Inland Revenue Department
Hong Kong

DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES

NO. 47 (REVISED)

EXCHANGE OF INFORMATION

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 June 2010.

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Commissioner of Inland Revenue

January 2014

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INTRODUCTION

This Departmental Interpretation and Practice Note sets out the practice of the Department on the exchange of tax information ("EoI") upon requests received from treaty partners. It explains the safeguards available to taxpayers and the procedural guidelines to be followed by officers of the Department.

International standard of transparency and exchange of information

2. Hong Kong has been very supportive of efforts by the international community to promote transparency in tax administration. In 2005, Hong Kong openly endorsed the Organisation for Economic Co-operation and Development ("OECD")'s Principles of Transparency and Effective Exchange of Information at the OECD Global Forum on Taxation held in Melbourne.

3. The standard of transparency and exchange of information developed by the OECD currently requires:

(a) exchange of information on request where it is "foreseeably relevant" to the administration and enforcement of the domestic laws of the treaty partner;

(b) no restrictions on exchange caused by bank secrecy or domestic tax interest requirements;

(c) availability of reliable information and powers to obtain it;

(d) respect for taxpayers' rights; and

(e) strict confidentiality of information exchanged.

4. Hong Kong will seek to abide by the standard. Taxpayers' rights will be fully respected and the confidentiality of information exchanged will be protected.

Hong Kong's policy on information exchange

5. The international standard requires a jurisdiction to make available both comprehensive avoidance of double taxation agreement ("CDTA") and tax information exchange agreement ("TIEA")[1] as instruments for EoI with other jurisdictions.

6. Given the benefits of CDTAs, it will remain a policy priority to seek to conclude CDTAs with Hong Kong's trading and investment partners. Nonetheless, the international standard is that preference for CDTA over TIEA cannot be a reason for refusing to enter into an EoI agreement. Hence, while Hong Kong will continue its efforts in persuading trading and investment partners to pursue CDTAs with Hong Kong, it cannot preclude the possibility of entering into TIEAs but not CDTAs with some jurisdictions.

Competent authority

7. All EoIs shall be conducted by the competent authorities of Hong Kong and the treaty partners. 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 of Inland Revenue ("the Commissioner") has authorised his two Deputy Commissioners as authorised representatives.

LEGAL BASIS FOR EXCHANGE OF INFORMATION

Legislative amendments

8. 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 Department to collect and disclose information in response to requests made by the treaty partners for their own tax purposes. The provisions in the 2010 Amendment Ordinance are summarised as follows:

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[1] A TIEA is a standalone agreement providing for EoI. It does not provide any double taxation relief or tax benefit.

(a) Section 49(1A) of the Inland Revenue Ordinance ("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 he, without reasonable excuse, gives any incorrect information in relation to any matter that affects his 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.

9. 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) Rule 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 relevant arrangements, or to tax assessment, in respect of any period that starts after the arrangements have come into operation.

Secrecy provisions

10. Section 4 of the IRO provides that except in the performance of his duties under the IRO, an officer of the Department 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 treaty partners under and in accordance with the relevant EoI Article in CDTAs or TIEAs does not contravene the secrecy provisions under the IRO.

Inland Revenue (Disclosure of Information) Rules

11. 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 CDTAs or TIEAs having effect under section 49. They provide a set of fair procedures to protect confidentiality and privacy right.

12. Details of the Disclosure Rules and the administrative guidelines are discussed in paragraphs 62 to 86 below.

Legal effect of CDTA or TIEA

13. Under section 49(1A) of the IRO, the Chief Executive in Council may by order declare that arrangements specified in the order have been made with the government of any territory outside Hong Kong with a view to:

(a) affording relief from double taxation;

(b) exchanging information in relation to any tax imposed by the laws of Hong Kong or the territory concerned.

The order made by the Chief Executive in Council is a piece of subsidiary legislation which is subject to negative vetting by the Legislative Council. Therefore, CDTAs and TIEAs having effect under section 49 shall have the full force and effect of the laws of Hong Kong.

Obligation to exchange information

14. Hong Kong has an obligation to exchange information under the EoI Article in a CDTA or a TIEA. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of Hong Kong if such conduct occurred in Hong Kong.

15. Despite the obligation and the various requirements under the international standard, the most prudent safeguards acceptable under the OECD Models are included to protect confidentiality of the information exchanged and taxpayers' right of privacy. Details of the safeguards adopted by Hong Kong are explained in paragraphs 17 to 48.

