

TAXATION LAW RESEARCH PROGRAMME

ASIAN INSTITUTE OF INTERNATIONAL FINANCIAL LAW

www.AIIFL.com

FACULTY OF LAW

THE UNIVERSITY OF HONG KONG

TLRP NEWSLETTER No. 8

INTRODUCTION

The Taxation Law Research Programme (TLRP) is one of the research programmes within the Asian Institute of International Financial Law (AIIFL) at the Faculty of Law of The University of Hong Kong.

The Foundation Members of the TLRP are Professor Andrew Halkyard, Associate Professor Wilson Chow and Professor Richard Cullen. Professor Cullen also serves as TLRP Director.

TLRP PERSONNEL



Welcome to Dr Jingyi Wang - the Third TLRP Post-Doctoral Fellow in PRC Tax

(Left: Wilson Chow, Middle: Professor Richard Cullen, Right: Dr Jingyi Wang)

Jingyi earned her PhD from King's College London. She also holds an LLM from King's College London and an LLB from the East China University of Political Science and Law. Her PhD thesis, "Regulating transfer pricing of intangibles - a global challenge and implications for China", considers the difficulties arising from the regulation of the transfer pricing of intangibles for tax purposes and explores the challenges faced by China, as a developing country, in its attempts to integrate OECD principles and practices into existing administrative structures.

Jingyi's wide research interests include international tax law, PRC tax law, comparative law and policy, administrative law, company law and commercial law. Her latest article "*The Chinese approach to transfer pricing: problems faced and paths to improvement*" was published in the British Tax Review in 2016. She also has published articles in the Australian Tax Forum, the International Transfer Pricing Journal, and the Company Lawyer, etc.

PUBLICATIONS

A Comparative Study of the General Anti-avoidance Rules of Mainland China and Hong Kong – Legislation, Interpretation and Application

This paper discusses the interpretation and application of General Anti-Avoidance Rules (GAARs) in both Mainland and Hong Kong, and puts forth the argument that the interpretation

and application of the GAAR in the Mainland effectively changes the “reasonable commercial purpose” principle to a “substance over form” principle. This provides an effective means for the Mainland tax authorities to counter tax avoidance. Hong Kong revenue authorities cannot counter tax avoidance with the same comparative efficiency as the Mainland authorities because Hong Kong revenue authority’s use of the GAAR has been substantially limited by the interpretations of the Hong Kong courts. However, the paper also suggests that an effectively designed GAAR should balance the tax authorities’ powers to counter tax avoidance and taxpayers’ legitimate rights to tax planning.

The author is **Yating Yang** who is a Master of Common Law at the University of Hong Kong. The paper was supervised by Professor Richard Cullen from the University of Hong Kong.

The paper has now been published by the [Bulletin for International Taxation](https://www.ibfd.org/IBFD-Products/Journal-Articles/Bulletin-for-International-Taxation/collections/bit/html/bit_2016_07_cn_1.html) in 2016 (Volume 70) – available at: https://www.ibfd.org/IBFD-Products/Journal-Articles/Bulletin-for-International-Taxation/collections/bit/html/bit_2016_07_cn_1.html.

Two Paths for Developing Controlled Foreign Corporation Rules in China

This paper is also written by **Yating Yang** as her Graduate Research Dissertation. It has also been accepted for publication in the October (online) / November (print) edition of the Bulletin for International Taxation, published by the International Bureau of Fiscal Documentation.

Reforming Value Added Tax in Mainland China: A Comparison with the EU

Value added tax (VAT) is a consumption tax that is applied in many countries today. It was introduced in mainland China as a key part of the major, 1994 tax reforms. The Chinese VAT system is most closely modelled on the European VAT system. This article discusses the Chinese VAT system and its problems with evasion. China’s recent reform experience is also compared with the European Union (EU) experience in implementing and applying VAT. The article discusses what lessons can be learned from the experience in mainland China and the EU, so that VAT evasion is minimized. The article is available at: <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1209&context=rj>.

