CB(1)717/10-11(01)

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
(The Treasury Branch)
Central Government Offices,
Lower Albert Road,
Hong Kong

傳真號碼 Fax No. : 2530 5921
電話號碼 Tel. No. : 2810 2229
本函檔號 Our Ref. :
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香港中區
昃臣道八號
立法會大樓
立法會秘書處
立法會財經事務委員會秘書
薛鳳鳴女士
（傳真：2121 0420）

薛鳳鳴女士：

根據《稅務條例》(第 112 章)在利得稅項下
機械或工業裝置享有的折舊免稅額

我們就待議事項第七項隨函附上以下文件，供委員會參考：

（一） 稅務聯合聯絡小組（下稱"小組"）提交予政府當局的報告（只有英文）；
（二） 政府當局給予小組的回應（只有英文）；及
（三） 政府當局在二零一零年十一月二十四日就立法會的一項口頭質詢所作出的回覆，列明政府當局就有關事宜的檢討結果。

財經事務及庫務局局長
（周雪梅 代行）

連附件

二零一零年十二月七日

JOINT LIAISON COMMITTEE ON TAXATION

CONSTITUENT MEMBERS: THE AMERICAN CHAMBER OF COMMERCE
THE HONG KONG GENERAL CHAMBER OF COMMERCE
HONG KONG INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
THE INTERNATIONAL FISCAL ASSOCIATION - HONG KONG BRANCH
THE LAW SOCIETY OF HONG KONG
THE TAXATION INSTITUTE OF HONG KONG
14th Floor, Hutchison House, Central, Hong Kong.
Telephone: (852) 2846 1716
Fax: (852) 2842 0529

11 June 2010

Prof. K.C. Chan, SBS JP
Secretary for Financial Services & The Treasury
Financial Services & The Treasury
8/F West Wing
Central Government Offices
Lower Albert Road
Hong Kong

Dear Prof. Chan,

Tax relief for expenditure on plant and machinery used in manufacturing operations outside Hong Kong

This letter is submitted in response to a request made by Mr Kenneth Cheng on your behalf, in the March 4, 2010 meeting of our committee. Kenneth asked us to provide advice on how the Inland Revenue Ordinance ("IRO") could be amended so as to permit Hong Kong taxpayers to claim tax relief in respect of expenditure on equipment (technically, "plant and machinery") that is used outside Hong Kong in the manufacturing of goods that produce taxable profits, bearing in mind the Government's concerns about the possibility of tax avoidance.

Policy aspects

Our proposed amendments to the IRO are set out below. Before discussing the technical aspects of the proposal, we would like to explain our view of the matter from a policy perspective.

A fundamental principle of Hong Kong profits tax is that it is charged only on assessable profits arising in or derived from Hong Kong. A corollary principle is that, in determining the assessable profits arising in or derived from Hong Kong, expenditure by the taxpayer is deductible as provided in the IRO to the extent that such expenditure is incurred in the production of chargeable profits. Under these principles, the availability of depreciation allowances with respect to expenditure on the provision of equipment does not ordinarily depend on where the equipment is located but rather on whether its use produces taxable profits for the taxpayer who incurred the expenditure.

The JLCT believes that this principle is a correct one. If the tax system in Hong Kong imposes tax on a person who conducts taxable activities outside of Hong Kong, elementary fairness

dictates that the taxpayer should be entitled to deduct expenses and depreciate assets that it uses to produce those profits, in the same way that tax relief is conferred for activities and assets in Hong Kong.

The problem that has arisen

Section 39E was previously amended for the purpose of preventing tax avoidance through leasing arrangements involving aircraft and other assets which were used outside Hong Kong by lessees having no connection to the Hong Kong taxpayer. To explain this further, at one stage, for example, many foreign airlines were financing their new aircraft through Hong Kong based leasing partnerships in order to take advantage of Hong Kong's generous tax depreciation regime. The Legislative Council reacted appropriately to counter such perceived abuse by amending the IRO to deal with the aircraft situation. At the same time, LegCo amended section 39E further to deny depreciation allowances in cases involving sale and leaseback transactions, and also to prevent Hong Kong based lessors from claiming depreciation allowances for leased assets that were located outside Hong Kong.