Possession and control

16. The information gathering power of the Department 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 Department.

Example 1

Mr. H owns all the shares in Company F and is the sole director of Company F, an international business 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 are or have been in the actual possession of Mr. H, he must disclose and produce all relevant documents. If Company F is the alter ego of Mr. H so that he has unfettered control of Company F's affairs, he must disclose and produce all relevant documents.

Example 2

Company HK is incorporated in Hong Kong whereas Company F is incorporated in a jurisdiction outside Hong Kong. Company HK owns 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 is the majority shareholder of Company F, Company HK cannot be said to have possession or control of the accounting records of Company F. Therefore, the assessor will not ask Company HK to provide the accounting records of Company F but will make use of the EoI mechanism, where appropriate, to obtain the accounting records of Company F. Company HK, however, is expected to provide copies of financial statements of Company F it received as a shareholder.

SAFEGUARDS PROVIDED UNDER CDTA AND TIEA

Model EoI Article

17. The OECD Model EoI Article has stipulated stringent safeguards to protect confidentiality of information exchanged and taxpayers' right of privacy. Hong Kong would adopt the international standard provided in the OECD Model EoI Article save for some modifications to reflect Hong Kong's EoI policy and to provide additional safeguards on confidentiality of

information and taxpayers' right of privacy. The EoI safeguards are provided in individual CDTAs which will be implemented in Hong Kong as subsidiary legislation.

Model TIEA

18. Hong Kong will follow the OECD Model TIEA with some modifications made to suit Hong Kong's situation. In terms of scope of EoI, there is no difference in substance between the TIEA and the EoI Article in CDTA. In terms of safeguards on confidentiality of information exchanged and taxpayers' right of privacy, a TIEA and the EoI Article offer the same level of protection since both the TIEA and CDTA are enacted as subsidiary legislation.

Exchange of information upon request only

19. The OECD Model EoI Article provides for broad information exchange but it does not limit nor commit Hong Kong and the treaty partners as to the forms or manner in which information exchange can take place. The main forms of information exchange are: (a) upon request; (b) automatic[2]; or (c) spontaneous[3]. The OECD Model TIEA is focused on information exchange upon request and does not cover automatic or spontaneous EoI.

20. Hong Kong's EoI policy is that information will only be exchanged upon request, and Hong Kong has not yet agreed to exchange information on an automatic or spontaneous basis. Information, including bank information, will only be supplied upon specific and bona-fide requests received from the competent authority of a treaty partner in justifiable cases.

21. Hong Kong's EoI policy will be explained to the potential treaty partners and the matter will be recorded in the CDTAs, the TIEAs, the associated protocols, the agreed minutes or other records in writing.

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[2] Information which is exchanged automatically is typically information comprising many individual cases of the same type, usually consisting of details of income arising from the source country (e.g. interest, dividends, royalties, pensions, etc). This information is obtained on a routine basis (generally through reporting of the payments by the payer) by the sending country and is thus available for transmission to its treaty partners.

[3] Information is exchanged spontaneously when one of the treaty partners, having obtained information in the course of administering its own tax laws which it believes will be of interest to one of its treaty partners for tax purposes, passes on this information without the latter having asked for it.

Scope of exchange of information

22. The scope of EoI is explained in the first paragraph of the OECD Model EoI Article and Article 1 in the OECD Model TIEA. The scope will be defined in the treaties signed by Hong Kong with other jurisdictions. Hong Kong shall exchange such information that is foreseeably relevant for carrying out the provisions of the CDTA, where appropriate, or to the administration or enforcement of the domestic laws of the treaty partners concerning taxes as agreed between Hong Kong and the treaty partners.

23. The standard of "foreseeable relevance" as explained in the OECD Model EoI Article and the OECD Model TIEA is intended to facilitate the exchange of tax information. Nevertheless, the treaty partners are not allowed to engage in "fishing expeditions" (i.e. speculative requests for information that have no apparent nexus to an open inquiry or investigation) or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. The Schedule to the Disclosure Rules in the Annex specifically set forth the particulars that a treaty partner should provide to demonstrate that the standard of "foreseeable relevance" is met. The "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 OECD Model EoI Article 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. The Department would accede to a group request if the treaty partner could substantiate that the request is related to tax purposes and that it could meet the standard of "foreseeable relevance".