The author is **Dr Yan Xu**, from the Chinese University of Hong Kong (CUHK), formerly the First TLRP Post-Doctoral Fellow (PDF) in PRC Tax. This paper, which was written whilst Dr Xu was a PDF at HKU. The article has recently been ranked No. 3 on one of the SSRN All-Time Top Downloads List (161 downloads) in the relevant subject area, please see: <http://papers.ssrn.com/sol3/topTen/topTenResults.cfm?groupingId=2719359&netorjrnI=jrnl>

TLRP TAX COMMENTS (TTC)

TTC was introduced in early 2016 to provide an online publication platform for stimulating Tax Law & Policy articles and notes. TTC publications are added to on an *ad hoc* basis, as suitable articles or notes come to hand. (TTC is not designed to operate as a regular journal, with regular issues.) Article and notes are vetted by staff within the TLRP.

Tax Comment No 1: The Making of Tax Law in China – Does It Comply with Rule of Law Principles by Agnes LEE, Sui Ping

Whether the legal reform of the last 30 years has fundamentally changed the role of law in China and led China towards a rule of law regime is contentious. Given the close relationship between taxation and development of the rule-of-law and the crucial role of the Enterprise Income Tax

law in China's developing tax regime, this article has specifically selected the making of the Enterprise Income Tax law as the unit of analysis in assessing whether the making of China's tax law complies with rule of law principles. This article also includes an extensive set of tables, listing relevant provisions which were reviewed in the course of its writing - and a full bibliography.

Tax Comment No 2: **Land Revenue and the Chinese Dream** by **Richard Cullen**

This essay written by Richard Cullen was originally published in 2014, in Chinese, in the China Policy Review (CPR). This work was judged by the CPR as one of the Top 20 Economic Essays of 2014, in China. It is now being republished as part of the TTC Series, in English.

Tax Comment No 3: **Real Estate Price Inflation: Lessons from Hong Kong** by **Richard Cullen**

The primary purpose of this TLRP Tax Comment is to review the ways in which behaviour-modifying fiscal measures – in particular Stamp Duty (or any like impost) – can be deployed to help bring the problem of excessive home-price inflation under greater control. In cities across the developed-world, especially (today) in jurisdictions popular with Mainland Chinese immigrants, there have been deep concerns expressed about rapid, residential real estate price inflation. It is argued that such inflation is putting home ownership beyond the reach of increasing numbers of younger, local residents seeking to buy their first home. In early May, 2016, it was reported that the benchmark price for a house in the Vancouver Region was C\$1.41 million (around HK\$8.35 million) – up 30.1% in one year. Although the lessons offered by Hong Kong potentially have quite wide application, the principal comparative focus in this essay is on Vancouver, in view of the stand-out nature of the price inflation problem in that city. The essay briefly reviews certain related issues which are associated with this public policy challenge. There also is a short discussion on why the recent innovative use of Stamp Duties in the HKSAR remains compliant with the Basic Law of the HKSAR (BL). There is no “magic wand” fix for this set of problems. Hong Kong has, however, done more than most, in an effective way, to bring the problem under a level of control. There is, Richard Cullen argues, much that Vancouver (and other like-affected cities) could learn from the HKSAR.

The full versions of all three Tax Comments are available at:

<http://www.law.hku.hk/aiifl/taxation-law-research-programme-tlrp/>

TLRP ALUMNI MEET IN SHANGHAI

The Chinese Intertax Policy under the Context of “One Belt One Road” Conference



This Conference was co-organized by the East China University of Political Science and Law, and The Institute for Austrian and International Tax Law, Vienna University of Economics and Business (WU), held in Shanghai on 9-10 May 2016.

Dr Yan Xu and **Dr Doreen Qiu** (The First and Second TLRP PDFs in PRC Tax) each gave presentations regarding outbound investment through Hong Kong and tax havens, while **Na Li** (a TLRP Visitor in 2014) presented on “China-EU Countries - Tax Treaties and Their Impacts on Chinese Investment to EU Countries”.

OECD APPOINTS NEW HEAD OF TAX TREATY, TRANSFER PRICING & FINANCIAL TRANSACTIONS



Professor Andrew Halkyard (left) and Jefferson Vanderwolk pictured enjoying a rather good Dai Pai Dong meal in North Point shortly before Andrew's retirement as a full professor at HKU (Andrew remains an Adjunct Professor at HKU)

Congratulations to Jefferson Vanderwolk who has recently been appointed as Head of the Tax Treaty, Transfer Pricing & Financial Transactions Division in the Centre for Tax Policy and Administration at the OECD from mid-2016. Jeff was appointed as a tax academic at the Department of Professional and Legal Education in 1991. Since then, Jeff has served as International Tax Counsel to the US Senate Finance Committee. He has also held positions as Special Counsel at the US IRS Office of Chief Counsel, was Associate Professor of Law at the Chinese University of Hong Kong, Managing Director at Merrill Lynch in Hong Kong where he was Head of Tax for the Asia Pacific Region, and he was also a Partner at Baker & McKenzie and Deloitte. See: <http://www.oecd.org/ctp/oecd-appoints-new-head-of-the-tax-treaty-transfer-pricing-and-financial-transactions-division-in-the-centre-for-tax-policy-and-administration.htm>.

