



By Email (bc_03_16@legco.gov.hk) & By Hand

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The Hon Kenneth Leung
Chairman
Bills Committee on the Inland Revenue (Amendment) (No.3) Bill 2017
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr. Leung,

Inland Revenue (Amendment) (No. 3) Bill 2017

The Institute's Taxation Faculty has considered the Inland Revenue (Amendment) No. 3) Bill 2017 and its views are set out below.

We appreciate that the Hong Kong Government ("government") has committed to implement the Automatic Exchange of Information ("AEOI") standard developed by Organisation for Economic Cooperation and Development ("OECD"), with the first exchanges to take place in 2018. Legislation to provide for AEOI was passed in 2016. At that time, we expressed our broad support for the objective of implementing the AEOI standard, as Hong Kong cannot afford to be perceived as being non-cooperative or opposing tax transparency.

The Institute notes that the government has now come back to the Legislative Council ("LegCo") to make further changes to legislation that was enacted less than a year ago on the grounds that the international landscape is changing and that "Hong Kong needs to expand our AEOI network quickly so as to preserve information covering the period starting from the second half of 2017 for exchange". If this is not done, the suggestion is that Hong Kong could be labelled as a "non-cooperative tax jurisdiction" by the OECD and/or the European Union ("EU"). In order to avoid this, the government is proposing to add another 65 "prospective AEOI partners" and seven already-confirmed partners to the reportable jurisdictions listed under the Inland Revenue Ordinance ("IRO"). The list will include all EU member states, jurisdictions which, as we understand it, have expressed an interest through an OECD survey in conducting AEOI with Hong Kong, in addition to Hong Kong's tax treaty partners committed to AEOI.

While we understand that Hong Kong, like other jurisdictions, faces some pressure internationally to move ahead with AEOI at a reasonable pace, and that it is indeed desirable to take further steps to preserve 2017 tax information relevant to those jurisdictions that are likely to be AEOI partners in the relatively near term, we have some qualms, on tax policy grounds, with the approach now being proposed by the government.



Firstly, there seems to be no obvious reason why Hong Kong could not fulfil the OECD criteria (quoted at footnote 4 of the LegCo Brief) to avoid being considered non-cooperative. The criteria put forward by the EU, on the other hand, which to all intents and purposes require an AEOI arrangement to be in place with all EU member states by the end of 2017, appear to be primarily an effort to exert pressure on non-EU members to serve the interests of the EU. These criteria seem to have no G20 endorsement, unlike the OECD criteria, and, arguably, rather than trying to comply with them, if doing so is not in the interests of other jurisdictions, non-EU jurisdictions, including Hong Kong, should consider challenging the basis for these criteria at the international level. Certainly, they do not sit well with Hong Kong's stated policy of proceeding with AEOI on a bilateral footing, i.e., only when a comprehensive double tax agreement or tax information exchange agreement ("CDTA/ TIEA"), together with a bilateral competent authority agreement, has been signed with a relevant jurisdiction (see the LegCo Brief, paragraph 10). Under the EU criteria, even with the proposed list of reportable jurisdictions in place, Hong Kong would need to have reached an AEOI arrangement separately with each EU member state by the end of 2017, or to have entered into the Convention on Mutual Administrative Assistance in Tax Matters ("Multilateral Convention") and signed the Multilateral Competent Authority Agreement, also before the end of 2017.

Given the above, the Institute considers it important that the government should appraise and explain what measures may need to be taken to avoid being labelled as an uncooperative jurisdiction, and the counter measures that could follow were Hong Kong to be so labelled.

We note further that adding 72 prospective AEOI partners to the list of reportable jurisdictions, whilst it may address the question of potential "information loss", will not in itself speed up the process of AEOI, if this is expected of Hong Kong, notwithstanding the suggestion in paragraph 8 of the LegCo Brief. This is so due to the constraints of the bilateral process referred to above and explained in paragraph 7 of the LegCo Brief. We wonder, therefore, about the value and efficacy of including a list of 72 additional jurisdictions in the IRO and, indeed, about the message that this will convey, when the list almost certainly includes jurisdictions with which Hong Kong has few commercial exchanges or connections and which are included only because they have expressed a general interest in having AEOI with Hong Kong. Some of these jurisdictions are clearly not priorities for a CDTA/ TIEA from Hong Kong's perspective and it is unlikely that there will be any bilateral agreement with them, through which an AEOI arrangement can be put in place, in the foreseeable future. As such, it is unclear what the purpose and potential implications would be of indicating that they are reportable jurisdictions under Hong Kong law.

