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LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2840 1621)

18 April 2018

Miss CHOI Man Kwan, Alice  
Prin AS for Commerce & Econ Dev  
(Commerce & Industry)3  
Commerce and Economic Development Bureau  
22-23/F, West Wing  
Central Government Offices  
2 Tim Mei Avenue, Tamar  
Hong Kong

Dear Miss CHOI,

**Inland Revenue (Amendment) (No. 2) Bill 2018**

We are scrutinizing the legal and drafting aspects of the captioned Bill and should be grateful if you could clarify the following matters:

Clause 3 – section 15 amended (certain amounts deemed trading receipts)

Clause 3 of the Bill proposes to amend, amongst others, section 15(1) of the Inland Revenue Ordinance (Cap. 112) to provide that (a) sums received by or accrued to a person for the use, or the right to use, in or outside Hong Kong of layout-design (topography) of an integrated circuit, performer's right and plant variety right or for imparting or undertaking to impart knowledge directly or indirectly connected with the use in or outside Hong Kong of any such layout-design (topography) of an integrated circuit, performer's right, or plant variety right (clause 3(1) and (2)); and (b) sums received by or accrued to a performer or an organizer for an assignment of, or an agreement to assign, a performer's right in relation to a performance given by the performer in Hong Kong, shall be deemed as taxable receipts arising in or derived from Hong Kong from a trade, profession or business carried on in Hong Kong (see clause 3(3)).

- (a) Please clarify the meaning and scope of "performer's right" as referred to in clause 3(1), (2) and (3). Does "performer's right" include (i) performer's non-economic rights as provided in section 224(1) of the Copyright Ordinance (Cap. 528); and (ii) rights of a person having fixation rights in relation to a performance as provided in sections 208 to 211 of Cap. 528?
- (b) Subject to your response to paragraph (a) above, please clarify whether the assignment of or agreement to assign a performer's non-economic rights and the rights of a person having fixation rights (if they form part of the performer's rights) in relation to a performance given by the performer in Hong Kong would be in violation of sections 224 and 225(1) of Cap. 528 which provide respectively that performer's non-economic rights (with the exception that they may be passed by testamentary disposition (see section 224(1) and (2) of Cap. 528)) and rights of a person having fixation rights are not assignable or transmissible.
- (c) It is proposed in clause 5 of the Bill that tax deduction would be allowed for capital expenditure incurred for the purchase of "performer's economic right" which is proposed to mean the rights mentioned in section 215(1)(a), (b), (c) or (d) of Cap. 528 and conferred by Part III of Cap. 528 on a performer or corresponding rights subsisting under the law of a place outside Hong Kong. If "performer's right" as referred to in clause 3 includes (subject to your response to paragraphs (a) and (b) above) a performer's non-economic rights and the rights of a person having fixation rights whereas clause 5 only covers "performer's economic right", please explain the rationale for the different arrangement under the Bill between clause 3 (which relates to a wider scope of performer's right) and clause 5 (which relates to performer's economic right only (i.e. a narrower scope of performer's right)).

Clause 5 – section 16EA amended (purchase of specified intellectual property rights)

Clause 5(2) proposes to amend section 16EA(6) of Cap. 112 to provide, amongst others, that tax deduction for capital expenditure incurred for the purchase of a protected layout-design (topography) right or protected plant variety right would be allowed if (a) the relevant intellectual property right has been used in the trade, profession or business in the production of taxable profits; and (b) the protection of the layout-design has not ceased or the grant of the protected plant variety right is in force, during a part or the whole of the basis period for a year of assessment.

- (a) In connection with the condition that the grant of protected plant variety right is in force, please clarify whether a taxpayer claiming the tax deduction is required to register the change of ownership in the grant of protected plant variety right (in relation to the assignment of the grant of protected plant variety right by the original grantee to the taxpayer) with the relevant authorities and produce the relevant documentary evidence to the Inland Revenue Department for claiming tax deduction.
- (b) Subject to your response to (a) above, please clarify whether the taxpayer can claim the tax deduction at the time when the registration process relating to the assignment of the grant of plant variety right has not yet been completed.
- (c) If tax deduction was previously granted for the capital expenditure incurred for the purchase of protected plant variety right but the registration or the grant of the protected plant variety right is subsequently invalidated, revoked or cancelled by the relevant authorities (e.g. by the Registrar of Plant Variety Rights under section 24 of the Plant Varieties Protection Ordinance (Cap. 490)), please clarify whether assessment or additional assessment would be made by the Inland Revenue Department to disallow the deduction previously granted under section 60 of Cap. 112.
- (d) It is noted that "(topography)" is missing after "the protection of the layout-design" in the English text of the proposed section 16EA(6)(bb) under clause 5(2), please clarify whether an amendment is necessary.

We would be grateful if your reply in both English and Chinese could reach us as soon as practicable, preferably before the second meeting of the Bills Committee.

Yours sincerely,

  
(Vanessa CHENG)  
Assistant Legal Adviser

c.c. DoJ (Attn.: Mr Alan CHONG (SGC)) (By Fax: 3918 4613)  
Legal Adviser  
Senior Assistant Legal Adviser 1  
Clerk to the Bills Committee