



**Inland Revenue Department**

The Government of the Hong Kong Special Administrative Region  
of the People's Republic of China

**DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES**

**NO. 47 (REVISED)**

**EXCHANGE OF INFORMATION ON REQUEST**

These notes are issued for the information of taxpayers and their tax representatives. They contain the Department's interpretation and practices in relation to the law as it stood at the date of publication. Taxpayers are reminded that their right of objection against the assessment and their right of appeal to the Commissioner, the Board of Review or the Court are not affected by the application of these notes.

These notes replace those issued in January 2014.

WONG Kuen-fai  
Commissioner of Inland Revenue

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# **DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES**

## **No. 47 (REVISED)**

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## **INTRODUCTION**

### ***Global Forum on Transparency and Exchange of Information for Tax Purposes***

The Global Forum on Transparency and Exchange of Information for Tax Purposes<sup>1</sup> (Global Forum) is the multilateral framework within which work on transparency and exchange of information (EOI) for tax purposes has been carried out by both the Organisation for Economic Co-operation and Development (OECD) and non-OECD economies since 2000. Since its restructuring in 2009, the Global Forum has become the key international body working on the implementation of the international standards on tax transparency. The Global Forum ensures that these high standards of transparency and EOI for tax purposes are in place around the world through its monitoring and peer review activities.

2. There are two internationally agreed standards on EOI for tax purposes:

- (a) EOI on request; and
- (b) automatic exchange of information.

3. This Departmental Interpretation and Practice Note sets out the practice of the Department on EOI on request. It explains the safeguards available and the procedural guidelines to be followed by officers of the Inland Revenue Department.

### ***EOI on Request Standards***

4. The international standard of EOI is primarily reflected in the 2002 OECD Model Agreement on Exchange of Information on Tax Matters and its commentary, Article 26 of the OECD Model Tax Convention on Income and on Capital (OECD Model Tax Convention) and its commentary and Article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries and its commentary.

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<sup>1</sup> As at February 2020, the Global Forum has 161 members participating on an equal footing, together with 19 observers. All member jurisdictions have committed to implementing the international standard on EOI.

5. The EOI standard provides for exchange on request of information foreseeably relevant for carrying out the provisions of the applicable instrument or to the administration or enforcement of the domestic tax laws of a requesting jurisdiction. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including ownership, accounting and banking information. The EOI standard currently also requires:

- (a) no restrictions on exchange caused by bank secrecy or domestic tax interest requirements;
- (b) availability of reliable information and powers to obtain it;
- (c) respect for taxpayers' rights; and
- (d) strict confidentiality of information exchanged.

6. Hong Kong always seeks to abide by the EOI standard. Taxpayers' rights are fully respected and the confidentiality of information exchanged is protected.

7. All Global Forum members, as well as non-members that are relevant to the Global Forum's work, are assessed through a peer review process<sup>2</sup> for their implementation of the EOI standard as set out in the 2016 Terms of Reference, which break down the standard into 10 essential elements under three categories:

- (a) availability of ownership, accounting and banking information;
- (b) access to information by the competent authority; and
- (c) exchanging information.

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<sup>2</sup> Since 2010, the Global Forum has been undertaking a robust, transparent and accelerated process of reviews of the implementation of the EOI standard. Assessment teams conduct systematic examinations and assessments of jurisdictions' legal and regulatory frameworks for EOI and also of the jurisdictions' practical application of their frameworks. The ultimate goal of the peer review process is to help jurisdictions to effectively implement the international EOI standard.

## ***EOI Instruments***

8. Hong Kong has made use of double taxation agreement (DTA), tax information exchange agreement (TIEA)<sup>3</sup> and the Convention on Mutual Administrative Assistance in Tax Matters (the Convention)<sup>4</sup> as instruments for EOI with other jurisdictions. In this practice note, DTAs, TIEAs and the Convention are referred to collectively as the “EOI Instruments”.

9. While the Convention enables Hong Kong to gain access to a wide network of jurisdictions for exchanging information as required under the automatic exchange of financial account information in tax matters and the base erosion and profit shifting initiatives, it remains a policy priority to seek to conclude DTAs with Hong Kong’s trading and investment partners given the benefits of DTAs. Hong Kong will continue its efforts in persuading trading and investment partners to commence DTA negotiations with Hong Kong.

## ***Competent authority***

10. All EOIs are conducted by the competent authorities of Hong Kong and the EOI partners. In the EOI Instruments, the term “competent authority” is defined, in the case of Hong Kong, as “the Commissioner of Inland Revenue or his authorised representative”. In this connection, the Commissioner has authorised the two Deputy Commissioners as authorised representatives.

## ***Safeguards***

11. In order to protect taxpayers’ privacy and confidentiality of any information exchanged, highly prudent safeguard measures have been adopted and followed in Hong Kong:

- (a) information sought should be foreseeably relevant (i.e. there will be no fishing expeditions);

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<sup>3</sup> A TIEA is a standalone agreement providing for EOI. It does not provide any double taxation relief or tax benefit.

<sup>4</sup> The Convention is a multilateral instrument jointly developed by the OECD and the Council of Europe to provide for all possible form of administrative cooperation between state parties in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. It provides a basis for jurisdictions to conduct automatic exchange of financial account information in tax matters and implement the initiatives to combat base erosion and profit shifting on a multilateral basis.

- (b) scope of tax types is confined to the taxes covered by the relevant EOI Instrument;
- (c) information received from the EOI partner should be treated as confidential;
- (d) information will only be disclosed to the tax authorities concerned and their oversight bodies;
- (e) information requested should not be disclosed to a third jurisdiction;
- (f) information will not be provided under certain circumstances (e.g. the supply of information would disclose any trade, business, industrial, commercial or professional secret or trade process, the information is covered by legal professional privilege).

### *Secrecy provisions*

12. Section 4 of the Inland Revenue Ordinance (IRO) provides that except in the performance of duties under the IRO, a person appointed under or employed in carrying out the provisions of the IRO shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person coming to his knowledge. Section 49(5) of the IRO provides that where any arrangements have effect by virtue of that section, the obligation as to secrecy imposed by section 4 shall not prevent the disclosure to any authorised officer of the government with which the arrangements are made of such information as is required to be disclosed under the arrangements. Therefore, disclosure of information to EOI partners under and in accordance with the relevant instrument does not contravene the secrecy provisions under the IRO.