25. Information requested by the treaty partner for the administration or enforcement of the domestic laws can include items such as the fiscal residence of an individual or a company, the nature of income in the source country, the business records, the banking records and the commercial contracts.

Example 3

Country F, a CDTA state, asked Hong Kong to provide the amount

of royalties transmitted to one of its residents whose income wherever derived were subject to income tax in Country F.

The information requested is foreseeably relevant to the administration or enforcement of the domestic laws of Country F concerning taxes as agreed. Information will be provided to Country F.

Example 4

Country F, a CDTA state, asked Hong Kong to confirm whether the recipient of royalties sourced in Country F was a resident of Hong Kong and whether he was the beneficial owner of the royalties.

If the beneficial owner of the royalties is a resident of Hong Kong, he will be entitled to a lower withholding tax rate in Country F. Since the information is foreseeably relevant for carrying out the provisions of the CDTA, it will be provided to Country F.

Taxes covered

26. Hong Kong has a simple tax system, under which only three direct taxes are imposed, namely profits tax, salaries tax and property tax. From Hong Kong's perspective, it is considered that EoI for the purposes of these direct taxes would suffice and the EoI Article is restricted to similar direct taxes covered by the CDTAs. 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, inheritance tax), and sometimes 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 facilitate their investigation of tax evasion cases concerning income taxes (i.e. those taxes covered by the relevant CDTA) and taxes of other types.

27. 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 the treaty partners. Hong Kong will have more flexibility in this respect to persuade the key jurisdictions to commence CDTA negotiations with Hong Kong, to meet the practical needs of the treaty partners

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

Persons covered

28. Exchange of information is not limited to information relating to the affairs of residents of Hong Kong and the treaty partner. The tax administration of the treaty partner often has an interest in receiving information on activities carried on in Hong Kong by 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. For these reasons, the EoI Article in a CDTA invariably stipulates that the exchange of information is not restricted by Article 1, which defines the persons covered by the CDTA.

29. Hong Kong has no obligation to provide information on residents of a third jurisdiction that is neither held by the Commissioner nor is in the possession or control of persons within Hong Kong.

Example 5

Company F1 is a resident of Country F1 which is a CDTA state. Company F1 purchased products from Company F2 which is a related supplier resident in Country 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, Country F1 requested Hong Kong to provide information relating to prices charged by Company F2 on unrelated distributors in Hong Kong.

The information requested by Country F1 should be relevant in a comparability analysis for its transfer pricing audit. If Hong Kong has the information or can obtain such information on prices charged by Company F2 on its unrelated distributors in Hong Kong, such information has to be provided regardless of whether such

distributors are residents of Hong Kong under the relevant CDTA or residents of a third jurisdiction.

Tax secrecy and personal data privacy

30. The OECD standard 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". Tax secrecy refers to the provisions under the domestic laws that ensure that information relating to a taxpayer and his affairs remains confidential and is protected from unauthorised disclosure.

31. 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 other jurisdictions. For this reason, any information supplied by a treaty partner must be treated as confidential. Confidentiality is preserved by the EoI instrument and the applicable domestic laws of the treaty partner.

Use of information for other purposes

32. 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 Article in a CDTA or a TIEA. Such persons or authorities shall use the information only for such purposes.

33. Where documents contain data of a third party which will be useful in verifying the accuracy of information shown in the document or otherwise assist in the proper administration of the domestic tax laws of the treaty partners, the information will not be crossed out and the document will be transmitted to the treaty partner in the manner they were produced. Typical examples are sales invoices and multi-partite service contracts. The treaty partner will be reminded in the reply to the disclosure request that the treaty partner is prohibited from making a reference to or relying on those information concerning any third party against such third party.

34. Where the treaty partner makes a separate request for information in respect of that "third party" which makes any reference to or which relies on any information afore-mentioned, such request will not be entertained.

35. The information exchanged shall not be used for purposes other than those for which it has been exchanged. The information obtained pursuant to the EoI Article in a CDTA or a TIEA cannot be used for non-tax purposes, for example, prosecution of non-tax related crimes or offences. If the information appears to be of value to the treaty partner for another purpose, it must resort to means specifically designed for that purpose, for example, through mutual legal assistance unless the provisions of the CDTA or TIEA specifically allow the use of information exchanged for other purposes.

