Hong Kong Institute of
Certified Public Accountants
香港會計師公會

By Hand

18 September 2009

Our Ref.: C/TXP(4), M65271

Hon. Paul Chan Mo-po, MH, JP
Chairman, Bills Committee on
Inland Revenue (Amendment) (No.3) Bill 2009
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Mr. Chan,

Inland Revenue (Amendment) (No.3) Bill 2009

The Hong Kong Institute of CPAs is supportive of the initiative to provide for a more extensive exchange of information ("EOI") with overseas tax authorities with a view to, and in the context of, entering into comprehensive avoidance of double taxation agreements ("CDTAs") with Hong Kong's main trading partners. The more favourable and certain tax reliefs that would accrue from having a wider network of CDTAs will help to strengthen Hong Kong's position as an international financial and business centre.

At the same time, a balance needs to be struck between providing relevant information about taxpayers, subject to adequate justification being provided in specific cases, and the prevention of "fishing expeditions" and use of information for purposes beyond those envisaged by the other provisions of a CDTA. For this reason, as the Institute pointed out in its submission during the EOI consultation conducted in 2008, there also needs to be sufficient safeguards against any misuse of the EOI provisions. The Institute, therefore, welcomes the various safeguards that the government proposes to stipulate in conjunction with the Inland Revenue (Amendment) (No.3) Bill ("the Bill"), which are outlined in the Legislative Council Brief ("the Brief") on the Bill.

Notwithstanding our support in principle for this Bill, we have some concerns regarding the proposed scope of permissible EOI and the means through which it is intended to implement the safeguards, as well as on certain other detailed matters.

In relation to the safeguards, the Institute is concerned about the differing status of the three forms of safeguards, namely:

(i) Safeguards in relation to the scope of exchange and usage of the information obtained, which are to be included in individual CDTAs, or in "documents of record" between the two contracting parties;

(ii) "domestic safeguards", which are to be incorporated in rules under section 49(6) of the Inland Revenue Ordinance (Cap. 112) ("IRO"); and

37th Floor, Wu Chung House,
213 Queen's Road East, Wanchai, Hong Kong
香港灣仔皇后大道東213號胡忠大廈37樓
Tel電話: (852) 2287 7228
Fax傳真: (852) 2865 6776
(852) 2865 6603
Website網址: www.hkicpa.org.hk
Email電郵: hkicpa@hkicpa.org.hk

(iii) procedural safeguards to be adopted by the Inland Revenue Department ("IRD") in processing EOI requests, which it is proposed should be set out in an IRD departmental interpretation and practice note ("DIPN").

The Institute's comments and concerns are set out in more detail below.

Scope of EOI

1. Given the importance of the safeguards, and also given that some of them will constitute subsidiary legislation, the Institute believes that the complete set of proposals, including draft rules and indicative wording of relevant provisions to be included in future CDTAs, should be presented to the Legislative Council for consideration along with the Bill.

2. The new subsection 49(1A), to be added into the IRO by clause 3 of the Bill (and consequently also the proposed section 58(1A) of the Personal Data (Privacy) Ordinance (Cap.486) added by clause 9), should be made expressly subject to any qualification that may be incorporated in particular CDTAs or, alternatively, rules made under the IRO. As indicated at paragraph 9(a) – (c) of the Brief, important safeguards that restrict the scope of EOI may be incorporated in individual CDTAs, which will be implemented as subsidiary legislation. If such safeguards are not incorporated in the CDTAs themselves then, in our view, as explained below, they should be contained in rules under the IRO. Therefore, the general provision in the new subsection 49(1A) should not be couched in such open-ended and unqualified terms.

3. We believe that the safeguards listed under paragraph 9 of the Brief must be prescribed in subsidiary legislation, either by incorporation in individual CDTA's, which is one of the possible alternatives suggested, or in rules, and not merely referred to in "documents of record", which is a possible alternative mentioned in the Brief. The term "documents of record" is vague and it is not clear that safeguards contained in such documents would have any legal standing.

4. The restriction on the types of tax referred to in item (b) of paragraph 9 is important. In this regard, it should be noted that paragraph 10.1 of the OECD commentary on EOI provisions allows the contracting parties to negotiate the scope of taxes to be covered. However, there is some ambiguity in the statement made in paragraph 9(b). While individual CDTAs may limit the scope of taxes covered to those referred to in item (b) (see, for example, article 2 of Hong Kong's CDTA with Belgium (Cap.122AJ) which refers to "taxes on income and capital"), the 2004 OECD model EOI provisions refer to "taxes of every kind and description imposed on behalf of the Contracting States", and state that the "exchange of information is not restricted by Articles 1 and 2" (Articles 1 and 2 of the model tax treaty relate to the persons and taxes covered by the treaty). This potential ambiguity emphasises the need to specify in legislation any limitation on the scope of EOI that may be included in CDTAs with other parties.

