

財經事務及庫務局  
(庫務科)  
香港下亞厘畢道  
中區政府合署



FINANCIAL SERVICES AND  
THE TREASURY BUREAU  
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3 November 2009

Clerks to Bills Committee  
Legislative Council Secretariat  
Legislative Council Building  
8 Jackson Road  
Central, Hong Kong  
(Attn: Ms Rosalind Ma)

Dear Ms Ma,

**Bills Committee on Inland Revenue (Amendment)(No. 3) Bill 2009**  
**Follow-up to meeting on 27 October 2009**

I refer to your letter dated 28 October 2009 and attach a paper (at Annex) setting out our response to the issues raised at the third Bills Committee meeting held on 27 October 2009.

Yours sincerely,

( Ms Joan Hung )  
for Secretary for Financial Services  
and the Treasury

**Item (1) No Retrospective Effect**

According to the “Entry into Force” Article in a Comprehensive Avoidance of Double Taxation Agreement (“CDTA”), all provisions under the CDTA (including the exchange of information (“EoI”) Article) shall have effect from a stipulated date as agreed (“effective date”) and shall only apply to taxes after the effective date. This is a standard article in our CDTAs and the one in our CDTA with Luxembourg is extracted at Enclosure for Members’ reference.

2. An EoI request can only be made after the effective date for enforcing taxes arising on or after the effective date. The “Entry into Force” Article does not create any bilateral obligation upon the HKSARG to provide any information coming into existence or relating to any matter prior to the effective date. We have not entertained and will not entertain any request for any information relating to a period before the effective date, even though such information comes into the light only after the effective date. We will seek to set this out in a protocol which forms part of the CDTA (and hence part of the subsidiary legislation) or in other documents of records (e.g. a Memorandum of Understanding between the two contracting parties), which although not being part of the CDTA but have to be observed by both parties in carrying out the CDTA. The Secretary for Financial Services and the Treasury will also reaffirm this policy in his speech for the resumption of second reading debate.

**Item (2) EoI Safeguards**

3. According to available official information and our enquiries with the relevant authorities, countries such as Australia, Canada, Japan, Malaysia, New Zealand, Singapore, Switzerland, United Kingdom and the United States do not provide standard Organisation for Economic Cooperation and Development (OECD) EoI safeguards in their primary legislations.

4. The EoI safeguards provided in individual CDTAs are implemented in Hong Kong as subsidiary legislations, which are known to the court and must be observed by the Commissioner of Inland Revenue (CIR). If the CIR applies for a court order to obtain information without complying with the EoI

safeguards stipulated in the relevant CDTA, the court with reference to the relevant subsidiary legislation could disallow the application.

### **Item (3) Notifications**

5. In case a requesting party requires the Inland Revenue Department (IRD) not to give notification on the ground that doing so would likely undermine the chance of success of its investigation, IRD would ask the requesting party to substantiate its claim. For example, the requesting party would be asked to provide information and reasons to explain why it believes the subject person would destroy or deface records, whether similar offences were committed in the past, or whether the subject person is the target of a covert criminal investigation. IRD would have to be satisfied that sufficient information is available to reasonably justify such requests.

6. In case of an urgent request where prior notification would frustrate the timely enforcement of the requesting party's tax laws, the IRD must be satisfied that the urgency is genuine. The OECD has issued detailed guidelines on what information should be contained in an EoI request. IRD would be able to see the background of a case and be able to have an assessment whether there is any deliberate or undue delay in making a request. For example, the IRD would ask the requesting party to substantiate why the request could not have been made earlier if the information is required before a certain date because there is an imminent statutory time limit of raising the relevant tax assessment.

7. The relevant procedure will be provided in the Departmental Interpretation and Practice Notes.

THE AGREEMENT BETWEEN THE HONG KONG SPECIAL  
ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA  
AND THE GRAND DUCHY OF LUXEMBOURG FOR THE AVOIDANCE  
OF DOUBLE TAXATION AND THE PREVENTION OF  
FISCAL EVASION WITH RESPECT TO TAXES  
ON INCOME AND ON CAPITAL

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**Article 28**

**Entry into Force**

1. Each of the Contracting Parties shall notify the other in writing of the completion of the procedures required by its law for the bringing into force of this Agreement. The Agreement shall enter into force on the date of the later of these notifications.

2. The provisions of the Agreement shall thereupon have effect:

(a) in the Hong Kong Special Administrative Region:

in respect of Hong Kong Special Administrative Region tax, for any year of assessment beginning on or after 1 April 2008;

(b) in Luxembourg:

(i) in respect of taxes withheld at source, to income derived on or after 1 January 2008;

(ii) in respect of other taxes on income, and taxes on capital, to taxes chargeable for any taxable year beginning on or after 1 January 2008.

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