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陳美卿女士

陳女士：

檢討《稅務條例》

我們曾在二零零五年八月十一日的信中，告知委員會，財政司司長會在制訂稍後公布的財政預算案時，考慮代表團體所提出的稅項寬免建議。我們亦承諾向財經事務委員會匯報稅務聯合聯絡小組(聯絡小組)就檢討《稅務條例》一事所提出的任何實質意見。對於牽涉《稅務條例》的詮釋和稅務局的稅務管理方法的事項，我們已告知委員會，聯絡小組會與稅務局繼續合作，按情況所需進行深入檢討。至於一些由代表團體提出但資料不詳的事項，我們已表示稅務局會與這些代表團體接觸，以便更清楚了解有關事項。

就第一部份而言，財政司司長現正制訂財政預算案，並會充分考慮有關建議。

至於第二部份，聯絡小組認為，《稅務條例》的基本架構在香港一直行之有效，相信日後亦能發揮同樣效用。《稅務條例》使香港得以維持相對簡單的稅制，令很多其他國家羨慕不已。聯絡小組擔心，如進行徹底而全面的檢討，就可能會引發不同的建議，不單不會簡化香港的稅制，反而會令稅制變得複雜。舉例來說，一旦進行全面檢討，就難免會有人要求當局擴闊徵稅範圍，包括對離岸收入、資本收益、股息和其他被動投資收益徵稅。因此，聯絡小組認為無須全面檢討《稅務條例》。我們同意聯絡小組的看法，認為無須全面檢討《稅務條例》，而且即使進行檢討，成效亦不大。

至於檢討具體事項方面，稅務局已繼續與聯絡小組緊密合作。聯絡小組已就譚香文議員和 Lloyd Deverall 先生來信所提出的具體事項提供意見。聯絡小組認為其中一些建議(包括對集團虧損和合夥虧損給予稅項寬免)值得考慮。至於其他事項，有些須進一步深入研究，另外一些則無須作出改動或不屬優先處理的事項。聯絡小組認為值得就香港現行稅制的具體事項進行範圍較大的檢討。聯絡小組也認為，《稅務條例》和稅務管理工作有一些地方可予改善，以強化香港的稅制。在這方面，對集團的虧損給予稅項寬免就是一個例子，因為聯絡小組認為商界日益關注這問題。聯絡小組也指出，商界有意見認為，稅務局傾向改變其評稅方法，這意味與稅務管理工作有關的問題亦可予考慮。

聯絡小組已提出與政府當局一同檢討一些商界主要關注的具體事項，包括稅務政策和稅務管理工作。關於這方面，聯絡小組明白到，如要在涉及多方面具體事宜的檢討中擔當積極的角色，則可能須重新考慮其成員的資格，以加強聯絡小組對納稅人來說的"代表性"。隨函付上聯絡小組的意見書(參閱***附件 A***)。

政府當局備悉聯絡小組的意見。雖然我們並不同意聯絡小組認為稅務局傾向改變其評稅方法的看法，但我們會與聯絡小組一同檢討有關改善稅務規例和評稅方法的具體稅務管理事宜，以期進一步提高香港稅制和稅務管理的競爭力。我們也歡迎聯絡小組計劃擴大其代表性。

總括而言，我們會繼續在每年制訂財政預算案時經常地考慮稅項寬免建議。我們亦會繼續聽取業界和公眾對稅務事宜的意見。我們也會與業界，特別是聯絡小組，和各有關方面保持聯繫，並依循上述方式有系統地檢討稅務事宜。我們已因應上述事情的進展，以及稅務局

向某些代表團體就建議詳情的查詢，更新政府當局對代表團體所提具體事項的回應概要一覽表(參閱***附件 B***)，以供議員參閱。

我們謹藉此機會感謝財經事務委員會、譚香文議員及其他代表團體對稅制提出的意見。

財經事務及庫務局局長
(郭立誠代行)

連附件

副本分送：稅務聯合聯絡小組主席
稅務局局長

二零零六年一月二十一日

Annex A

JOINT LIAISON COMMITTEE ON TAXATION

CONSTITUENT MEMBERS: THE AMERICAN CHAMBER OF COMMERCE
THE GENERAL CHAMBER OF COMMERCE
THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
THE INTERNATIONAL FISCAL ASSOCIATION - HONG KONG BRANCH
THE LAW SOCIETY OF HONG KONG
THE TAXATION INSTITUTE OF HONG KONG

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13 September 2005

Mr Martin Glass
Assistant Secretary for Financial Services and the Treasury
Financial Services and the Treasury Bureau
(The Treasury Branch)
Central Government Offices
Lower Albert Road
Hong Kong

Dear Martin,

Re: Review of the Inland Revenue Ordinance

I refer to your letter dated 2 February 2005 in which you briefed the JLCT on the Administration's position concerning the desirability of a comprehensive review being conducted of the Inland Revenue Ordinance ("IRO").

You also enclosed a copy of a letter from Mandy Tam Heung-Man to the LegCo Panel on Financial Affairs dated 28 October 2004 setting out her proposals to allow for the carrying back of tax losses, allowing double deduction of expenses for companies employing new staff members, computing commercial building and industrial building allowances by reference to the purchase price of the property rather than the cost of construction, and allowing separate assessment on husbands and wives under personal assessments.

The JLCT has since considered Ms. Tam's proposals for a comprehensive review to be conducted of the IRO, as well as her specific proposals. In this letter, we wish to relay our comments on the issue of a comprehensive review. We will write to you separately with our comments on Ms. Tam's specific proposals.

