



Inland Revenue (Amendment)(No. 3) Bill 2009 Further Submissions

The Law Society welcomes the opportunity to review and to comment upon the documents that have now been provided by the Administration:

- (a) Outline of the proposed safeguards to be covered by the Inland Revenue (Disclosure of Information) Rules (“the Rules”); and
- (b) Departmental Interpretation and Practice Notes - Implementation Details of Exchange of Information Provisions under Comprehensive Double Taxation Agreements (“the DIPN”).

These documents, together with the Bill, have been reviewed by members of the Law Society’s Revenue Law Committee who have commented as follows:

1. We believe it is fundamentally unsatisfactory that the legal provisions to allow for the implementation of Exchange of Information provisions in Comprehensive Double Tax Agreements are to be dealt with piecemeal in three separate legal documents - the Bill (to be enacted by LegCo), the proposed Rules (to be promulgated by the CE in Council) and the proposed DIPN (to be published by the Commissioner of Inland Revenue). More importantly, we believe it is also fundamentally unsatisfactory that the proposed safeguards intended to protect the Hong Kong public from abuse of the proposed Exchange of Information arrangements are intended to be set out not in the legislation itself but in the proposed Rules and in the proposed Inland Revenue Department DIPN.
2. We question the desirability of this piecemeal approach to legislation. Why cannot all the relevant provisions be contained in the Bill so that they are readily available in one place for the public to read and so that, once the Bill is enacted into law, all of the provisions, including all the safeguards, have statutory force and effect? This is what has been done in Singapore -see the attached copy of the *Singapore Income Tax (Amendment) (Exchange of Information) Bill* (“the *Singapore Bill*”), which we understand has recently been enacted and passed into law in Singapore. We see no reason why this should not also be done in Hong Kong.

3. The advantages of being able to find all the relevant provisions in one place are obvious. But more important than this, in our view, is the desirability of giving statutory force to the safeguards against abuse. To have the safeguards enshrined in the statute law of Hong Kong will provide a greater degree of security for the public than if such safeguards are provided in part by Rules made by the CE in Council and in part by a mere statement of Inland Revenue Department practice. Rules made by the CE in Council can be changed by the CE in Council without reference to LegCo, and a DIPN provides virtually no protection whatsoever as a DIPN has little legal effect, has no force of law and is not binding on either members of the public or on the IRD.

Indeed there are, we believe, many instances where for one reason or another the IRD will depart from what has been stated in a DIPN. A DIPN is merely a statement of IRD practice and can be amended or withdrawn at any time by the Commissioner. Indeed, it is the invariable practice of the IRD to endorse a note on each DIPN in the following terms:

These notes are issued for the information of taxpayers and their tax representatives. They contain the Department's interpretation and practices in relation to the law as it stood at the date of publication. Taxpayers are reminded that their right of objection against the assessment and their right of appeal to the Commissioner, the Board of Review or the Court are not affected by the application of these notes.

4. We consider that the Bill should be amended by adding the following provisions of the proposed Rules and DIPN with the modifications indicated:

(1) Proposed Rule 3

Proposed Rule 3 should be incorporated into the Bill with the modification that a disclosure request may only be approved by the Commissioner or an Assistant Commissioner. This modification is necessary to ensure that disclosure requests are dealt with and approved only by sufficiently senior officers of the IRD. We have noted from the proposed DIPN that the Commissioner has proposed to authorise the Chief Assessor (Special Duties) as the officer to be authorised to approve disclosure requests. We consider that, as an internal Departmental matter, the Chief Assessor (Special Duties) may be designated to consider whether a disclosure request should or should not be approved and to make a recommendation to the Commissioner or Assistant Commissioner in that regard, but the final decision to approve or not to approve the request should be a matter for the Commissioner or an Assistant Commissioner.

(2) Proposed Rule 4

Proposed rule 4 should be incorporated into the Bill with the modification that the procedures proposed to be specified by the Commissioner as one of the criteria with which a disclosure request must comply should be set out not in an Appendix to the DPIN, as appears to be the Administration's present proposal, but in a Schedule to the Bill itself as has been done in the *Singapore Bill* - see Section 105D(2) of, and the Eighth Schedule to, the *Singapore Bill*. It is an important safeguard for the public that the criteria with which the

disclosure request must comply be specified by statute and not merely in a statement of Inland Revenue Department practice and that any departure from compliance with such criteria should only be permitted in the most exceptional circumstances.

(3) Proposed Rule 5

Proposed Rule 5 should be incorporated into the Bill with the modification that in paragraphs (b) and (c) of Rule 5 the periods of 14 days for a person to request a copy of the information the Commissioner is prepared to disclose and for a person to request the Commissioner to amend such information after he/she has received a copy of it should be changed to 28 days or 1 month. To allow only 14 days is unreasonably short, particularly in the case of members of the public who travel out of Hong Kong more frequently and for longer periods than in the past.

We recommend that Proposed Rule 5(c) should be amended so that any person who is served with a request is entitled to object to such request on any other grounds in addition to those that are specified therein.

(4) Proposed Rules 6, 7 and 8

Proposed Rules 6, 7, and 8 should be incorporated into the Bill but with Rules 7 and 8 modified along the lines of Section 105E(4) of the *Singapore Bill*.

We believe it would also be helpful to provide for a greater degree of certainty as to when notice of the disclosure request is deemed to be served if provisions similar to those contained in Section 105E(3) of the *Singapore Bill* could also be added to the Hong Kong legislation.

(5) Proposed Rules 9, 10 and 11

Proposed Rules 9, 10 and 11 should be incorporated into the Bill but with modifications:

- (a) to change the period of 14 days in Rule 10 to 28 days or 1 month;
- (b) to give a right of appeal to the Court against a decision of the Financial Secretary under Rule 11; and
- (c) to provide, along the lines of Part XXB of the *Singapore Bill* (Section 105I et seq.), for the Commissioner to apply for a Court order before any information subject to legal privilege can be disclosed pursuant to a disclosure request.

5. DIPN

We query the statements in paragraphs (a), (b) and (c) of the proposed DIPN which concern procedures and practices relating to the provision of information pursuant to a disclosure request which are not specified or permitted by law or by the relevant tax treaty. These paragraphs refer to administrative practices, protocols, memoranda of understanding, minutes of meetings and exchanges of correspondence, as well as to “generally accepted international practice” as if these are matters to which the authorised officer in

the IRD “must have due regard when approving a disclosure request”. It should be remembered that Section 49(5) of the Inland Revenue Ordinance only permits the disclosure of information, which would otherwise be secret under Section 4 of the Ordinance, to a foreign government official if it is information “**required** to be disclosed” under the relevant double tax treaty (emphasis added).

6. We also query the statements in the proposed DIPN which concern the standard response time of 90 days said to have been set by the OECD. We have not researched this ourselves but we refer to the comments of the JLCT on this subject at paragraph 3(f) of their letter to the Clerk to the Bills Committee dated 18 September 2009.

As we stated in our Submissions on the Bill dated 1 September 2009, the Law Society supports the government’s efforts to enable Hong Kong to enter into Comprehensive Double Tax Agreements containing the OECD 2004 Standard Exchange of Information Provision, but that our support is not unconditional. As presently drafted the Bill, together with the proposed Rules and DIPN, does not satisfy our concerns and we strongly urge the modifications to the Bill which we have proposed above.

We therefore request that the Bill be amended to incorporate the modifications we have proposed.

**The Law Society of Hong Kong
The Revenue Law Committee
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