

Bills Committee on Inland Revenue (Amendment) Bill 2013
Follow-up to the meeting on 7 June 2013

Purpose

At the meeting held on 7 June 2013, Members of the Bills Committee raised questions in the following areas -

- (a) the process of engaging relevant stakeholders in the formulation of future programme for comprehensive avoidance of double taxation agreements (“CDTAs”) and tax information exchange agreements (“TIEAs”);
- (b) the possible impact on taxpayers in Hong Kong with the proposed fine-tuning of the current limitation on disclosure; and
- (c) the need for independent oversight of compliance with the safeguards/procedures as provided for in CDTAs/TIEAs and the Inland Revenue (Disclosure of Information) Rules (Cap. 112 sub. leg. BI) (“the Disclosure Rules”).

2. The Administration now sets out in this paper its responses to address the above concerns. We would like to reiterate that we have adopted a **minimum necessary approach** in the current legislative exercise so as to enable Hong Kong to meet the international standard on exchange of information (“EoI”). We are also mindful of stakeholders’ concerns on the protection of taxpayers’ privacy and confidentiality of information exchanged. For this reason, we have committed to upholding the existing highly prudent safeguards for the purpose of EoI under both CDTAs and TIEAs.

Engagement with Relevant Stakeholders

3. At present, for the purpose of drawing up our CDTA programme that best serves the needs of Hong Kong, we consult from

time to time the business and professional sectors and public organisations involved in the promotion of trade and investment so as to gauge their views on potential partners to be approached and the strategies to be adopted in expanding Hong Kong's network of CDTAs. Having taken into account their views and suggestions, we would consider and work out the priorities in pursuing negotiations with potential CDTA partners for the coming years.

4. Prior to the commencement of CDTA discussions with a particular jurisdiction, the Inland Revenue Department ("IRD") will make known to the public through its website the upcoming negotiations such that interested parties could submit to IRD their specific views with respect to the negotiations. Where necessary, IRD will meet with individual organisations so as to exchange views on upcoming negotiations. Separately, the Administration provides regular updates to the Joint Liaison Committee on Taxation ("JLCT")¹ on the progress of CDTA negotiations.

5. The engagement arrangements outlined above have been working effectively. **As indicated at the last Bills Committee meeting, we agree that we should adopt similar arrangements in engaging stakeholders in pursuing both CDTAs/TIEAs in future.** A flowchart showing our engagement with relevant stakeholders is at **Annex A**.

6. Like the existing arrangement for CDTAs, every CDTA/TIEA to be signed in future will be effected by means of subsidiary legislation domestically, subject to negative vetting by the Legislative Council ("LegCo"). During the legislative process, individual agreements would be subject to vetting in detail.

7. With the provision of a legal framework for entering into TIEAs, we share relevant stakeholders' concern about possible resource implications on Hong Kong in anticipation of growing number of incoming EoI requests. In this regard, it is relevant to note that the Organisation for Economic Cooperation and Development ("OECD")'s

¹ Independent of the Government, the JLCT is a forum set up on the initiative of the accountancy and commercial sectors to discuss and formulate recommendations on various tax matters. Its constituent members include chambers of commerce and professional associations.

model text on TIEA carries a standard provision on cost, which provides that “incidence of costs incurred in providing assistance shall be agreed by the Contracting Parties”. With reference to some other jurisdictions’ existing practices, our current thinking is that we would consider charging the requesting party for the **extraordinary costs** incurred in obtaining and providing the requested information, such as fees charged by third parties for copying huge bulk of documents and conveying these documents to the requesting party, costs of engaging experts, interpreters or translators, any litigation costs in relation to the EoI requests, and costs of obtaining deposition and testimony. However, the costs to be incurred in respect of EoI assistance which can be provided in the ordinary course of administering our domestic tax laws will be borne by Hong Kong.

Limitation on Disclosure

8. According to the OECD’s Model Tax Convention on Income and on Capital (“Model Tax Convention”), the key overriding rule concerning EoI is that the competent authorities of the Contracting Parties shall exchange such information as is foreseeably relevant for the application of the provisions of the agreement or for the administration or enforcement of the domestic laws of the Contracting Parties concerning taxes imposed in the Parties. The standard of “foreseeable relevance” is set to safeguard that Contracting Parties should not be engaged in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a taxpayer.