Need for Comprehensive Review of IRO

The view of the JLCT is that no *general* review of the IRO needs to be conducted. We believe that the basic structure of the IRO has served Hong Kong well and is capable of doing so for many years to come. It has enabled Hong Kong to maintain a relatively simple tax system which is the envy of many other countries.

Although there have been previous Inland Revenue Review Committees established in Hong Kong, their terms of reference were generally quite limited and they did not conduct what could be regarded as a *general* or "from scratch" review of Hong Kong's tax system. We are concerned that conducting a full-blown general review is an invitation to invite proposals that would have the effect of complicating Hong Kong's taxation system rather than simplifying it. For example, it is inevitable that such a review would prompt calls for a wider basis for taxation including the taxation of offshore income, capital gains, dividends and other passive investment income. Although such wide forms of taxation have become the norm in other countries, Hong Kong has been blessed by being able to function without such forms of taxation.

That being said, we do believe that there is merit in having a relatively wide-ranging review of *specific* issues relating to Hong Kong's existing taxation system. In saying this, we do not suggest that Ms. Tam's specific proposals are necessarily those in respect of which reform could be considered, not that they are the only issues that require review. We believe that there are facets of the Inland Revenue Ordinance and tax administration that could be improved so as to strengthen Hong Kong's tax system for the future.

Before proceeding, we would offer a general observation that the Administration has not been, in our view, aggressive in its pursuit of taxation reform over the years. There is a perception in many quarters that the Administration has tended to react negatively to suggestions for specific tax reforms without taking into account the importance of regular reviews of technical rules and assessing practices as a means of keeping Hong Kong's tax system relevant to economic and business developments. Such a regular review of specific issues would in our view have helped to avoid the development of frustration in some quarters that ultimately has resulted in the more recent demands for a general review, as evidenced by the support that Ms. Tam's proposals have obtained. We believe that, were the Administration more flexible in considering and implementing suggestions for tax reform in specific areas on a regular basis, wide-ranging demands for a general review of Hong Kong's tax system would be less likely to curry support. A simple example (and this is only an example) concerns group loss relief which is increasingly becoming a major issue of concern to the business community.

The perceived lack of certainty in Hong Kong's taxation system is another issue that is key to the business community, yet the importance of this appears to be underrated by the Administration. It has caused concern within the business community, especially among foreign investors. A widely held perception is that the IRD – whether rightly or wrongly - has frequently changed its practices in a number of matters (eg, source of profits), but this in itself is not the main complaint our members hear. The business community can tolerate changes on a prospective basis where such changes can be budgeted for. However, the IRD's tendency is to apply its new practices to the last 6 years (as indeed it is legally entitled to do). This has resulted in hefty and unanticipated tax bills and tax disputes, and has led to companies moving operations out of Hong Kong (eg, to Macau or Europe where more favourable tax treatment is available).

Businesses require a reasonable degree of certainty with respect to their tax affairs. Until recently, Hong Kong's tax system has provided relatively predictable results, but there is a general perception that this is no longer the case. Of course, the Administration might disagree with this view, but it cannot deny that such a perception prevails in the business

community and among tax advisers. Such perceptions are often more important than the reality. It is important that steps be taken to correct such perceptions.

Thus, in identifying specific issues that deserve review, regard could be had not only to legislative issues but also issues that relate to the administrative aspects of the tax system, including the IRD's assessing practices.

Over time, new issues will emerge that will cause concern and will need to be addressed early on before disputes arise. For example, one nascent issue concerns the lack of tax amortization for capital expenditure (other than expenditure on tangible items such as plant and machinery and on buildings, as well as other isolated cases). This means that a taxpayer can be taxed on its gross income without being permitted to amortize the real costs of carrying on its business or otherwise to deduct them as expenses. The unfairness of the depreciation rules has been accentuated by the IRD recently asserting more frequently that expenditures that previously were permitted as deductions outright are really on capital account and therefore do not qualify for any tax benefit whatsoever. In view of the fact that, following the *Secan* case, there is a gradual convergence of taxation and accounting principles, we can foresee that such a situation will not be tolerated by the business community in the long term, yet unless the Administration takes the lead we would not expect this issue to be resolved without many disputes and angst. Hong Kong's tax system would be more "user-friendly" if such specific issues could be addressed and resolved early on. The fact that such issues exist emphasizes that Hong Kong's tax system is "behind the times" and that some review of specific tax issues is called for.

It is no answer to say that issues can be decided by the courts. Taxpayers do not relish litigation, which is very expensive and has an uncertain outcome. Court decisions apply to the facts of a specific case and do not provide certainty for other taxpayers whose facts invariably differ. Importantly, the courts cannot address fundamental policy issues (eg, the lack of group loss relief in Hong Kong). It is of course dangerous in any event to allow courts to dictate tax policy. Often, this can create worse problems that either cause more discontent or require legislative intervention to undo. As a practical matter, it cannot be denied that the IRD's assessing policies have an important role to play in shaping tax policy in Hong Kong, and can be adapted to meet the legitimate concerns of the taxpayer community in many cases.

In light of these observations, we believe that it would be very helpful to review specific issues relating to Hong Kong's tax system, and to monitor new issues as and when they arise. Such a review should deal with both technical tax rules and, where appropriate, the IRD's assessing procedures.

We believe that such a review should be conducted outside the Administration, but we are not convinced that a formal statutory body needs to be established for this purpose. It would be sufficient if the Administration participated in the review process in good faith in an attempt to understand what are the legitimate concerns of the IRD's users, to listen to the concerns of the IRD's users, and strove to implement changes from time to time (whether at a legislative or administrative level) to ensure that Hong Kong's tax system retains the correct balance between providing certainty and fairness to taxpayers. Needless to say, maximizing tax revenue should not be the driver for the Administration's participation in this process (and nor do we suggest that it would be). The common goal of all parties should be to achieve a

good, effective, certain, fair and balanced tax system for Hong Kong that is acceptable to all concerned.