## **THE RELEVANT LEGISLATIONS**

### ***The Inland Revenue (Amendment) Ordinance 2010***

13. On 12 March 2010, the Inland Revenue (Amendment) Ordinance 2010 (the 2010 Amendment Ordinance) became effective. The purpose of the 2010 Amendment Ordinance was to enable the Commissioner to collect and disclose information in response to requests made by the EOI partners for their own tax purposes. The provisions in the 2010 Amendment Ordinance are summarised as follows:

- (a) Section 49(1A) of the IRO clarifies that if an arrangement made with a territory outside Hong Kong allows EOI, it shall have effect in relation to tax of that territory.
- (b) Section 51(4AA) of the IRO enables the Assessor to exercise the same power under section 51(4) of the IRO to collect information concerning tax of a territory outside Hong Kong for the purpose of EOI.
- (c) Section 51B(1AA) of the IRO enables a magistrate to exercise the same power under section 51B of the IRO to issue search warrants for information concerning tax of a territory outside Hong Kong for the purpose of EOI.
- (d) Section 80(2D) of the IRO provides that a person commits an offence if the person, without reasonable excuse, gives any incorrect information in relation to any matter that affects the person's or another person's liability to tax of a territory outside Hong Kong for the purpose of EOI.
- (e) The word "tax" in section 58(1)(c) of the Personal Data (Privacy) Ordinance (Cap. 486) includes any tax of a territory outside Hong Kong for the purpose of EOI.

### ***The Inland Revenue (Amendment) (No. 2) Ordinance 2013***

14. On 19 July 2013, the Inland Revenue (Amendment) (No. 2)

Ordinance 2013 (the 2013 Amendment Ordinance) took effect. It was enacted to provide a legal framework for standalone TIEAs and to enhance the EOI arrangements in respect of tax types and limitation on disclosure. The provisions in the 2013 Amendment Ordinance are summarised as follows:

- (a) Section 49(1B) of the IRO enables arrangements made with a territory outside Hong Kong not only for affording relief from double taxation, but also for exchanging information in relation to any tax imposed by the laws of Hong Kong or the territory concerned.
- (b) Sections 51 and 52 of the IRO clarify that the power of the Commissioner to obtain information is exercisable not only in respect of information possessed by a person, but also in respect of information in a person's control.
- (c) Section 4 of the Inland Revenue (Disclosure of Information) Rules (Cap. 112 sub. leg. BI) (the Disclosure Rules) enables the Commissioner to disclose information that relates to the carrying out of the provisions of the relevant arrangements, or to the administration or enforcement of the tax law of the EOI partner, in respect of any period that starts after the relevant arrangements have come into operation.

#### ***The Inland Revenue (Amendment) Ordinance 2018***

15. On 2 February 2018, the Inland Revenue (Amendment) Ordinance 2018 took effect. It was enacted to provide a legal framework for Hong Kong to implement multilateral tax arrangements under the IRO. It empowers the Chief Executive in Council (CE-in-Council) to make an order to give effect in respect of arrangements that have been made with more than one government or arrangements that have been made by the Central People's Government (CPG) and applied to Hong Kong.

#### ***The Inland Revenue (Convention on Mutual Administrative Assistance in Tax Matters) Order***

16. The Convention has been open for signature by states only and each

signatory state may specify the territory or territories to which the Convention applies. Upon the request of Hong Kong, the CPG agreed in principle in May 2017 to extend the application of the Convention to Hong Kong. The declaration<sup>5</sup> for extending the application of the Convention to Hong Kong (Declaration for Extension) made by the CPG was registered at the OECD on 29 May 2018.

17. After CPG's deposit of the Declaration for Extension and Hong Kong's list of reservations and declarations, the CE-in-Council made an order under section 49(1A) of the IRO to give effect to the Convention in Hong Kong. The Inland Revenue (Convention on Mutual Administrative Assistance in Tax Matters) Order was published in Gazette on 13 July 2018 and the Convention entered into force in Hong Kong on 1 September 2018.

### ***Inland Revenue (Disclosure of Information) Rules***

18. The Disclosure Rules came into operation on 12 March 2010. They were made under section 49(6) of the IRO and they can be applied to the provisions of any international arrangements having effect under section 49 of the IRO. They provide a set of fair procedures to protect confidentiality and privacy right.

## **TAX INFORMATION**

### ***Reasons for exchange***

19. In the course of an examination or audit, a tax official of a territory outside Hong Kong may need information which has not been provided by a person or the person's agent and which does not appear to be available within the territory. The information however may be available in Hong Kong.

20. This information may help to ensure that the terms of the DTA with Hong Kong are correctly applied. For example, credit can be given for tax paid in Hong Kong against tax due in this territory on the same income. This may be where a withholding tax has correctly been levied in Hong Kong on

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<sup>5</sup> It includes a list of reservations and declarations made by the CPG in respect of Hong Kong under the Convention.

certain royalty income. Information can also be used to make tax assessments and to detect and counter cases of avoidance and evasion.

### ***No domestic tax interest requirement***

21. Hong Kong has an obligation to exchange information in accordance with the provisions of an EOI Instrument. Such information shall be exchanged without regard to whether Hong Kong needs the information for tax purposes under the IRO or whether the conduct being investigated would constitute a crime under the laws of Hong Kong if such conduct occurred in Hong Kong. The provisions of an EOI Instrument provide that a requested jurisdiction cannot decline to supply information solely because it has no domestic tax interest in such information. After removal of the domestic tax interest requirement under the 2010 Amendment Ordinance, Hong Kong is required to gather and provide the information requested even if Hong Kong has no domestic tax interest regarding the information.

### ***Foreseeably relevant***

22. Information which is requested from an EOI partner must be “foreseeably relevant” to the tax affairs being examined. The term “foreseeably relevant”, currently used in Article 26 of the OECD Model Tax Convention, Article 1 of the OECD Model Agreement on Exchange of Information on Tax Matters and Article 4 of the Convention is intended to provide for information to be exchanged to the widest possible extent, but excludes “fishing expeditions” (i.e. speculative requests for information that have no apparent nexus to an open inquiry or investigation) or requests that are unlikely to be relevant to the tax affairs of a given taxpayer. It covers information in respect of all persons (e.g. not limited to persons that are residents in either contracting party of a DTA), in both civil tax matters and criminal tax matters, such as tax fraud and evasion. In *AXY and others v Comptroller of Income Tax* (2018) 20 ITLR 723, it was held at the Singapore Court of Appeal that the Comptroller’s assessment of foreseeable relevance should be based on the face of the statements and information provided by the foreign tax authority. The Comptroller is not obliged to embark on an independent investigation or a mini-trial to establish the veracity of the foreign tax authority’s statements, nor is he required to delve into questions concerning a foreign jurisdiction’s domestic law. Where the foreign tax authority

provides an explanation to clarify any doubts that may arise, the Comptroller is not obliged to embark on a substantive inquiry into the correctness of that explanation.

