(立法會秘書處譯本，只供議員參考用)

(中華人民共和國香港特別行政區立法會陳茂波議員用箋)

香港特別行政區立法會
內務委員會主席
劉健儀議員

劉議員：

關於《2011年稅務(修訂)(第2號)條例草案》

關於內務委員會最近曾考慮的上述條例草案，很抱歉，當內務委員會在3月11日首次考慮該條例草案時，本人剛好在倫敦出席英聯邦議會聯合會舉辦的議會議事方式及程序研討會，故不在港。

本人其後得悉，會計專業界對該條例草案的現有條文表示關注。就此，本人謹附上特許公認會計師公會香港分會的函件，供閣下參閱；該會已在隨附函件中清楚說明其關注事項。謹請閣下協助處理上述關注。

(簽署)

(陳茂波)

2011年3月29日

只備英文本
English version only

Hon Paul CHAN Mo-po, MH, JP
Legislative Councillor (Accountancy)
Room 410 West Wing
Central Government Offices
Hong Kong

29 March 2011

Dear Sir

Inland Revenue (Amendment) (No.2) Bill 2011 (The Bill)

The Bill was gazetted on 25 February 2011. The initiative was proposed by the Financial Secretary in his 2010 Budget Speech and its purpose is "to promote the wider application of intellectual property by enterprises and the development of creative industries". As it is currently drafted, the Bill will not be able to serve such purpose and will cause concern that is similar to the current problem caused by section 39E of the Inland Revenue Ordinance. On behalf of ACCA (Association of Chartered Certified Accountants) Hong Kong, we would like to raise our concerns as follows and suggest that the Bill should be further examined by a Bills Committee before it is enacted.

Licensing specified Intellectual Property use outside Hong Kong

While section 16EA provides deduction of capital expenditure on specified intellectual properties (that are copyright, registered design and registered trade mark), section 16EC, as an anti-avoidance measure imposes restrictions on the deduction similar to existing section 39E on leased plant and machinery.

In the situation where the owner (licensor) of the specified intellectual property (IP) licenses the IP to companies (associated or non-associated) for them to use outside Hong Kong, under the current practice of the Inland Revenue Department (IRD) as explained in paragraph 45 of the Departmental Interpretation and Practice Note 21 (DIPN21), the source of the royalties received by the licensor will be in Hong Kong and subject to profits tax if the place of acquisition and granting of the licence is Hong Kong. However the cost of the IP will not be deductible under the proposed section 16EC(4)(b) of the Bill.

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The asymmetry in treatments of the royalties derived from the IP and the deduction of the cost of IP may not serve the original intention of the Bill.

Use of the IP outside Hong Kong under sub-contracting

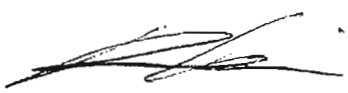
The proposed section 16EC(4)(b) may also cause problem to owner of the IP to produce goods using the IP through sub-contractors outside Hong Kong. Section 16EA allows deduction of the cost of IP irrespective whether the IP is *used* in Hong Kong or outside Hong Kong. "Use" means use by the owner in its own production. If the production is carried out by a sub-contractor outside Hong Kong, strictly speaking, the IRD may disallow the deduction of the cost of the IP on the ground it is not used by the owner but by someone else (sub-contractor) under license outside Hong Kong. As such, deduction on the cost of the IP will be denied under section 16EC(4)(b). The situation will be similar to the denial of depreciation allowances on plant and machinery under the existing section 39E.

Use of the IP by another person other than the taxpayer who incurs the expenditure

S16EA(2) allows the deduction if "Any specified capital expenditure *incurred by the person*.....if the specified intellectual property right concerned is purchased *for use in the trade, profession or business* in the production of profits in respect of which the person is chargeable to tax". In the case where the IP is licensed to another person for use in HK, clarification is required whether deduction will be denied by the IRD on the ground that the IP is not for use in the business of the taxpayer but by someone else (the licensee). This will be a very narrow interpretation and is completely contrary to the intention of the Bill.

The above situations warrant further examination before the Bill is enacted. We suggest a Bills Committee be formed and comments from the business and profession be invited. Should you wish to discuss the above suggestions in more detail, kindly please feel free to contact us at 2524 4988.

Yours faithfully



Rosanna Choi
Chairman