If the Administration agrees, we offer the services of the JLCT (or of a specially constituted sub-committee of the JLCT) to act in this role. We appreciate that this might require the JLCT to rethink its membership criteria in order that it (or the sub-committee) can be regarded as being more "representative" of the tax-paying community. The Administration, on the other hand, would need to commit to provide the JLCT with more resources to undertake such a role. One attraction of the sub-committee proposal is that this would enable the JLCT itself to continue to act in a "technical" role, whereas the sub-committee could have greater input vis a vis policy-related matters.

* * *

We hope you find our comments above useful. If you have any questions, please call me at 2846 1716.

Yours sincerely,

Michael Olesnicky,
Chairman,
for and on behalf of
The Joint Liaison Committee on Taxation

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JOINT LIAISON COMMITTEE ON TAXATION

CONSTITUENT MEMBERS: THE AMERICAN CHAMBER OF COMMERCE
THE GENERAL CHAMBER OF COMMERCE
THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
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13 September 2005

Mr Martin Glass
Assistant Secretary for Financial Services and the Treasury
Financial Services and the Treasury Bureau
(The Treasury Branch)
Central Government Offices
Lower Albert Road
Hong Kong

Dear Martin,

Re: Review of specific facets of the Inland Revenue Ordinance

I refer to your letter dated 2 February 2005 with which you enclosed a copy of a letter from Mandy Tam Heung-Man to the LegCo Panel on Financial Affairs dated 28 October 2004 setting out her proposals to allow for the carrying back of tax losses, allowing double deduction of expenses for companies employing new staff members, computing commercial building and industrial building allowances by reference to the purchase price of the property rather than the cost of construction, and allowing separate assessment on husbands and wives under personal assessments. Also attached to that letter was an undated letter from Mr. Lloyd Deverall in which he suggested further tax issues that could usefully be reviewed.

The JLCT has since considered Ms. Tam's and Mr. Deverall's specific proposals. We wish to relay to you our comments, as follows.

Ms. Tam's specific proposals

a. **Penalty regime under section 82A**

Ms. Tam suggested that too much discretion is provided to the IRD in calculating penalty tax. She suggested that more precise rules, if enshrined in legislation, would be desirable and would result in fewer taxation appeals.

We note that the IRD has a formal penalty policy which is publicly available on its website. These guidelines have given reasonable certainty to taxpayers and their advisors as to how penalties will be calculated. The experience of our members is that the Commissioner has been quite consistent in her application of these guidelines. We therefore query to what extent enshrining these (or other) guidelines in legislation would give more certainty.

We also note that, although there are inevitably appeals to the Board of Review against penalty assessments (what appear to be in only a small percentage of cases, we understand in the 2-4% range), such disputes would be expected to arise even if the penalty guidelines were enshrined in legislation. We also note that most of these appeals tend to be dismissed by the Board of Review. This suggests that the penalty guidelines are applied appropriately.

In summary, we believe that the IRD's penalty policy is reasonably transparent and consistently applied. We do not see any reason to provide for legislation. We suggest that there are other issues that deserve more pressing attention.

b. Sections 61 & 61A

Ms. Tam suggested that the anti-avoidance provisions in sections 61 & 61A are applied widely to commercial transactions. Her suggestion is that these provisions are antiquated and should be abolished, and that specific anti-avoidance provisions be introduced to deal with particular types of tax avoidance. Her preference is to leave the issue of tax avoidance to the courts to decide.

The issue of whether general anti-avoidance rules in tax legislation are desirable has given rise to debate in other countries. Even in Australia, which has very wide general anti-avoidance provisions (on which Hong Kong's section 61A is modeled), the principles remain unclear even though there have been many court cases dealing with the interpretation of these provisions. There is no inherently right or wrong answer. In the US, the authorities tend to legislate specifically against particular schemes, but this has led to a huge amount of legislation. Such an approach would be inconsistent with Hong Kong's desire to have a relatively simple system.

On balance, the JLCT favours general anti-avoidance rules in a statutory format. The experience of some of our members suggests that the IRD tends to be aggressive in applying these anti-avoidance provisions, especially in simple source cases. This is despite the IRD's assurances that such provisions would not be applied in such circumstances. To this extent, Ms. Tam's concerns are legitimate. If wide powers are to be given to the IRD, there is a concomitant obligation on the part of the IRD to apply these provisions sparingly and not across the board. Regretfully, it appears that some Assistant Commissioners do apply these provisions to transactions which one would not easily characterize as being of a tax avoidance nature. It is not appropriate, eg, to apply such rules merely because a taxpayer could have performed a transaction in the manner that would have resulted in more tax being levied.

Some degree of artificiality should be a precursor to the application of these provisions.

The courts have tended to support the IRD's application of the anti-avoidance provisions, and we have reviewed statistics in this regard. However, there are many other instances where the IRD has applied anti-avoidance provisions in which taxpayers have simply decided that they do not wish to pursue the matter on litigation, and so these statistics do not present a full picture.

Perhaps one compromise is to retain a statutory rule but limit its *content* in order to scale down its potential application. However, we would not support out-right abolition of general anti-avoidance rules.