23. The obligation to exchange information that is “foreseeably relevant” pursuant to an EOI Instrument is mandatory. Some DTAs use the word “necessary” for “foreseeably relevant” and these terms are considered equivalent. The Schedule to the Disclosure Rules in Appendix 1 specifically set forth the particulars that a requesting jurisdiction should provide to demonstrate that the standard of “foreseeable relevance” is met. The term “foreseeable relevance” should be evaluated with reference to the strength of the information supplied in the disclosure request.

24. In July 2012, the OECD approved an update to the EOI Article of the OECD Model Tax Convention and its commentary. The 2012 version has provided more detailed interpretation of the prevailing standard of “foreseeable relevance”. It has elaboration on how a request which relates to a group of taxpayers not individually identified should be treated. According to the interpretation, a group request should be accepted if the requesting jurisdiction could substantiate that the request is related to tax purposes and that it could meet the standard of “foreseeable relevance”.

25. Information requested by a requesting jurisdiction for the administration or enforcement of its domestic tax laws can include items such as the fiscal residence of an individual or a company, the legal and beneficial owners of a company, the nature of income in the source country, the business and accounting records, the bank records and the commercial contracts.

#### Example 1

*Jurisdiction-F requested Hong Kong to provide the amount of royalties transmitted to one of its residents whose income wherever derived was subject to income tax in Jurisdiction-F.*

The information requested was foreseeably relevant to the administration or enforcement of the domestic laws of Jurisdiction-F concerning taxes as agreed. The information would be provided to Jurisdiction-F.

## Example 2

*Jurisdiction-F requested Hong Kong to confirm whether the recipient of royalties sourced in Jurisdiction-F was a resident of Hong Kong and whether the recipient was the beneficial owner of the royalties.*

If the recipient of the royalties was the beneficial owner of the royalties and was a resident of Hong Kong, the recipient would be entitled to a lower withholding tax rate in Jurisdiction-F. Since the information was foreseeably relevant for carrying out the provisions of the DTA between Hong Kong and Jurisdiction-F, it would be provided to Jurisdiction-F.

### ***Common types of information***

26. The information requested may relate to taxpayers, whether individuals or companies and it may be directly available within the Department (e.g. information on the tax return, amount of taxes paid, etc.). If not already held, it may be held by the taxpayer or a third party (e.g. an employer or a financial institution).

27. Common types of information may include:

- (a) tax return and financial statements;
- (b) tax paid abroad;
- (c) residence status;
- (d) property owned or used;
- (e) income and expenses;
- (f) bank account balances and transactions;
- (g) directors and shareholders of companies;

- (h) company registration;
- (i) accounts including business records and invoices.

### ***Bank information***

28. Hong Kong has never had any bank secrecy laws. The Commissioner has all along been empowered to collect information from banks for the purposes of administration of taxes under the IRO. If the bank information is foreseeably relevant for carrying out the provisions of a DTA or to the administration or enforcement of the tax laws of the requesting jurisdiction, it would be provided to the requesting jurisdiction.

### ***Taxes covered***

29. Information exchanged under an EOI instrument made by an order pursuant to section 49(1A) of the IRO by the CE-in-Council may relate to any tax imposed by the laws of Hong Kong or a territory outside Hong Kong.

30. Since Hong Kong has a simple tax system under which only three direct taxes are imposed (i.e. profits tax, salaries tax and property tax), it is considered that EOI for the purposes of these direct taxes would suffice and the EOI provisions are restricted to similar direct taxes covered by the EOI Instruments. However, the tax systems of most jurisdictions are far more complex than that of Hong Kong and have a much wider range of tax types (e.g. value-added tax, wealth tax, inheritance tax, etc.), and sometimes have different level of taxes (e.g. federal and state taxes). Understandably, the tax authorities of these jurisdictions would like to have information from Hong Kong to assist their investigation of tax evasion cases concerning income taxes and taxes of other types (i.e. taxes which are not income tax in nature but are covered by the relevant EOI Instrument).

31. After enactment of the 2013 Amendment Ordinance, the coverage of tax types for exchanging information is extended to any tax imposed by the laws of Hong Kong or any territory with which Hong Kong has an EOI arrangement. In this respect, Hong Kong will have more flexibility to persuade the key jurisdictions to commence DTA negotiations with Hong Kong, to meet the practical needs of these jurisdictions and to ensure that EOI

arrangements are on par with the international standard. In practice, a positive listing approach may be adopted to set out the tax types to be covered in each DTA or TIEA. The relevant DTA or TIEA will be implemented as subsidiary legislation domestically subject to negative vetting by the Legislative Council.

32. Paragraph 1 of Article 2 of the Convention lists the main categories of taxes covered by the Convention. The taxes to which the Convention applies are listed in Annex A of the Convention<sup>6</sup>. These are the taxes in relation to which assistance is expected to be received. Since Hong Kong has made reservation under paragraph (1)(a) of Article 30 of the Convention, Hong Kong is not obligated to provide any form of assistance, including EOI on request, in relation to the taxes of other jurisdictions described in paragraph (1)(b) of Article 2 of the Convention.

### ***Persons covered***

33. EOI is not limited to information relating to the affairs of residents of Hong Kong and the territory concerned. The tax administration of the territory concerned often has an interest in receiving information on activities carried out between a company in Hong Kong and a particular person resident in a third jurisdiction because the tax liability of the latter as a non-resident taxpayer is at issue. There are also circumstances under which a person of a third jurisdiction is interposed in the chain of information flow. In a DTA, the EOI Article invariably stipulates that the EOI is not restricted by Article 1, which defines the persons covered by the DTA.

### **Example 3**

*Company-F1 was a resident of Jurisdiction-F1 which had a DTA with Hong Kong. Company-F1 purchased products from Company-F2 which was a related supplier resident in Jurisdiction-F2. Company-F2 sold the same products to unrelated distributors in Hong Kong. In a transfer pricing audit on the prices used by Company-F1, the tax administration in Jurisdiction-F1 requested Hong Kong to provide information relating to prices charged by Company-F2 on unrelated distributors in Hong Kong.*

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<sup>6</sup> Annex A of the Convention can be accessed via this [link](#).

The information requested by Jurisdiction-F1 should be relevant in a comparability analysis for its transfer pricing audit. If Hong Kong had the information or could obtain such information on prices charged by Company-F2 on its unrelated distributors in Hong Kong, such information had to be provided regardless of whether such distributors were residents of Hong Kong under the relevant DTA or residents of a third jurisdiction.