36. If the new requirement in the 2012 version of the OECD Model EoI Article is adopted in a CDTA, the use of information exchanged for other purposes (i.e. non-tax related) should be allowed provided that such use is allowed under the laws of both Hong Kong and the treaty partner and the competent authority of the supplying party authorises such use. In other words, it is a prerequisite that EoI must first be conducted for tax purposes in accordance with the provisions of a relevant CDTA. As envisaged by the OECD, the sharing of tax information exchanged is only meant for certain high priority matters (such as to combat money laundering, corruption and terrorism financing).

37. 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 both parties to the relevant CDTA. 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 section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), section 25A of the Organized and Serious Crimes Ordinance (Cap. 455) and section 12 of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) respectively.

38. It follows that in reality, the competent authorities of the treaty partners may only use the tax information exchanged under CDTAs for the said

limited non-tax related purposes if they also have similar laws permitting the use of tax information for the said non-tax related purposes. The non-tax related purposes, if agreed, will be specified in the texts of the CDTAs, including their protocols, which will then be enacted as subsidiary legislation domestically.

39. In addition, on every occasion of intended use of tax information for such specified non-tax related purposes, the competent authorities of the treaty partners have to seek prior authorisation from the Department, which will then consult relevant law enforcement agencies and Department of Justice in Hong Kong. The Department will only indicate consent to the competent authorities of the treaty partners 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.

Confidentiality of information exchanged

40. Information received under the CDTAs and TIEAs 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 confidentiality provisions of the CDTAs and TIEAs create obligations under international law. These provisions take precedence over any domestic rules that permit disclosure to persons not referred to in the confidentiality provision. 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 CDTAs and TIEAs. The confidentiality rules apply to all types of information, including both information provided in a request and information transmitted in response to a request.

41. The confidentiality rules cover, for instance, competent authority letters, including the letter requesting information. The Department will only disclose the minimum information contained in a disclosure request necessary for Hong Kong to enable the information holder to locate the requested

information and respond to the notice. The type and amount of information to be disclosed depends on the circumstances of each case and would not normally include the name of the requesting treaty partner.

42. To gather information, the Department will issue a formal notice to the information holder requesting for the relevant information or documents. If the information holder has the need to know the name of the requesting treaty partner (e.g. claiming privilege against self-incrimination), the Department 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. Specifically, where the information holder has reasonable grounds to know the name of the requesting treaty partner, the Department would seek prior consent of the requesting treaty partner before disclosure of the name. If the requesting treaty partner declines to give any consent, the Department will inform the information holder accordingly. If the information holder refuses to provide the information requested as the name of the requesting treaty partner is not known, the Department will, having considered the circumstances of the case, decline the disclosure request for reason that it could not disclose to the information holder the name of the requesting treaty partner, which is considered necessary to facilitate the gathering of the requested information.

No disclosure to oversight authorities

43. Whilst the OECD Model EoI Article permits disclosure of information exchanged to the oversight authorities of the treaty partners, Hong Kong adopts a more prudent approach in this respect. Unless there are legitimate reasons given by the treaty partner (e.g. administrative or governmental structure of the treaty partner permits or requires the oversight authorities to have access to tax information), disclosure to oversight authorities is not permitted and this intent will be reflected in the CDTA and TIEA accordingly. Even in a case in which disclosure is permitted, such disclosure would be in accordance with the provisions in the respective CDTA or TIEA only. Oversight authorities are authorities that supervise the tax administration and enforcement authorities as part of the general administration of the Government of Hong Kong Special Administrative Region and the government of the treaty partner.

No disclosure to third jurisdictions

44. To ensure the strictest confidentiality, information shall not be disclosed to any third jurisdiction for any purpose. In some CDTAs entered into by Hong Kong where the old version of EoI Article was adopted, it is stated in the EoI Article that information shall not be disclosed to any third jurisdiction without the consent of the originating party. The same also applies to the TIEA. The Department does not envisage any circumstances under which Hong Kong would give consent for such disclosure.

No retrospective effect

45. All the provisions under a CDTA, including the EoI Article, or a TIEA shall have effect only after the agreement enters into force. Any exchange of information will only be possible after the date on which relevant provisions have effect ("the effective date"). The effective date, as agreed with the treaty partners, is stipulated under the Article on Entry into Force in CDTAs or TIEAs. Hong Kong's current EoI policy, regarding information that may be disclosed in response to a disclosure request, is reflected in Rule 4 of the Disclosure Rules:

> *"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."*

46. Hong Kong's stance on the retrospectivity of information to be exchanged is summarised as follows:

(a) Information relating to any period or periods after the effective date of a CDTA or a TIEA will be exchanged.