We do not believe that the best solution to tax avoidance is simply to leave this matter to the courts to decide. One reason is that court decisions are inevitably decided ex post facto, and therefore do not give taxpayers certainty. Indeed, court decisions are often surprising and unpredictable. More importantly, the issue of how to attack tax avoidance is a fundamental issue of tax policy. Such policy issues are not best left to the courts to decide. We note that courts in common law countries have been dealing with common law doctrines of tax avoidance for over thirty years. No certainty has arisen; decisions have changed the scope of the common law rule quite often during the course of the development of the rule, to the extent that a lot of uncertainties exist with the judge-made principles.

c. Carrying back of tax losses

The issue of carrying back of tax losses is linked with the more general issue of group loss relief. From a general policy perspective, both matters raise the same issues. We therefore do not distinguish between them in our discussion below.

We do appreciate that introduction of group loss relief in Hong Kong would be an expensive proposition to the government (by one estimate, this would result in a loss of revenue equal to approximately 2.5% of profits tax collections for a single year). However, this fact serves to highlight the real cost that the lack of group loss relief imposes on the business community. Whatever the actual costs, the lack of group loss relief puts them on the business community. This situation has been tolerated until now. However, there has recently been growing demand for group loss relief to be introduced (or, at the very least, a system of carry back of losses in order to ensure the matching of profits with past years' losses).

The need for some type of loss relief has become exacerbated by recent legal developments, particularly the *Secan* case. We also note that this was previously less of an issue because the IRD had in the past been reasonably tolerant about arrangements to shift profits between related companies (eg, through management fees arrangements). However, such arrangements are increasingly being challenged by the IRD, and so the demand for group loss relief has increased.

We accept that there are many tax avoidance implications that need to be addressed with a group loss relief system. The fact is that all sophisticated tax regimes offer some type of group loss relief, and they address this avoidance issue through appropriate rules. Group loss relief need not be particularly complicated. For example, a simple "loss transfer regime" would be simpler to administer than a full tax consolidation regime.

What is important is to get the policy right in the first place. Group loss relief could be seen as part of the trade-off for introducing a goods and services tax in Hong Kong.

d. Double deduction of expenses for companies employing new staff members

Ms. Tam suggested that a double deduction be permitted for wages of new staff, in order to encourage companies to employ more people.

We respectfully disagree with such an approach. One of the most attractive features of Hong Kong's tax system, which helps to ensure its relative simplicity, is the fact that it is not used by government in order to achieve ulterior social objectives. In other words, the Inland Revenue Ordinance focuses on technical tax matters. Although it is obviously desirable to encourage full employment in Hong Kong, there are other mechanisms by which this could be achieved, without utilizing the tax system for this purpose. For example, government could simply give cash grants to employers to compensate them for the cost of new employees. Experience overseas dictates that any incentives conferred by tax legislation are susceptible to exploitation and schemes in order to achieve artificial benefits that do not in fact fulfill the social objective behind such provisions. This in turn distorts the tax system in an inefficient manner.

We do not believe that the tax system should be utilized for this purpose.

e. The IRD could increase penalties to enhance correct filings

There is no right or wrong answer to this, and we do not offer a comment.

f. Commercial building and industrial building allowance

Ms. Tam suggested that the CBA and IBA should be computed on a "cost of purchase" basis instead of a "cost of construction" basis.

We are not aware that the current rules have caused dissatisfaction or difficulties, so the issue is not a pressing one. That being said, Ms. Tam's proposal does have the advantage of simplicity and therefore deserves further consideration. However, one difficulty we foresee is that it is difficult to determine what is the cost of purchasing a building (particularly a second-hand building) as opposed to the cost of buying the underlying land. This is one reason, we suspect, why the tax rules tend to focus on the cost of

construction rather than the cost of purchase. We fear that closer examination will reveal that our fear is insurmountable and that Ms. Tam's proposal is unworkable.

g. Sales of properties by non-residents

We offer no comment on this proposal. To a large measure, a decision would need to be based on how significant tax evasion is in this context, because this needs to be balanced against the inconvenience of requiring clearances to be obtained in all cases.

h. Personal assessment

Ms. Tam suggested that tax should be computed on a personal assessment basis unless the taxpayer affirmatively elects for non-personal assessment. This is in contrast with the current position where an election for personal assessment must be made.

We see no compelling reason to introduce this change. Both proposals have advantages and disadvantages. We believe there are more pressing issues that need to be addressed.

Mr. Deverall's specific comments

i. Introduction of group loss relief

Our comments on this proposal are the same as set out above in dealing with Ms. Tam's proposal to permit the carrying back of tax losses (item c. above). The issues are similar.

j. Offsetting of partnership losses

Mr. Deverall expressed concern that the losses of a partner in a partnership cannot be set off against its share of profits in a separate partnership. He suggested that s.19C(5) of the IRO be amended to permit such setting off.

In principle, we agree that this proposal has merit. The current position does indeed seem odd. It appears to us that the reason why a taxpayer's partnership losses cannot be set off against the taxpayer's profits from another partnership is due to a drafting glitch rather than any overt policy.

k. Exemption for capital profits

Mr. Deverall has identified a technical lacuna in the IRO. Although many people assume that Hong Kong does not tax capital gains, the exemption in s.14 of the IRO only extends to a limited range of capital profits, namely, "profits arising from the sale of capital assets". This lacuna has caused concern although, in practice, the IRD has generally recognized that *all* capital profits are tax-free, whether they fall within the strict wording of the exemption or not.

This is a point of growing concern because, with recent wide-spread changes in accounting standards, there is a fear that such practice might change. Amending the legislation as suggested by Mr. Deverall would be welcomed as a means of providing certainty in respect of what is generally regarded as a fundamental aspect of Hong Kong's tax system.

l. Transfer pricing

We agree that s.20(2) is badly drafted and is inappropriate to serve as a basis for a transfer pricing regime in Hong Kong.

