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FINANCIAL SERVICES AND
THE TREASURY BUREAU
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10 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 5 November 2009**

I refer to your letter dated 6 November 2009 and attach a paper (at Annex) setting out our response to the issues raised at the fourth Bills Committee meeting held on 5 November 2009.

Yours sincerely,


(Ms Joan Hung)

for Secretary for Financial Services
and the Treasury

Item (1) A Provision on No Retrospective Effect

In our letter dated 3 November 2009, we have explained in detail how the “no retrospective effect” safeguard has been and will be implemented in our comprehensive avoidance of double taxation agreements (“CDTAs”). Our policy in this regard has been very clear, and we will not enter into a CDTA if our treaty partner does not agree to this policy. We note Member’s views and will take them into account.

Item (2)(a) Usage of the Term “Foreseeably Relevant”

2. The term “foreseeably relevant” is recommended by the Organisation for Economic Cooperation and Development and adopted internationally in the exchange of information article of CDTAs to guard against “fishing expeditions”. It is unlikely that our treaty partners would agree to adopt any alternative term we propose unilaterally.

3. The concept of "foreseeability" is the most common test of proximate cause in tort law. The test (in tort context) is basically whether the harm resulting from an action was reasonably able to be predicted. In the context of CDTAs, the test will become whether it is reasonably able to predict that the piece of information requested would be relevant to the case in question. We are not able to find any Hong Kong case where a reference to "foreseeably relevant" was made in the judgment. We could only find two United Kingdom cases where the term "foreseeably relevant" was mentioned without elaboration. The term "foreseeably relevant" will have to be construed in accordance with its ordinary dictionary meaning, which is to be applied to the facts of each case.

Item (2)(b) Channels Available for Raising Objections

4. Apart from requesting the Financial Secretary to review the factual correctness of the information the Inland Revenue Department (“IRD”) is going to provide to the requesting jurisdiction, the person concerned may also challenge the IRD’s collection or disclosure of information in the court. In accordance with section 51(4B) of the Inland Revenue Ordinance (Cap. 112), if a person fails to comply with the notice for information the IRD issues under the

proposed section 51(4AA), IRD may bring his case to the court. He will then have the opportunity to present his objection to the court. In any case, if a person thinks that the IRD has not properly discharged its responsibility to ensure that the information requested is within the scope of the relevant CDTAs or the law, he can seek to challenge the Government's actions through judicial review.

Item (3) Mutual Legal Assistance

5. The Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("MLAO") excludes a request under the MLAO framework the primary purpose of which is for tax assessment and collection (section 5(2)). This should not prevent the Government from making any law or arrangement to specifically provide for mutual assistance on tax assessment and collection as it thinks fit. In fact, exchange of tax information has been taking place with foreign tax authorities (albeit limited to information collected by IRD for our domestic tax interest) under CDTAs concluded under the present provisions of the Inland Revenue Ordinance. There is no question of any adverse impact on or inconsistency with the MLAO.

Item (4) Departmental Interpretation and Practice Note (DIPN)

6. The proposed DIPN is to provide procedural guidelines on how an authorised officer of the IRD will process a request for information. The proposed Inland Revenue (Disclosure of Information) Rules will require the authorised IRD officer to ensure that a request for information has complied with the stipulated procedures before approving the request. Since such procedural guidelines may be refined from time to time in line with international practice or operational needs, it is not appropriate to set them out as subsidiary legislation.

7. However, the DIPN will be a public document drawn up after wide consultation. As with other DIPNs issued by IRD that set out guidelines on how it would implement Hong Kong's tax laws, the IRD will consult stakeholders, professional bodies and the Joint Liaison Committee on Taxation on any future amendment to the DIPN. We would also be happy to consult the LegCo Panel on Financial Affairs if there is any substantive change in the future to the procedures set out in the DIPN.