The last amendment is the one that has given rise to the difficulties that have arisen. This amendment was justified in LegCo because it was accepted in LegCo that lease income from assets located outside Hong Kong was not taxable in the first place, and hence the denial of depreciation allowances would not have any adverse impact.

The problem that has arisen is that the definition of "lease" in section 2 of the IRO can be, and has been, interpreted as covering not only the type of leasing arrangements which the legislation was meant to cover, but also arrangements in which manufacturing equipment owned by a Hong Kong taxpayer is used rent-free in Mainland China, under the taxpayer's control, in operations that are integrally related to the taxpayer's trading or manufacturing business.

The result has been the denial of tax relief for the taxpayer's expenditure on such equipment even though its use produces chargeable profits for the taxpayer. This is far removed from the abuse that the amendments were designed to cover. It is clear from the LegCo transcripts that, when LegCo debated the amendments, members accepted that the denial of depreciation allowances would apply where a Hong Kong lessor leased equipment to companies manufacturing on the Mainland, in the context of typical financing arrangements. However, at no stage did LegCo address the situation in which a Hong Kong trader or manufacturer would consign equipment rent-free to factories on the Mainland in the pursuance of the trader's or manufacturer's own trading or manufacturing business. The amendments were not aimed at such consignment arrangements which, in 1992, were not as prevalent as they are today.

This unintended result conflicts with the fundamental principle of profits tax noted above that a taxpayer should be entitled to deduct expenses that it incurs, and depreciate assets that it uses, to generate taxable profits, regardless of where those activities occur and where the assets are located.

The proposed solution

To rectify this situation, it is necessary to amend the definition of "lease" in section 2 so as to exclude such manufacturing-related arrangements. Legislative amendment is called for. In doing so, it is important to ensure that no tax avoidance opportunities are created. We have drafted our proposed amendments with that in mind.

To overcome the denial of depreciation, we believe that the simplest approach would be to amend the definition of the word "lease" in section 2 simply to exclude from its scope equipment which is made available by taxpayers to manufacturers and contract processors outside Hong Kong. The effect of this amendment would thereby avoid the application of the depreciation denial provisions in section 39E which hinges on whether there is a "lease" in place as defined in section 2.

We also propose that this exclusion would apply only where equipment is consigned to the factory on a rent-free basis. This reflects LegCo's original intention to include financing arrangements within the scope of the 1992 amendment, whilst recognizing that it was not LegCo's stated intention to adversely affect pure consignment arrangements.

We therefore propose that the IRO be amended as set out in the annex to this letter. The Legislative Draftsman will no doubt have his own views about our precise drafting and may seek to refine it, but the basic thrust of our amendments should, in our view, be sufficient to overcome the problems that have arisen.

Avoidance Issues

We have also considered the administrative issue that has been raised by the Commissioner of Inland Revenue in regard to the proposal, namely that such an amendment could promote tax avoidance or evasion.

We understand that the Commissioner's primary concern is that it might be difficult for field auditors to obtain access to premises in Mainland China for the purpose of verifying that the taxpayer's equipment is actually being used in operations that produce taxable profits for the taxpayer. There is also a concern that the equipment might not belong to the taxpayer at all but might belong to the overseas factory instead.

In our view, this administrative issue has limited significance in view of

(1) the rarity of field audits in which the assessors actually attend taxpayers' premises in order to verify the use and ownership of equipment even in Hong Kong where no such restriction on making visits exists,

(2) the Commissioner's ability to rely on audited financial statements supporting every Hong Kong company's profits tax computation,

(3) the fact that the Inland Revenue Department already permits tax depreciation for equipment located offshore in those cases where the taxpayer qualifies for the so-called 50/50 contract processing concession (the same evasion concerns presumably arise in such cases, but there has been no suggestion that the Inland Revenue Department has been unable to police the tax laws effectively in those cases),

(4) the fact that, if the issue is in doubt, the taxpayer has the positive burden of proving that it owns the equipment and that the equipment is being used for the required purpose (eg, by being required to produce appropriate documents),

(5) the fact that, under the double tax arrangement between Hong Kong and the Mainland, the Commissioner can request the Mainland tax authorities to gather evidence from the Mainland (and in this context we note that this arrangement was amended a couple of weeks ago to widen such information exchange powers), and

(6) the fact that, where arrangements are entered into for tax avoidance purposes, the Commissioner has wide powers under general anti-avoidance provisions (sections 61 and 61A) to ignore such arrangements.