The more fundamental issue in this regard is whether Hong Kong should adopt a more formal transfer pricing regime. We offer no comment on this issue at this stage, because this is a complex area that deserves extensive review. However, we definitely agree that this is an issue that must be reviewed more closely.

We would ask you to note that transfer pricing regimes are an integral feature of all sophisticated tax regimes worldwide. Such rules have an important role to play in allocating income and profits between various jurisdictions in situations involving cross-border business activities. This in turn avoids double taxation, which is an obvious point of concern for international businesses. We also note that Hong Kong's entry into comprehensive double tax treaties will inevitably put pressure on Hong Kong to deal with transfer pricing issues in a more systematic manner consistently with global transfer pricing standards (which, to work efficiently, must be applied consistently by taxation authorities around the world).

We agree this issue deserves review.

m. Taxation of trusts

We share Mr. Deverall's view that the rules relating to the taxation of trusts are confusing and ambiguous, although as a practical matter they have rarely given rise to concern. Some clarity would be useful from a technical viewpoint, but this is not a high priority compared to other issues.

n. Taxation of stock options

The JLCT has generally taken the position that tax rules should be set out in legislation rather than in practice notes that have no binding force. The old maxim "that it is better to be taxed by legislation than untaxed by concession" applies in this regard. This is a consequence of the rule of law.

That being said, on a practical level, we appreciate that it is often impractical to legislate minutiae to deal with unforeseen circumstances, or to set out comprehensive rules. Thus, practice notes in our view do have a useful role to play, at least pending legislative changes.

In the case of the specific issue raised by Mr. Deverall in this context, we agree with him on general principle, but we do not think that the situation cries out for urgent change. There are other priorities. We point out that addressing Mr. Deverall's concern about the role of practice notes would require many other legislative changes to be made, because his example (dealing with stock options) is only one instance where practice notes serve to modify or ameliorate relatively strict legislative rules.

o. Source of trading profits

The JLCT does have concern that Hong Kong appears to be gradually departing from the stricter source rules that were applied in the past. We are in the process of making comments to the Commissioner about the practice note that deals with the issue of source of profits.

The issue of source of profits has given rise to many tax disputes. The application of the source rules has probably been the biggest cause of frustration with Hong Kong's tax system over recent years, particularly among foreign investors in Hong Kong. Also, it appears to us that there is potential to modify Hong Kong's source rules in a manner that would attract more foreign investors to base their operations in Hong Kong.

There is no right or wrong answer to many of these issues which are inevitably complex. Suffice it to say that we agree that this is an issue that deserves thorough review.

p. Source of salaries income

We agree that many of the rules and practices dealing with the source of salaries income are confusing and irrational. This is an area that deserves thorough review.

q. Deduction of excess foreign taxes

We agree that the IRD's practice in this regard is contrary to the plain wording of s.50(2) of the IRO and deserves explanation. This is an administrative matter that does not require legislative reform.

The Administration might consider there is a policy issue here as to whether such a deduction ought to be permitted in the first place, but any change would require legislative change. We offer no further comment on this issue.

r. Taxation of unrealized profits

There is in our view no inherently right or wrong answer to the issue whether unrealized profits should be taxed, or whether taxation should be deferred until such profits are actually realized. This is, however, a recent point that has caused a lot of controversy, and it therefore does deserve to be reviewed. There are many issues involved here, such as fairness to taxpayers and the

impact of accounting treatment on tax liability. The latter issue raises even more wide-ranging points that need to be separately reviewed.

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We hope you find our comments above useful. If you have any questions, please call me at 2846 1716.

Yours sincerely,

Michael Olesnicky,
Chairman,
for and on behalf of
The Joint Liaison Committee on Taxation

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附件 B

意見書提出的具體事項

A. 譚香文議員二零零四年十月二十八日致財經事務委員會的信件亦有提出的事項

	提出的事項和意見	政府當局的意見
1.	根據第 82A 條徵收的行政罰款額訂得有點隨意。(Aaron Wong 先生) 根據第 82A 條實施的罰款政策可予改善。(香港會計師公會)	♦ 稅務局的罰款政策具透明度，並且廣為人知。納稅人可就罰款額提出上訴。
2.	第 61A 條的實施情況須予改善。(香港會計師公會)	♦ 第 61A 條已訂明援引該條的客觀方法。有七點客觀事項須予考慮。 ♦ 稅務局已發出指引和《稅務條例釋義及執行指引》，述明其對實施該條的意見。 ♦ 納稅人可就第 61A 條是否適用於預期進行的交易，申請作出事先裁定。事實上，第 61A 條的適用範圍很多時是申請裁定的事項。
3.	引入虧損移後扣減的條文。(香港會計師公會)	♦ 現已批准稅項虧損可無限期移前扣減。 ♦ 該建議會大大影響收稅工作和政府財政帳目的收支平衡。 ♦ 財政司司長擬備每年的財政預算案時，會考慮這稅項寬免建議。