#### Example 4

*The tax administration of Jurisdiction-F1 was conducting an investigation into the tax affairs of Mr. F1. There was evidence that Mr. F1 was the beneficial owner of several bank accounts maintained with Bank-HK in Hong Kong which were held by nominee companies incorporated in Jurisdiction-F2 and Jurisdiction-F3. Taxes were levied on a world-wide basis in Jurisdiction-F1. Hong Kong was requested by Jurisdiction-F1 under the Convention to provide the bank account opening information and bank statements of these bank accounts.*

The information requested under the Convention could assist Jurisdiction-F1 to identify any undisclosed income and assets outside Jurisdiction-F1, beneficially owned by Mr. F1, which would be subject to tax in Jurisdiction-F1. This information was foreseeably relevant to the administration or enforcement of the domestic tax laws of Jurisdiction-F1. The information would be provided to Jurisdiction-F1.

#### ***Possession and control***

34. The information gathering power of the Commissioner is not restricted to information in the possession of a person but also information under the person's control. The term "possession" does not mean physical possession only. It should also bear the meaning of legal possession (i.e. possession which is recognised and protected as such by law). If a person is the owner of the information which at the material time is kept by other party, say the record books held by his auditors or lawyers, the person is still in possession of such information, and he has to provide such information to the Commissioner.

35. Hong Kong is not obligated to provide information that is neither held by the Commissioner nor is in the possession or control of persons within Hong Kong.

Example 5

*Mr. H owned all the shares in Company-F and was the sole director of Company-F, a corporation incorporated in an offshore jurisdiction. The assessor requested Mr. H to provide documents which were in the possession or control of Company-F.*

If the documents were in the actual possession of Mr. H, he had to disclose and produce all relevant documents. If Company-F was the alter ego of Mr. H so that he had unfettered control of Company F's affairs, he had to disclose and produce all relevant documents.

Example 6

*Company-HK was incorporated in Hong Kong whereas Company-F was incorporated in a jurisdiction outside Hong Kong. Company-HK owned 70 percent of the shares in Company-F. To verify the transactions between Company-HK and Company-F, the assessor required the accounting records of Company-F.*

Though Company-HK was the majority shareholder of Company-F, Company-HK could not be said to have possession or control of the accounting records of Company-F. Therefore, the assessor would not ask Company-HK to provide the accounting records of Company-F but would make use of the EOI mechanism, where appropriate, to obtain the accounting records of Company-F. Company-HK, however, was expected to provide copies of financial statements of Company-F it received as a shareholder.

***Information held by nominees, agents, fiduciaries and ownership information***

36. Hong Kong is required to provide information even though the information is held by a nominee or a person acting in an agency or fiduciary capacity, or relates to an ownership interest.

### ***Confidentiality of information received***

37. The international standard for EOI requires that information should be kept confidential, and that information should be treated “as secret in the same manner as information obtained under the domestic laws”. In the Hong Kong context, tax secrecy refers to the provisions mainly under the IRO that ensure that information relating to a taxpayer and his affairs remains confidential and is protected from unauthorised disclosure. Appendix 2 sets forth the data security and confidentiality measures adopted in Hong Kong.

38. It is fundamental for the co-operation in matters of information exchange that such confidential information continues to enjoy a similar level of protection when it is exchanged with Hong Kong. For this reason, any information supplied by a requested jurisdiction to Hong Kong will be treated as confidential. Confidentiality is preserved by the EOI Instrument concerned and the applicable domestic laws of Hong Kong.

39. The confidentiality provisions of an EOI Instrument create obligations under international law. Information received by Hong Kong under an EOI Instrument shall be treated as confidential and may be disclosed only to persons or tax authorities concerned with the assessment, collection and enforcement of the taxes (including the prosecution or the determination of appeals) and the information may be used only for such purposes. The competent authorities may disclose the information in public court proceedings or in judicial decisions. However, the information should not be disclosed to any other person, entity, authority or jurisdiction. These are the safeguards provided under the EOI Instruments.

40. The confidentiality rules apply to all types of information, including both information provided in a request, for instance, competent authority letters requesting information, and information transmitted in response to a request.

41. To gather information, a formal notice will be issued to the information holder requesting the relevant information or documents. The Commissioner will only disclose the minimum information contained in a disclosure request (but not the letter itself) to enable the information holder to locate the requested information and respond to the notice. The type and amount of information to be disclosed in the notice depends on the

circumstances of each case and would not normally include the name of the requesting jurisdiction. If the information holder has reasonable grounds to know the name of the requesting jurisdiction (e.g. claiming privilege against self-incrimination), the Commissioner is prepared to take a pragmatic approach to deal with the situation after striking a balance between the international standard and information holder's need. If the reasons provided by the information holder is acceptable, the Commissioner would seek prior consent of the requesting jurisdiction before disclosure of its name. If the requesting jurisdiction declines to give any consent, the Commissioner will inform the information holder accordingly. If the information holder refuses to provide the information requested as the name of the requesting jurisdiction is not known, the Commissioner will, having considered the circumstances of the case, decline the disclosure request because it could not disclose to the information holder the name of the requesting jurisdiction, which is considered necessary to facilitate the gathering of the requested information.

### ***Use of information for other purposes***

42. Any information received under a disclosure request shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in the EOI Instrument. Such persons or authorities shall use the information only for such purposes.

43. Where documents contain data of a third party which will be useful in verifying the accuracy of information shown in the documents or otherwise assist in the proper administration or enforcement of the domestic tax laws of the requesting jurisdiction, the data will not be crossed out and the documents will be transmitted to the requesting jurisdiction in the manner produced. Typical examples are sales invoices and multi-partite service contracts.

44. Where the requesting jurisdiction lodges a request for information in respect of that “third party” which makes any reference to or which relies on any data aforementioned, such request will be regarded as a separate request. If the requested information relating to the “third party” is foreseeably relevant to the administration or enforcement of the domestic tax laws of the requesting jurisdiction, such information on the “third party” may be provided to the

requesting jurisdiction.

45. In general, the information obtained under an EOI Instrument can only be used for the purposes provided in that instrument. The primary purpose will be linked to the administration, assessment and enforcement of tax. However, the use of information so obtained for other non-tax related purposes may be allowed under an EOI Instrument where:

- (a) the relevant arrangement contains non-tax use provision;
- (b) the domestic laws of both the receiving jurisdiction and the supplying jurisdiction permit such use; and
- (c) prior authorisation is given by the competent authority of the supplying jurisdiction.

46. As far as other non-tax related purposes are concerned, in the case of Hong Kong, it does not merely mean any purpose other than a tax related purpose. Such non-tax related purposes must be purposes for which the tax information exchanged may be so used under the laws of Hong Kong and the EOI partner. Under the laws of Hong Kong, tax information may only be used for limited non-tax related purposes, such as recovery of proceeds from drug trafficking, organised and serious crimes and terrorist acts under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), the Organized and Serious Crimes Ordinance (Cap. 455) and the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) respectively.

