**INLAND REVENUE (AMENDMENT) BILL 2013**
**VIEWS OF THE HONG KONG BAR ASSOCIATION**

1. These are the views of the Hong Kong Bar Association (the "**HKBA**") on the Inland Revenue (Amendment) Bill 2013 (the "**Bill**") given in response to the letter dated 10 May 2013 from the clerk to the relevant Bills Committee of the Legislative Council.

Background

2. Since the late 1990s the Hong Kong Government (the "**HKG**") has been seeking to enter Comprehensive Avoidance of Double Taxation Agreements ("**CDTAs**") with other tax jurisdictions.

3. Prior to 2010 the potential extent of disclosure of information by Hong Kong under CDTAs was limited by the fact that under the Inland Revenue Ordinance (Cap 112) the collection of information by officers of the Inland Revenue Department ("**IRD**") was restricted to the collection of information relating to a domestic (Hong Kong) tax interest.

4. This restriction did not conform with the 2004 version of the OECD Exchange of Information Article, which required a contracting state to obtain requested information even if the information was not needed for the contracting state's own tax purposes.

5. In 2008 the HKG conducted a consultation exercise on proposals to empower officers of the IRD to collect information from persons in Hong Kong in relation to tax obligations under the law of a territory outside Hong Kong (irrespective of whether the information related to a domestic tax interest) and disclose such information pursuant to a CDTA with that territory.

6. The HKBA's views on those proposals were set out in its letter to the Financial Services and the Treasury Bureau dated 22 September 2008 (the "**HKBA's 1st Response**") (copy at Annex A). In summary, the HKBA's position was that, from the legal policy point of view, it was considered a sufficient case had **not** been made out for the proposals concerned, noting, in particular:

(1) there was no guarantee other jurisdictions would agree to enter CDTAs with Hong Kong if the proposals were implemented;

(2) the liberalisation of the exchange of tax information may have a negative effect on the willingness of investors to invest in Hong Kong due to the expansion of information gathering and disclosure under the proposals;

(3) the Hong Kong tax system is territorially-based; and

(4) the potential adverse impact on personal privacy, a fundamental human right that ought not to be eroded without good and sufficient reason.

7. Nevertheless, the HKG's proposals were taken forward in the Inland Revenue (Amendment)(No 3) Bill 2009 (the "**Bill**"). In the course of the passage of the Bill through the Legislative Council, the HKG proposed the making of a set of rules (following the enactment of the Bill) to provide for safeguards with respect to the disclosure of information pursuant to CDTAs.

8. The HKBA responded to this proposal in a letter to the clerk to the relevant Bills Committee dated 25 November 2009 (the "**HKBA's 2nd Response**") (copy at Annex B) by proposing that consideration be given to implementing a system of independent oversight and scrutiny of compliance with the proposed safeguards. It was further suggested that one way this could be done would be for the Privacy Commissioner for Personal Data to conduct privacy audits of such compliance on, say, an annual basis with publication of his results.

9. The Bill was enacted in 2010 as the Inland Revenue (Amendment)(No 1) Ordinance 2010, following which the Inland Revenue (Disclosure of Information) Rules (Cap 112, sub leg BI) (the "**Rules**") were made to provide for the safeguards that were proposed during the passage of the Bill.

10. Neither the Rules nor the IRD's practices in relation to the exchange of information under CDTAs (as set out in IRD Departmental Interpretation and Practice Note No 47) make any provision for the independent oversight and scrutiny proposed in the HKBA's 2nd Response.

11. The issue of whether Hong Kong should enact legislation to provide for a statutory framework for entering into Tax Information Exchange Agreements ("**TIEAs**") with other tax jurisdictions was the subject of consultation paper issued by the Secretary for Financial Services and the Treasury in 2012. The HKBA gave its response to the consultation paper in a written submission dated 3 July 2012 (the "**HKBA's 3rd Response**") (copy at Annex C).

12. The conclusion of the HKBA's 3rd Response was that that no or no sufficient benefit from enacting such legislation had been demonstrated to offset the further erosion of privacy rights and disincentive to income generation and investment in Hong Kong that would result from entering TIEAs (see paragraph 17(1) and the analysis in paragraphs 11 to 16 of Annex C in particular).

