

Taxation and Business

The simple, territorial-based tax regime of Hong Kong is an attractive part of Hong Kong's business environment. At the same time, the government has been working to sign double taxation agreements (CDTA) with overseas tax jurisdictions, although in some instances, tax information exchange agreements (TIEA) are entered into. In recent years there is overseas pressure to set up a government-to-government mechanism for automatic exchange of financial account information in tax matters. All these carry business implications, and ICC-HK has continuously offered our views at rounds of consultations.

On Taxation Information Exchange Agreements (TIEA)

ICC-HK believes it will be in the interest of Hong Kong, without prejudicing the interest of other nations, to set its priority in entering into comprehensive double taxation agreements (CDTA), before contemplating to explore TIEAs.

The bases of CDTA and TIEA are different. CDTA is based on the interest of taxpayers of contracting parties; TIEA, however is based on the information need of the tax service, often unilaterally, of the contracting parties. Since the basis is different, it is reasonable that the scope, the mode or the process for exchange of information need not be the same. That is, they should be narrower and more restrictive than in the case of CDTA.

ICC-HK believes the government could proceed with CDAs as a means to further economic development and as a form of jurisdictional cooperation demonstrating Hong Kong's not being a tax haven. It is gratifying that Hong Kong has gone a long way in this regard based on the information the Administration provide, signing further CDAs will much depend on the economic benefit derived.

ICC-HK notes the suggestion that conclusion of TIEAs would not preclude the possibility of entering into CDAs with these jurisdictions in future. With respect, this is rather optimistic. If a jurisdiction has the real intention of signing a CDTA knowing it contains provisions on exchange of information, it can from the beginning state its intention clearly, unless domestic political considerations bar it from doing so. Otherwise, it does not have to seek entering into a TIEA first.

A taxpayer resident in a host country is under certain protection, and the host government has the duty to ensure that his protection might not be compromised either by law or by public administration because of an external request for tax information.

When a party refuses to enter into a CDTA with Hong Kong, but instead seeks to enter into a TIEA, it should provide clear explanation for not entering into CDTA and for the need of TIEA. The party's position should be submitted to the Legislative Council.

In considering a TIEA, the government should specify clearly the taxes referred to. Thus, the words "income tax" as applied to Hong Kong are generic, and it is preferred to state "profits tax" or "salaries tax" etc. Also, ICC-HK agrees that there should be no examination abroad.

Between CDTA and TIEA, there is no reason to accord favoured treatment to TIEA. Therefore, there is no need to seek new/ additional resources if Hong Kong is to proceed with TIEA.

In any agreement, ICC-HK is seeking fair treatment and to safeguard the rights of citizens. ICC-HK believes Hong Kong could sign TIEAs with jurisdictions which manifestly govern by the rule of law, upkeep independence of the judiciary and honour human rights. Further, there should be regular review of agreements entered into, and where circumstances warrant, an agreement should be modified or annulled.

On Automatic Exchange of Financial Account Information in Tax Matters (AEOI) in Hong Kong

Definition

It is important to have a clear definition of a non-Hong Kong tax resident reporting account. For example, in case of a corporation registered in Hong Kong where the majority shareholding is Hong Kong tax resident, will it still be liable to become a non-Hong Kong tax resident reporting account? Or where a financial institution has no non-Hong Kong tax resident customer in respect of any AEOI agreement, presumably it will not be caught by definition? The term "low risk" used to depict financial institutions and accounts as being exempt needs careful description. Finally, when there is dispute between a tax authority and a financial institution and account holder there should be recourse for resolution.

Bilateral and Staged Approach

ICC-HK agrees Hong Kong should enter into bilateral agreement with individual tax jurisdictions and should adopt a phased approach. Hong Kong could start with jurisdictions with which it has entered into CDTA. The pace should depend on experience gained, workload, additional public resources being available, and the adverse impact on business. This may be followed by TIEA jurisdictions depending on circumstances. It is too early to consider AEOI agreement with other jurisdictions than these.