47. There may be times when the tax information provided by an EOI partner under an EOI Instrument is of use to a law enforcement agency in Hong Kong dealing with the enforcement of the laws aforementioned, in particular the Joint Financial Intelligence Unit (JFIU) jointly run by the Hong Kong Police Force and the Hong Kong Customs and Excise Department. However, the provisions of an EOI Instrument as explained would take precedence over the aforementioned laws which require disclosure of tax information to the JFIU. As a rule, the Commissioner would only disclose the information to the JFIU if:

- (a) the relevant EOI Instrument contains non-tax use provision;

- (b) the domestic laws of the supplying jurisdiction permit the use of the information for the said non-tax related purposes; and
- (c) the competent authority of the supplying jurisdiction authorises such use.

48. Likewise, a requesting jurisdiction may only use the tax information obtained from Hong Kong under an EOI Instrument for the said non-tax related purposes if the EOI Instrument contains non-tax use provision and such use is permitted under the domestic laws of the requesting jurisdiction. In addition, on every occasion of intended use of tax information for the said non-tax related purposes, the competent authority of the requesting jurisdiction has to seek prior authorisation from the Commissioner. The relevant law enforcement agencies and the Department of Justice in Hong Kong will be consulted. The Commissioner will only indicate consent to the competent authority of the requesting jurisdiction if the relevant government departments raise no objection and such use of information is covered by the current exemption as provided under section 58 of the Personal Data (Privacy) Ordinance (Cap. 486) in relation to crime under the laws of a place outside Hong Kong with which Hong Kong has in place legal or law enforcement cooperation.

#### ***Disclosure to oversight authorities***

49. The Convention and the EOI Article of the OECD Model Tax Convention permit disclosure of information exchanged to the oversight authorities of the requesting jurisdiction. Oversight authorities are authorities that supervise the tax administration and enforcement authorities as part of the general administration of the governments of the requesting and requested jurisdictions. Hong Kong adopts a more prudent approach in the DTA negotiations with other jurisdictions. Disclosure to oversight authorities is accepted if there are legitimate reasons (e.g. administrative or governmental structure of the DTA jurisdiction permits or requires the oversight authorities to have access to tax information).

#### ***Disclosure to third jurisdictions***

50. To ensure the strictest confidentiality, information shall not be disclosed to any third jurisdiction for any purpose. In some DTAs entered

into by Hong Kong, it is stated in the EOI Article that information shall not be disclosed to any third jurisdiction without the consent of the requested jurisdiction. The same approach is also followed in a TIEA and the Convention. The Commissioner does not envisage any circumstances under which Hong Kong would give consent for such disclosure.

### ***Retrospective effect***

51. The EOI provisions under an EOI Instrument shall have effect only after the instrument enters into force. Any EOI will only be possible after the date on which the EOI provisions have effect (i.e. the effective date). The effective date is stipulated under the Article on Entry into Force in the EOI Instrument. Regarding the information that may be disclosed in response to a disclosure request, section 4 of the Disclosure Rules provides that:

*“The Commissioner must not disclose any information in response to a disclosure request unless the Commissioner is satisfied that the information relates to –*

- (a) *the carrying out of the provisions of the relevant arrangements in respect of any period that starts after the arrangements have come into operation; or*
- (b) *the administration or enforcement of the tax law of the requesting government’s territory in respect of any period that starts after the relevant arrangements have come into operation.”*

52. The provisions of section 4 of the Disclosure Rules however do not preclude disclosure of information that precedes the effective date of the EOI Instrument, provided that such information relates to the carrying out of the provisions of a DTA or the administration or enforcement of the tax law of the requesting jurisdiction in respect of any period that starts after the EOI Instrument has come into operation.

53. In summary, information that can be exchanged includes:
- (a) information relating to any period that starts after the effective date of an EOI Instrument;
  - (b) information that exists or generated prior to the effective date of an EOI Instrument if the information is foreseeably relevant for the carrying out of the provisions of a DTA or to the tax administration or enforcement of the tax law of the requesting jurisdiction concerning taxes imposed in a period that starts after the EOI Instrument came into effect.

54. Under the Convention, for tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the requesting jurisdiction, information relating to taxable periods beginning on or after 1 January of the third year (i.e. 1 January 2015) preceding the one in which the Convention entered into force in respect of Hong Kong (i.e. 1 September 2018) is required to be provided to the requesting jurisdiction.

#### Example 7

*Company-F was a resident of Jurisdiction-F which had a DTA with Hong Kong. The relevant DTA had effect in Hong Kong for any year of assessment beginning on or after 1 April 2016. Company-F opened a savings account with a bank in Hong Kong on 1 March 2015 and received interest therefrom. Jurisdiction-F was investigating the tax affairs of Company-F for the period from April 2016 onwards and suspected that Company-F had failed to report its worldwide income attributable to the interest income arising in Hong Kong. Jurisdiction-F requested Hong Kong to provide bank statements of the account in Hong Kong for the period from 1 April 2016 to 31 March 2017 as well as a copy of the signature card for the account in question.*

Pursuant to section 4 of the Disclosure Rules, Hong Kong should be able to provide the bank statements for the period from 1 April 2016 to 31 March 2017 and a copy of the signature card for the account in question. Although the signature card was generated prior to the

effective date of the DTA, it could be exchanged because it was foreseeably relevant to the administration or enforcement of the tax laws of Jurisdiction-F in respect of a period that started after the DTA came into operation.

### Example 8

*Company-HK received dividends on 1 June 2018 paid by Company-F, a resident of Jurisdiction-F which had a DTA with Hong Kong. Company-HK made a claim for DTA benefits (i.e. reduced withholding tax rate on dividends under the provisions of the relevant DTA that came into effect on 1 April 2017). To verify the identity and resident status of Company-HK, Jurisdiction-F requested Hong Kong to provide, among others, a copy of the Certificate of Incorporation of Company-HK as evidence that Company-HK was a resident of Hong Kong. The Certificate of Incorporation of Company-HK was issued on 1 April 2015.*

Although the Certificate of Incorporation of Company-HK was issued before 1 April 2017, Hong Kong should provide the document to Jurisdiction-F since it was foreseeably relevant for carrying out the provisions of the DTA (i.e. Jurisdiction-F had to ascertain whether Company-HK was eligible for claiming tax benefits under the provisions of the DTA after 1 April 2017).

## **ADMINISTRATIVE MEASURES**

### ***No obligation to carry out measures at variance with domestic laws and administrative practices***

55. The Commissioner is not obligated to carry out administrative measures at variance with Hong Kong's laws and administrative practices. The underlying rationale is that a requested jurisdiction should be required to do no more, but also no less, than it would if its own taxation was at stake. Thus, where the information in the possession of the Commissioner is not sufficient to reply to a request, the Commissioner should take all relevant information gathering measures as the Commissioner would take for the tax

purposes in Hong Kong. Item 7(a) of the Schedule to the Disclosure Rules in Appendix 1 specifically sets forth that a requesting jurisdiction should provide a statement to confirm that the disclosure request complies with its laws and administrative practices.

