



香港華人會計師公會

The Society of Chinese Accountants & Auditors

Consultation on Measures to Counter Base Erosion & Profit Shifting (BEPS)

5 Dec 2016

Introduction

- The Base Erosion and Profit Shifting (“BEPS”) package first launched by G20 and OECD in 2013.
- Now 100 for AEOI and over 85 countries and jurisdictions for BEPS.
- Objective:
 - (1) Restore Public Confidence in Tax System
 - (2) Level the playing field for business
- Tax revenue losses ranging from US\$100 to 240 billion a year globally.

BEPS Package

- Inclusive Framework: HK joined in June 2016 as an Associate
- 15 action plans
- Improve Coherence of international tax rules
- Realign taxation with economic substances and value creation
- Promote a transparent Tax Environment

15 Action Plans (1–5)

- 1 – Address the Tax Challenges of the Digital Economy
- 2 – Neutralise the Effects of Hybrid Mismatch Arrangements
- 3 – Strengthen Controlled Foreign Companies Rules
- 4 – Limit Base Erosion via Interest Deductions and Other Financial Payments
- 5 – Counter Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance

15 Action Plans (6–10)

- 6 – Prevent Treaty Abuse
- 7 – Prevent the Artificial Avoidance of PE Status
- 8–10 – Assure that Transfer Pricing Outcomes are in Line with Value Creation

15 Action Plans (11–15)

- 11 – Measuring and Monitoring BEPS
- 12 – Require Taxpayers to Disclose their Aggressive Tax Planning Arrangements
- 13 – Re-examine Transfer Pricing Documentation
- 14 – Make Dispute Resolution Mechanisms More Effective
- 15 – Develop a Multilateral Instrument

Four Minimum Standards

Committed to implementing the BEPS package, including the four minimum standards –

- Countering harmful tax practice (Action 5)
- Preventing treaty abuse (Action 6)
- Imposing country-by-country (CbC) reporting requirement (Action 13)
- Improving cross-border dispute resolution mechanism (Action 14)

4 Main categories

- New minimum standard
- Reinforced international standards
- Common approaches and best practices
- Analytical reports

HK Implementation Schedule

Milestone	Key Date
Consultation Period	26 Oct to 31 Dec 2016
Meeting with key stakeholders	Nov to Dec 2016
Introduce Bill(s) into LegCo	Mid-2017
CbC reporting: MNEs to gather relevant records	2018
MNEs to file CbC reports to IRD	2019
IRD to exchange CbC reports with partnering jurisdictions	2020
OECD's Global Review	2020

HK Implementation Strategy

Put in place necessary legislative framework

- Transfer pricing rules (Action 8 to 10)
- Spontaneous Exchange of Information (EOI) (Action 5), CbC reporting (Action 13), Cross Border dispute resolution mechanism (Action 14)
- Modify present Comprehensive Avoidance of Double Taxation Agreements (CDTA)

Transfer Pricing

- Arm's length principle

Present: – DIPN

Transfer Pricing – Proposed (1)

- Fundamental TP Rules to be Codified in statutes and offer Clarity and Certainty of TP rules which will be Consistent with OECD
- Apply when affected persons are associated person
- Associated Person: one affected person is directly or indirectly participating in the management, control or capital of the other, or a third person is participating in the same of both affected persons

Transfer Pricing – Proposed (2)

- Dealings between different parts of an enterprise: Head Office and PE
- Advanced APA
- Assets and services
- Financial or business arrangements, e.g. making of loans, cost contribution arrangements
- Exemption
- Penalty

Penalty

Making tax returns with incorrect information on transfer pricing

- without reasonable excuse : Level 3 : HK\$10,000
- willfully with intent to evade : Level 5 : HK\$50,000

TP Documentation & CbC reporting (1)

3-tiered Standardized approach

1. Master file

- high level overview of the group of enterprises
- include global business operations, transfer pricing policies & allocation of income
- available to all relevant tax administrations

TP Documentation & CbC reporting (1)

2. Local file

- detailed transactional transfer pricing information
- specific to enterprise in each jurisdiction
- include details of material RPT or arrangements, amounts, TP analysis

TP Documentation & CbC reporting (1)

3. CbC report

- for each jurisdiction the MNE group operates
- include amounts of revenue, profits and tax paid
- include certain indicators of economic activity, e.g. number of employees, stated capital, retained earnings & tangible assets, etc.
- must identify entity or entities operating in each jurisdiction and indicate business activities of each entity

TP Documentation & CbC reporting

- all enterprises which carry on trades or businesses in Hong Kong, AND
- engage in transactions with associated enterprises

should be required to prepare the master and local files

TP Documentation – Exemption

Enterprises which satisfy **any two of the following three conditions** are **not required** to prepare the master and local files –

- (i) total annual revenue not more than HK\$100 million;
- (ii) total assets not more than HK\$100 million; and
- (iii) no more than 100 employees.