9. At the meeting held on 7 June 2013, when considering the Administration’s proposed amendments to section 4 of the Disclosure Rules for the purpose of effecting the proposed fine-tuning on the current limitation on disclosure, one Member has suggested that we should consider expressly confining disclosure under section 4 to information that is “necessary and direct” as opposed to the international EoI standard of “foreseeably relevant”. **We wish to stress that as far as the OECD standard is concerned, the formulation “foreseeably relevant” has been adopted to mean “necessary” and “relevant”.** Further, the term “foreseeably relevant” is recommended by the OECD in its Model Tax

Convention and model text for TIEA, and has been adopted internationally in the EoI Article of CDTAs and TIEAs. As such, our CDTA/TIEA partners would unlikely agree to adopt an alternative term we propose unilaterally. Therefore, we recommend maintaining the current formulation of “foreseeably relevant” in CDTAs/TIEAs, which can enable Hong Kong to comply with the international standard whilst offering protection to taxpayers concerning disclosure of information.

10. In an attempt to minimise the potential impact arising from the proposed fine-tuning of the current limitation on disclosure, we have been asked to consider whether or not a time limit be set on the period for which provision of information generated before the entry into force of the CDTAs/TIEAs would be considered. As set out in our earlier papers to the Bills Committee (i.e. CB(1)1145/12-13(02) and CB(1)1243/12-13(02)), notwithstanding that we propose to fine-tune the limitation on disclosure under the current Bill, we have no plan to change the existing record-keeping requirements under sections 51C and 51D of the Inland Revenue Ordinance (Cap. 112) (“IRO”). As such, a person has no obligation to provide to IRD, for EoI purposes, information which is not in his possession or control and is not required to be kept or beyond the statutory retention period under the IRO, even when IRD acts on a valid EoI request and exercises its information-gathering power to approach him for the relevant information. We therefore do not see the need to impose a time limit as suggested.

11. More importantly, IRD would examine all the particulars provided by the relevant CDTA/TIEA partner in each and every EoI request so as to satisfy that the information requested relates to the carrying out of the provisions of the relevant CDTA/TIEA or the administration or enforcement of the tax laws of the CDTA/TIEA partner concerning taxes imposed in periods after the provisions of the CDTA/TIEA have come into effect. In other words, IRD would **not entertain any further requests for information that has a connection with the information it provided pursuant to an earlier EoI request but is not related to the subject matter of the first valid EoI request.** In any event, the standard of “foreseeable relevance” will be strictly observed.

Compliance with Safeguards

12. We note one Member's suggestion, in the light of views expressed by some deputations, of putting in place an independent oversight, say in the form of operations review committee, for monitoring IRD's compliance with the procedures in handling EoI requests.

13. Under existing arrangement, in order to monitor IRD's performance of public service, including complaints handling, there is an established independent Users' Committee, comprising members from the sectors of legal practitioners, tax practitioners and academics. The Users' Committee meets quarterly to review the services of IRD and to make suggestions for improving IRD's services. It also monitors the effectiveness of the complaints procedures. The terms of reference and composition of the Users' Committee is at **Annex B**.

14. In so far as EoI requests are concerned, as mentioned in the Legislative Council Brief, the Disclosure Rules provide for domestic statutory safeguards in addition to those provided in individual CDTAs to protect taxpayers' privacy and confidentiality of information exchanged. It also provides for a notification and review system in handling EoI requests and related appeals. We will extend its applicability to the EoI arrangements under both future CDTAs and TIEAs.

15. As a matter of prudence, section 3(1) of the Disclosure Rules provides that an EoI request may only be approved by the Commissioner of Inland Revenue ("CIR") personally, or by an officer of the IRD not below the rank of chief assessor authorized in writing by CIR personally. Under the Disclosure Rules, a person concerned can ask CIR to amend any part of the information to be disclosed on the grounds that the information is factually incorrect or does not relate to him. In that case, CIR may make full amendment, partial amendment or no amendment. If the person is not satisfied with CIR's decision, he can further ask the Financial Secretary ("FS") to direct CIR to make the amendments requested. FS acting as an oversight person under the existing system will review CIR's decisions. If the person is aggrieved by any of the administrative decisions, he can apply to the court for judicial review. We consider that the above mechanism has balanced various factors, such

as personal privacy, effective implementation of EoI and compliance with international treaty obligations.