B. 稅項寬免／新稅收建議

	提出的事項和意見	政府當局的意見
4.	所有公司債券的收益可免稅。(香港英商會)	♦ 財政司司長擬備每年的財政預算案時，會考慮這些稅項寬免建議。
5.	澄清／放寬對付予海外相聯者的利息的可扣除限制。(《稅務條例》第 16 條)(香港英商會)	♦ 同上。
6.	減低個人免稅額。(香港英商會)	♦ 同上。
7.	提高居所貸款利息的扣除額。(香港英商會)	♦ 同上。
8.	容許扣除更多與旅遊業有關的翻修開支。(香港英商會)	♦ 同上。
9.	引入集團稅項虧損寬減。(香港英商會、香港會計師公會和 Lloyd Deverall 先生)	♦ 同上。
10.	鼓勵進行全球交易活動。(香港英商會)	♦ 同上。
11.	為高增值行業(例如電子商貿、研究和發展工作)提供稅務優惠。(香港英商會)	♦ 同上。
12.	放寬合夥虧損的申索資格。(香港英商會)	♦ 同上。
13.	引入污染者自付稅項。(香港英商會)	♦ 財政司司長擬備每年的財政預算案時，會考慮這項新稅收建議。

C. 與《稅務條例》的詮釋及稅務局的行政做法有關的事項

	提出的事項和意見	政府當局的意見
14.	澄清利潤來源地的規定。(香港會計師公會及 Lloyd Deverall 先生) "來源地"一詞應有法定的定義。(香港英商會) 希望看到來源地的規定成為成文法則。(香港稅務學會) 香港的稅務條例是以利潤於香港產生或得自香港為基礎而草擬的，因此，不能分攤計算利潤。(Dickson Wong 先生) 澄清從出售內地分包商製造的貨品所得利潤50%可免稅的安排(雖然《稅務條例》並無訂明這項轄免規定，但稅務局實際上作出豁免安排)，以及該項豁免規定將適用於哪些架構。(香港英商會及香港會計師公會)	♦ 利潤的地域來源是繁複的實際問題，必然會引起爭議，尤其是在這個營商環境不斷轉變的時代。 ♦ 稅務局一直沿用判例法所確認的作業驗證法。 ♦ 判例法已裁定，在某些情況下可分攤計算有關利潤。 ♦ 稅務局正檢討《香港稅務條例釋義及執行指引》第 21 號"利潤的來源地"，以便為納稅人及稅務從業員提供更多指引。 ♦ 在適當時候會徵詢業界對《香港稅務條例釋義及執行指引》修訂本的意見。
15.	現時"境內"及"境外"的概念相當模糊。近期的案例似乎引進了"中央管理及控制權"的概念。若以這個概念為基礎，並擴大引伸範圍，則會對香港公司從"全球各地"所得的收入徵稅。(Dickson Wong 先生)	♦ 利潤的地域來源是實際而繁複的問題，經常引起爭議。 ♦ "中央管理及控制權"的概念與決定有關人士是否非居住於香港有關。 ♦ 這與對從"全球各地"所得的收入徵稅並無關

	提出的事項和意見	政府當局的意見
		係。香港只對得自香港的利潤徵稅。
16.	澄清外地受僱工作的規定。(香港英商會及香港會計師公會)	♦ 根據判例法，就受僱工作所在地作出裁定前，須考慮全部事實。 ♦ 正如《香港稅務條例釋義及執行指引》第 10 號所解釋，稅務局就薪俸稅的徵收作出決定時，一般會考慮多項因素。 ♦ 稅務局現正根據近期的經驗及稅務上訴委員會案例，就《香港稅務條例釋義及執行指引》進行檢討。 ♦ 在適當時候會徵詢業界對該《香港稅務條例釋義及執行指引》修訂本的意見。
17.	借調往內地工作的僱員的薪俸稅責任。(香港英商會及 Lloyd Deverall 先生)	♦ 一九九八年與內地簽訂有關安排後，稅務局於同年六月發出《稅務條例釋義及執行指引》第 32 號闡釋安排的內容，並於十月就此事出版兩本資料小冊子，其中一本題為“個人勞務須知”。另一本特別針對“香港居民中港兩地跨境工作”的資料小冊子，載述截至二零零三年十二月與內地商定的事項，亦已上載稅務局網頁。稅務局已於今年七月修訂及重新印行該本小冊子，並把最新版的小冊子上載網頁。

	提出的事項和意見	政府當局的意見
18.	資本增益／其他免稅項目的定義(《稅務條例》第 26A 條)。(香港英商會)	♦ 有關資本增益的案例多不勝數。 ♦ 第 26A 條已清楚界定可免稅的入息。至今沒有任何重大爭議。
19.	第 14(1)條的條文應增訂至包括"資本性質的利潤"。(Lloyd Deveral 先生)	♦ 社會人士及稅務局通常接受資本性質的利潤無須課稅。這點從來沒有引起爭議。
20.	澄清對海外人士的代理人的處理方法(《稅務條例》第 20A 及 20AA 條)。(香港英商會)	♦ 稅務局已特別針對這些事宜，(分別於二零零五年一月及一九九八年八月)發出經修訂的《稅務條例釋義及執行指引》(第 17 號"代非居住於香港的人士課利得稅者的課稅事宜"及第 30 號"利得稅：第 20AA 條 — 不視為代理人的人")。
21.	澄清信託的課稅問題。(香港英商會及 Lloyd Deveral 先生)	♦ 判例法已確立貿易信託的受託人須繳交利得稅這個原則。如受託人只是受益人的代名人，則受益人須就信託業務的利潤繳交利得稅。這方面的法律已無大爭議，對於誰應繳稅的問題，幾乎沒有無法釋除的疑慮。
22.	澄清有關行使股份認購權的稅項。(香港英商會及 Lloyd Deveral 先生)	♦ 最近在二零零五年三月發出經修訂的《稅務條例釋義及執行指引》第 38 號"僱員股份認購權利益"已澄清這點。
23.	引用 Secan 案例(即何時扣除開支)(香港英商會)、計算利潤及評估入息的時間(香港會計師公會及 Lloyd Deveral 先生)。	♦ 有關會計慣例對計算應課稅利潤的重要性，Secan 案例已澄清這方面的法例。 ♦ 關於扣除開支的時間，稅務局已就預付的營運