TLRP CONFERENCE

The Fourth TLRP International Conference “**Renovating the Hong Kong Revenue Regime: the Local, Cross-Border and International Contexts**” was held on 31 October 2015.



The conference title used the term Revenue Regime (RR) rather than “Tax System” because Hong Kong has, ever since 1842, relied notably on non-tax sources of revenue. The Hong Kong RR has, in many respects, proved to be remarkably successful for over 170 years resulting in a low tax, simple system, unique within the developed world. So successful, in fact, that the

HKSAR typically holds savings of up to 2 years total Government expenditure within its Fiscal Reserve Fund.

When British Hong Kong was established, formally, in 1842, the primary source of public revenue was meant to be derived from the retail sale of opium, above all, to the rapidly growing Chinese community. Briefly, the new Hong Kong Government planned to establish such a revenue stream by selling monopoly opium retail rights to the highest bidder - which was the model successfully deployed in the slightly earlier British Singapore Colony. Hong Kong also copied the Singapore free port model (thus excluding customs duties as a revenue source). In fact it took around 40 years before opium income became a serious contributor to public revenues in Hong Kong. This proved not to be a crucial problem, however, as revenues from (leasehold) land sales and other land-related revenues (including lease conversion premiums) more than made up for opium-income shortfall. From 1842 to this day, the RR in Hong Kong has benefitted from revenues resulting from Government land sales and other major land-transaction revenues to an extent found in no other comparable jurisdiction.

The conference title also stressed “renovation” of the HKSAR system. For the reasons just briefly outlined, there is a widely shared view that the RR is not in need of radical or wholesale reform - especially given the levels of great complexity many years of such reforms have produced in Tax Systems right across the developed world. As it happens, the HKSAR Basic Law also spells out, in Articles 107 and 108: that Hong Kong shall strive to adhere to the low tax policy of British Hong Kong; and that it should keep a rein on public expenditure and avoid deficit financing. Article 106 additionally stipulates that the Mainland and HKSAR revenue systems must be kept strictly separated.

The Conference Report is available at the [TLRP Special Newsletter](http://www.law.hku.hk/aifl/taxation-law-research-programme-tlrp/) or at <http://www.law.hku.hk/aifl/taxation-law-research-programme-tlrp/>.

TLRP SEMINARS

7 June 2016



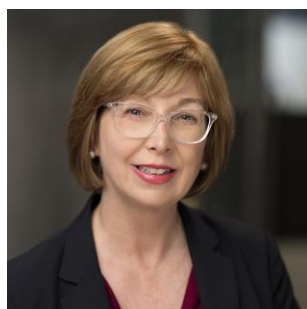
Sarah Hinchliffe, Visiting Professor, College of William and Mary Mason School of Business
(Left: Wilson Chow, Right: Sarah Hinchliffe)

Are Trusts Still a Strategic Investment Vehicle for Clients?

The objective of this seminar was to highlight (in a practical sense) how changes in tax law and succession planning in Hong Kong, the US, Australia and Canada have placed a number of limitations on the use of trusts as ideal tax planning vehicles, particularly for HWI (high wealth individuals). This seminar first outlined the tax planning objectives of individual clients, including expats in Hong Kong who are residents for tax purposes in either Canada, the US, UK or Australia. These included gifting life interests to beneficiaries, wealth maximization through a living trust, and what common law or statutory limitations exist (eg the Rule Against Perpetuities) that can cap a grantor's wishes. Second, the extent to which federal, national and/or state taxes (eg Generation Skipping Transfer Tax, Gift Tax, Stamp Duty, Income Tax, and Deductions to name a few) either act as an incentive or disincentive to strategic tax planning by expats. Third, this seminar suggested some practical alternatives for legal practitioners and tax accountants about other investment strategies that may

be employed, as well as proposed regulatory changes affecting clients who may be residents in the above countries.