The concern that a dishonest taxpayer will disregard his obligations under the IRO exists with respect to all of the provisions of the tax laws. In our view, this concern, in relation to the proposed amendment, does not provide a basis for concluding that honest taxpayers must be taxed unfairly. Worse, it appears to be based on a presumption that taxpayers are dishonest, and this is hardly a basis on which the tax authority of any jurisdiction should seek to administer its tax laws.

Implications for "prescribed fixed assets"

We have also considered the implications for section 16G which was enacted in 1998 (after the relevant amendments were made to section 39E). Section 16G permits a deduction of 100% of the cost of capital expenditure incurred on a "prescribed fixed asset", which is defined to include certain manufacturing equipment that is used specifically and directly for any manufacturing process (including computer hardware, computer software and computer systems). The same issue of denial of tax relief applies to "prescribed fixed assets" which are owned by Hong Kong taxpayers but which are used in factories outside Hong Kong.

In our view, the proposed amendment to the word "lease" in section 2 will similarly overcome this problem.

Additional points

There are three additional points we wish to make.

First, you might wish to consider whether amendments to correct this problem should be given retrospective effect. We have no view on this and merely wish to raise the issue for your consideration. We appreciate that retrospective legislation is generally undesirable, but in this case could arguably be supported by the fact that the purpose of the amendment would be to correct a situation that was never intended to occur in the first place. Also, if you were to accept our proposal, we appreciate that transitional provisions would need to be put in place. We would be happy to comment on transitioning issues in due course.

Secondly, the same issue of denial of depreciation allowances applies to taxpayers who conduct business in Hong Kong but who make equipment available to service entities outside Hong Kong. An example is an airline or product distributor who establishes (or contracts with) a call centre entity or data processing centre entity outside Hong Kong to perform services for the Hong Kong business. The Hong Kong taxpayer might provide the equipment to the offshore entity in order to enable it to perform those services, yet retain ownership of the equipment that it provides. This could be because the offshore entity does not have the financial ability to invest in such equipment itself, and/or because the Hong Kong business wishes to be able to remove such equipment if it were to terminate its relationship with the offshore entity. Our amendments

therefore deal with this situation as well. That being said, we acknowledge that, as a practical matter, this issue does not appear to have arisen in practice, but we cannot rule out the possibility that it will emerge as a real issue in future. In any event, it raises exactly the same issue of fairness as does the manufacturing scenario.

Thirdly, and finally, we would observe that section 39E has another undesirable effect which is to deter companies from establishing regional and global leasing operations based in Hong Kong. This is due to the fact that such lessors could be taxed in Hong Kong on their leasing income without being entitled to claim off-setting depreciation allowances for their leased equipment. This is different from the immediate issue facing Hong Kong traders and manufacturers who produce goods in (or buy goods from) factories abroad, and it raises wide-ranging policy issues that could usefully be addressed as part of a separate exercise. The amendments in the annex to this letter by contrast are designed to address and deal more quickly with the more immediate and pressing difficulty faced by Hong Kong manufacturing and trading companies. Nevertheless, and without pre-judging the issue, we would observe that this wider issue of encouraging the use of Hong Kong as a leasing hub deserves separate attention.

We hope you find these comments useful. If you have any questions, please call me at 28461716.

