

立法會
Legislative Council

LC Paper No. CB(1)408/09-10
(These minutes have been seen by
the Administration)

Ref : CB1/BC/10/08/2

Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009

Third meeting on
Tuesday, 27 October 2009, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present : Hon Paul CHAN Mo-po, MH, JP (Chairman)
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon CHIM Pui-chung
Hon Starry LEE Wai-king
Hon CHAN Kin-por, JP

Members attending : Hon Audrey EU Yuet-mee, SC, JP
Hon Ronny TONG Ka-wah, SC

Public officers : Agenda item I
Attending

Ms Julia LEUNG
Under Secretary for
Financial Services and the Treasury

Mr Clement LEUNG
Deputy Secretary for
Financial Services and the Treasury (Treasury)

Mr Kenneth CHENG
Principal Assistant Secretary for
Financial Services and the Treasury (Treasury)

Ms Katherine NG
Political Assistant to Secretary for Financial Services and
the Treasury

Mr CHU Yam-yuen
Deputy Commissioner of Inland Revenue

Miss Fatima NGAN
Senior Assessor
Inland Revenue Department

Mr Michael LAM
Senior Assistant Law Draftsman
Department of Justice

Ms Rayne CHAI
Senior Government Counsel
Department of Justice

Clerk in attendance : Ms Rosalind MA
Chief Council Secretary (1)5

Staff in attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Mr Noel SUNG
Senior Council Secretary (1)4

I Meeting with the Administration

Follow-up to issues raised at the meeting on 8 October 2009

(LC Paper No. CB(1)106/09-10(01) —List of follow-up actions arising
from the meeting on 8 October 2009
prepared by the Legislative Council
Secretariat

LC Paper No. CB(1)106/09-10(02) —Administration's response to the

issues raised at the meeting on 8 October 2009)

Relevant papers previously issued

(LC Paper No. CB(3)751/08-09	—The Bill
FIN CR 12/2041/46	—The Legislative Council Brief issued by the Financial Services and the Treasury Bureau
LC Paper No. CB(1)2622/08-09(18)	—Marked-up copy of the Bill prepared by the Legal Service Division
LC Paper No. CB(1)2622/08-09(19)	—Letter from Assistant Legal Adviser to the Administration dated 14 August 2009
LC Paper No. CB(1)2682/08-09(08)	—Administration's response to the Assistant Legal Adviser's letter)

The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

Follow-up actions to be taken by the Administration

2. In relation to Mr James TO's concern about details of the provisions under comprehensive avoidance of double taxation agreements (CDTAs) to ensure that the exchange of information (EoI) arrangement would have no retrospective effect, the Administration was requested to provide supplementary information (including but not limited to the commencement Articles of some of the CDTAs in force) to illustrate how the provisions under CDTAs would stipulate that requests from treaty partners for information on cases or periods before commencement of the CDTAs would be declined.

3. In response to the view of Mr James TO and Ms Miriam LAU that the EoI safeguards to be provided in CDTAs should be stipulated in primary legislation to ensure that the fundamental safeguards would not be compromised in the course of treaty negotiations, the Administration was requested to:

- (a) provide information on the EoI safeguards provided by other jurisdictions (including Singapore and Switzerland) and the practices of these jurisdictions in providing for the safeguards; and
- (b) consider Mr James TO's view that in case the Commissioner of Inland Revenue (the Commissioner) had to apply for a court order for the taxpayer concerned to provide the information requested under an EoI arrangement, whether the court could disallow the application on

grounds of EoI safeguards if these were not stipulated in the primary legislation.

4. On the notification of proposed disclosure, members including Mr James TO, Ms Miriam LAU and Mr Alan LEONG were concerned that protection of the right of the person concerned would be undermined in cases stipulated in paragraphs 7 and 8 of Annex B to LC Paper No. CB(1)106/09-10(02) under which notification or prior notification would not be required. In this connection, the Administration was requested to take heed of members' concerns and provide the following information:

- (a) the "reasonable grounds" for the Commissioner to decide that notification was not required as "notification is likely to undermine the chance of success of the investigation in relation to which the request is made" (as stipulated in paragraph 7(b)); and
- (b) the criteria for the Commissioner to decide that prior notification was not required as "failure of disclosing the information within the time constraint will likely frustrate the efforts of the requesting government in enforcing its tax laws"(as stipulated in paragraph 8).

(Post-meeting note: The Administration's response to paragraphs 2 to 4 was circulated to members vide LC Paper No. CB(1)260/09-10(2) on 4 November 2009.)

