

立法會 *Legislative Council*

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

Background Brief

Purpose

This paper sets out the background of the Inland Revenue (Amendment) (No. 3) Bill 2009 (the Bill), which amends the Inland Revenue Ordinance (Cap. 112) (IRO) to enable Hong Kong to adopt the latest international standard for exchange of information (EoI) in a comprehensive avoidance of double taxation agreement (CDTA). It also summarizes the views and concerns of members of the Panel on Financial Affairs (FA Panel) on the proposed legislative amendments.

Background

Double taxation agreements

2. To avoid the problem of double taxation, jurisdictions sign bilateral avoidance of double taxation agreements to clarify each other's taxing rights. Besides, a CDTA will normally result in reduced withholding tax rates on passive incomes such as dividends, royalties and interest. As a business facilitation initiative, the Government has been seeking to sign CDTAs with Hong Kong's major trading partners¹ since 1998-1999.

3. A CDTA would normally include an 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 CDTAs 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

¹ So far, the Government has concluded CDTAs with Belgium (2003), Thailand (2005), Mainland China (2006), Luxembourg (2007) and Vietnam (2008) and are negotiating CDTAs with 11 economies.

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.

Constraints under Hong Kong's tax law

4. Hong Kong currently cannot adopt the 2004 version of the EoI article because under IRO, 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. This constraint has reduced the number of Hong Kong's potential CDTA partners, and restricted the progress of the negotiations for CDTA.

5. The Administration consulted the business and professional sectors on the liberalization of EoI under CDTAs in 2005 and 2008. While views were divided in the 2005 consultation exercise, most of the stakeholders in some 50 business chambers, professional bodies and advisory committees consulted between July and October 2008 indicated support for liberalization so as to expand Hong Kong's CDTA network. In view of this consultation outcome, the Financial Secretary announced in the 2009-2010 Budget that the Government would put forward legislative proposals by the middle of 2009 to align Hong Kong's EoI arrangements with the international standard.

Recent development

6. 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 standard². The OECD did not put Hong Kong on any list, but pointed out Hong Kong's 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.

Safeguards to protect privacy and confidentiality of information exchanged

7. As advised by the Administration, it will include the most prudent safeguards acceptable under OECD 2004 version of EoI article to protect an individual's right to privacy and confidentiality of the information exchanged. The safeguards will be incorporated in individual CDTAs (which will be implemented as subsidiary legislation subject to negative vetting by the Legislative Council) or in documents of record between the two contracting parties. Apart from adopting the safeguards

² Subsequently, all jurisdictions in this list have been moved to the second list after they have announced commitment to OECD's standard.

provided by individual CDTAs, the Administration will also put in place domestic safeguards through subsidiary legislation. Subsequent to the introduction of the Bill, the Administration will proceed to prepare a set of rules under section 49(6) of IRO to set out a number of domestic safeguards on IRD's handling of an EoI request. IRD will also issue a Departmental Interpretation and Practice Note setting out the procedural safeguards IRD must adopt in processing EoI requests.

The Bill

8. The Administration proposes to amend the relevant provisions of IRO to enable IRD to collect and disclose a taxpayer's information in response to requests made by the CDTA partners for their own tax purposes. The major amendments are as follows -

- (a) clarifies 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) enables IRD to exercise the same power under section 51(4) of IRO to collect information concerning tax of a foreign territory for the purpose of EoI under a CDTA;
- (c) enables a magistrate to exercise the same power under section 51B of IRO to issue search warrants for information concerning tax of a foreign territory for the purpose of EoI under a CDTA;
- (d) 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; and
- (e) a related amendment to the Personal Data (Privacy) Ordinance (Cap. 486) to provide that the word "tax" in section 58(1)(c) of that Ordinance includes a foreign tax covered by an EoI article under a CDTA.

Major views and concerns expressed by the Panel on Financial Affairs

9. The Administration briefed the FA Panel on the proposed legislative amendments at the meeting on 4 May 2009. Members expressed the following views on the proposed amendments:

- (a) the proposed extension of IRD's power to gather information from taxpayers and provide the information to contracting parties should be

examined in a prudent manner, taking into consideration the uniqueness of Hong Kong's small and open financial market and the possible number of EoI requests from the contracting parties. Moreover, EoI under CDTA should be limited to the information on a specific taxpayer in a case, but not those on his business counterparts and associates;

- (b) measures and mechanism in place for handling requests for information so that IRD could guard against abuse of the information provided to another jurisdiction under a CDTA, protect the confidentiality of the information exchanged and the privacy of the local taxpayers concerned;
- (c) impact of the legislative proposal, including the impact on the protection of personal privacy and on business enterprises' interests in making investments in Hong Kong; and
- (d) whether additional resources would be required for IRD to collect the requested information after the adoption of the OECD 2004 version of EoI article.

Relevant papers

10. Relevant papers are available at the following links:

The Administration's paper for the FA Panel meeting on 4 May 2009

<http://www.legco.gov.hk/yr08-09/english/panels/fa/papers/fa0504cb1-1408-3-e.pdf>

Minutes of FA Panel meeting on 4 May 2009 (paragraphs 8 to 26)

<http://www.legco.gov.hk/yr08-09/english/panels/fa/minutes/fa20090504.pdf>

Legislative Council Brief provided by the Financial Services and the Treasury Bureau

http://www.legco.gov.hk/yr08-09/english/bills/brief/b25_brf.pdf