(b) Information that exists or generated prior to the effective date of a CDTA or a TIEA will be exchanged if the information is foreseeably relevant for the carrying out of the provisions of the CDTA or TIEA or to the tax administration or enforcement of the tax law of the treaty partner concerning taxes imposed in period that starts after the CDTA or TIEA came into effect.

47. The provisions of Rule 4 do not preclude exchange of information that precedes the effective date of the CDTA or TIEA, provided that such information relates to the carrying out of the provisions of the CDTA or TIEA or the administration or enforcement of the tax law of the treaty partner in respect of any period that starts after the CDTA or TIEA has come into operation.

Example 6

Company F is a resident of Country F which is a CDTA state. Company F opened a savings account with a bank in Hong Kong on 1 March 2010 and received interest therefrom. Country F suspected that Company F had failed to report its worldwide income attributable to the interest income arising in Hong Kong. Country F was investigating the tax affairs of Company F for the period from April 2011 onwards and requested Hong Kong to provide bank statements of the account in Hong Kong for the period from 1 April 2011 to 31 March 2012 as well as a copy of the signature card for the account in question. The relevant CDTA has effect in Hong Kong for any year of assessment beginning on or after 1 April 2011, but the bank account was opened by Company F on 1 March 2010.

Pursuant to Rule 4 of the Disclosure Rules, Hong Kong is able to provide the bank statements for the period from 1 April 2011 to 31 March 2012 and a copy of the signature card for the account in question. Although the signature card pre-dates the effective date of the CDTA, it can be exchanged because it is foreseeably relevant to the administration or enforcement of the tax law of Country F in respect of a period that starts after the CDTA comes into operation.

Example 7

Company HK, a Hong Kong resident company, received dividends on 1 June 2012 paid by Company F, a resident of Country F which is a CDTA state. Company HK made a claim for CDTA benefits (i.e. reduced withholding tax rate under the provisions of the relevant CDTA that came into effect on 1 April 2011). To verify the identity and resident status of Company HK, Country F requested Hong Kong to provide a copy of the Certificate of Incorporation of Company HK as evidence that Company HK is a tax resident in Hong Kong. The Certificate of Incorporation of Company HK was issued on 1 April 2009.

Hong Kong should provide the requested information to Country F if the copy of the Certificate of Incorporation is necessary for Country F to ascertain whether Company HK is eligible for claiming tax benefits under the provisions of the CDTA after 1 April 2011 even though the Certificate of Incorporation of Company HK was issued before that date.

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

48. Hong Kong is not obligated to carry out administrative measures at variance with Hong Kong's laws and administrative practices. The underlying rationale is that a treaty partner 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 possession of the Commissioner is not sufficient to reply to a request, the Department should take all relevant information gathering measures as it would take for its own tax purposes. Item 7 of the Schedule to the Disclosure Rules in the Annex specifically sets forth that a treaty partner should provide a statement to confirm that the disclosure request complies with the laws and administrative practices of the treaty partner.

OTHER IMPORTANT ISSUES

No bank secrecy laws

49. Hong Kong has never had any bank secrecy laws. The Department has all along been empowered to collect information from banks for the purposes of administration of taxes under the IRO.

No domestic tax interest requirement

50. Both the OECD Model EoI Article and Model TIEA provide that irrespective of domestic law or domestic administrative practice a treaty partner cannot use a domestic tax interest requirement as a basis for declining to provide information.

51. Hong Kong removed the domestic tax interest requirement following the enactment of the 2010 Amendment Ordinance.

Information held by nominees, agents, fiduciaries and ownership information

52. Hong Kong will provide information even though the information is held by a nominee or a person acting in an agency or fiduciary capacity or because it relates to an ownership interest.

Limitations to exchange of information

53. 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 will be adopted in full in the EoI Article in the CDTAs or TIEAs concluded with other tax jurisdictions. In the rare cases where the exceptions apply, Hong Kong or the treaty partners are not obligated to provide information. Hong Kong will act within the framework of the CDTA or TIEA and will not provide the information where there is no obligation to do so.

Reciprocity

54. Hong Kong, when collecting information for the treaty partner, is obliged only to obtain and provide such information that the treaty partner could itself obtain under its own laws in similar circumstances. It will be stipulated in the CDTA or TIEA that Hong Kong is not obliged to supply information that the treaty partner itself could not obtain in the normal course of administration.

