



**The British
Chamber of Commerce
in Hong Kong**

香 (By email to: PASTSYR@FSTB.GOV.HK)

港
英
商
會

21 September, 2009

CB(1)2682/08-09(01)

Mr. Kenneth Cheng
Principal Assistant Secretary
Financial Services and The Treasury Bureau
(The Treasury Branch)
Central Government Offices
Lower Albert Road
Hong Kong

Dear Mr. Cheng

Exchange of Information provisions

We write in response to the Public Consultation on this important subject.

As you will know from our July 2009 letter, our members are concerned at the broad scope of the proposed amendments to the Inland Revenue Ordinance (“IRO”), and in particular the proposed amendments to sections 49 and 51. We wish to reiterate the points we made in our earlier letter, and to make some additional points, below.

The proposed changes, as they are currently drafted, will be a major departure from the existing tax legislation in Hong Kong, and therefore may have unforeseen consequences.

Currently the Inland Revenue Department (“IRD”) is permitted to collect information for purposes of assessing and collecting only Hong Kong taxes. After the proposed legislation is enacted they may collect “full information in regard to any matter that may affect any liability, responsibility or obligation of any person under the laws of a territory outside Hong Kong concerning tax of that territory, where there is a Comprehensive Double Tax Treaty”.

Whilst we understand that the Government’s intent is to have a broad enabling power to enter into Comprehensive Double Taxation Agreements (“CDTA”s) with exchange of information provisions, and that each Agreement will then be vetted and accepted by Legco, it is proposed that the appropriate safeguards will only be implemented under each CDTA.

Where business gets done

We still firmly believe the safeguards should be included in the primary Hong Kong legislation. These safeguards should clearly establish that:

- information will only be exchanged on case specific matters, and in controlled conditions (i.e. so that automatic exchange of information is not later possible);
- only information on taxes covered by the CDTA will be exchanged;
- the requesting party must satisfy the IRD that the information is necessary or foreseeably relevant for the administration or enforcement of the local tax laws (to avoid “fishing expeditions”);
- the requesting party must use the information only for the purposes specified in the request; and
- the information the requesting party is requesting must also be legally obtainable under its own laws.

Many G20 members are saying that current Clause 26 of the OECD model treaty on Exchange of Information provisions needs to be strengthened. It is clear that this proposed Hong Kong legislation has been drafted with a view to enabling not only the 2004 version of the Exchange of Information provisions, but also possible future versions of Exchange of Information provisions.

We would suggest that the negotiation of future tax treaties by Hong Kong would be helped if the scope available for such treaties is made clearer in the primary legislation. In particular, if safeguards are in place in the primary legislation, there will be less chance of having to concede points that we may not want to concede, in the course of any particular treaty negotiation.

We also understand there is a plan to have domestic safeguards in place in Hong Kong, in that there will be subsidiary rules, or secondary legislation about the application of the rules, and additionally the IRD will issue a Departmental Interpretation and Practice Note setting out its procedural safeguards.

With regard to secondary legislation or rules, we would like to see the following confirmed please:

- That any request under a CDTA will be handled by an Assistant Commissioner or more senior person at the IRD (not Directorate level or above);
- That there will be a regular review of the handling of enquiries received under Exchanges of Information that have taken place;
- We also understand that the intention is to notify persons that there has been an enquiry on their case, before a response to that enquiry will be made. Will this be possible where those persons are resident outside Hong Kong? We doubt it. In which case it may be considered discriminatory that persons based in Hong Kong will be notified, whilst persons based outside Hong Kong may not.

We would hope that this draft subsidiary legislation (to be released under S49(6) of the IRO) can be made available for review as soon as possible, and before the amendments to the primary legislation are enacted, so we can see how the two sets of legislation will work together. We would also like to see a draft of the proposed Practice Note.

Whilst writing we would also appreciate confirmation by the Government that it will not now, or in future, enter into standalone Taxation Exchange of Information Agreements ("TIEA"s). We would also appreciate an update by the Government on the current status of its CDTA treaty negotiations- information on this had recently been removed from the HK IRD website -- so that we know which treaties are likely to be entered into when this new legislation is enacted.

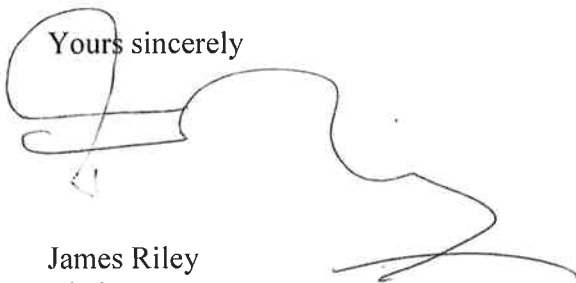
As you will know the United Kingdom has already expressed willingness to finalise treaty negotiations with Hong Kong as soon as the enabling legislation is in place.

Many are also asking if there will be a prompt amendment to the HK/PRC "treaty" to upgrade it to the 2004 standard for Exchange of Information provisions and, whether the United States has requested a treaty with Hong Kong; which in fact would be of major benefit to the many Hong Kong companies conducting business with US parties.

Although at present, few specific requests for information under CDTAs occur in practice and they are used primarily as a tool to encourage compliance and disclosure of information at the taxpayer level, we still believe the safeguards we have suggested should be built into the primary Hong Kong legislation.

We are intending to give evidence before the Bills Committee on 8th October 2009.

Yours sincerely

A handwritten signature in black ink, appearing to be 'James Riley', written in a cursive style. The signature starts with a large, looped 'J' and ends with a long, sweeping horizontal stroke.

James Riley
Chairman