III Any other business

Date of next meeting

5. The Chairman reminded members that the next meeting of the Bills Committee would be held on Tuesday, 5 November 2009 at 10:45 am.

6. There being no other business, the meeting ended at 6:30 pm.

**Proceedings of the
Bills Committee on Inland Revenue (Amendment) (No.3) Bill 2009
Third meeting on Tuesday, 27 October 2009, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000205 – 000417	Chairman	Introductory remarks	
Follow-up to issues raised at the meeting on 8 October 2009			
000418 – 001005	Chairman Administration	Briefing by the Administration on the safeguards incorporated in CDTAs in respect of the scope of information exchange and the usage of information exchanged (Annex A to LC Paper No. CB(1)106/09-10(02)).	
001006 – 001840	Chairman Mr CHAN Kin-por Administration	<p>(a) Mr CHAN Kin-por's concern whether the additional protection measures that the Administration would seek to include in CDTAs would be accepted by the potential treaty partners of Hong Kong.</p> <p>(b) The Administration's advice that the proposed safeguards were mostly adopted from the 2004 version of the Organization for Economic Cooperation and Development (OECD) Model Tax Convention EoI article, or with modification allowable under the OECD standard. Hence, the majority of the safeguards should be accepted by the international community. Some of the additional measures such as confining disclosure of information to the tax authorities but not their oversight bodies would need to be worked out during the negotiation of individual CDTAs.</p> <p>(c) Responding to Mr CHAN Kin-po's further enquiry, the Administration's advice that individual CDTAs would be implemented as subsidiary legislation subject to the Legislative Council (LegCo)'s scrutiny. Safeguards provided under the CDTA or other records of documents agreed with treaty partners would be summarized in the LegCo Brief for the subsidiary legislation.</p> <p>(d) Responding to the Chairman's enquiry on whether the modifications proposed to the safeguards on the scope of information exchange could be successfully incorporated in</p>	

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		<p>CDTAs, the Administration's advice that despite anticipated difficulties in the negotiation process, it would insist in confining the scope of information exchange to income taxes. So far, it had successfully incorporated such modifications in the five CDTAs signed.</p>	
001841 – 002059	Ms Starry LEE Administration	<p>In response to Ms Starry LEE's enquiry, the Administration's confirmation that the exchange of information under CDTAs would be governed by the commencement Articles, and information relating to any matter prior to the effective date of the respective provisions of the CDTAs would not be exchanged.</p>	
002100 – 004019	Ms Miriam LAU Administration Mr James TO	<p>(a) Concern shared by Ms Miriam LAU and Mr James TO that the safeguard provisions proposed to be incorporated in CDTAs should be provided in the primary legislation instead. Ms LAU's view that while individual CDTAs would be subject to LegCo's scrutiny, Members could hardly amend the provisions at that stage, when agreements had been reached with the treaty partners. Ms LAU's view that if reference to the safeguards would not be made in the primary legislation, the Administration should at least undertake during the resumption of Second Reading debate of the Bill that the safeguards stipulated in the model text of OECD 2004 version of EoI article would be adopted.</p> <p>(b) Mr James TO's remark that Hong Kong should seek to comply with the minimum international standard for EoI arrangement only in order to avoid sanctions by the international community. His concern that the Administration might compromise the fundamental safeguards in negotiations of individual CDTAs with treaty partners, if these safeguards were not provided in the primary legislation. Mr TO's view that reference should be made to practices of other jurisdictions in this regard.</p> <p>(c) The Administration's response that it would adopt the most prudent safeguards permissible under the OECD 2004 version of EoI article in the CDTAs. The Secretary for Financial Services and the Treasury could reaffirm this in his speech for the resumption of Second</p>	