Yours sincerely,

Michael Olesnicky
Chairman
Joint Liaison Committee of Taxation

ANNEX

PROPOSED AMENDMENTS TO SECTION 2 OF THE INLAND REVENUE ORDINANCE

Generally

The idea is that the change to the section 2 definition of "lease" takes the relevant assets out of s 39E altogether, so no change is necessary in s 39E itself. The same rationale applies with respect to section 16G. Both sections 16G and 39B will only provide relief to the extent that the assets are used in the production of chargeable profits, so there should not be any opportunity for abuse.

The proposed amendments are shown in italics and underlined.

IRO, section 2

"lease" in relation to any machinery or plant, includes-

(a) any arrangement under which a right to use the machinery or plant is granted by the owner of the machinery or plant to another person; and

(b) any arrangement under which a right to use the machinery or plant, being a right derived directly or indirectly from a right referred to in paragraph (a), is granted by a person to another person,

but does not include:-

(c) a hire-purchase agreement or a conditional sale agreement unless, in the opinion of the Commissioner, the right under the agreement to purchase or obtain the property in the goods would reasonably be expected not to be exercised; *or*

(d) *any arrangement under which machinery or plant is used in (i) manufacturing or processing products ordered or commissioned by the owner of the machinery or plant or (ii) performing services under a contract with the owner of the machinery or plant, provided in both cases that no rent or other fee is charged for the use of the machinery or plant. [For the purposes of this provision, an adjustment of any price or fee paid by the owner to any such manufacturer, processor or service provider based on the lack of a charge of rent or other fee shall not be regarded as a charge of rent or other fee for the use of the machinery or plant.]*

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（庫務科）
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FINANCIAL SERVICES AND THE TREASURY BUREAU
(The Treasury Branch)
Central Government Offices,
Lower Albert Road,
Hong Kong

傳真號碼 Fax No. : (852) 2523 5722
電話號碼 Tel. No. : (852) 2810 2492
本函檔號 Our Ref. :
來函檔號 Your Ref. :

24 November 2010

Mr Michael Olesnicky
Chairman
Joint Liaison Committee on Taxation
14/F, Hutchison House
Central
Hong Kong

Dear Chairman,

Tax relief for expenditure on plant and machinery used in manufacturing operations outside Hong Kong

Thank you for your letter of 11 June 2010 to the Secretary for Financial Services and the Treasury, setting out the proposal of the Joint Liaison Committee on Taxation ("JLCT") to amend the definition of "lease" in relation to machinery or plant in section 2 of the Inland Revenue Ordinance ("IRO") so as to permit Hong Kong taxpayers to claim depreciation allowances for expenditure on their machinery or plant that is used outside Hong Kong for manufacturing of goods or performing services as ordered or commissioned by them with no rent or other fee being charged for use of such machinery or plant. I am authorised to reply on his behalf.

The Administration's Position

After thorough deliberations, we consider that JLCT's proposal is not in line with the established taxation principles and has yet to address the enforcement

issues identified by the Administration. Hence, we have fundamental difficulty taking on board JLCT's proposal. Our rationale is elaborated in the ensuing paragraphs.

The Administration's Considerations

As a rule of law, we agree that an expenditure incurred in the production of Hong Kong chargeable profits should be allowed for deduction. However, we have fundamental difficulty accepting that the machinery or plant, which is provided at no rent for use by the Mainland enterprises under "import processing", is used to produce chargeable profits of the Hong Kong enterprises.

In this regard, we wish to point out that "contract processing" and "import processing" are entirely two different modes of operation. Under "contract processing" arrangements, while conducting part of the business and production activities in Hong Kong, Hong Kong enterprises have to participate in the manufacturing activities in the Mainland in various ways, including providing raw materials, machinery or plant, and technical support as well as assigning technical and managerial staff to the Mainland. The Mainland production units only charge the Hong Kong enterprises processing fees. As a result, part of the profits of the Hong Kong enterprises are regarded as sourced in Hong Kong and taxed under the Hong Kong Law accordingly. Based on the same facts, the Mainland authorities may treat the Hong Kong enterprises carrying out the said production activities in the Mainland as permanent establishments, and consider imposing taxes on them for the profits they derive from their subsequent sales of products.

