

財經事務及庫務局



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By fax (2877 5029)

13 December 2017

Miss Evelyn Lee
Assistant Legal Advisor
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Miss Lee,

Inland Revenue (Amendment) (No. 5) Bill 2017

Thank you for your letter dated 22 November 2017 on the captioned Bill. Our response is set out in the attached note.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Pecvin Yong'.

(Ms Pecvin Yong)

for Secretary for Financial Services and the Treasury

c.c.

Commissioner of Inland Revenue
Department of Justice

(Attn: Mr KK Chiu)
(Attn: Ms Phyllis Poon)

Inland Revenue (Amendment) (No. 5) Bill 2017 (“Bill”)

Government’s Response

Personal data provided or exchanged under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (“Multilateral Convention”)

The Multilateral Convention contains various provisions in relation to exchange of information between parties to the Convention, including exchange of information on request (Article 5), automatic exchange of information (Article 6), spontaneous exchange of information (Article 7), simultaneous tax examinations (Article 8) and tax examinations abroad (Article 9). It also contains a secrecy provision (Article 22) on the protection and the use of information exchanged amongst partners to the Multilateral Convention.

Disclosure of information exchanged under the Multilateral Convention to third parties prohibited

2. While the Multilateral Convention allows for the establishment of exchange networks among parties to the Convention, **exchange of information indeed occurs between two parties**. In general, the information supplied by a party (“supplying party”) to another party (“receiving party”) would only be made available to that receiving party. The receiving party is prohibited from disclosing such information to a third party without prior authorisation from the supplying party (Article 22(2) and (4)).

3. Information would be supplied to the receiving party only if the supplying party is satisfied that the information concerned is foreseeably relevant for the administration or enforcement of the receiving party’s domestic laws concerning the taxes covered by the Multilateral Convention (Article 4(1)). This “foreseeably relevance” requirement under the Multilateral Convention is also applicable to the prevailing bilateral comprehensive avoidance of double taxation agreements (“CDTAs”) and tax information exchange agreements (“TIEAs”) that Hong Kong has entered into. Hong Kong will continue to handle information exchange prudently.

Scope of information exchanged under the Multilateral Convention

4. As a matter of government policy, Hong Kong would participate in three forms of information exchange, namely, exchange of information on request (Article 5), automatic exchange of information (Article 6) and spontaneous exchange of information (Article 7) under the Multilateral Convention.

5. Exchange of information on request refers to a situation in which a party (i.e. requesting party) seeks particular tax information from another party (i.e. requested party) related to a particular case. For example, the requesting party may ask for information from the requested party to verify the information supplied by a taxpayer about his income from, or assets in, the requested party.

6. Information involved in automatic exchange typically entails specified information comprising many individual cases of the same category, such as information under the automatic exchange of financial account information in tax matters and country-by-country reports under Action 13 of the base erosion and profit shifting (“BEPS”) package, in which parties would exchange the specified information at regular intervals with prior agreement.

7. Information is exchanged spontaneously when the supplying party, having obtained information which it believes will be of interest to the receiving party, passes on the information without the receiving party having asked for it. In this regard, Hong Kong is prepared to ride on the Multilateral Convention to undertake spontaneous exchange of information on six specific types of tax rulings as required by Action 5 of the BEPS package¹. They are the “minimum standards” required by the Organisation for Economic Co-operation and Development under the BEPS package.

8. **Generally, the scope of information to be exchanged, be it conducted on a bilateral basis under a CDTA or TIEA or on a multilateral basis under the Multilateral Convention, is the same.**

¹ To counter harmful tax practices by improving transparency through exchange of information, the Organisation for Economic Co-operation and Development mandates compulsory spontaneous exchange on six specific types of tax rulings (i.e. (i) rulings relating to preferential regimes, (ii) unilateral advance pricing arrangements or any other cross-border unilateral rulings in respect of transfer pricing; (iii) cross-border rulings providing for a downward adjustment of taxable profits; (iv) permanent establishment rulings; (v) related party conduit rulings; and (vi) any other type of ruling that, in the absence of spontaneous exchange of information, could give rise to BEPS concerns).