## LIMITATIONS ON EOI

### *Obligation lifted*

56. In the Manual on the Implementation of EOI Provisions for Tax Purposes - Module on General and Legal Aspect of EOI, the OECD explicitly states that the legal obligation to supply information is lifted in a limited number of situations. These exceptions are adopted in full in the EOI Instruments. In the rare cases where the exceptions apply, the Commissioner or the competent authority of the jurisdiction concerned are not obligated to provide information. The Commissioner will act within the framework of the EOI Instrument and will not provide the information where there is no obligation to do so.

### *Reciprocity*

57. The Commissioner, when collecting information for the requesting jurisdiction, is only obligated to obtain and provide such information that the requesting jurisdiction could itself obtain under its own laws in similar circumstances. It is stipulated in the EOI Instruments that there is no obligation to supply information that the requesting jurisdiction itself could not obtain in the normal course of administration.

58. The underlying idea of the concept of reciprocity is that a requesting jurisdiction cannot take advantage of the information system of Hong Kong if Hong Kong's information system is wider than its own system. The Commissioner may refuse to provide information where the requesting jurisdiction is precluded by law from obtaining or providing the information or where the requesting jurisdiction's administrative practices (e.g. failure to provide sufficient administrative resources) result in a lack of reciprocity.

59. The requesting jurisdiction is required to provide a statement confirming that the reciprocity condition is met. Item 7(b) of the Schedule to

the Disclosure Rules in Appendix 1 specifically sets forth that the requesting jurisdiction should confirm in a statement that the information is obtainable under its domestic laws or in the normal course of its administrative practices. The request may be declined if there are grounds for believing that the statements are clearly inaccurate.

### ***Public policy***

60. The Commissioner is not obligated to supply information if the disclosure of such information would be contrary to public policy (ordre public). “Public policy” generally refers to the vital interests of a country, for instance where information requested relates to a state secret. This limitation rarely arises in practice.

### ***Trade, business and other secrets***

61. Hong Kong has made clear with the EOI partners that there is no obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Whether any piece of information amounts to a “trade or business secret” should not be interpreted in too wide a sense. According to the commentary to the EOI Article of the OECD Model Tax Convention, a trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage. Financial information, including books and records, does not by its nature constitute a trade, business or other secret.

62. The Commissioner will determine whether or not to pass on sensitive information. Tax secrecy protects trade and business secrets in all jurisdictions alike, when such secrets come into the hands of the tax authorities. It is not expected that tax authorities of an EOI partner would demand access to trade and business secrets in the first place, as their information seeking powers generally permit the collection of “tax information” only. In any event, a person can dispute the supply of any information claimed to be trade or business secrets, or initiate legal actions to challenge the Commissioner’s actions in collecting such information. The issue will ultimately be decided by the courts.

### Example 9

*Jurisdiction-F, which had a DTA with Hong Kong, requested commercial information concerning the manufacture of a drug by Company-HK, which was a pharmaceutical company resident in Hong Kong. As a result, the Commissioner was exposed to highly valuable commercial information of the drug itself.*

Such commercial information would be subject to the limitations described above and the Commissioner could refuse to supply the information to Jurisdiction-F, or at least excise that part of the information from the response to Jurisdiction-F.

### ***Legal professional privilege***

63. In addition to the safeguards provided for in EOI Instruments that there is no obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, the Commissioner will not exchange information covered by legal professional privilege. The general law on legal professional privilege is maintained under the EOI regime. The restriction on disclosure of legally privileged materials is legally binding on the Commissioner.

64. According to the commentary to the EOI provisions of the OECD Model Tax Convention and the OECD Model Agreement on Exchange of Information on Tax Matters, a requested jurisdiction may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law. In this regard, it is relevant to note that domestically, the protection of legal professional privilege has all along been afforded under section 51(4A) of the IRO, which states that “nothing in subsection (4) shall require disclosure by counsel or solicitor of any privileged information or communication given or made to him in that capacity”. Hence, under the IRO, the Commissioner has no power to require furnishing of information that is subject to legal professional privilege.

## **NOTIFICATION AND REVIEW SYSTEM**

### ***Right to be informed about information to be or has been exchanged***

65. The Disclosure Rules provide for a variety of procedural rights and safeguards for persons affected by the EOI mechanism. Such rights and safeguards include a right to be informed about the information to be or has been exchanged, a right to request the Commissioner to amend the information to be or has been exchanged, and a right to request the Financial Secretary to review the Commissioner's decision.

66. Few OECD countries have a notification and review mechanism in place. Given the possible implications of these rights and safeguards, Hong Kong's EOI partners have been informed of Hong Kong's legislation and administrative practices concerning the notification and review mechanism in DTA or TIEA negotiations and thereafter whenever the relevant rules are modified. Reservation has been made under paragraph (3) of Article 4 of the Convention that Hong Kong resident may be informed before information concerning that resident is transmitted to the requesting jurisdiction.

### ***Notice of disclosure request***

67. Subject to the exceptional circumstances in paragraphs 68 and 69, the Commissioner has to notify the person, who is the subject of a disclosure request, prior to the disclosure of any information in response to the disclosure request. In practice, the Commissioner will issue the notice of disclosure request as soon as practicable after the disclosure request in question is approved. The Commissioner must also notify the person that the person may request a copy of the information that the Commissioner is prepared to disclose to the requesting jurisdiction. The request for a copy of the information must be made by a notice in writing given to the Commissioner within 14 days after the notice of disclosure request is given to the person.

68. The Commissioner is not required to serve a notice of disclosure request if the Commissioner has reasonable grounds to believe that:

- (a) all the addresses of the person known to the Commissioner are inadequate for the purpose of giving the notification; or

- (b) the notification is likely to undermine the chance of success of the investigation in relation to which the disclosure request is made.

69. The Commissioner will only notify the person at the time when information relating to the person is disclosed to the requesting jurisdiction if:

- (a) it is not practicable to give the notification and to determine the subsequent requests that the person may make in relation to the information under the Disclosure Rules within the time constraint; and
- (b) the failure of the Commissioner in disclosing the information to the requesting jurisdiction within the time constraint is likely to frustrate the efforts of the requesting jurisdiction in enforcing its tax laws.

70. Where the person has requested a copy of the information to be disclosed, the Commissioner must, within a reasonable time, by a notice in writing given to the person, provide the person with a copy of the information that the Commissioner is prepared to disclose to the requesting jurisdiction.