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

56. Hong Kong will require the treaty partner to provide a statement confirming that the reciprocity condition is met. Item 7 of the Schedule to the Disclosure Rules in the Annex specifically sets forth that the treaty partner should confirm in a statement that the information is obtainable under the domestic laws of its territory or in the normal course of the administrative practices of its territory. The request may be declined if there are grounds for believing that the statements are clearly inaccurate.

Public policy

57. Hong Kong is not obliged to supply information the disclosure of which 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

58. Hong Kong will make clear with the treaty partners that Hong Kong has 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 on the OECD Model EoI Article, 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.

59. The Commissioner will determine whether or not to pass on sensitive information. Ordinary tax secrecy protects trade and business secrecy in all jurisdictions alike, when these come into the hands of the tax authorities. It is not expected that tax authorities 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 taxpayer in Hong Kong can dispute the supply of any information claimed to be trade or business secrets, or initiate legal actions to challenge the Department's actions in collecting such information. The issue will ultimately be decided by the courts.

Example 8

Country F, a CDTA state, requested for commercial information concerning the manufacture of a drug by Company HK, which is a pharmaceutical company resident in Hong Kong. As a result, the Department 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 Country F, or at least excise that part of the information from the response to Country F.

Legal professional privilege

60. In addition to the safeguards provided for in the CDTAs or TIEAs that there is no obligation on Hong Kong to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, information covered by legal professional privilege will not be

exchanged. The general law on legal professional privilege will be maintained under the EoI regime. The restriction on disclosure of legally privileged materials is legally binding on the Department.

61. According to the commentary on the OECD Model EoI Article and the provisions in the OECD Model TIEA, 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 Department has no power to require furnishing of information that is subject to legal professional privilege.

NOTIFICATION AND REVIEW SYSTEM UNDER THE DISCLOSURE RULES

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

63. Only a few OECD countries have in place notification or appeal mechanisms. Given the possible implications of such rights and safeguards for information exchange, the negotiating partners will be informed of Hong Kong's legislation and administrative practices concerning notification and any other relevant procedural rights and safeguards in CDTA or TIEA negotiations and thereafter whenever the relevant rules are modified.

64. A disclosure request is defined as a request for exchange of information made by a territory outside Hong Kong under arrangements made with the government of that territory having effect under section 49(1) or

49(1A) of the IRO. This means that the Disclosure Rules also apply to CDTAs concluded using the pre-2004 OECD version of EoI Article. For disclosure requests made pursuant to the old EoI Article, the domestic tax interest requirement still exists.

Issue of notification

65. Unless exceptional circumstances stated in paragraphs 66 and 67 exist, the Commissioner must, prior to the disclosure of any information in response to a disclosure request, notify the person who is the subject of the request by a written notice ("notice of 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 treaty partner. 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.

66. 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.

67. The Commissioner will only notify the person at the time when information relating to the person is disclosed in response to a disclosure request 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 treaty partner within the time constraint is likely to frustrate the efforts of the treaty partner in enforcing the tax laws of its territory.

68. Where the person has made a request for 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 treaty partner.

Request to the Commissioner for amendments

69. The person may request the Commissioner to amend any part of the information to be exchanged, by notice in writing given to the Commissioner within 21 days after the date of the Commissioner's notice mentioned in paragraph 68. The person making the request shall specify the manner in which he requests the information to be amended and the grounds for the request, and submit any documentary evidence in support. The grounds for a request for amendments can be that:

(a) the information or that part of the information does not relate to him; or

(b) the information or that part of the information is factually incorrect.

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").

70. The person has the same right for requesting a copy of information and for making amendments where notice of disclosure request is served at the time of the disclosure of information (i.e. situation in paragraph 67).

Request to the Financial Secretary for directions

71. If the Commissioner refuses the request of the person to amend any part of the information to be disclosed in response to the disclosure request, that person may, by giving a notice in writing within 14 days after the Commissioner's notice of decision is given, request the Financial Secretary to review the Commissioner's decision and to direct the Commissioner to make the amendments.

72. In his request, the person must specify the manner in which he requests the information to be amended, and the grounds for the request, and submit a copy of the Commissioner's notice of decision and any documentary evidence in support. Likewise, the Financial Secretary may approve, either fully or partially, or refuse the request. A written decision together with the reasons therefor will be given to the person. The decision of the Financial Secretary is final.