16. Nonetheless, in the light of the concerns expressed, we are prepared to extend the ambit of IRD's Users' Committee such that it would be provided, on a regular basis, with details of IRD's performance with respect to EoI matters. Specifically, IRD would provide report on its compliance in respect of EoI to the Users' Committee on a regular basis, such as the number of EoI requests received, the breakdown by types of information requested, status of processing, number of appeals received as well as any complaints lodged by persons concerned, etc. Of note, IRD would not disclose to the Users' Committee any details of individual EoI requests in order to abide by the confidentiality provisions provided in individual CDTAs/TIEAs which are enacted as domestic legislation.

17. As requested by a few Members at the last meeting, the statistics on complaints received by IRD in the past two years are provided in **Annex C**. So far, IRD has received no complaints regarding handling of EoI requests.

Response to the Submission from the Privacy Commissioner for Personal Data

18. Disclosure of information to other jurisdictions for tax purposes already exists under the present CDTA framework. Modelling on our current approach on CDTAs, we will examine the legal framework of our future CDTA/TIEA partners to ensure that they have in place legal protection for personal data.

19. The purpose of the current Bill is only to put in place a legal framework for Hong Kong to enter into standalone TIEAs with other jurisdictions and to enhance the existing EoI arrangement under CDTAs in terms of tax types and limitation on disclosure to facilitate Hong Kong to meet the international standard on EoI adopting a minimum necessary approach. The current Bill itself does not seek to amend the IRO for the purpose of allowing tax information exchanged to be used for non-tax

related purposes.

20. According to the OECD's new requirement carried in the 2012 version of the EoI Article in its Model Tax Convention, the use of information exchanged for other purposes (i.e. non-tax related) should be allowed **provided that such use is allowed under the laws of both contracting parties and the competent authority of the supplying party authorises such use.** In other words, it is a prerequisite that EoI must first be conducted for tax purposes in accordance with the provisions of a relevant CDTA. As envisaged by the OECD, the sharing of tax information exchanged is only meant for certain high priority matters (such as to combat money laundering, corruption and terrorism financing).

21. As far as other **non-tax related purposes** are concerned, in the case of Hong Kong, it does not merely mean any purpose other than a tax related purpose. Such non-tax related purposes must be purposes for which the tax information exchanged may be so used under the laws of both parties to the relevant CDTA. **Under the laws of Hong Kong, tax information may only be used for limited non-tax related purposes,** such as recovery of proceeds from drug trafficking, organized and serious crimes and terrorist acts under section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), section 25A of the Organized and Serious Crimes Ordinance (Cap. 455) and section 12 of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) respectively.