To avoid disputes on the apportionment of profits, the Inland Revenue Department has all along allowed Hong Kong enterprises engaging in "contract processing" to apportion their profits on a 50:50 basis according to the territorial source principle for assessment of Hong Kong profits tax payable. As the production unit in the Mainland is considered an integral part of the business of the Hong Kong enterprise, the machinery or plant is made available for use in the Mainland not under a lease. Since no leasing arrangement is involved, section 39E of the IRO is not triggered. Based on the "tax symmetry" principle, the Hong Kong enterprises are eligible for the depreciation allowances for the machinery or plant used for the production of their chargeable profits. However, since only 50%

of the Hong Kong enterprises' profits are taxable in Hong Kong, adjustments to the amount of depreciation allowances have to be made and only 50% are granted subsequently.

Under "import processing", such machinery or plant is indeed used by the Mainland enterprises (being separate legal entities) to generate their own chargeable profits in the Mainland deriving from their manufacturing operations; whereas the Hong Kong enterprises' chargeable profits are derived from their trading transactions. As the machinery or plant used by the Mainland enterprises is unrelated to the chargeable profits of the Hong Kong enterprises, according to the "tax symmetry" principle, there is no justifiable grounds to grant depreciation allowances for such machinery or plant to the Hong Kong enterprises.

In fact, based on our understanding, during the process of upgrading and restructuring of processing trade, considerable Hong Kong enterprises have transferred the title of their machinery or plant to the newly established Mainland enterprises as capital injection. For those who charge rent in providing machinery or plant for use by the Mainland enterprises, the rental income is taxable in the Mainland.

For rent-free provision of machinery or plant for the Mainland enterprises, we need to consider the matter with extra caution for fear that transfer pricing arrangements may be involved. As a responsible tax jurisdiction, Hong Kong should observe the arm's length principle set out in the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD Transfer Pricing Guidelines"). We are mindful that Hong Kong should not be, or seen to be, acting in violation of the internationally-recognised arm's length principle, otherwise Hong Kong may be regarded a harmful tax competitor whose action constitutes an erosion of tax base of other tax jurisdictions.

Given that in most of the cases of "import processing", the Hong Kong enterprises and their Mainland counterparts are associated enterprises, we need to be very cautious when considering whether the restriction in section 39E of the IRO should be relaxed, so as to forestall any perception that we are acting in violation of the internationally-recognised arm's length principle or encouraging such practice.

Indeed, according to the comprehensive avoidance of double taxation agreement between Hong Kong and the Mainland, the Mainland tax authorities could make tax adjustments to the chargeable profits of the Mainland enterprises to offset the effect of transfer pricing arrangements between associated enterprises. In such cases, IRD has an obligation to make corresponding tax adjustments to the chargeable profits of the Hong Kong enterprises. As evidenced by the proposed amendment to the term "lease" in section 2 of the IRO, it is apparent that JLCT also envisages that there can be an adjustment of price or fee paid because of the lack of a charge of rent for the use of machinery or plant by enterprises outside Hong Kong.

In case the Administration were to accede to the request of some of the Hong Kong enterprises to relax the restriction of section 39E to the effect that they could enjoy depreciation allowances in Hong Kong for the machinery or plant provided at no rent to the Mainland enterprises, once the Mainland tax authorities, upon detection of transfer pricing arrangements, determine that the Hong Kong enterprises should charge rent for the machinery or plant and make tax adjustments to the chargeable profits of the Mainland enterprises accordingly, the HKSAR Government would suffer revenue loss in two ways: on the one hand, as suggested by the JLCT, IRD should not claw back the depreciation allowances because of any rent deemed by the Mainland tax authorities; whereas under the CDTA between Hong Kong and the Mainland, IRD has an obligation to make tax adjustments to the chargeable profits of the Hong Kong enterprises correspondingly.