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		<p>Reading debate of the Bill if Members so wished. Incorporating the safeguard provisions in the primary legislation was considered inappropriate, as this would reduce the flexibility in CDTA negotiations, say when there were merely textual changes to the OECD Model Tax Convention or when treaty partners proposed minor refinements. The Administration considered that setting out EoI safeguards in individual CDTAs provided sufficient protection because each CDTA would need to be implemented by a subsidiary legislation to be passed by LegCo. In any event that the LegCo considered the Administration had deviated substantially from the OECD standard or its EoI policy, the Administration could revert to treaty partners for further discussions.</p> <p>(d) View shared by Ms Miriam LAU and Mr James TO that the Administration should not be given excessive negotiation flexibility and sufficient checks and balances should be put in place to ensure that the safeguard provisions in CDTAs would not deviate from those proposed by the Administration in Annex A to LC Paper No. CB(1)106/09-10(02).</p>	
004020 – 004946	Mr James TO Administration	<p>(a) Mr James TO's concern about details of the provisions under CDTAs to ensure that the EoI arrangement would have no retrospective effect.</p> <p>(b) The Administration's explanation that the EoI arrangement would not have retrospective effect as the information exchanged under CDTAs would only cover those information relating to periods after the commencement of the provisions of the respective CDTAs.</p>	The Administration to take action as required in paragraph 2 of the minutes.
004947 – 010427	Mr James TO Administration Chairman Ms Miriam LAU	<p>(a) Mr James TO's view that all the fundamental safeguards should be stipulated in the primary legislation, but he would be prepared to allow flexibility for the Administration to make slight variations through provisions in the subsidiary legislation.</p> <p>(b) The Chairman's suggestion that reference be made to the safeguard provisions in the Singapore Bill, which had just been passed. Ms Miriam LAU echoed. Mr James TO's</p>	

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		<p>request that Hong Kong should make reference to practices of other jurisdictions (including Singapore and Switzerland) in providing for the safeguards.</p> <p>(c) The Administration's reiteration that it would adopt the most prudent safeguards acceptable under the OECD 2004 version of EoI article. Moreover, the proposed domestic safeguards to be implemented through rules and the draft Departmental Interpretation and Practice Note (DIPN) setting out the procedural guidelines had been provided to the Bills Committee. The proposed safeguards were in line with international practice. As most economies had adopted the OECD 2004 version of EoI article, Hong Kong's attractiveness as a CDTA partner might be reduced if it could not meet the international standard.</p>	<p>The Administration to take action as required in paragraph 3(a) of the minutes.</p>
010428 – 010833	Chairman Administration	<p>The Administration's briefing on the proposed rules to be made under section 49(6) of the Inland Revenue Ordinance (Cap. 112) which would put in place domestic safeguards (Annex B to LC Paper No. CB(1)106/09-10(02)).</p>	
010834 – 012024	Ms Starry LEE Administration Mr James TO	<p>(a) Given the standard 90-day response time set by OECD for exchange of information, Ms Starry LEE's concern whether the information of the person concerned would have been transmitted to the requesting party before completion of the review by the Financial Secretary (FS) on the Inland Revenue Department (IRD)'s decision relating to amendments of the information provided.</p> <p>(b) The Administration's reply that the relevant information would not be transmitted to the requesting party before completion of the review procedures, if the person concerned had requested for a review. This arrangement would be stipulated in the DIPN.</p> <p>(c) Ms Starry LEE's enquiry as to IRD's possible actions to follow up cases where the person concerned had failed to provide the information requested.</p> <p>(d) The Administration's advice that under the existing legislation, a person would be liable to</p>	

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		<p>a fine for failure to furnish the requested information to IRD for taxation purposes. IRD could also apply for a court order for the person concerned to provide the information. The Bill only sought to extend such power to the collection of information concerning tax of a foreign territory for the purpose of EoI under a CDTA.</p> <p>(e) Mr James TO's concern whether the court could disallow the application of IRD for an order to request the provision of information by a person concerned on grounds of EoI safeguards, if these were only incorporated in CDTAs but not stipulated in the primary legislation.</p> <p>(f) The Administration's advice that IRD would examine whether the EoI requests were in line with the provisions in the respective CDTA before acceding to the requests and asking the person concerned to provide the information.</p>	<p>The Administration to take action as required in paragraph 3(b) of the minutes.</p>
<p>012025 – 013605</p>	<p>Mr James TO Administration Ms Miriam LAU</p>	<p>(a) Mr James TO's view that a copy of the information to be disclosed to the requesting party should be provided to the person concerned automatically when notification was given, instead of upon request of the person concerned.</p> <p>(b) The Administration's advice that to ensure that the information was produced to the party concerned, it was considered prudent to provide a copy of the information upon request made by the person concerned to whom the prior notification was given.</p> <p>(c) Mr TO's concern about efforts made by IRD staff to obtain the addresses of persons concerned before deciding that such information was inadequate for the purpose of giving notification (paragraph 7(a) of Annex B to LC Paper No. CB(1)106/09-10(02)). In response, the Administration's advice that IRD maintained a comprehensive database on the taxpayers' addresses through obtaining information from different sources, including records maintained by other government departments. Where necessary, IRD staff might conduct site visit to verify the addresses.</p>	