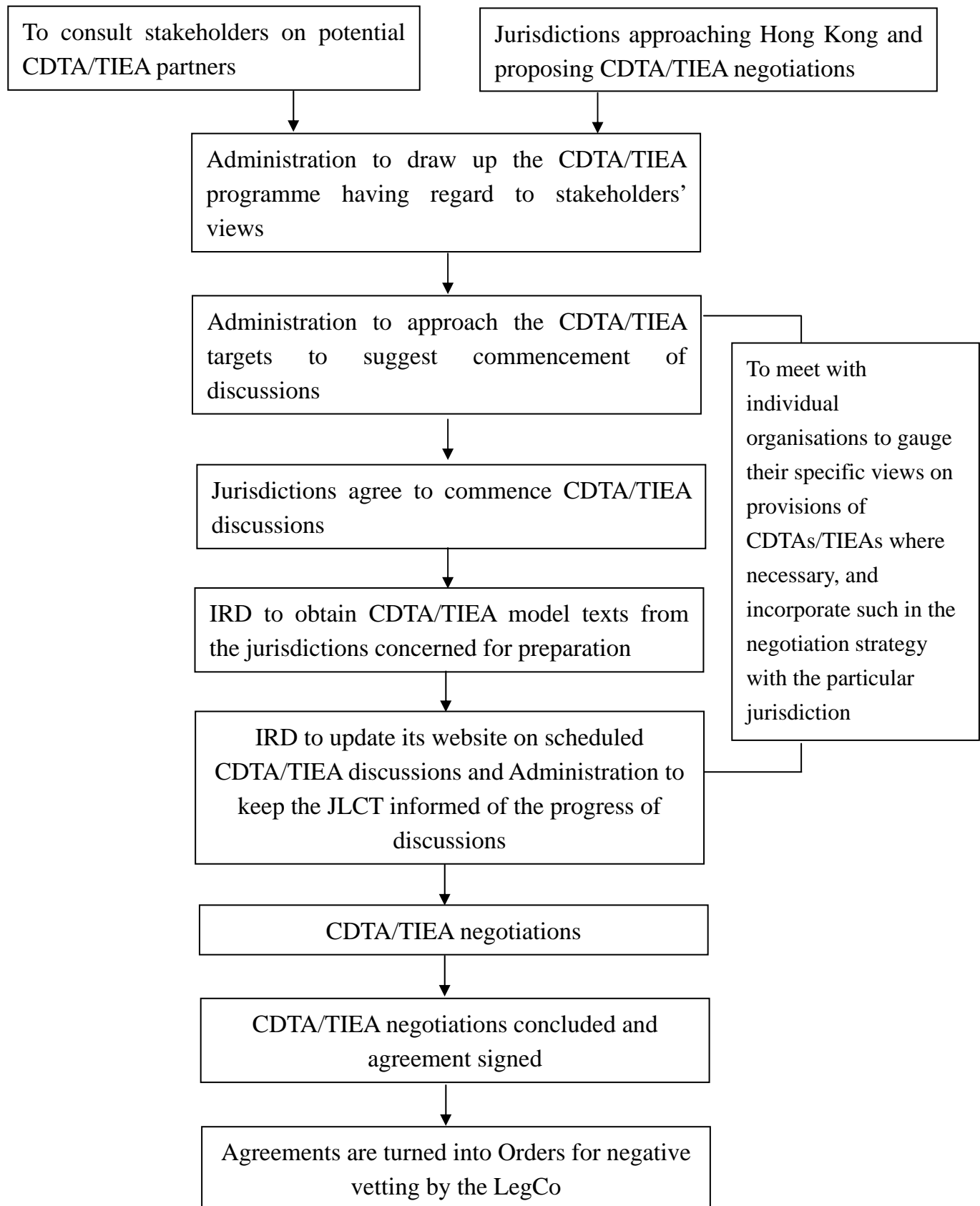
22. It follows that in reality, the competent authorities of our CDTA partners may only use the tax information exchanged under CDTAs for the said limited non-tax related purposes **if they also have similar laws permitting the use of tax information for the said non-tax related purposes.** For clarity sake, we will specify such limited non-tax related purposes in the texts of future CDTAs (including their protocols), which will then be enacted as subsidiary legislation domestically.

23. In addition, on every occasion of intended use of tax information for such specified non-tax related purposes, **the competent**

authorities of our CDTA partners have to seek prior authorisation from IRD, which will then consult relevant law enforcement agencies and Department of Justice in Hong Kong. IRD will only indicate consent to the competent authorities of our CDTA partners if the relevant Government departments raise no objection and such use of information is covered by the current exemption as provided under section 58 of the Personal Data (Privacy) Ordinance (Cap. 486) (“PDPO”) in relation to crime under the laws of a place outside Hong Kong with which Hong Kong has in place legal or law enforcement cooperation. Accordingly, there should be no contradiction with the provisions of the PDPO. We would like to stress that we have no intention to widen the current exemption in relation to prevention or detection of crime under section 58 of the PDPO.

Financial Services and the Treasury Bureau
13 June 2013

Flowchart on engagement with relevant stakeholders in pursuing CDTAs/TIEAs



Users' Committee of the Inland Revenue Department

Terms of Reference

- To be consulted on performance standards;
- To be provided, on a regular basis, with details of standards achieved and comparative data;
- To monitor the effectiveness of the complaints procedures; and
- To make recommendations to the Commissioner of Inland Revenue on matters arising out of the Performance Pledge.

Composition

Chairman: Deputy Commissioner of Inland Revenue (Operations)

16 Members: - Tax/legal practitioners
- Academics
- Representatives from professional bodies
- IRD officers

(Members are appointed on an annual basis by the Commissioner of Inland Revenue)

Statistics on complaints received by IRD in the past two years

Members of the public may lodge complaints under the existing mechanism of IRD. If they wish, they can choose to lodge their cases with the Ombudsman or the Privacy Commissioner for Personal Data as appropriate. Below is a breakdown of the statistics on complaints received by IRD in the past two financial years –

	2011-12	2012-13
Total Complaints	290	289
Types		
(i) Profits tax (corporations and partnership businesses)	13	14
(ii) Profits tax (sole proprietorships), salaries tax, property tax and personal assessment	166	169
(iii) Tax collection, business registration and stamp duty	87	74
(iv) Field audit and tax investigation	6	5
(v) General enquiries and appeals	18	27