OECD requirements for CbC reporting :

MNEs with annual consolidated group revenue equal to or exceeding EUR750 million (app. HK\$6.8 billion)

Key Issues – Transfer Pricing (TP)

- Put in place a **statutory fee-based** regime for advance pricing arrangement (APA), including the following features –
- Prescribe transfer pricing issues that can be **subject matter** of APA
- Provide **legal certainty** for APA
- Clarify the **rights and obligations** of the Commissioner of Inland Revenue (the Commissioner) and taxpayers
- Provide **penalty** for supply of false/misleading information and failure to supply information
- Provide the Commissioner with the **discretion to decide** whether an APA applications is to be accepted

Other issues (1)

- Time frame : file within 12 months from last year-end date
- Language : Chinese or English
- Penalty: Failure to comply re master file and local file without reasonable excuse : Level 6 : HK\$100,000
- Failure to submit CbC without reasonable excuse : Level 6. and HK\$500 for each day of continuing offense (Same as AEOI)

Other issues (2)

- Secondary filing mechanism – ultimate parent entity of an MNE group is in a jurisdiction that neither requires the filing of CbC report nor exchanges such report with IRD, Commissioner will be empowered to **mandate a constituent of the group in Hong Kong (“Hong Kong Constituent”)** to file the CbC report.
- Surrogate filing mechanism – avoid undue burden, can authorize HK Constituent to file CbC report to IRD on its behalf

TP Documentation and CbC reporting

Compliance Issues

	Master File and Local File	CbC Report
Timeframe	Prepared for each fiscal year and retained for not less than 7 years	File within 12 months from the last day of fiscal year
Language	Either Chinese or English	
Penalty for non-compliance	Level 6 (i.e. \$100,000)	Level 6 (i.e. \$100,000) plus a further fine of \$500 per day for continuing offence after conviction for failure to comply

Multilateral Instrument (MLI)

- Hong Kong intends to modify the relevant provisions of our CDTAs to implement the treaty-related BEPS measures by means of the MLI.
- Either (A) Principal Purposes Test Rule (PPT) or (B) Limitation on Benefit Rule (LOB)
- For prevention of treaty abuse, HK is inclined to **adopt the principal purposes test (PPT) rule**, and accept **symmetrical application** in respect of HK's treaty partners which prefer options other than the PPT rule alone.
- HK plans to incorporate relevant provisions of MLI in CDTAs to be signed in future.

Other related matters

Dispute Resolution Mechanism

To put in place a **statutory** mechanism on mutual agreement procedure (MAP) and arbitration, including the following features –

- Taxpayers may **apply for MAP** in accordance with CDTA, notwithstanding any objection/claim for relief lodged under the IRO
- **Not mandatory** for the Commissioner to reach agreement with competent authority of CDTA state via MAP
- Taxpayer may request unresolved issues arising from MAP to be submitted for **arbitration**
- Taxpayer can't pursue arbitration if the issues have been resolved via domestic litigation
- The Commissioner may charge a **fee** for referral to arbitration on a cost recovery basis

Other related matters

Spontaneous Exchange of Information (EOI) on Tax Rulings

To allow the conduct of spontaneous EOI on six specified categories of tax rulings on the basis of tax treaty agreements, including –

- Rulings relating to preferential regimes
- Unilateral APAs and any other cross-border unilateral rulings in respect of transfer pricing
- Cross-border rulings providing for a downward adjustment of taxable profits
- Permanent establishment rulings
- Related party conduit rulings
- Any other type of ruling that, in the absence of spontaneous EOI, could give rise to BEPS concerns

Other related matters

Double Taxation Relief

To enhance the existing tax credit systems, including the following features –

- **CDTAs should prevail** in case of any conflicts between IRO and CDTA
- Allows a **longer period** for claiming tax credits (i.e. six years)
- Taxpayers should **make full use of all other available relief** (i.e. CDTAs and local legislation of foreign jurisdictions) before resorting to tax credit
- Taxpayers should **notify IRD of any adjustment to their foreign tax payments** which may result in the amount of tax credit or unilateral relief granted becoming excessive
- Tax credits would **not** be allowed in respect of a foreign tax payment if **unilateral relief has already been granted**

Q & A

Thank you very much