### ***Request for amendments***

71. The person may request the Commissioner to amend any part of the information to be exchanged, by giving a written notice to the Commissioner within 21 days after the person is given a copy of the information. The person making the request shall specify the manner in which the information is to be amended and the grounds for the request, and submit any documentary evidence in support of the request. The grounds for a request for amendments should be that:

- (a) the information or that part of the information does not relate to the person; or
- (b) the information or that part of the information is factually incorrect.

72. The Commissioner may, on the basis of the factual evidence available, approve the request for amendment fully or partially or refuse the

request. The Commissioner's decision, the reasons therefor together with a copy of the amended information, if any, will then be given to the person by way of a notice (notice of decision).

73. The person has the same right for requesting a copy of the information and for requesting amendment where a notice of disclosure request is served at the time of the disclosure of information (i.e. situation in paragraph 69).

74. If the Commissioner refuses the request of the person to amend any part of the information to be or has been disclosed in response to the disclosure request, that person may, by giving a written notice within 14 days after the Commissioner's notice of decision is given, request the Financial Secretary to review the Commissioner's decision. The person must specify the manner in which the information is to be amended and the grounds for the request, and submit any documentary evidence in support of the request. It is also necessary to send a copy of the Commissioner's notice of decision together with the request to the Financial Secretary. The address and contact details of the office of the Financial Secretary are as follows:

Address	:	25/F, Central Government Offices, 2 Tim Mei Avenue, Tamar, Hong Kong
Telephone No.	:	2810 2589
Fax No.	:	2840 0569
E-mail address	:	fso@fso.gov.hk

75. Having considered the factual evidence, the Financial Secretary may approve the request for amendment fully or partially, or refuse the request. A written decision together with the reasons therefor will be given to the person within a reasonable time. The decision of the Financial Secretary is final. In this administrative review procedure, the Financial Secretary is bound by the confidentiality obligation in the Official Secrets Ordinance (Cap. 521) and the Commissioner will only disclose, on a confidential basis, minimum information required for the Financial Secretary to determine whether the grounds for amendment are valid or not. In any event, all necessary information required for determining the issue should have already been provided by the person as mentioned in paragraph 74.

## **PROCESSING OF DISCLOSURE REQUESTS**

### *Approval of a disclosure request*

#### *Approval by the Commissioner or authorised officer*

76. Under section 3(1) of the Disclosure Rules, a disclosure request may only be approved by the Commissioner personally, or by an officer of the Inland Revenue Department not below the rank of chief assessor authorised in writing by the Commissioner personally (i.e. authorised officer). In this connection, the Commissioner has authorised the Chief Assessor (Tax Treaty) (CA(TT)) as an authorised officer.

#### *Conditions for approval under section 3(2) of the Disclosure Rules*

77. First, the disclosure request must comply with the provisions of the relevant arrangement. In this regard, the authorised officer should review the provisions of the relevant EOI Instrument, including the Taxes Covered Article and the protocol in the case of a DTA or a TIEA.

78. Secondly, the disclosure request must comply with the applicable procedures specified in any instrument that amends or supplements the relevant EOI Instrument. The authorised officer should review the protocol, memorandum of understanding, agreed minutes of meeting or correspondence subsequent to the signing of the relevant EOI Instrument, which may prescribe the procedures applicable to a request for disclosure of information.

79. Thirdly, the authorised officer has to ensure that the disclosure request sets out the particulars prescribed in the Schedule to the Disclosure Rules, which is a statutory requirement and is extracted at Appendix 1. As a rule, the requesting jurisdiction is expected to provide all the particulars, applicable to the request concerned, as specified in the said Schedule. Under section 3(2)(b) of the Disclosure Rules, the Commissioner may permit departure from this requirement on reasonable grounds. The requesting jurisdiction is required to set out its grounds for waiver of provision of any of the particulars. Approval of departure would depend on the particular circumstances of each case. As a bare minimum, the Commissioner would require the following particulars to be provided in the disclosure request:

- (a) the identity of the person who is the subject of the disclosure request (i.e. subject person);
- (b) the purpose of the disclosure request;
- (c) the tax type concerned;
- (d) the tax period for which the information is requested;
- (e) the nature of the information requested; and
- (f) the relevance of the information to the purpose of the disclosure request.

80. One possible instance in which the Commissioner may permit departure is where the requesting jurisdiction has supplied the name of the person believed to have possession or control of the information requested together with other essential particulars but has genuine difficulty in supplying that person's up-to-date address. Though the Commissioner has delegated his authority under the Disclosure Rules to the CA(TT), the Commissioner or the Deputy Commissioners will review the decision of the CA(TT) when the requested information is about to be sent to the requesting jurisdiction.

### ***Administrative matters requiring special attention***

#### *Form and language of a disclosure request*

81. A disclosure request must be made in writing and made by the competent authority of the requesting jurisdiction as required in the relevant EOI Instrument under which the disclosure request is made. Unless otherwise agreed, the disclosure request must be in the English language.

#### *Request for not issuing notification or prior notification*

82. In case a requesting jurisdiction requests the Commissioner not to give a notification or prior notification on the ground that doing so would likely undermine the chance of success of its investigation or frustrate the timely enforcement of its tax laws, the requesting jurisdiction should substantiate its claim.

### Example 10

*In a disclosure request, Jurisdiction-F requested Hong Kong not to give a notification to the subject person on the ground that doing so would likely undermine the chance of success of its investigation.*

Jurisdiction-F had to provide information and reasons to explain the situation (e.g. why it was believed that the subject person would destroy or deface records, whether similar offences were committed in the past, or whether the subject person was the target of a covert criminal investigation). The CA(TT) must be satisfied that sufficient information is available to reasonably justify such requests.

### Example 11

*Jurisdiction-F, which had a DTA with Hong Kong, required the information before a certain date because there was an imminent statutory time limit for raising the relevant tax assessment in Jurisdiction-F.*

The CA(TT) must be satisfied that the urgency is genuine and this is not to be abused if the “urgency” is simply a result of deliberate or undue delay in making a request.

83. If the requesting jurisdiction claims that the exception rules should apply to a tax investigation case or an urgent request, details required in items 11 and 12 of the Schedule to the Disclosure Rules in Appendix 1 have to be provided.

### ***Amendments to the information disclosed***

84. The Commissioner has the obligation to provide all the relevant and correct information to the requesting jurisdiction in response to a specific and legitimate request for tax information. For those cases where notification is made to the subject person at the same time as the requested information is disclosed to the requesting jurisdiction, if the Commissioner subsequently approves, either fully or partially, the subject person’s request for amendment, the Commissioner must, within a reasonable time, disclose the amended

information to the requesting jurisdiction in accordance with section 9(5) of the Disclosure Rules. Likewise, where the subject person requests the Financial Secretary to direct the Commissioner to make the amendments and the Financial Secretary approves the request, either fully or partially, the Commissioner must, within a reasonable time, disclose the amended information to the requesting jurisdiction in accordance with section 10(8) of the Disclosure Rules.