13. In addition, the HKBA's 3rd Response:

    (1) repeated the proposals of the HKBA in its 2nd Response for independent oversight and scrutiny of compliance with the safeguards/procedures in the Rules and IRD Departmental Interpretation and Practice Note No 47 (paragraphs 8 and 17(3) of Annex C refer); and

    (2) proposed that entry into a TIEA be permitted only if the other tax jurisdiction concerned has in force a law that is substantially similar to or serves the same purpose as the Personal Data (Privacy) Ordinance (Cap 486) (paragraph 17(3) of Annex C refers).

The Bill

14. Enactment of the Bill would result in the following changes.

    (1) First, the Bill would permit Hong Kong to enter TIEAs without any resulting avoidance of double taxation (currently exchange of tax information is permissible only under CDTAs) ("**proposal (1)**").

    (2) Second, the Bill would remove in one case, and relax in the other, two of the current limitations on the exchange of tax information, viz it would:

(a) remove the limitation that the information exchanged must relate to the taxes covered by the CDTA (which could not be applicable to a TIEA in any event) ("**proposal (2)(a)**"); and

(b) relax the limitation that the information exchanged shall not relate to any period before the agreement comes into effect by providing that information may be exchanged that relates to the carrying out of the agreement concerned or to tax assessment in any period after the agreement comes into effect (which could include information relating to a prior period) ("**proposal (2)(b)**").

15. The justification given for proposal (1) in the Legislative Council Brief on the Bill (the "**LegCo Brief**") is that unless Hong Kong has a legal framework to enter TIEAs, it is (apparently) believed Hong Kong will fail the phase 2 peer review of the Global Forum on Transparency and Exchange of Information for Tax Purposes and "may [as a consequence] run the risk of being labelled as an uncooperative jurisdiction, which is highly undesirable for Hong Kong's international reputation and may in turn undermine our position and competitiveness as an international business and financial centre." (paragraph 4 of the LegCo Brief). Further: "Other jurisdictions may also impose unilateral sanctions on Hong Kong." (paragraph 4 of the LegCo Brief refers).

16. The justification given for proposals (2)(a) and (2)(b) is that the restrictions proposed to be removed/relaxed are impeding the expansion of Hong Kong's CDTAs network (paragraph 5 of the LegCo Brief refers), i.e. it is suggested the restrictions are causing tax jurisdictions with which Hong Kong has yet to enter CDTAs not to do so. To put this into context, up to the end of March 2013, Hong Kong has entered 27 CDTAs, including 11 with Hong Kong's top 20 trading partners (paragraph 6 of the LegCo Brief refers).

HKBA's Views

17. The proposed relaxation of the restriction on the period to which tax information intended to be exchanged must relate (proposal (2)(b)) would address the practical problem that an assessment relating to a period after a CDTA came into force may be

dependent (in part) on information that relates to a period prior to the coming into force of the CDTA (an example is given in footnote 3 of the LegCo Brief).

18. As provided for in clause 8 of the Bill, proposal (2)(b) should have limited effect and seems to be a sensible "tweak" to the restriction concerned to address the practical problem that has been identified. Accordingly, it is not objected to by the HKBA.

19. Proposals (1) and (2)(a), on the other hand, would be significant changes to the current regime of the exchange of tax information with other tax jurisdictions. Their effect would be to "de-link" the exchange of tax information from the avoidance of double taxation and result in an asymmetry of tax information flow between Hong Kong and its CDTA/TIEA counterparts with more tax information flowing out of (than into) Hong Kong (because of Hong Kong's relatively simple tax regime compared with the other tax jurisdictions that are and will be involved).

20. This is a typical case of information "scope creep". The current tax information exchange regime was introduced on the basis that it brought a direct benefit to Hong Kong tax payers in facilitating the avoidance of double taxation and the scope of information to be exchanged would be limited to taxes common to Hong Kong and each CDTA counterparty. Now, it is said this limitation on the tax information that may be exchanged does not satisfy potential CDTA partners and will not satisfy the Phase 2 peer review of the Global Forum and should be abandoned.

21. This "scope creep" is objectionable because it represents an erosion of the information privacy of Hong Kong tax payers with no direct benefit of potential relief from double taxation.

22. Of course, if proposal (2)(a) encouraged other tax jurisdictions to enter CDTAs with Hong Kong there would be an indirect benefit of potential relief from double taxation that could be weighed in the balance against the erosion of information privacy of Hong Kong tax payers. But no evidence is given in the LegCo Brief that specific tax jurisdictions are poised to enter CDTAs with Hong Kong if the change concerned is implemented.

