

Clerk of Bills Committee
Inland Revenue (Amendment) Bill 2013
Legislative Council
Legislative Complex
1 Legislative Council Road
Central Hong Kong

24 May 2013

Dear Sir/ Madam

We refer to the Bills Committee's invitation of 10th May 2013 for the Hong Kong Trustees' Association ('HKTA') to provide written submission in relation to the Inland Revenue (Amendment) Bill 2013 and thank you for the invitation. The Bill seeks to amend the Inland Revenue Ordinance to allow entry into Tax Information Exchange Agreements ('TIEA').

The HKTA acknowledges that that Hong Kong is the only member of The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (the 'Global Forum') yet to amend its legal framework to allow entry into TIEAs. Having regard to this, and to international economic developments, we believe that it is no longer credible for Hong Kong to resist the introduction of a legal framework for TIEAs. However we believe that both the granting of a TIEA and the exchange of information ('EOI') pursuant to a TIEA must be subject to appropriate safeguards to protect legitimate taxpayer confidentiality.

We have previously made extensive submission to the FSTB on 5 July 2012 in response to its consultation on TIEA. We will not repeat our submissions as regard government policy and administration here. We will instead reiterate a few salient points to the Bills Committee to the extent they relate to the legislative framework.

Our concern focuses on the need for additional legislative safeguards for EOI under a CDTA/TIEA.

Given that many of our new treaties have only come into force or are not yet in effect, we do not believe that the small number of data request/ requests refused to date can be taken as evidence that the safeguards introduced by the Inland Revenue (Disclosure of Information) Rules and by the Inland Revenue Department Departmental ('IRD') Interpretation and Practice Notes ('DIPN 47') are sufficient.

1. No Right of Recourse to the Courts

In other countries such as Singapore, there is judicial protection for a person being the subject of an EOI request. Investors and businesses having a choice as to the jurisdictions with whom they conduct business frequently take advice as to the comparative legal and commercial merits of different jurisdictions. We believe that the judicial oversight of EOI requests will give Singapore a commercial advantage over Hong Kong. The Hong Kong legislation should be amended to provide for judicial oversight.

2. Non-binding 'Safeguards' set out in DIPN

We are particularly concerned that much of the 'safeguards' currently exist only in DIPN 47, which has no force of law whatsoever. Indeed as a policy matter, we note that the FSTB in its legislative council brief has already indicated certain fundamental departures from the IRD's stated view in DIPN 47. To the extent the Hong Kong government continues to standby the 'safeguards' stated in DIPN47, they should be included in the legislation. The problem of using DIPN is threefold. First, there is no transparency or accountability as to whether the safeguards are consistently administered by the IRD. Second, in the event that the safeguards may not be consistently administered, there is no mechanism for the data subject to find out. Third, even if the data subject found out about it, there is no mechanism for the data subject to challenge the IRD's decision to release his personal information to another country. Judicial review is not the remedy as it would be post facto and particularly if the data subject did not find out until after the event.

3. Limited Right of Objection under the Disclosure of Information Rules

We are also concerned that the Disclosure of Information Rules only allows a taxpayer to object on the basis that the information is **factually** incorrect. The objection is considered by the IRD with appeal to the Financial Secretary, and not to the court. In any event, a taxpayer cannot object on the basis that the EOI breaches the safeguard stated in a DIPN 47, or that the IRD has allowed the request or released the information for inappropriate reasons. In other words, the safeguards in a DIPN are not enforceable. Indeed, a Hong Kong court of law cannot take into account the views of the IRD as stated in a DIPN if it was to determine the legal position of a taxpayer. The safeguards should all be contained in relevant legislations.

The HKTA strongly supports speedy introduction of the amendment law to allow Hong Kong to enter into TIEAs. However, we continue to have the above concerns regarding the protection of individuals as data subjects.

Yours faithfully

J. Shek

Jacqueline Shek

Chairman – Legislative and Regulatory Subcommittee &
Vice Chairman

Hong Kong Trustees' Association Ltd