5. In relation to item (c) under paragraph 9, the restriction that the requesting party must satisfy the tax authority that the information requested is "necessary" or "foreseeably relevant" (for the carrying out of the provisions of CDTA, or of the domestic laws of the contracting parties concerning taxes covered by the CDTA

insofar as the taxation thereunder is not contrary to the CDTA, as well as to prevent fiscal evasion in relation to such taxes) does not provide sufficient comfort for taxpayers. The term "foreseeably relevant" may be given a wide interpretation and, as such, may not provide an adequate safeguard against fishing expeditions. We would propose restricting the scope to information that the requesting party can satisfy the IRD is "necessary" or, as a minimum, "relevant" for purposes referred to the above.

Confidentiality of information provided

6. We should like to seek clarification on the measures that will be adopted by the government to ensure that a requesting party would not share the information provided with any third party. We are of the opinion that the government should specifically raise this issue in CDTA negotiations that it undertakes, to ensure that negotiating partners share the same understanding, and that an express restriction disallowing routine disclosures to other jurisdictions, law enforcement agencies and judicial authorities, is included in any CDTA.

Domestic safeguards

7. Regarding item (b), under paragraph 10, the reference to "unduly delay the effective exchange of information" [emphasis added] needs to be clarified. While a requested party should accede to a request in good faith and without unnecessary delay, there is no requirement for a requested party to meet any specific deadline that may be set by a requesting party.

8. In relation to the same item, it is not clear whether the qualification for exceptional circumstances is intended to apply to prior notification only, i.e., the taxpayer will be notified, but only after the EOI has taken place, or to any form of notification at all. If the latter, this needs to be further explained and justified. If there are cases where it is envisaged no notification will be given, either before or after the EOI, these may need to be distinguished from cases where the issue is only one of the timing of the notification. In this connection, we would emphasise that, in principle, taxpayers should be able to verify information that will be, or has been, passed on about them, and, where applicable, to correct any errors, so as to ensure the accuracy of any personal data conveyed.

9. Adequate checks and balances need to be built into the system to ensure any EOI is conducted on a fair and reasonable basis. While we note that taxpayers may seek a review by higher authority if the IRD refuses to accept a proposed correction to information held about them, we should like to clarify how the IRD will proceed where a decision is pending from the higher authority on a dispute regarding the accuracy of information.

Procedural safeguards (that IRD must adopt on processing EOI requests)

10. The Institute considers that the proposed procedural safeguards, under paragraph 11 of the Brief, should be incorporated in subsidiary legislation, to provide legal authority and procedural certainty. DIPNs merely reflect IRD practice, which may change, and they are non-binding. Incorporating the

important safeguards outlined in items (a) – (f), in a DIPN would not provide enough procedural certainty for taxpayers.

Other safeguards

11. The Institute recommends that, in order to ensure proper checks and balances on the system as a whole, and to establish public confidence and trust in the operation of the EOI procedure, periodic reviews should be conducted by an independent, external body (such as the existing Board of Inland Revenue, the remit of which could be expanded for this purpose) and its findings, and any recommendations put forward by this body, should be made public.

Other detailed drafting points

12. We make the following suggestions with regard to the detailed wording of the Bill:

Clause	Amendment
Clause 3(2) (i) re. subsection 49(1A) of Cap. 112	We note that the IRO appears to use the terms "charged" and "imposed" almost interchangeably. We would suggest standardising the terminology under the IRO generally, and, preferably, using "charged" rather than "imposed" in the phrase "...any tax of a similar character imposed by the laws of that territory..."
(ii) re. subsection 49(1A)(b)	Use "concerning tax charged by that territory" instead of "…concerning tax of that territory,…"
Clause 9 re. subsection 58(1A) of Cap. 486	Use "tax charged by" instead of "...any tax of..."

If you have any questions on the Institute's submission, please do not hesitate to contact me on 22877084 or at peter@hkicpa.org.hk.

Yours sincerely,

Peter Tisman
Director, Specialist Practices

PMT/EC/ay