23. TIEAs (entered into as a result of proposal (1)) would not even have this potential benefit.

24. As already noted, the HKBA concluded in its response (copy at Annex C) to the consultation paper on the proposal to enact legislation to enable Hong Kong to enter TIEAs, that no or no sufficient benefit in doing so had been demonstrated to offset the further erosion of privacy rights and disincentive to income generation and investment in Hong Kong that would result from entering TIEAs (see paragraph 17(1) and the analysis in paragraphs 11 to 16 of Annex C in particular). The HKBA's does not consider there is any good reason to revise this conclusion.

25. The warnings in the LegCo Brief of a possible risk of Hong Kong's being labelled uncooperative and being at risk of unilateral sanctions if it is not able to enter TIEAs are made without any supporting evidence and are unconvincing. In any event, they need to be balanced against the potential adverse effect on Hong Kong's "competitiveness as an international business and financial centre" caused by becoming a tax jurisdiction that is a net provider of tax information to other tax jurisdictions with no actual or potential benefit in the form of avoidance of double taxation. The LegCo Brief does not consider this counter-argument.

26. In the absence of a compelling case for proposals (1) and (2)(a) (and, for the reasons given above, the LegCo Brief does not make one), the HKBA does not support them bearing in mind the counter-arguments identified above.

27. The HKBA's previous proposals for (i) independent oversight and scrutiny of compliance with the safeguards/procedures in the Rules and IRD Departmental Interpretation and Practice Note No 47 and (ii) entry into any TIEA to be permitted only if the other tax jurisdiction concerned has in force a law that is substantially similar to or serves the same purpose as the Personal Data (Privacy) Ordinance (Cap 486) (paragraphs 8 and 17(3) of Annex C refer) are repeated and maintained.

Dated: 4th June 2013

Hong Kong Bar Association

Annex A


# HONG KONG BAR ASSOCIATION

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Financial Services & the Treasury Bureau
The Treasury Branch
Central Government Offices,
Lower Albert Road,
Hong Kong
Attn.: Mr. Kenneth Cheng
Your Ref.: FIN CR 10/2041/46

**By Fax** (2530 5921)
**& By Hand**

22 September 2008

Dear Sirs,

**Re: Liberalisation of Exchange of Information Article for Comprehensive Double Taxation Agreements**

Thank you for your letter dated 28 July 2008 in respect of the captioned matter.

The Bar's position on this matter can be summarized as follows:

1. Under the 2004 version of the OECD Exchange of Information Article ("EOI Article"), a contracting state is required to obtain requested information even if the contracting state in question does not need that information for her own tax purposes.

2. This requirement, which did not exist in the 1995 version of the EOI Article, is repugnant to principle 1 ("DPP1" of the data protection principles set out in Schedule 1 to the Personal Data (Privacy) Ordinance

(Cap. 486) ("PD(P)O") insofar as the relevant information relates to living individuals (though not in respect of information involving non-living individuals or corporations, etc. to which the PD(P)O does not apply).

3. Under DPP1, personal data shall not be collected unless the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data. The assessment of tax levied in a place outside the Hong Kong SAR is not a function or activity of the Inland Revenue Department ("IRD"). This cannot be got around by saying that the IRD is not going to "use" the data, since the expression "use" is defined in the PD(P)O to include "disclose" and "transfer". Thus, any collection of information for this purpose by the IRD would not be directly related to its function or activities.

4. We appreciate that DPP1 or even provisions in the PD(P)O can be amended if the Legislature thinks fit to do so. In other words, we accept that if there is good reason to adopt the 2004 version of the EoI Article, the issue of repugnancy summarized above can be dealt with by appropriate legislative amendments.

5. The question therefore boils down to whether a sufficient case has been made out for adopting the 2004 version of the EoI Article and thus justifying the necessary legislative amendments. This question is not purely a question of law, but involved political, economical and other policy considerations.

6. From the legal policy point of view, we do not see a sufficient case has been made out to adopt the 2004 version of the EoI Article.

7. We have considered the arguments for and against liberalisation of EoI cogently set out in paragraphs 9 to 13 inclusive of the note attached to your letter under reply. We certainly see the force of the argument that Hong Kong should not be seen to be lagging behind the international trend. We also see the benefit that may be brought about by having more comprehensive double taxation agreements ("CDTs").