85. However, the Commissioner is under no obligation to provide further information that only came to his knowledge after the disclosure request has been fully complied with based on the then available information. The Commissioner, therefore, will not communicate any such after-acquired information.

#### ***Standard response time***

86. The Global Forum requires that a jurisdiction's internal procedures cannot unduly delay effective EOI. The standard response time set by the OECD is 90 days after the receipt of a disclosure request.

87. The time required to obtain tax information in pursuance of a disclosure request depends on whether the information is available in the tax files of the Department or the information has to be obtained from the taxpayer or any other parties. The Commissioner will try to comply with the standard response time as far as possible. If the information is unable to be provided within the 90-day period, the requesting jurisdiction will be informed with the reasons for not being able to do so upon the expiration of that period.

#### ***Dispatch of requested information***

88. The officers of the Inland Revenue Department are obliged to comply with the provisions of the relevant EOI Instruments when processing disclosure requests. To ensure that the information to be exchanged is proper in all respects, all replies to the requesting jurisdictions will be reviewed and approved by the Deputy Commissioners.

## **RECORD-KEEPING REQUIREMENTS**

### ***Business records***

89. Section 51C of the IRO requires, among others, a person carrying on a trade, profession or business in Hong Kong to keep sufficient records in the English or Chinese language of the person's income and expenditure to enable the assessable profits of such trade, profession or business to be readily ascertained. Such records shall be retained for a period of not less than seven years after the completion of the transactions, acts or operations to which they relate.

### ***Rent records***

90. Section 51D of the IRO requires, among others, a person who is the owner of a property situated in Hong Kong to keep sufficient records in the English or Chinese language of the consideration, in money or money's worth, payable or deemed to be payable to the person, to the person's order or for the person's benefit in respect of the right of use of that property to enable the assessable value of that property to be readily ascertained. Such records shall be retained for a period of not less than seven years after the completion of the transactions, acts or operations to which they relate.

## **INFORMATION COLLECTION**

### ***For domestic tax purposes***

91. Section 51(4)(a) provides that for domestic tax purposes (i.e. profits tax, salaries tax and property tax purposes), any information in possession or control by a person in Hong Kong, which may affect any liability, responsibility or obligation of any person under the IRO, shall be disclosed to the Commissioner. Section 51(4)(b) provides that an assistant commissioner may give notice in writing to such person, or to such other person, requiring the person, at a time and place to be named by the assistant commissioner, to attend and be examined, and upon such examination to answer truthfully all questions put to the person, respecting any matter which may affect any liability, responsibility or obligation of any person under the IRO.

***For overseas tax purposes***

92. Section 51(4AA) provides that the powers in section 51(4) can be applied for the purposes of obtaining full information in regard to the matter concerned that may affect any liability, responsibility or obligation of the person concerned under the laws of a territory outside Hong Kong concerning any tax of that territory if:

- (a) arrangements having effect under section 49(1A) are made with the government of that territory; and
- (b) that tax is the subject of a provision of the arrangements that requires disclosure of information concerning tax of that territory.

***Information in existence***

93. According to the commentary to the EOI Article of the OECD Model Tax Convention, a requested jurisdiction is not obliged to provide information in circumstances where it has attempted to obtain the requested information but finds that the information no longer exists following the expiration of domestic record retention period. However, where the requested information is still available notwithstanding the expiration of such retention period, the requested jurisdiction cannot decline to exchange the information available. To comply with the international standard, the Commissioner shall use its information gathering measures to gather the information requested by the EOI partner irrespective of whether the information could still be used for domestic tax purposes in Hong Kong.

## **Appendix 1**

### **Schedule to the Inland Revenue (Disclosure of Information) Rules**

**(Cap. 112 sub. leg. BI)**

#### **Particulars to be Contained in Disclosure Request**

1. The identity of the person or authority that makes the disclosure request (competent authority).
2. The purpose of the disclosure request and the tax type concerned.
3. The identity of the person who is the subject of the disclosure request.
4. A statement on the information requested, including—
  - (a) the nature of the information;
  - (b) the relevance of the information to the purpose of the disclosure request; and
  - (c) the form in which the competent authority wishes to receive the information from the Commissioner.
5. The ground for believing that the information requested is held by the Commissioner or is in the possession or control of a person in Hong Kong.
6. The name and address of any person believed to have possession or control of the information requested.
7. A statement that—
  - (a) the disclosure request complies with the laws and administrative practices of the requesting government's territory;
  - (b) the competent authority is able to obtain the information under the laws of the requesting government's territory or in the normal course of the administrative practices of the requesting government's territory; and

- (c) the disclosure request complies with the relevant arrangements.
8. A statement that the requesting government has pursued all means available in its territory to obtain the information, including getting the information directly from the person who is the subject of the disclosure request.
  9. The tax period for which information is requested.
  10. The period within which the competent authority wishes the disclosure request to be met.
  11. If applicable, a statement—
    - (a) confirming that the competent authority is of the opinion that notification to the person who is the subject of the disclosure request is likely to undermine the chance of success of the investigation in relation to which the request is made; and
    - (b) giving reasons for the opinion.
  12. If applicable, a statement—
    - (a) confirming that the competent authority is of the opinion that prior notification to the person who is the subject of the disclosure request is likely to frustrate the timely enforcement of the tax laws of the requesting government's territory; and
    - (b) giving reasons for the opinion.

## **Appendix 2**

### **Data Security and Confidentiality**

1. All disclosure requests are made or received through the Commissioner as the competent authority of Hong Kong. The authority to obtain and collate information is delegated to a restricted number of officers of the Inland Revenue Department.
2. All information contained in correspondence between the Commissioner and the competent authorities of EOI partners and information received in response to a disclosure request is treated as strictly confidential and handled with care. The Department has developed specific rules and guidelines to safeguard the confidentiality of information exchanged under an EOI Instrument. The guidelines on confidentiality and handling of disclosure requests require all officers involved in the requests of their confidentiality duty and the steps to be taken when handling the requests.
3. All documentation relating to the processing of the disclosure request should be kept in specific confidential folder. The folder should be put in a confidential envelope for transmission by hand.
4. After completion of action, the records of the disclosure request should be returned to proper storage (e.g. filing cabinets with lock for confidential paper files) as soon as possible.
5. An EOI register is maintained by the Department to keep track of all disclosure requests. The access rights to the EOI register are restricted to officers handling the disclosure requests.
6. Any unauthorised access to, possession or use of the information exchanged under an EOI Instrument for personal use will constitute a breach of government/department regulations and may also constitute a criminal offence under the IRO, other Ordinances (e.g. Crimes Ordinance (Cap. 200)), or common law (e.g. misconduct in public office).