Avoidance issues

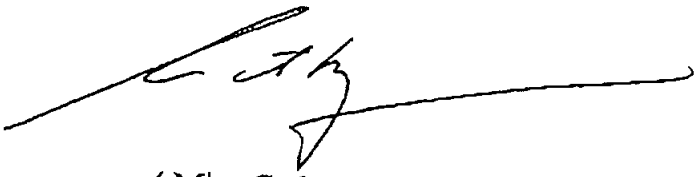
We could not agree to JLCT's view that the administrative issues have limited significance. In this regard, we note that no practical solutions are yet suggested by JLCT to address the enforcement difficulties.

Conclusion

All in all, given the above-mentioned considerations, we are of the view that there are no justifiable grounds to relax the anti-avoidance provisions in section 39E of the IRO.

Thank you very much for JLCT's advice on this matter.

Yours sincerely,



(Miss Cathy Chu)
for Secretary for Financial Services and the Treasury

c.c. Administrative Assistant to Secretary for Financial Services and the Treasury

內容以在立法會發表爲準

立法會問題第一條
（口頭答覆）

提問者： 林大輝議員 會議日期：二零一零年十一月二十四日

作答者： 財經事務及庫務局局長

問題

財經事務及庫務局局長(下稱“局長”)於本年2月表示，會透過稅務聯合聯絡小組(下稱“小組”)檢討《稅務條例》第39E 條(下稱“第39E 條”)的實施情況。據悉，小組已於多月前完成檢討，以及向局方提交檢討報告和建議，但局長多次在回答本會議員的質詢時，卻只說當局會在切實可行的情況下盡快完成有關的研究。就此，政府可否告知本會：

(一) 當局收到小組的上述報告的確實日期、一直沒有向外透露已收到小組報告和公開報告內容的原因，以及何時會向公眾公布報告內容；

(二) 上述局長所說的“切實可行的情況”的意思爲何；及

(三) 有否評估，當局就第39E條進行的檢討工作出現延誤或處理不善會對工商業界造成甚麼負面影響，以及身爲問責制下的主要官員，局長要如何負上責任；如有評估，詳情爲何；如否，原因爲何？

答覆

主席：

(一)、(二)及(三)

過去一年，林大輝議員先後多次在立法會提出放寬《稅務條例》第39E條，從而讓香港企業在「進料加工」安排下，

可就免費提供予內地企業使用的機器及工業裝置在香港獲得折舊免稅額。就此，我們已不斷重申，第39E條是一條反避稅條文，放寬有關限制會影響《稅務條例》中反避稅條文的完整性，而執行上亦存在實質困難，可能導致避稅漏洞。

儘管如此，我們亦樂意進一步探討是否有空間放寬《稅務條例》第39E條。因此，本年三月，我們邀請了稅務聯合聯絡小組(下稱「小組」)研究有關課題，讓小組在技術層面探討是否有符合稅務原則和務實可行的方案，以放寬第39E條。小組其後於本年六月就有關課題向當局提交了意見。我們對此表示感謝。

經仔細研究，我們認爲小組就部分業界提出有關放寬第39E條要求的建議並未符合香港稅制既有的「地域來源徵稅」和「稅務對稱」等基本原則，而小組亦沒有提出有效措施以堵塞可能出現的避稅漏洞。此外，小組建議，當所涉及以免費租賃形式由香港企業提供的機器及工業裝置在作價上被調整時，香港稅務局不應因該等調整而撤銷建議應給予的折舊免稅額。我們對此極其關注。接下來，我會詳細闡釋我們不能接納有關建議的原因。

一直以來，香港企業指出他們在內地加工貿易升級轉型，由「來料加工」轉爲「進料加工」後，運作模式沒有根本上的改變。但從稅務角度而言，我們對此觀點不敢苟同。在「來料加工」安排下，香港企業需要多方面參與內地的製造活動，並負責提供一切需要的原材料和生產設備，內地的「來料加工廠」基本上只是負責按照香港企業的指示和要求爲原材料進行加工，所生產的製成品也是屬於香港企業擁有，內地當局亦嚴格規定「來料加工」的製成品須全部外銷出口。香港企業在內地進行「來料加工」所付出的開支費用，以及從而所產生的利潤，均會反映在香港企業的賬目內。根據「地域來源徵稅」及「稅務對稱」的原則，我們按50:50比例計算香港企業在「來料加工」下從內地製造活動所賺取的應課稅利潤，亦因此可以爲香港企業就賺取上述應課稅利潤而付出的開支費用，包括在內地使用的機器及工業裝置的折舊額，提供50%的扣除。