8. However, looking at the matter in the round, we do not think the arguments in favour of liberalization are strong enough to overwhelm the arguments against liberalization of EoI. Amongst others, it is important to note that there is no guarantee that other jurisdictions would agree to

enter into CDTs with the Hong Kong SAR just because we agree to adopt a more liberal EoI Article. Besides, the liberalisation of EoI would compromise the confidentiality of taxpayers' information and thus may undermine investors' confidence in Hong Kong, which will lead to a deterioration of the competitiveness of the Hong Kong SAR. Last but not least, it is highly pertinent to note that our taxation system is territorial-based.

9. These considerations, as well as the potential erosion of personal privacy (which is a fundamental human right that should not be let go without a good and legitimate reason), lead us to the view that no good reason has yet been made out for adopting the 2004 version.

I trust the above have explained out position sufficiently. Should your Bureau have any other queries, we would be obliged to assist further.

Best Regards.

Yours sincerely,

Rimsky Yuen, S.C.
Chairman

Annex B

# HONG KONG BAR ASSOCIATION

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25 November 2009

**Mr. Noel Sung**
**Clerk to the Bills Committee**
Legislative Council
8 Jackson Road
Central
Hong Kong.

Dear Mr Sung

**Re: Inland Revenue (Amendment) (No 3) Bill 2009**

I refer to your letter dated 21 October 2009.

The Bar has no specific comments on the two documents enclosed with your said letter. However, the Bar takes the view that consideration ought to be given for the provision of a system whereby there would be independent oversight and scrutiny of compliance with the proposed safeguards/procedures. One particular manner of providing this is for the Privacy Commissioner to conduct privacy audits of compliance with the safeguards/procedures on, say, an annual basis with publication of his findings.

Yours sincerely,

**Russell Coleman, S.C.**
**Chairman**

# CONSULTATION ON PROVISION OF LEGAL FRAMEWORK FOR ENTERING INTO TAX INFORMATION EXCHANGE AGREEMENTS

## RESPONSE OF THE HONG KONG BAR ASSOCIATION

1. By a letter dated 4th May 2012 the Secretary for Financial Services and the Treasury has invited the Hong Kong Bar Association ("**HKBA**") to submit views in response to a consultation paper (the "**Consultation Paper**") on whether Hong Kong should enact legislation to provide for a statutory framework for entering into Tax Information Exchange Agreements ("**TIEAs**") with other tax jurisdictions.

Background

2. Since the late 1990s the Hong Kong Government (the "**HKG**") has been seeking to enter Comprehensive Avoidance of Double Taxation Agreements ("**CDTAs**") with other tax jurisdictions.

3. Prior to 2010 the potential extent of disclosure of information by Hong Kong under CDTAs was limited by the fact that under the Inland Revenue Ordinance (Cap 112) the collection of information by officers of the Inland Revenue Department ("**IRD**") was restricted to the collection of information relating to a domestic (Hong Kong) tax interest.

4. This restriction did not conform with the 2004 version of the OECD Exchange of Information Article, which required a contracting state to obtain requested information even if the information was not needed for the contracting state's own tax purposes.

5. In 2008 the HKG conducted a consultation exercise on proposals to empower officers of the IRD to collect information from persons in Hong Kong in relation to tax obligations under the law of a territory outside Hong Kong (irrespective of whether the information related to a domestic tax interest) and disclose such information pursuant to a CDTA with that territory.

6. The HKBA's views on those proposals were set out in its letter to the Financial Services and the Treasury Bureau dated 22nd September 2008 (the "**HKBA's 1st Response**") (copy at Annex A). In summary, the HKBA's position was that, from the legal policy point of view, it was considered a sufficient case had **not** been made out for the proposals concerned, noting, in particular:

   (1) there was no guarantee other jurisdictions would agree to enter CDTAs with Hong Kong if the proposals were implemented;

   (2) the liberalisation of EoI may have a negative effect on the willingness of investors to invest in Hong Kong due to the expansion of information gathering and disclosure under the proposals;

   (3) the Hong Kong tax system is territorially-based; and

   (4) the potential adverse impact on personal privacy, a fundamental human right that ought not to be eroded without good and sufficient reason.

7. Nevertheless, the HKG's proposals were taken forward in the Inland Revenue (Amendment)(No 3) Bill 2009 (the "**Bill**"). In the course of the passage of the Bill through the Legislative Council, the HKG proposed the making of a set of rules (following the enactment of the Bill) to provide for safeguards with respect to the disclosure of information pursuant to CDTAs.