On Request or Automatic

An overseas tax authority would first request for information exchange in regard to an account or accounts. If the request is accepted, the account(s) will be reportable account(s). The AEOI scheme therefore starts with an external request, and thereafter, the Hong Kong tax authority will provide periodic (annual) reports on the relevant reportable account(s).

Exemptions

The Administration should start with a low threshold in defining low risk financial institutions and accounts. The charities under Section 88 of the Inland Revenue Ordinance shall be exempted. MPF and ORSO should be exempted.

Safeguards and Review Mechanism

The Administration should establish a committee with independent members to consider each request for AEOI. There should also be an appeal mechanism in respect of definitions, reports by Hong Kong tax authority to an overseas tax authority, etc. In this connection, ICC-HK is concerned that while under the CDTA and TIEA regimes, an account holder can seek redress up to judicial review; the AEOI proposals do not seem to provide for this to account holders and financial institutions. Provision should be in place in legislation to safeguard their rights.

There should be a review mechanism in respect of each AEOI agreement. Any change should be approved by negative vetting of the Legislative Council (LegCo) after consultation with the relevant stakeholders.

The Administration says that Hong Kong will monitor the non-compliance of an overseas authority with which it has signed an AEOI agreement. ICC-HK should like to know how this will be put into practice, and suggest that future legislation will empower the Hong Kong tax authority to enter into, change, suspend or rescind an agreement subject to negative vetting of the LegCo.

Other issues

The Administration proposes to include a list of non-reporting financial institutions in the form of a Schedule to IRO. ICC-HK presumes these relate to different types of institutions rather than individual institutions. However, this may give the impression that other than those types of institutions listed, all institutions are reporting institutions. The same misconception may happen in the case of excluded accounts. It will be necessary to clarify in law that all other financial institutions or accounts are not reporting subjects, unless any one of them is designated by the Hong Kong tax authority or is an account referred by an overseas tax authority of a particular agreement. On the other hand, the Administration may wish to consider instead listing by Schedule those reporting financial institutions and accounts, since after all, IRO has to keep a register of reporting financial institutions with reportable accounts as pointed out in the Consultation paper.

Paragraph 2.23 of the Consultation paper states that “.... In order to implement AEOI, ICC-HK proposes to empower IRO to

- “a)
- b)
- c) use the information obtained from FIs for the administration of IRO and
- d)”.

ICC-HK should be obliged if the Administration could clarify this intention before ICC-HK offers comment.

Looking ahead, ICC-HK envisages business may face 2 separate regimes, CDTA/TIEA and AEOI. ICC-HK shall be grateful to know if they are run in parallel, or they will be merged into one mode of operation. If it is the latter, ICC-HK should like to know the adverse implications to the financial institutions and taxpayers affected.

The Administration says key provisions of Competent Authority Agreement (CAA) and Common Reporting Standard (CRS) may be incorporated in legislation. It may be an alternative that an AEOI agreement should be put in Schedule so that any variation of agreements may be covered. Moreover, if a change in content of an agreement is demanded or imposed, it will not invalidate implementation of the existing agreement based on what was first agreed.

Burden on Financial Institutions and Service Users

It may be foreseen that whether or not caught by any AEOI agreement a financial institution will have to set up the necessary structure, and to build up its competence to equip itself in anticipation of complying with the new legislation. There will be cost, manpower and administration implications in addition to foreseeable inconvenience and harassment to service users. Compliance requirements have been growing over the years, and ICC-HK hopes the Administration will try its best to maintain a business friendly environment, through, in this case, adopting measures to keep compliance work simple and to the minimum.

Publicity

Credit goes to the Bureau and IRD in giving advance notice of AEOI. ICC-HK hopes that the Administration will also give ample publicity to the new measures once legislation is passed, and the public may have sufficient time to attune to the new requirements.