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		<p>(d) Mr TO's view that an independent authority, such as FS, instead of the Commissioner, should be the authority to decide that "the notification is likely to undermine the chance of success of the investigation in relation to which the request is made". Mr TO's view that the requesting party should provide sufficient grounds to justify the claim that notification would undermine the chance of success of the investigation.</p> <p>(e) Ms Miriam LAU's view that sound justifications should be provided by the requesting party if no notification would be given, or the notification system could not provide the intended protection to the persons concerned.</p> <p>(f) The Administration's advice that while a notification system was acceptable under the OECD standard, this should not undermine the efficiency and effectiveness of exchange of information, which was one of the compliant standards required by OECD. Paragraph 7(b) to Annex B of LC Paper No. CB(10106/09-10(02) had in fact imposed a more stringent requirement, requiring the requesting party to substantiate its claim that giving a notification to the person concerned would likely undermine the chance of success of its investigation. In implementing the notification system, a proper balance had to be struck between the confidentiality of investigation for certain cases and protection of the rights of the persons concerned.</p>	<p>The Administration to take action as required in paragraph 4(a) of the minutes.</p>
<p>013606 – 014311</p>	<p>Ms Miriam LAU Administration Mr James TO Chairman</p>	<p>(a) Ms Miriam LAU's reference to concerns expressed in some written submissions to the Bills Committee about the authority for approval of disclosure request. Her view that a disclosure request should be approved by the Commissioner, instead of the Commissioner or any officer of IRD not below the rank of chief assessor as proposed by the Administration. Ms LAU's enquiry about the role of the Commissioner and the Deputy Commissioner in transmitting the requested data.</p> <p>(b) The Administration's explanation that the</p>	

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		<p>competent authority for exchange of information under CDTAs was the Commissioner or her Deputy. Under the present proposal, accession to an EoI request would have to be approved by a directorate officer, which would be a chief assessor, according to a set of transparent departmental procedures. The Commissioner or her Deputy would perform a gate-keeping role to check and personally sign the reply before transmitting the information to the requesting party.</p> <p>(c) View shared by Ms Miriam LAU and Mr James TO that the provisions in the proposed rules on approval of disclosure requests (paragraph 3 of Annex B to LC Paper No. CB(10106/09-10(02))) might have to be revised to set out clearly the authority to approve and sign the EoI requests.</p>	
014312 – 014527	Chairman Administration	<p>(a) The Chairman's concern that the proposed notification system might infringe on international requirements for anti-money laundering (AML).</p> <p>(b) The Administration's response that EoI arrangement under CDTAs was related to taxation matters, and should have no conflict with the AML regime. In the event that the requesting party considered that notification given to the person concerned of an EoI request might infringe on any AML requirements, it should advise IRD of the details accordingly in making the request.</p>	
014528 – 015524	Mr Alan LEONG Administration	<p>(a) Mr Alan LEONG's concern about the circumstances where notification or prior notification would not be required as stipulated in paragraphs 7 and 8 of Annex B to LC Paper No. Cb(1)106/09-01(02). Mr LEONG's concern about protection of the right of the persons concerned under such circumstances. His enquiry of the criteria and grounds for the Commissioner to decide that notification or prior notification would not be required.</p> <p>(b) The Administration's advice that the Commissioner had to examine and decide whether sufficient and sound justifications</p>	The Administration to take actions as

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		<p>were given by the requesting party for not giving notification or prior notification in circumstances under paragraphs 7(b) and 8.</p> <p>(c) As the review procedures for the person concerned to seek amendment and review IRD's decision on the amendment (paragraphs 9 to 11 of Annex B to LC Paper No. CB(10106/09-10(02)) would still apply if prior notification would not be given, Mr LEONG's concern about the real effect of the review procedures when the requested information had been transmitted to the requesting party due to time constraint.</p> <p>(d) The Administration's advice that while prior notification would not be given if the requesting party's claim of a tight time constraint was accepted, the person concerned would be notified of the exchange concurrently when the information was transmitted to the requesting party. The amended information would be transmitted to the requesting party if the Commissioner or the FS had agreed to make any amendment as requested by the person concerned.</p> <p>(e) Responding to Mr LEONG's further enquiry on the implementation of notification systems in other jurisdictions, the Administration's advice that among the 30 OECD members, only 11 jurisdictions had put in place notification systems. Hong Kong had also proposed the review procedures for the persons concerned to request for amendments of the information. This provision was beyond the mere notification with regard to collection of information in other jurisdictions.</p>	<p>required in paragraph 4 of the minutes.</p>
015525 – 015542	Chairman	Date of next meeting	