Hong Kong Institute of
Certified Public Accountants
香港會計師公會

By email (yhcheung@legco.gov.hk) and by hand **CB(1)260/09-10(06)**

2 November 2009

Our Ref.: C/TXP(4), M66451

Hon. Paul Chan Mo-po, MH, JP
Chairman, Bills Committee on
Inland Revenue (Amendment) (No.3) Bill 2009
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Mr. Chan,

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

The Institute would like to thank the Bills Committee on the above bill for the invitation to comment on the additional information provided by the Administration on the proposed safeguards to be covered by the proposed Inland Revenue (Disclosure of Information) Rules and draft Departmental Interpretation and Practice Notes.

--- The Institute's comments on the draft materials are contained in the Appendix. Our comments also relate to the letter from the Administration to the Bills Committee, dated 21 October 2009.

If you have any questions on the Institute's submission, please do not hesitate to contact me on 2287 7084 or at peter@hkicpa.org.hk.

Yours sincerely,

Peter Tisman
Director, Specialist Practices

PMT/EC/ay
Encl.

37th Floor, Wu Chung House,
213 Queen's Road East, Wanchai, Hong Kong
香港灣仔皇后大道東213號胡忠大廈三十七樓

Tel 電話 : (852) 2287 7228
Fax 傳真 : (852) 2865 6776
(852) 2865 6603

Web 網址 : www.hkicpa.org.hk
E-mail 電郵 : hkicpa@hkicpa.org.hk

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Inland Revenue (Amendment)(No.3) Bill 2009
Comments on additional material provided by the Administration following the Bills Committee meeting on 8 October 2009

Scope of information exchange

Threshold for requesting party to seek information

Paragraph 2 of Annex A to the Administration's letter (paper CB(1)106/09-10(2))[1] ("letter") suggests that the need for a requesting party to satisfy the Inland Revenue Department ("IRD") that information requested is "foreseeably relevant" for the carrying out of the comprehensive agreement for the avoidance of double taxation ("CDTA") or to the administration or enforcement of its local laws, is a sufficient safeguard against "fishing expeditions". In its response to views submitted on the bill (Annex D to the letter), the Administration appears to support the view that there is no clear definition of "necessary" in this context and that more controversy would arise if "necessary" were the threshold. We should like to clarify whether there is any clearer definition of the term "foreseeably relevant". In our earlier submission, we proposed that adopting "relevant" rather than "foreseeably relevant" would provide a better safeguard for taxpayers against fishing expeditions[2] and, in our view, "relevant" is a more-clearly-understood term. This wording is also acceptable under the OECD commentary on exchange of information ("EOI") provisions.

No automatic or spontaneous exchange

In paragraph 8 of Annex A to the letter, the Administration clarifies that "documents of record" could include a memorandum of understanding. The Institute understands that documents of record could also be in the form of agreed minutes of meetings or exchanges of correspondence subsequent to the signing of the relevant agreement. As we indicated in our previous submission, the legal standing of such documents is unclear[3]. We remain of the view that important safeguards, such as that against automatic or spontaneous exchanges of information, should be contained in subsidiary legislation, which could be the Inland Revenue (Disclosure of Information) Rules ("IRR"), or the CDTA or the protocol forming part of the CDTA.

Scope of taxes covered

Paragraph 3 of Annex A to the letter clarifies that the Administration will seek to confine the scope of EOI to taxes covered by the CDTA (i.e. basically income taxes). It is not stated where this restriction will appear, although presumably, in addition to anywhere else, it will need to be contained in individual CDTAs. As individual CDTAs are subject to negotiation with contracting parties, it would give greater comfort to taxpayers if this restriction were also to be stated, preferably, in the IRR and in the procedural provisions contained in the Departmental Interpretation and Practice

[1] Letter from Financial Services and the Treasury Bureau to Legislative Council Bills Committee, 21 October 2009.
[2] Institute's submission, 18 September 2009, detailed comments, para.5.
[3] Institute's submission, 18 September 2009, detailed comments, para.3.

Notes ("DIPN"). At the very least, the Secretary for Financial Services and the Treasury ("SFST") should state this intention during the passage of the bill through the Legislative Council.

Procedural safeguards contained in the draft DIPN

On page 12 of Annex D to the letter, the Administration states that the DIPN does not provide additional safeguards. It simply sets out the procedures that the IRD will follow to implement those safeguards stipulated in CDTAs and the IRR. We find this statement somewhat confusing, as it is not clear where the relevant safeguards are to be found in the CDTAs and IRR. The Institute notes that the procedures stated in the Appendix to the extract of the draft DIPN, at Annex C of the letter, include the "procedural safeguards" referred to in paragraph 11 of the Legislative Council Brief on the bill. In our previous submission, we expressed the view that these proposed procedural safeguards should be incorporated in subsidiary legislation to provide legal authority and procedural certainty, and we remain of this view. It certainly needs to be clarified where the specific safeguards to which the procedures in the draft DIPN relate will be prescribed and how they will be worded.

We note the cross-reference, in paragraph 4 of the outline of the IRR, to "any other procedures that may be specified by the Commissioner" (presumably in a DIPN). However, from Hong Kong taxpayers' point of view, this cross-reference would clearly not give adequate standing to procedural safeguards that do not appear in the CDTA. This is because, as we also pointed out in our previous submission, DIPNs simply reflect IRD practice. They are not binding (least of all on other contracting parties to CDTAs) and they may be changed by the Commissioner at any time, as is explicitly stated in paragraph 4 of the Appendix to Annex C.

Notification to taxpayers under the IRR

Under the procedures described in paragraph 5(b) of Annex B to the letter, the taxpayer has to make a request for a copy of the information that the Commissioner is prepared to disclose to a requesting party. Given that it is likely that almost all taxpayers would want to review information that the IRD is proposing to pass on about them, the step of requiring a formal request to be made seems unnecessary. The Institute would suggest that the information that the IRD proposes to be disclosed about a taxpayer be provided concurrently with the initial notification to the taxpayer, referred to under item 5(a). While this might mean that the taxpayer is notified slightly later than might otherwise be the case, it would seem that merely notifying an affected taxpayer that a request for information has been made would not be of much value in itself without also supplying the details.

If the additional step described paragraph 5(b) is no longer necessary, the time provided for the taxpayer to amend the information, under the procedure described in paragraph 5(c), should be extended from 14 days to 21 days or longer, to allow more time for taxpayers to provide the necessary supporting documents.

Consideration should be given to providing more specific examples in the DIPN of circumstances where the Commissioner would not serve a notification on a person who is the subject of a disclosure request.

EOI article not to have retrospective application

The Institute notes, from paragraph 7 of Annex A to the letter, that the Administration proposes to decline any request from treaty partners to give retrospective effect to the EOI arrangement. This is an important point. However, as the terms of individual CDTAs are subject to negotiation, Hong Kong may find itself under pressure to relax this stipulation. In order to give greater comfort to taxpayers, we would suggest that the Administration make it clear that the commencement article is non-negotiable. This can be done, preferably, by including provisions in the IRR and the DIPN. At the very least, the SFST should state this intention expressly during passage of the bill.