



Tax information exchange agreements – a conundrum for Hong Kong

The Hong Kong government has recently issued a consultation paper to professional and industry groups asking for their views on whether the Inland Revenue Ordinance (IRO) should be amended to provide the legal framework for entering into tax information exchange agreements (TIEAs).

TIEAs are standalone agreements that provide for the exchange of information (Eol) with respect to tax matters. Unlike a comprehensive double taxation agreement (DTA), TIEAs do not provide for double taxation relief, specify taxing rights or provide for lower withholding tax rates.

The Government previously amended the IRO in 2010 to remove the domestic tax interest requirement for exchanging tax information under DTAs. This allowed Hong Kong to adopt the latest international standard on Eol (the 2004 version of the Organisation for Economic Co-operation and Development Model Tax Convention on Income and Capital). This has allowed Hong Kong to further expand its network of DTAs from five to currently 24 (with a further four concluded, but awaiting formal signature).

The amended law only allows Hong Kong to enter into an Eol as part of a DTA and not as a standalone TIEA. This was a commitment given by Hong Kong when it amended the law to adopt the international standard on Eol.

The Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) conducted a Phase 1 peer review on Hong Kong in 2011. The report acknowledged that whilst Hong Kong has an adequate legal and regulatory framework to facilitate effective Eol, it recommended that Hong Kong should put in place the legal framework for entering into TIEAs. Under the Global Forum standard, a jurisdiction should agree to exchange tax information either in the form of an Eol article in a DTA or in a standalone TIEA. However, of particular interest to Hong Kong is the Global Forum's view that Hong Kong should not refuse any request to enter into a TIEA if such a request is made. However, as we note below, this could jeopardise Hong Kong's ability to subsequently enter into a DTA with a jurisdiction that has already concluded a TIEA with Hong Kong.

The conundrum

If Hong Kong does not amend its legal framework to allow it to enter into TIEAs, it runs the risk of being considered an uncooperative jurisdiction, which could lead to some type of sanctions being imposed by other jurisdictions. On the other hand, if Hong Kong amends its legal framework to comply with the Global Forum, the concern is that there may be little incentive for jurisdictions to enter into a DTA with Hong Kong when they already have a TIEA in force.

If Hong Kong amends the law to allow it to enter into TIEAs, it would appear that Hong Kong would not be in a position to refuse any request by another jurisdiction to enter into a TIEA, regardless of whether Hong Kong had a preference for a DTA or a TIEA with that particular jurisdiction. This could certainly place Hong Kong at a disadvantage in its future DTA negotiations with a jurisdiction that has already signed a TIEA with Hong Kong. The concern is that once a jurisdiction enters into a TIEA with Hong Kong, there may be little incentive for that jurisdiction to subsequently conclude a DTA with Hong Kong. From the other jurisdiction's perspective, the principal driver for a DTA with Hong Kong would be an EoI clause. If that jurisdiction already has concluded a TIEA with Hong Kong, this may obviate the need for a DTA.

Whilst Hong Kong wants to ensure it remains a co-operative jurisdiction in the eyes of the Global Forum, it needs to weigh the above concerns against its overriding objective of continuing to expand its DTA network with its major trading partners.



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