(h) Mutual agreement procedures under a CDTA

In agenda item A4(c) of the 2010 minutes, the IRD provided some examples of cases where a request for MAP would be justified. In this regard, the Institute would like to ask:

(i) If the IRD has processed any request for a MAP.

(ii) If so, the nature of the MAP involved.

Mr Wong advised that the IRD had not processed any request for a MAP at this stage. In reply to a question from Ms Macpherson, Mr Wong replied that a Hong Kong resident had to demonstrate that the actions of one or both of the contracting parties result or would result in taxation not in accordance with the provisions of the CDTA before the IRD could start MAP with the competent authority of the other contracting party.

Further, the Institute would like to seek the IRD's view on the following situation:

(iii) A Hong Kong taxpayer ("HKCo") has sought an advance ruling from the IRD on the transfer price in respect of transactions with its group entity residing in a jurisdiction with which Hong Kong has signed a CDTA (say the Mainland, "PRCCo"). PRCCo then requests an advance pricing agreement ("APA") with the Mainland tax authority regarding HKCo-PRCCo transactions. If the outcome of the APA deviates from the advance ruling made by the IRD, the Institute would like to ask if the IRD would accede to a MAP request made by HKCo.

Mr Wong advised that a contracting party had to ascertain whether there was a prima facie or justifiable case before entertaining a request for MAP under a CDTA. A person could only request for MAP if the actions of one or both of the contracting parties resulted or would result for him in taxation not in accordance with the provisions of the CDTA.

Mr Wong explained that paragraph 64 of DIPN 45 (Relief from Double Taxation due to Transfer Pricing or Profit Reallocation Adjustments) set out the circumstances in which the Commissioner would not consider there was a justifiable case for MAP.

Mr Wong further explained that in the circumstances mentioned by the Institute, the IRD did not consider that there was a prima facie case for MAP as it was premature to conclude there would be taxation not in accordance with the provisions of the CDTA simply because the outcome of the APA deviated from the advance ruling made.

(iv) It is noted that the Japan DTA and Luxembourg protocol have specified articles for arbitration. The Institute requests IRD to provide more details of the mechanism and whether arbitration articles will be included in future CDTAs.

Mr Wong advised that the OECD in its Model Tax Convention issued in July 2008 introduced the arbitration provisions and it was now an international trend to adopt these provisions. These provisions would be adopted in the CDTAs if Hong Kong and its treaty partners both considered it desirable and appropriate to do so. The OECD Model Tax Convention contained a sample agreement for implementing the arbitration provisions, which would form the basis of the IRD's negotiation with Hong Kong's treaty partners. CIR said that, currently, three of Hong Kong's CDTAs contained arbitration provisions.

Agenda item A5 - Departmental policy and administrative matters

(a) Employer's withholding obligation under Hong Kong salaries tax

An employer is required to comply with the withholding requirement under section 52(7) to withhold from making any payment of money or money's worth to or for the benefit of the employees who are about to depart from Hong Kong, for a period of one month from submitting the notice required under section 52(6) (which is the Form IR56G). In relation to this, the Institute would like to clarify the following:

In the case where the employees would exercise stock options or be vested with restricted shares within the one month withholding period, it would be difficult for the employers to comply with the withholding requirement because (i) there is no payment of cash by the employer to the employees and (ii) the transactions of exercise and vesting would be handled directly by intermediates such as banks and brokerage houses. As there is no payment by the employer to the employee, would the IRD accept and/ or agree that the employer is not required to comply with the withholding requirement on the income derived from the stock option exercised or restricted shares vested in these circumstances? If not, can the IRD provide any practical suggestions to the employer for complying with the withholding requirement?