Introduction of the ‘BEPS Bill’ in Hong Kong

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Introduction

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Background to the 'BEPS Bill'

- HK is a signatory (via PRC) to BEPS inclusive framework and therefore minimum standards
- International pressure to comply (eg, from EU)
- FSTB consultation on implementing the BEPS minimum standards and putting transfer pricing on a statutory footing late in 2016
- FSTB published conclusions on consultation in July 2017
- Inland Revenue (Amendment) (No. 6) Bill 2017 gazetted on 29 December 2017, now being debated in LegCo

Overview of the bill

- The bill will generally apply from the 2018/19 YoA onwards

- If enacted as currently drafted it will:

  - Introduce a statutory transfer pricing regime;
  - Introduce transfer pricing documentation requirements including CbC reporting;
  - Introduce statutory provisions for dispute resolution under MAP;
  - Amend double taxation relief rules;
  - Remediate existing harmful tax practices; and
  - Introduce new and unexpected rules on appropriation to/from trading stock and deemed profits from DEMPE activities re intellectual property

Statutory dispute resolution mechanism

- Currently, HK deals with Mutual Agreement Procedures (“MAP”) initiated under its CDTAs in accordance with its administrative practices
- The IRO will be amended to put the practices on a statutory footing
- The changes will also provide for the results of arbitration procedures under MAP to be effected
- Though currently arbitration is not provided for under HK’s existing CDTAs or the multilateral instrument it has signed (the PRC signing on its behalf)

Changes to double tax relief rules

- Period for claiming foreign tax credit relief extended to six years
- Requirement to minimize foreign tax when claiming foreign tax credits to be introduced
- Requirement to notify changes in foreign tax that may result in foreign tax credits having been overclaimed to be introduced

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Remediating harmful tax practices

- In addition to review of HK's preferential tax regimes under the BEPS inclusive framework for harmful tax practices, the EU threatened HK with 'blacklisting' if it did not remove its harmful tax practices

- The regimes in question are the Corporate Treasury Centre, Professional Reinsurer and Captive Insurer regimes

- The bill will amend these tax incentive regimes to:

  - Remove 'ring-fencing' from the domestic economy. Currently, they only apply to profits derived from foreign transactions; and
  - Introduce a HK 'substantial activities' requirement

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Wildcards – new sections 15BA and 15F of the IRO

- These measures were not subject to consultation and are being snuck in

- New section 15BA of the IRO deals with transactions where a person is trading with themselves or not at market value (ie, appropriations into and from trading stock)
  - This overturns existing case law

- New section 15F of the IRO deems sums from the use of intellectual property attributable to contributions to DEMPE in respect of that IP in HK to be taxable profits of a person, even when those sums are received by an associate
  - This duplicates the transfer pricing requirements under the OECD Transfer Pricing Guidelines but without similar protections

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Questions?

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