above international backdrop, it is critical for Hong Kong to have in place the legal framework for TIEAs in mid-2013 before the Phase 2 peer review report on Hong Kong is finalised by the Global

¹ TIEAs provide for EoI mechanism only without double taxation relief. The existing Inland Revenue Ordinance only allows Hong Kong to enter into tax agreements with other jurisdictions when there is double taxation relief.

Forum. Further, in order to enable us to further expand the network of CDTAs, we consider that it is crucial for us to take the minimum necessary approach to enhance the EoI arrangement under CDTA to the extent that it could catch up with the prevailing international standard for EoI to be provided under TIEA. Only through doing so can we be able to continue with our efforts in negotiating CDTAs with existing as well as potential partners whilst providing in place a legal framework for TIEA for Hong Kong to meet our international obligations.

9. We conducted a further round of briefing and consultation sessions from November 2012 to January 2013 with various stakeholders, including tax and accountants' associations, banking and insurance associations, as well as chambers of commerce. They all supported the above approach to enhance the EoI under CDTA framework and to put in place a legal framework for TIEA. The majority emphasized the importance to accord priority to conclude CDTAs with trading partners and to provide similar safeguards for the EoI arrangement under TIEA.

Detailed Legislative Proposals

10. In order to enhance the EoI arrangements in respect of tax types and limitation on disclosure under CDTAs and to enable Hong Kong to enter into TIEAs with other jurisdictions where necessary, we propose to amend the Inland Revenue Ordinance (Cap. 112) ("IRO") as follows -

- (a) to amend section 49(1A) to the effect that arrangements can be made with governments of territory outside Hong Kong not only for the purpose of affording relief from double taxation in relation to income tax and any tax of a similar character imposed by the laws of that territory, but also for the purpose of exchanging information in relation to any tax imposed by the laws of Hong Kong or the territory concerned. This will provide the legal basis for Hong Kong to conclude TIEAs and to relax the coverage of tax types for EoI under both CDTAs and TIEAs;

- (b) to amend section 51B(1AA) to the effect that the Inland Revenue Department (“IRD”) can exercise its power to obtain information relevant to the proposed enhanced EoI under CDTAs and TIEAs;
- (c) to amend sections 51 and 52 to put it beyond doubt that IRD’s information gathering power applies not only to information that is in physical possession of a person but also information that is in his control. This will avoid any ambiguity and align the wording in the IRO with that of the Model Agreement on Exchange of Information on Tax Matters; and
- (d) to amend Rule 4 of the Inland Revenue (Disclosure of Information) Rules (“Disclosure Rules”) (Cap. 112BI) to the effect that the Commissioner of Inland Revenue can disclose information in response to an EoI request if the Commissioner is satisfied that such information relates to tax assessments in respect of any period after the date on which the relevant CDTA or TIEA comes into operation. This is to slightly relax the current limitation on disclosure whilst upholding our policy of no retrospectivity for EoI.

11. We consider that the above proposals are the minimum necessary to address the concerns of our treaty partners and to enable us to meet our international obligation in area of tax transparency. In pursuing the changes, we are mindful of some Members’ and stakeholders’ concerns about taxpayers’ privacy and confidentiality of information exchanged, and would ensure that necessary safeguards are in place.

Safeguards on Taxpayers’ Privacy and Confidentiality of Information Exchanged

12. Under both CDTAs and TIEAs, we will continue to adopt the existing highly prudent safeguards to protect taxpayers’ privacy and confidentiality of information exchanged as follows –

- (a) we will only exchange information upon receipt of requests and no information will be exchanged on an automatic or spontaneous basis;
- (b) the information sought should be foreseeably relevant, i.e. no fishing expeditions;
- (c) information received by our treaty partners should be treated as confidential;
- (d) information would only be disclosed to the tax authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of and the determination of appeals in relation to taxes falling within the scope of EoI but not for release to their oversight bodies unless there are legitimate reasons given by the treaty partners;
- (e) information requested should not be disclosed to a third jurisdiction;
- (f) there is no obligation to supply information under certain circumstances, for example, where the information would disclose any trade, business, industrial, commercial or professional secret or trade process, or which would be covered by legal professional privilege, etc; and
- (g) we will not accede to any requests from our treaty partners for tax examinations abroad and assistance in collection of taxes.

13. To afford legal protection to taxpayers in this respect, similar to our existing practice with CDTAs signed, we will strive to include the above safeguards in the texts of future CDTAs/TIEAs, which will be implemented as subsidiary legislation domestically subject to negative vetting by the Legislative Council (“LegCo”).

14. Currently, for EoI under CDTAs, we also have in place the Disclosure Rules as domestic statutory safeguards in addition to those

provided in individual CDTAs to protect taxpayers' privacy and confidentiality of information exchanged. The Rules stipulate the particulars to be contained in an EoI request made by an overseas jurisdiction to demonstrate that the requested information is "foreseeably relevant". It also provides for a notification and review system in handling EoI requests and related appeals. We would extend the applicability of the Disclosure Rules currently applicable to EoI under CDTAs to TIEAs to be signed in future.

Way Forward

15. We are drafting the relevant legislative amendments as set out in paragraph 10 above and aim to introduce the relevant amendment bill into the Legislative Council in April 2013.

Financial Services and the Treasury Bureau
January 2013

CDTAs that Hong Kong has Signed with Other Jurisdictions

(as at 25.1.2013)

CDTAs signed before March 2010

	Jurisdictions	Date of Signing
1	Belgium*	10.12.2003
2	Thailand*	7.9.2005
3	Mainland China*	21.8.2006
4	Luxembourg	2.11.2007
5	Vietnam*	16.12.2008

New CDTAs signed since March 2010

	Jurisdictions	Date of Signing
1	Brunei	20.3.2010
2	Netherlands*	22.3.2010
3	Indonesia	23.3.2010
4	Hungary	12.5.2010
5	Kuwait	13.5.2010
6	Austria	25.5.2010
7	United Kingdom*	21.6.2010
8	Ireland	22.6.2010
9	Liechtenstein	12.8.2010
10	France*	21.10.2010
11	Japan*	9.11.2010
12	New Zealand	1.12.2010
13	Portugal	22.3.2011
14	Spain	1.4.2011
15	Czech Republic	6.6.2011
16	Switzerland*	4.10.2011
17	Malta	8.11.2011
18	Jersey	22.2.2012
19	Malaysia*	25.4.2012
20	Mexico	18.6.2012

21	Canada	11.11.2012
22	Italy*	14.1.2013

* *Among the top 20 trading partners of Hong Kong*