GUIDELINES ON PROCESSING OF DISCLOSURE REQUESTS

73. The paragraphs below set out the relevant provisions of the Disclosure Rules on approval of disclosure requests in Hong Kong and how the disclosure requests are dealt with in practice within the Department.

Approval of a disclosure request

Approval of the Commissioner or authorised officer

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

Conditions for approval under Rule 3(2) of the Disclosure Rules

75. 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 CDTA, including the EoI Article, the Taxes Covered Article, the protocol, or the relevant TIEA.

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

77. Thirdly, the authorised officer has to ensure that the disclosure request sets out the particulars prescribed in the Schedule to the Disclosure Rules in the Annex, which is a statutory requirement. As a rule, the requesting treaty partner is expected to provide all the details, applicable to the request concerned, as specified in the said Schedule. Under Rule 3(2)(b) of the Disclosure Rules, the Commissioner may permit departure from this requirement on reasonable grounds. It will be for the requesting treaty partner to set out its grounds for waiver of provision of any of the particulars. Whether departure would be permitted would be decided by 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 subject person;

(b) the purpose of the request and the relevance of the information to such purpose (i.e. the standard of "foreseeable relevance"); and

(c) the nature of the information required.

78. One possible instance in which the Commissioner may permit departure is where the requesting treaty partner 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 treaty partner (see paragraph 86 below).

Administrative matters requiring the attention of the authorised officer

Form and language of a disclosure request

79. A disclosure request must be made in writing and made by the competent authority of the treaty partner as required in the relevant CDTA and TIEA under which the disclosure request is made. Unless otherwise agreed between the parties, the disclosure request must be in the English language.

Requests for not issuing notification or prior notification

80. In case a treaty partner requests the Department 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 the tax laws of the treaty partner, the treaty partner should substantiate its claim.

Example 9

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

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

Example 10

Country F, a CDTA state, required the information before a certain date because there was an imminent statutory time limit for raising the relevant tax assessment in Country 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.

81. If the treaty partner 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 the Annex have to be provided.

Amendments to the information disclosed

82. The Commissioner has the obligation to provide all the relevant and correct information to the treaty partner in response to a specific and legitimate request for tax information. According to Rule 9(5) of the Disclosure Rules, for those cases where notification is made to the subject person at the same time as the requested information is disclosed, if the Commissioner approves, either fully or partially, the person's request for amendment, the Commissioner must, within a reasonable time, disclose the amended information to the treaty partner. Likewise, according to Rule 10(8) of the Disclosure Rules, where the person has made a request to the Financial Secretary for direction and the Financial Secretary has approved the request, either fully or partially, the Commissioner must disclose the amended information to the treaty partner.

83. 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 Department, therefore, will not communicate any such after-acquired information.

Standard response time

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

85. 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 Department 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 treaty partner will be informed with the reasons for not being able to do so upon the expiration of that period.

Despatch of requested information

86. The obligations for complying with the EoI Article or TIEA are imposed on the Commissioner and the two Deputy Commissioners who will sign off the replies to the treaty partners. They will personally ensure that disclosure requests received are in order and that the information to be exchanged is proper in all respects before signing off the replies in their names.

NO ADDITIONAL RECORD-KEEPING REQUIREMENTS

87. The existing record-keeping requirements are provided in sections 51C and 51D of the IRO.

88. Section 51C of the IRO requires, among others, that every person carrying on a trade, profession or business in Hong Kong shall keep sufficient records in the English or Chinese language of his 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. Section 51D of the IRO requires, among others, that every person who is the owner of a property situated in Hong Kong shall 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 him, to his order or for his 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.

89. Section 51(4)(a) of the IRO provides that for domestic tax purposes (i.e. profits tax, salaries tax and property tax purposes), information in possession or control by a person in Hong Kong is subject to disclosure to the Department. Any such information which is in possession or control by a person in Hong Kong for domestic tax purposes may be subject to disclosure for EoI purposes, but the information so requested would have to meet the provisions of the respective CDTAs or TIEAs that Hong Kong has made with other jurisdictions, including the standard of "foreseeable relevance" as required under the CDTAs or TIEAs.

90. A person has no obligation to provide to the Department, for EoI purposes, information which is not in his possession or control and is not required to be kept beyond the statutory retention period under the IRO, even when the Department acts on a valid disclosure request and exercises its information-gathering power to approach him for the relevant information.

Annex

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.