	提出的事項和意見	政府當局的意見
		性開支發出《稅務條例釋義及執行指引》第40號。 ♦ 至於計算利潤及評估時間，稅務局已將有關財務工具的《稅務條例釋義及執行指引》第42號草擬本，送交香港會計師公會參閱，並諮詢他們的意見。稅務局已在指引解釋其對這些事項的立場，並就Secan案例的相關性表達意見。該《稅務條例釋義及執行指引》已於二零零五年十一月發出。
24.	澄清折舊免稅額的計算方法。(香港英商會)	♦ 稅務局已於二零零二年八月發出經修訂的《稅務條例釋義及執行指引》第7號"機械和工業裝置 — 折舊免稅額"。 ♦ 有關工業建築物和商業建築物免稅額的《稅務條例釋義及執行指引》第2號將予修訂。 ♦ 在適當時候會徵詢業界對《稅務條例釋義及執行指引》第2號修訂本的意見。
25.	修訂《稅務條例》有關雙重課稅寬免的部分，以及簡化該條例所有涉及受影響外地稅款的相關條文。(香港稅務學會) 對沒有稅收抵免的外地稅款作出的扣除十分有限。(香港英商會)	♦ 現時，如香港與其他地區已簽訂避免雙重課稅安排，而安排已生效，則涉及有關地區的稅款可獲雙重課稅寬免。有關的寬免是已在海外課稅的入息可免稅或給予稅收抵免。根據國際標準，那些條文的規定是公平的，而且已經足

	提出的事項和意見	政府當局的意見
		夠。同時，該條例的條文清晰明確。 ♦ 《稅務條例》並無訂定單方面寬免的條文。由於香港只會對源自香港的入息徵稅，外地入息雙重課稅的機會很微。 ♦ 根據國際認可的徵稅原則，任何國家均有權對源自該國的入息徵稅，而稅項寬免則應由納稅人所屬國家提供。如納稅人所屬國家對其在香港賺取並已在香港繳稅的入息徵稅，則香港沒有理由給予稅項寬免。 ♦ 其他形式的稅項寬免，包括已在其他地方繳稅的薪俸入息可免稅(第 8(1A)(c)條)，以及把若干已繳付的海外稅款作為開支扣除(第 16(1)條)。 ♦ 香港特別行政區政府正積極與主要貿易／投資伙伴商議有關避免雙重課稅的綜合協定。
26.	澄清第 50(5)條有關稅收抵免的執行方法。(Lloyd Deverall 先生)	♦ 《稅務條例釋義及執行指引》第 32 號已訂明稅收抵免的計算方法。
27.	改善稅務個案的事先裁定程序。(香港英商會)	♦ 《稅務條例釋義及執行指引》第 31 號已訂明事先裁定程序的細則。 ♦ 市民普遍關注的一些事先裁定個案，已上載稅務局的網頁。

	提出的事項和意見	政府當局的意見
28.	在"先評後核"的制度下，不當地運用實地審核／調查權力。(Aaron Wong 先生) 重開以前課稅年度的評稅個案，以及採用先評後核的程序。(香港會計師公會)	♦ 評稅主任有責任確保納稅人被評定的稅額為恰當的稅額，故根據法例獲賦權可在有關課稅年度結束後六年內，就有關評稅作出檢討，以及在有需要時作出補加評稅。即使在推行先評後核制度之前，情況已是如此。 ♦ 稅務局已訂出清晰的指引及程序，處理因評稅主任看法有所改變而須作出補加評稅的個案。 ♦ 納稅人可就評稅主任所發出的評稅提出反對及上訴。在某些範圍內，納稅人亦可更正往年的評稅。(《稅務條例》第 70A 條)
29.	澄清評稅的程序（第 59 條）－ 新的先評後核方式是否合法。稅務局可於課稅年度之後的 6 年內作出保護評稅及補加評稅這種收稅方法，漠視其對納稅人造成的影響。這 6 年的期限比其他國家所訂立的為長，應該縮短，譬如說，至 5 年。(香港英商會)	♦ 稅務局已獲得法律意見，該意見確認先評後核的評稅方式是有法律基礎的。而法律依據就是稅務條例第 59 條第 2(a)款，該款規定任何人已按照第 51 條的規定提交報稅表，則評稅主任可接納該報稅表並據此作出評稅。 ♦ 作出原先及補加評稅的 6 年期限是稅務條例第 60 條中所訂明的，並非行政做法。為保障稅收，有需要制定這條文。此外，可參考政府當局對上述第 28 項的意見。
30.	公開《稅務主任手冊》。(香港會計師公會)	♦ 我們曾在不同場合多次與香港會計師公會商討這個問題，並在二零零五年一月五日立法會會