In our view, any expansion of the list of reportable jurisdictions should be limited to, for example, (i) those jurisdictions with which Hong Kong already has or is negotiating a CDTA/ TIEA; (ii) those with which Hong Kong has significant commercial dealings; and, perhaps, (iii) those which are on the priority list for CDTA/ TIEAs, drawn up by the government on the basis of periodic consultations with stakeholders, which, in any case, are likely to be overlapping with those in (ii), and are likely to include the remaining EU member states with which Hong Kong does not currently have a CDTA/ TIEA.

Against this background, we would suggest that more information should be provided on the list of proposed reportable jurisdictions at Annex B of the LegCo Brief, in addition to the information provided at paragraph 9: e.g.: the commercial significance of the jurisdictions to Hong Kong; the priority to be given to the negotiations with each; and the likely prospects of concluding a bilateral agreement with them within a reasonable timeframe.

More generally, the Institute wishes to bring to the attention of the Bills Committee the rapid changes in the approach adopted by the government in recent years, nominally in response to requirements flowing from developments in international standards and expectations. These have seen changes, within the space of a few years, from the introduction of an expanded statutory framework for exchange of information on request, through CDTAs/ TIEA - accompanied by a number of taxpayer safeguards, which the Institute and other stakeholders argued for strongly and which included a requirement, in normal circumstances, to inform taxpayers of personal information that was being exchanged about them and to allow taxpayers to correct any errors; to AEOI on a bilateral basis, with few of the original safeguards left in place, to the potential for further changes in the near future (see paragraph 12 of LegCo Brief) that could see Hong Kong dispensing with the bilateral approach, which retains at least some safeguards through the mechanism of individually negotiated CDTAs/ TIEAs, in favour of adopting the Multilateral Convention. We are concerned that these changes are happening and continue to happen without sufficient consultation or assessment of the implications for Hong Kong's tax system and Hong Kong taxpayers.

It is evident from paragraph 18 of the LegCo Brief that not much time elapsed between the briefing session for stakeholders on these latest proposals and the introduction of a bill. This has allowed little time for detailed discussion and exchange views on the proposals. If this continues to be the case with future related proposals, it will become a matter of significant concern. We would urge, therefore, that in addition to considering the Institute's views above in relation to the current proposals that the government be asked to commit to allowing adequate time for consultation with stakeholders on any new, related proposals in the future. This is important given that new requirements may translate into additional compliance and reporting costs for financial institutions operating in Hong Kong, which may in turn result in greater costs for customers.

We would also take this opportunity to reiterate a point made in the Institute's response to last year's AEOI legislation (the then Inland Revenue (Amendment) Bill 2016). In our view, there needs to be a reasonable balance between the rights and obligations of revenue authorities and taxpayers, including the right of revenue authorities to obtain relevant information about their tax residents' offshore financial accounts and safeguards for taxpayers to ensure that information on them is not misused or that inaccurate information about them is not widely circulated and used as the basis for tax audits or further enquiries. Whilst we noted that AEOI gives rise to different practical considerations to EOI on request and that advance notification is more straightforward with individual information requests from overseas revenue authorities than with AEOI, nevertheless, we proposed that, if practicable, account holders should be provided with a copy of any information to be reported on them, if



not in advance of being reported to the Inland Revenue Department ("IRD"), then as soon as practicable afterwards. There should be appropriate mechanisms to allow for inaccurate or incomplete information, whether in the hands of financial institutions or the IRD, to be corrected and for supplementary transmissions of corrected information to be made to foreign jurisdictions. It follows that account holders should have the right to obtain a copy of their information contained in the IRD records for this purpose and should be able to request the IRD to correct any errors that may have occurred after information was received by the IRD.

Should you have questions on this submission, please feel free to contact me on 22877084 or at peter@hkiipa.org.hk

Yours sincerely,

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