

Hong Kong and USA conclude tax agreements

Introduction

Hong Kong has recently signed its first standalone tax information exchange agreement (**TIEA**) with the United States of America (**HK-United States TIEA**)¹. It is the first TIEA signed by Hong Kong with the government of a foreign territory since amendments to Hong Kong's Inland Revenue Ordinance (**IRO**) came into force in July 2013 allowing the exchange of tax-related information with other jurisdictions under comprehensive avoidance of double taxation agreements (**CDTAs**) and TIEAs. The HK-United States TIEA, operative on 20 June 2014, puts into practice international tax exchange information standards to enhance tax transparency and prevent tax evasion that were recommended be adopted by Hong Kong by the Organization for Economic Cooperation and Development (**OECD**)².

In addition, within the past week, Hong Kong and the United States have substantially concluded an intergovernmental agreement (**IGA**) that will reduce the reporting burden under the US Foreign Account Tax Compliance Act (**FATCA**) and facilitate compliance by financial institutions (**FIs**) in Hong Kong. FATCA is a US tax law requiring financial institutions *outside* the US to report financial account information of US taxpayers to the US tax authorities. The IGA and the Hong Kong TIEA will complement each other with the aim of avoiding tax evasion locally and overseas. The scope of the IGA is explained later in this briefing.

For further information as to the changes to Hong Kong's tax laws enabling CDTAs and TIEAs³, read our July 2013 briefing [here](#).

What is the object and scope of the HK-United States TIEA?

The object and scope of the HK-United States TIEA is for the jurisdictions upon request to exchange foreseeably relevant information regarding the determination, assessment and collection of taxes covered by the agreement, including recovery and enforcement of tax claims or the investigation or prosecution of tax matters. Tax-related facts, statements or records in any form whatever will be able to be exchanged but will not include customs duties.

Each jurisdiction is expected to use all available information gathering measures to obtain requested information, including, where appropriate, witnesses' depositions for the other.

Key issues

- Hong Kong-United States tax information exchange agreement
- "FATCA" – intergovernmental compliance agreement

¹ Inland Revenue (Exchange of Information relating to Taxes) (United States of America) Order, L.N.54 of 2014, http://www.ird.gov.hk/eng/pdf/Agreement_US_HongKong.pdf

² Global Forum on Transparency and Exchange of Information for Tax Purposes of the OECD, <http://www.oecd.org/tax/transparency/>

³ [CAP 112 Inland Revenue Ordinance](#)

What taxes are covered under the HK-USA TIEA?

1. In the case of the **United States**:-

- Federal taxes on income
- Federal taxes related to employment and self-employment
- Federal estate and gift taxes
- Federal excise taxes.

2. In the case of **Hong Kong**:-

- Profits tax
- Salaries tax
- Property tax

whether or not charged under personal assessment.⁴

Are there any limits, geographical or otherwise, on the tax-related information that may be exchanged?

There are geographical restrictions imposed under the HK-United States TIEA. Hong Kong and the United States are not obliged to provide information to each other that is *not* held by their own authorities nor in the possession or control of persons within each of their own geographic areas of jurisdiction⁵. Any information that is held shall be provided to the other regardless of the residence or nationality of the person holding the information *or* to whom the information relates. Either jurisdiction may also decline to assist the other with respect to a request made under the TIEA where the requesting jurisdiction has not pursued all reasonable measures within its own jurisdiction to obtain the information.⁶

Importantly, legally privileged communications such as confidential solicitor-client or attorney-client communications produced for the purposes of seeking or providing legal advice or for the purposes of use in existing or contemplated legal proceedings are also protected from disclosure under the TIEA.⁷

What safeguards are provided for under the HK-United States TIEA?

Prudential safeguards of privacy and confidentiality have been specifically written into the agreement to prevent any exchanged tax information from falling into the wrong hands.

Any tax information exchanged is to be treated as confidential and is only to be disclosed to persons or authorities including courts and administrative bodies concerned with the assessment, collection of, enforcement or prosecution of taxes covered under the TIEA. Further, tax information that is exchanged cannot be disclosed to *any other* person, entity, authority or jurisdiction.⁸

⁴ Article 3, fn 1.

⁵ Articles 2 and 4, *ibid*.

⁶ Article 6, *ibid*.

⁷ Article 6.3, *ibid*.

⁸ Article 7 *ibid*.

What are the implications for FIs regarding the IGA recently reached between HK-United States on FATCA compliance?

Reporting requirements under FATCA target specified US taxpayers including US citizens, US resident individuals and specified entities established in the US or controlled by US persons. The proposed IGA between HK-USA will be a "Model 2" IGA, and will oblige FIs in Hong Kong to register and comply with a model agreement published by the United States Internal Revenue Service (US IRS). Exemptions will be available for FIs or financial products that present low-risk from a tax-evasion point of view of US taxpayers.⁹

Under the IGA, account holders based in Hong Kong who are also specified US taxpayers will need to reach consensus with their FIs with respect to the FIs having to report customers' account information directly to the US IRS annually. In conjunction with these FATCA reporting requirements, the Hong Kong-United States TIEA permits the exchange of information on relevant US taxpayers on a government –to-government basis on a need basis and upon request.

It should be noted that FIs in Hong Kong that are complying with the terms of the US IRS model agreement will be under an obligation to only accept new accounts that consent to such disclosure. Furthermore, such FIs may be required under such an agreement in certain circumstances to withhold on passthru payments to non-participating foreign financial institutions.

Read our briefing on FATCA [here](#).

Conclusion

Going forward, now that the first tax information exchange agreement has been signed by Hong Kong with one of Hong Kong's largest trading partners, the United States, and an agreement is also about to be concluded by Hong Kong to facilitate FATCA compliance, organizations which are covered under both of these intergovernmental agreements should have procedures and systems in place to take steps to avoid tax evasion locally and overseas. It is anticipated that Hong Kong will enter into future TIEAs with other jurisdictions where necessary.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that, unless specifically indicated otherwise, any U.S. federal tax advice contained in this communication (including attachments) (i) is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code, and (ii) was written to support the promotion or marketing by other parties of the transactions or matters addressed in this communication (including attachments). Each taxpayer that is not a client of Clifford Chance US LLP in respect of these transactions or matters should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

⁹ HK Government press release, 12 May 2014 : <http://www.info.gov.hk/gia/general/201405/09/P201405090723.htm>

Contacts

Brian Gilchrist

E: brian.gilchrist@cliffordchance.com

Elaine Chen

E: elaine.chen@cliffordchance.com

Dauwood Malik

E: dauwood.malik@cliffordchance.com

Paget Dare Bryan

E: paget.darebryan@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong

© Clifford Chance 2014
Clifford Chance

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.