



CB(1)338/09-10(02)

Room 525, 5/F., Prince's Building, Central, Hong Kong
Telephone: 2521 1160, 2521 1169 Facsimile: 2868 5035
Email: info@hkab.org.hk Web: www.hkab.org.hk

香港中環太子大廈5樓525室
電話：2521 1160, 2521 1169 圖文傳真：2868 5035
電郵：info@hkab.org.hk 網址：www.hkab.org.hk

10 November 2009

By e-mail: yhcheung@legco.gov.hk

Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009
Legislative Council
Legislative Council Building
8 Jackson Road
Hong Kong

Attention: Mr. Noel Sung

Dear Sirs

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

We refer to our letter dated 3 November 2009.

Once again, we are grateful to the Bills Committee to further consult the Hong Kong Association of Banks (HKAB) on the documents in relation to the Inland Revenue (Amendment) (No. 3) Bill 2009 (the Bill). Please find below our comments for your consideration:

A. To set out an appropriate legal process for Commissioner of Inland Revenue (Commissioner) requesting information from third parties including financial institutions

The current proposed documents appear to be focused on where the Commissioner already has information in his hands, and having decided that it is appropriate to disclose such information to the overseas tax authority, is notifying the taxpayer re such proposed disclosure.

However, the effect of Clause 5 of Article 26 Exchange of Information in 2004 OECD Model which Hong Kong is adopting, is to extend to a scenario where the Hong Kong Inland Revenue Department (IRD) may be called upon by an overseas tax treaty partner (which Hong Kong has signed a tax treaty incorporating this Article) to request a third party such as banks and financial institutions to supply information.



Further to our previous letter 12 September 2008, with respect to the operation of Clause 5 of Article 26 requiring third parties including financial institutions to provide information on taxpayers, there should be evidence of safeguards for taxpayers and third parties – financial institutions assisting in such information requests as well as the Commissioner to protect from “unauthorized” disclosures challenges or concerns. Hence, there should be legal procedures involving an independent judiciary panel to provide a fair and independent assessment of the validity of requests before information is sought and provided to overseas treaty partners, which will allow the Commissioner to render effective assistance to valid requests. Such legal procedures are essentially similar to procedures used in the United Kingdom, which relies on a tribunal process, or the United States which relies on the courts. Singapore is also implementing such legal procedure.

As further elaboration of the legal procedures:

- (i) The Commissioner will notify the affected taxpayer and third parties including financial institutions of the request by the overseas tax treaty partner, unless there are exceptional circumstances, such as if doing so would prejudice an investigation into any breach of tax laws, or prevent the effective exchange of information.
- (ii) The Commissioner will make an application to the independent judiciary (which could be the Board of Review or High Court (“Court”)) for a production order to access the requested information. The affected taxpayer and third parties including financial institutions will have the right to apply to the Court to discharge or vary the Court order.

The above legal procedures proposal, which is similar to legal procedures adopted by several OECD members, is suggested as an additional and complementary process to the Departmental Interpretation and Practice Notes Implementation Details of Exchange of Information Provisions under Comprehensive Double taxation Agreements (extract of the Part on “Administrative Guidelines”) – Annex C attached to your letter 21 October 2009. More importantly, it supports taxpayer’s rights, provides third parties including financial institutions with legal immunity from challenges re confidentiality etc. and assists the Commissioner to facilitate valid requests.

B. Outline of the Proposed Safeguards to be covered by the Inland Revenue (Disclosure of Information) Rules (“IRRs”) – Annex B – Commissioner notifying taxpayer

1. Subject to comments in (A) above, to provide sufficient time for the taxpayer to review and, where necessary, make amendment to the information to be

disclosed by the Commissioner to the requesting country, we suggest that the Commissioner should provide the taxpayer with a copy of such information in his prior notification of proposed disclosure to the taxpayer, instead of requiring the taxpayer to make a written request within 14 days after the prior notification is given by the Commissioner as stated in paragraph 5(b) of the IRRs.

2. In some circumstances, the taxpayer may require more than 14 days to verify and make necessary amendments to the information to be disclosed by the Commissioner. There should be provision to allow the taxpayer to make application with the Commissioner for an extension of time for verifying the information to be disclosed by the Commissioner and making amendments.
 3. The taxpayer should have the right to object to an independent body (currently stated as Financial Secretary) against the Commissioner's decision to disclose information to a tax treaty partner, in addition to the ability to request the independent body (currently stated as Financial Secretary) to amend information per Paragraph 10 of Annex B.
 4. The circumstances in which the Commissioner will not make prior notification of the proposed disclosure to the taxpayer should be reasonable and justified as an important safeguard against abuse. We consider "tight time constraint" stated in paragraph 8 should not be a reasonable and justifiable reason.
 5. Pursuant to paragraph 156 of the Departmental Interpretation and Practice Notes 44 (revised) issued in August 2008 relating to the tax agreement between Hong Kong and China, the view of the Commissioner is that Hong Kong's existing legislation (including the Personal Data (Privacy) Ordinance (PDPO)) does not provide that the IRD should inform the taxpayer concerned if it has passed on information relating to him to the competent authority of the Mainland, and accordingly, the IRD would not provide taxpayers with details of any such changes. Please clarify whether it is the policy intent of the Administration to extend the notification requirement under the IRRs to information exchanges under the Hong Kong/China tax agreement.
- C. Departmental Interpretation and Practice Notes ("DIPN") - Implementation Details of Exchange of Information Provisions under Comprehensive Double Taxation Agreements (CDTA) - Annex C
1. In relation to paragraph (a) of the DIPN – Annex C, we suggest that the exchange of information should be restricted to what is "necessary", instead of "foreseeably relevant", information on taxes covered by the CDTA for clarity and avoidance of fishing expedition requests from the requesting party.



2. In relation to paragraph (f) of the DIPN – Annex C, it should be stated that only requests which are in respect to the years where the CDTA is in force should be entertained. In other words, any request for information prior to or post the CDTA being in force should not be entertained.

Yours faithfully

A handwritten signature in black ink, appearing to be "Jennifer Cheung", written in a cursive style.

Jennifer Cheung
Secretary