Confidentiality and data protection safeguards

9. The Government attaches great importance to the protection of taxpayers' information and is determined to uphold the high level of safeguards for protecting data privacy and confidentiality when handling exchange of information.

10. **The Bill does not alter the high level of privacy and confidentiality safeguards currently applicable to the handling of tax information.** Currently, there is already a high level of protection for personal data exchanged under the existing CDTAs/TIEAs. In future, the same standard will also apply to the Multilateral Convention. The relevant safeguards include –

- (a) the information exchanged should be foreseeably relevant for the administration or enforcement of the receiving party's domestic laws relating to the taxes covered. In other words, there will be no "fishing expeditions" (Article 4(1));
- (b) the information received should be treated as secret by the receiving party (Article 22(1));
- (c) the information exchanged should not be disclosed to a third party without prior authorisation of the supplying party (Article 22(4));
- (d) there is no obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process (Article 21(2)(d));
- (e) the use of information exchanged for other purposes (i.e. non-tax related) would only be allowed if such use is allowed under the laws of both supplying and receiving parties and the competent authority of the supplying party authorises such use (Article 22(4));
- (f) information will only be disclosed to the authorities concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes, or their oversight bodies (Article 22(2)).

11. The Multilateral Convention has also provided elaborated data protection and safeguards to ensure that **secrecy is not compromised** during exchange of information. The relevant articles governing such protection and safeguards are –

- (a) Article 21: the rights and safeguards of persons under the laws and administrative practices of the supplying party shall not be affected in any way by the Multilateral Convention; and
- (b) Article 22: information obtained under the Multilateral Convention shall be treated as secret and protected by the receiving party in accordance not only with its own domestic law, but also with the safeguards that may be specified by the supplying party as required under its domestic laws.

12. In considering whether to exchange information pursuant to the Multilateral Convention, Hong Kong shall evaluate whether the receiving party is able to meet with the data protection obligations under the Multilateral Convention. These considerations include whether the receiving party has put in place sufficient safeguards to ensure data protection as required under the laws of Hong Kong (including the Personal Data (Privacy) Ordinance (Cap. 486)), having regard to the statutory rules and administrative practices of the receiving party as well as the outcome of the peer review concerning the receiving party as obtained from the Global Forum on Transparency and Exchange of Information for Tax Purposes. If the receiving party is unable to meet the required standard, depending on the circumstances, Hong Kong may decline to provide information to the receiving party, or enter into an arrangement with the receiving party whereby the receiving party agrees to comply with the data protection requirements of Hong Kong before proceeding with the exchange of information. Where the receiving party does not comply with its obligations regarding data protection under the Multilateral Convention or the data protection arrangement with Hong Kong, Hong Kong may suspend any exchange of information with the receiving party under the Multilateral Convention until it is satisfied by the assurance given by the receiving party that the data protection obligations will be respected.

13. After the Multilateral Convention has been declared of having effect by way of order following the passage of the Bill, **the current requirements and protection provided under the Inland Revenue Ordinance applicable to existing CDTAs/TIEAs that have been declared with effect, including the disclosure rules under the Inland Revenue (Disclosure of Information) Rules (Cap. 112BI), will equally apply to the Multilateral Convention.**

Participation in examinations provided under Articles 8 and 9 of the Multilateral Convention (i.e. simultaneous tax examinations and tax examinations abroad)

14. Under Article 8 of the Multilateral Convention, two or more parties to the Multilateral Convention may enter into an arrangement under which the parties, each in its own territory, examine the tax affairs of persons in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain. Article 9 of the Multilateral Convention states that at the request of the requesting party, the requested party may allow representatives of the requesting party to be present at the appropriate part of a tax examination carried out in the requested party.

15. Given that Hong Kong has been operating a territorial tax regime, it appears unlikely that Hong Kong would need to ascertain a taxpayer's liability by conducting tax examinations with other jurisdictions, whether in Hong Kong or in other jurisdictions. Therefore our policy is that **Hong Kong, as a general rule, will neither participate in any simultaneous tax examinations nor accept requests for tax examinations abroad from other jurisdictions.**

**Financial Services and the Treasury Bureau
December 2017**