1 April 2016



Dr Fiona Martin, School of Taxation and Business Law, UNSW, Sydney

Tax Concessions Granted to Charities – an International Comparison

Taxation concessions are commonly granted to non-profit organisations (NPOs), both in common law countries and those with civil law backgrounds. These concessions are a significant cost to the relevant government's tax revenue, for example, the Australian Treasury estimates that the annual concession costs the revenue \$1.3 billion. Dr Martin's work investigates and compares the range of concessions granted in Australia, England, USA, Germany, Japan, Taiwan and Hong Kong. In order to understand how the concessions are granted, the legal concepts that define not-for-profit/non-profit; charity; public benefit and tax deductibility of donations needed to be understood in the context of each jurisdiction. It was found that although there are core areas of commonality there are some differences in the definitions and treatment of NPOs and charities. Critical findings include the significance and widespread use of the exemption from income tax of income of charities. In Australia, all income of charities is exempt, however in other countries eg the USA and Japan, the exemption only extends to income that is used for their public benefit purpose. Charitable income that arises from business activities is subject to income tax. Another significant area of difference is the treatment of donations. In Australia all donations to specified NPOs (and some government agencies) are deductible from income tax. In other jurisdictions there are limits to the tax deductibility of donations and in England there is a different approach involving a tax rebate granted to the charity. This Seminar was jointly organized with CUHK's Centre for Financial Regulation and Economic Development (CFRED).

23 March 2016



Professor Miranda Stewart, Director of the Tax and Transfer Policy Institute in the Crawford School of Public Policy at ANU, in Canberra, Australia

(Left: Professor Richard Cullen, Right: Professor Miranda Stewart)

Transnational Tax Law: Fiction or Reality, Future or Now?

This stimulating presentation discussed: notable, relevant historical revenue-collection turning points; wider theoretical perspectives; and broad practical application issues. The presentation provided a very strong framework for considering the important - and wide-ranging - Tax Policy changes under discussion. Miranda Stewart has a long standing Hong Kong connection, as it happens. Her secondary education was completed at the King George V School in Kowloon.

2 December 2015



Stefano Mariani, Registered Foreign Lawyer, Deacons, Hong Kong

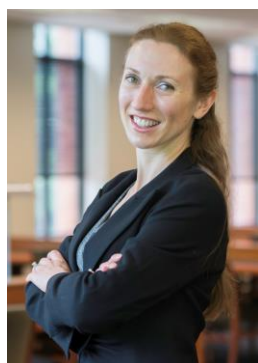
(Left: Stefano Mariani, Right: Professor Richard Cullen)

The Taxation of Trusts in Hong Kong

The framework for this Seminar was, as follows (1) Introduction to the issue: how, if at all, is a trust taxable in Hong Kong and why it matters. (Summary of the various theories on the subject. Considering the relevant statutory framework and the effect of the 1981 amendments to the Inland Revenue Ordinance); (2) Applying section 14 to trusts: the genesis and implications of the section 2(1) definition of “trustee” and what is meant by “his assessable profits”; (3) Considering the implications of South African jurisprudence and, in particular, the Appellate Division judgment in Phillip Frame; (4) Resolving the nominee problem – analysis and critique of Board of Review decisions on the taxation of nominees and a proposed framework for reconciliation with the IRO’s schema for the taxation of trusts; and (5) Conclusion that the answer has always been in plain sight: trust profits are taxable in the hands of the trustee.

TLRP INTENSIVE COURSE

3-5 June 2016



Sarah Hinchliffe, Visiting Professor, College of William and Mary Mason School of Business

An Introduction to International Taxation

An introductory level course to the operation of international taxation as it applies to expatriates and businesses. The course provided a comprehensive introduction to the current international tax regime operating in select jurisdictions, including Hong Kong, Mainland China, Australia, the United Kingdom and the United States. The enrolment response for the intensive course was very good.

~~~~~

We welcome your comments and suggestions for further research and other activities in the taxation area. Please feel free to email Professor Richard Cullen at [richard.cullen@gmail.com](mailto:richard.cullen@gmail.com) or Flora Leung at [fkleung@hku.hk](mailto:fkleung@hku.hk).

More information about the TLRP is available at  
<http://www.law.hku.hk/aiifl/taxation-law-research-programme-tlrp/>

We look forward to your continuing support.

July 2016