	提出的事項和意見	政府當局的意見
		議答覆提問時論及這個問題。 ♦ 正如早前解釋，稅務局認為，《稅務主任手冊》對納稅人及其稅務代表來說沒有太大參考價值。此外，手冊的內容涉及一些納稅人的資料，例如稅務局局長所作出的有關裁定，以及一些未經報道的稅務上訴委員會案例等。這些資料可能會泄露納稅人的身分。
31.	應加強工作，促使納稅人遵守稅務規定。(Aaron Wong 先生)	♦ 我們已不斷努力工作，促使納稅人及其稅務代表遵守稅務規定。有關工作包括(但不局限於)在傳播媒介作出廣告宣傳、透過不同方式(例如以印發文本及電子方式)發布有關資料、提供查詢服務、舉辦講座，以及每年與稅務從業員舉行會議等。
32.	簡化應繳薪俸稅的計算方法。明白現行計算基礎的人為數甚少。(香港英商會)	♦ 稅務局已就二零零四至零五年度的薪俸稅及個人入息課稅評稅通知書作出全新的設計。新設計的評稅通知書清楚解釋應繳稅款的計算方法。
33.	澄清轉讓定價的規定。(香港英商會及 Lloyd Deverall 先生) 政府應考慮應否訂立一套更詳細及容易貫徹執行的轉讓定價規定。(香港稅務學會)	♦ 稅務局已解釋其採用各自獨立利益原則的立場。雖然如此，政府當局仍然歡迎各界就如何使有關規定更為清晰提出意見。

D. 其他事項

	提出的事項和意見	政府當局的意見
34.	有需要重新成立"覆核委員會"。(香港英商會) 成立一個職權明確的正式委員會，以便可有資源、專業知識和時間處理與《稅務條例》有關的較基本及宏觀事宜。(香港稅務學會) 認為政府如循各個諮詢渠道收集意見，持續檢討《稅務條例》，會有助確保《稅務條例》與時並進。因此，只要在有需要時因應"特別事項"進行檢討，便無須把全面檢討列為首要工作。(英國特許公認會計師公會 — 香港分會) 設立論壇，聽取專業團體及市民的意見。(香港稅務學會) 稅務聯合聯絡小組並無成文的憲章或職權範圍，只是一個由稅務專家組成的特設諮詢組織，因此沒有足夠代表性"監察"《稅務條例》的定期檢討工作，亦沒有權力或義務執行如此重大的職能。(香港英商會)	♦ 正如我們在二零零五年五月十一日的動議辯論中指出，政府當局的一貫做法是與社會各界溝通和緊密合作，研究如何定出最妥善的改善方法。 ♦ 政府當局會繼續定期檢討各個稅項，並循多個途徑收集市民的意見。在擬備每年的財政預算案時，政府當局亦會一如既往廣泛諮詢社會各界。 ♦ 我們亦會繼續探討如何擴闊現有的諮詢渠道及收集社會各界的意見，以改善稅務政策的制定及推行工作。政府當局歡迎各界提出建議和意見。 ♦ 稅務聯合聯絡小組明白到，如要在涉及多方面具體事宜的檢討中擔當積極的角色，則可能須重新考慮其成員的資格，以加強聯絡小組對納稅人來說的"代表性"。我們歡迎聯絡小組計劃擴大其代表性。

	提出的事項和意見	政府當局的意見
	建議擴大稅務聯合聯絡小組的成員組合，以吸納更多不同意見。(英國特許公認會計師公會 — 香港分會)	
35.	考慮推行即賺即付計劃。(香港英商會) 無須規定納稅人在收到評稅通知書後才繳稅。(Aaron Wong 先生) 暫繳稅制度令人混淆(誤以為是預繳稅)，應予廢除。(Aaron Wong 先生)	♦ 現行的評稅及收稅安排行之有效，收稅成本亦相對較低。我們認為無須全面修改有關安排。
36.	簡化個人入息課稅。(香港英商會) ♦ 很多傳聞證據都顯示，市民未能完全理解個人入息課稅制度。雖然個人入息課稅的主要目的，是讓納稅人在無薪俸收入的情況下可利用個人免稅額抵銷營業或物業收入，或以本年度的營業虧損抵銷薪俸或物業收入，但個別人士報稅表內並無澄清有關事項。已婚人士的情況更為混亂，因為他們可能不知道在某些情況下可以根據個人入息課稅提出申索，利用配偶的營業虧損。 ♦ 制訂更全面的方針，對營業虧損給予稅項寬免，以及利用個人免稅額抵銷在本港的任何形式應課稅入息，這將會是較佳的做法。	♦ 《個別人士報稅表指南》闡明，選擇個人入息課稅可能減少納稅人所須繳納的稅款。然而，由於納稅人可在多種情況下受惠於個人入息課稅，當局不可能在報稅表或指引摘要內列出所有詳情。稅務局於二零零五年一月更新了《稅務條例釋義及執行指引》第 18 號“薪俸稅及個人入息課稅的個人評稅”。納稅人亦可參閱《個人入息課稅簡介》小冊子，或瀏覽稅務局的網頁，內容包括以實例說明個人入息課稅如何減少納稅人的稅款、選擇機制、常見問題及答案等。納稅人亦可利用稅務局在網站提供的電腦程式計算個人入息課稅的稅款。由二零零五年七月開始，稅務局已採用全新設計的個人入息課稅評稅通知書，更清楚顯示根據個人入息課稅計算的稅款。

	提出的事項和意見	政府當局的意見
		♦ 現行的個人入息課稅制度已給予足夠的稅項寬免，讓納稅人可以利用個人免稅額及營業虧損抵銷其他收入。
37.	認為第一步應重新編定條文(《稅務條例》條文)的編號。(香港英商會) 把《稅務條例》修訂成為一條前後呼應及合乎邏輯的法例。(香港稅務學會) 《稅務條例》有不少地方用語艱澀，即使經驗豐富的稅務從業員亦覺深奧，因此應予簡化。	♦ 稅務從業員熟悉現行安排。不過，政府當局歡迎各界提出詳細而具體的建議。

代表團體：

香港英商會

英國特許公認會計師公會 — 香港分會

香港稅務學會

香港會計師公會

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Aaron Wong 先生