8. The HKBA responded to this proposal in a letter to the clerk to the relevant Bills Committee dated 25 November 2009 (the "**HKBA's 2nd Response**") (copy at Annex B) by proposing that consideration be given to implementing a system of independent supervision and scrutiny of compliance with the proposed safeguards. It was further suggested that one way this could be done would be for the Privacy Commissioner for Personal Data to conduct privacy audits of such compliance on, say, an annual basis with publication of his results.

9. The Bill was enacted in 2010 as the Inland Revenue (Amendment)(No 1) Ordinance 2010, following which the Inland Revenue (Disclosure of Information) Rules (Cap 112, sub leg BI) (the "**Rules**") were made to provide for the safeguards that were proposed during the passage of the Bill.

10. Neither the Rules nor the IRD's practices in relation to the exchange of information under CDTAs (as set out in IRD Departmental Interpretation and Practice Note No 47) make any provision for the independent oversight and scrutiny proposed in the HKBA's 2nd Response.

HKBA's Views

11. Since CDTAs make provision for double taxation relief and/or other tax benefits they provide a potential benefit for tax payers in Hong Kong in general. Thus, although the collection and disclosure of tax information from individuals pursuant to CDTAs represents an erosion of their privacy interests, it can at least be argued this is counter-balanced by the benefit brought to tax payers in general in the avoidance of double taxation and/or obtaining other tax benefits.

12. It can also be argued that CDTAs encourage investment and income generation in Hong Kong because of the same tax benefits (although, as pointed out in the HKBA's 1st Response, the collection and disclosure of tax information pursuant to CDTAs that is unrelated to tax payers' domestic tax liabilities is a countervailing disincentive to investment and income generation in Hong Kong).

13. The same arguments cannot, however, be made in support of a legal framework for entering into TIEAs since TIEAs do not provide for double taxation relief or other tax benefits.

14. As stated in paragraph 15 of the Consultation Paper, TIEAs are "standalone agreements" for the exchange of information.

15. In other words, TIEAs are agreements that are concerned solely with the exchange of information with other tax jurisdictions. On this basis, there would be no advantage or potential advantage accruing to tax payers in general in exchange for the erosion of privacy rights that would result from the collection and disclosure of information pursuant to TIEAs. There would also be no resulting incentive for income generation and investment in Hong Kong to offset the disincentive to this created by the information collection and disclosure of information required pursuant to TIEAs.

16. It seems the only reason put forward in the Consultation Paper for establishing a legal framework to enable Hong Kong to enter TIEAs is that Hong Kong may be labelled an "uncooperative jurisdiction" if this is not done. Even this is suggested only indirectly (paragraph 16 refers). In any event, however, there is no suggestion the risk of this is significant or that such labelling would have an adverse impact on Hong Kong.

Specific Questions

17. The HKBA's response to the specific questions posed in paragraph 32 of the Consultation Paper are as follows:

(1) Q: Should Hong Kong proceed to work on a legal framework for TIEAs?

A: No. For the reasons that have been given, the HKBA does not consider a good and sufficient case has been put forward for doing so. In summary, no or no sufficient benefit has been demonstrated to offset the further erosion of privacy rights and disincentive to income generation and investment in Hong Kong that would result from entering TIEAs.

(2) Q: What are the considerations that we should take into account in choosing CDTA and TIEA partners:

A: Not applicable by reason of the answer to question (1).

(3) Q: Do you have any other suggestions on the implementation of the CDTA and TIEA programmes?

A: The HKBA repeats and maintains the proposal in its 2nd Response for independent oversight and scrutiny of compliance with the safeguards/procedures in the Rules and IRD Departmental Interpretation and Practice Note No 47. If a legal framework for entering TIEAs were to be proceeded with (contrary to the arguments against this set out herein), the HKBA proposes, as a further safeguard, that entry into a TIEA be permitted only if the other tax jurisdiction concerned has in force a law that is substantially similar to or serves the same purpose as the Personal Data (Privacy) Ordinance.

(4) Q: What are the specific concerns for not supporting the legal framework for TIEAs:

A: These are set out in paragraphs 11 to 16 above and summarised in the answer to question (1).

(5) Q: Are there any possible ways to address these concerns?

A: A good and sufficient case would need to be advanced for establishing the proposed legal framework. This has not been done.

Dated this 3rd July 2012

Hong Kong Bar Association