但在「進料加工」下，負責內地製造活動的內地企業具有獨立法人地位，由該內地企業自行付匯進口所需要的原材料，並按需要設置生產設備，而製成品均屬內地企業擁有，由其負責外銷出口或內銷。香港企業與內地企業是買家與賣家的關係，在香港的應課稅利潤是源自其買賣貨品的貿易活動。由於有關內地製造活動的利潤並不屬於香港企業，不會反映在香港企業的賬目內，因此香港稅務局不會向香港企業徵收與內地製造活動有關的利得稅，在「稅務對稱」的原則下，亦不會就只與製造活動有關的機器及工業裝置提供折舊免稅額。根據「地域來源徵稅」原則，我們亦不能把內地企業賬目內有關製造活動所賺取的利潤分拆給香港企業，按香港稅率徵稅。

據我們理解，不少香港企業在內地加工貿易升級轉型時，已選擇以注資方式把機器及工業裝置的擁有權轉至新成立的內地企業。至於部分香港企業以租賃形式向內地新成立的企業提供機器及工業裝置，有關租金收入屬內地的應課稅利潤，須繳交內地的營業稅和所得稅。

至於在「進料加工」下免費租用予內地企業的機器及工業裝置，我們擔憂若果按照部分企業的要求，爲該等機器及工業裝置在香港提供折舊免稅額，可能被視爲鼓勵轉讓定價，影響香港和其他稅收管轄區(包括內地)的徵稅權利，這將有違國際上處理轉讓定價的原則和指引，使香港被視爲損害其他稅收管轄區利益的地方。所謂轉讓定價安排，是指甲方以低於市場價格向乙方提供原材料或設備，以換取乙方以低於市場價格向其提供製成品，因而令乙方的利潤轉移到甲方，令乙方的應課稅利潤減少。換言之，乙方所屬的稅務機關會因而有稅收流失的情況。

就此，我要指出，隨著近年全球經濟一體化，跨地域經濟活動大大增加，經濟合作與發展組織和各地的稅務當局已愈來愈關注關聯企業在跨境貿易中所涉及的轉讓定價問題。這種未能反映市場價格的交易安排往往會影響稅務當局的徵稅權利，各地稅務機關均有共識，要盡量防止轉讓定價安排的出現，以保障各地稅務機關應得的稅收。

鑑於香港企業與內地企業很多情況下均屬關聯企業，我們在考慮應否放寬第39E條時要格外小心，以免令人聯想到我們是否作出一些有違「公平獨立交易」原則的舉措，及變相鼓勵各地稅務機關均不接受的轉讓定價安排。

事實上，就兩地關聯企業之間的轉讓定價安排，根據香港和內地的全面性避免雙重徵稅協定，內地稅務機關可按「公平獨立交易」原則調整所徵收的稅額，而香港稅務局亦須就香港所徵收的稅額作出相應調整。

假若政府當局放寬第39E條，讓香港企業可以在「進料加工」下就免費提供予內地企業使用的機器及工業裝置獲得折舊免稅額，一旦內地稅務機關認爲存在轉讓定價安排，內地企業因而應就有關的機器及工業裝置向相關的香港企業繳付租金，並按「公平獨立交易」原則對內地企業作出稅收調整時，根據小組的建議，香港稅務局不應因而撤銷建議應給予香港企業的折舊免稅額，而另一方面，根據香港和內地的全面性避免雙重徵稅協定，香港稅務局將有責任對香港企業作出相應的稅收調整，結果香港的稅收將會蒙受雙重損失。

主席，作爲負責香港稅務政策的官員，我們所作出的每項政策決定都必須以廣大納稅人的福祉爲依歸。基於上述的考慮(特別是我們一直堅守的稅務原則)，我們的檢討結論是認爲沒有足夠理據放寬現時第39E條的限制。

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