

立法會
Legislative Council

LC Paper No. CB(1)465/09-10
(These minutes have been seen
by the Administration)

Ref : CB1/BC/10/08/2

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

Fourth meeting on
Thursday, 5 November 2009, at 10:45 am
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 Miriam LAU Kin-yee, GBS, 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 absent** : Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
- Public officers** : Agenda item II
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 Confirmation of minutes and matters arising

(LC Paper No. CB(1)223/09-10 —Minutes of meeting on 8 October
2009)

The minutes of the meeting held on 8 October 2009 were confirmed.

II Meeting with the Administration

Follow-up to issues raised at previous meetings

- (LC Paper No. CB(1)260/09-10(01) —List of follow-up actions arising from the meeting on 27 October 2009 prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)260/09-10(02) —Administration's response to the issues raised at the meeting on 27 October 2009
- IN03/09-10 —Information note on Income Tax (Amendment) (Exchange of Information) Bill 2009 of Singapore prepared by the Research and Library Services Division of 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)

Further submissions on safeguards to protect an individual's right to privacy and confidentiality of the information exchanged

- (LC Paper No. CB(1)260/09-10(03) —Further submission from Office of the Privacy Commissioner for Personal Data, Hong Kong
- LC Paper No. CB(1)260/09-10(04) —Further submission from the Real Estate Developers Association of Hong Kong
- LC Paper No. CB(1)260/09-10(05) —Further submission from KPMG Tax Limited dated
- LC Paper No. CB(1)260/09-10(06) —Further submission from Hong Kong Institute of Certified Public Accountants
- LC Paper No. CB(1)260/09-10(07) —Further submission from Deloitte Touche Tohmatsu
- LC Paper No. CB(1)260/09-10(08) —Further submission from Society of

Trust and Estate Practitioners, Hong Kong Limited

LC Paper No. CB(1)260/09-10(09) —Further submission from CPA Australia Ltd.)

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. The Chairman and Mr James TO both held the view that the Administration's policy of not entertaining any request for information relating to a period before the effective date of the respective comprehensive avoidance of double taxation agreements (CDTAs), i.e. the exchange of information (EoI) arrangement would have no retrospective effect, should not be negotiable. In this connection, the Administration was requested to consider instead of setting out such policy only in a protocol which would form part of the CDTAs or in other documents of records, a provision should be incorporated in the primary legislation or the rules to be made under section 49(6) of the Inland Revenue Ordinance (IRO) (Cap. 112) (the Rules).

3. Mr James TO was concerned that the term "foreseeably relevant" adopted to restrict the scope of information exchange under the Organization for Economic Cooperation and Development 2004 version of EoI Article (the OECD Model Article) might not provide the best protection to the right of the persons concerned to seek legal remedies in the context of domestic law. In this connection, the Administration was requested to:

(a) examine, with reference to case laws in Hong Kong or other jurisdictions,

whether an alternative term could be adopted to prevent "fishing expeditions"; and

- (b) provide information on the channels available to the persons concerned to raise objections or appeal against the collection or disclosure of information under the EoI arrangement.

4. Referring to the provision in the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO) on refusal of assistance that "Where the criminal matter to which a request by a place outside Hong Kong for assistance under this Ordinance relates is an investigation into an external offence relating to taxation, then the request shall be refused" (section 5(2) of MLAO), Mr James TO expressed the following concerns:

- (a) whether the proposed amendments in the Bill to extend the power of the Inland Revenue Department (IRD) to collect and disclose a taxpayer's information in response to request made by CDTA partners would be at variance with the above provision in MLAO;
- (b) the impact, if any, of the proposed amendments to enable collection and disclosure of information under the EoI arrangement on the refusal of assistance provision in MLAO; and
- (c) whether the refusal of assistance provision in MLAO would have any implication on the EoI arrangement under CDTAs.

The Administration was requested to examine the proposed amendments in the Bill, making reference to the relevant provision in MLAO, and provide its response to Mr TO's above concerns.

5. The Chairman and members including Mr James TO, Ms Miriam LAU and Ms Starry LEE expressed concern that procedural safeguards in relation to IRD's handling of EoI requests would have significant implications on the operation of the business and professional sectors. In this correction, the Administration was requested to consider members' request of providing for the safeguards in the Rules, instead of in the Departmental Interpretation and Practice Note (DIPN) which was not legally binding.

(Post-meeting note: The Administration's response to the requests at paragraphs 2 to 5 above was circulated to members vide LC Paper No. CB(1)327/09-10(02) on 11 November 2009.)

III Any other business

6. The Chairman reminded members that the fifth meeting of the Bills Committee would be held on Thursday, 12 November 2009 at 2:30 pm.
7. There being no other business, the meeting ended at 12:30 pm.

Council Business Division 1
Legislative Council Secretariat
25 November 2009

**Proceedings of the
Bills Committee on Inland Revenue (Amendment) (No.3) Bill 2009
Fourth meeting on Thursday, 5 November 2009, at 10:45 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000133 – 000430	Chairman	(a) Confirmation of minutes of meeting on 8 October 2009 (LC Paper No. CB(1)223/09-10) (b) Introductory remarks	
Follow-up to issues raised at previous meetings			
000431 – 001051	Chairman Administration	Briefing by the Administration on the response to issues raised at the meeting on 27 October 2009 (LC Paper No. CB(1)260/09-10(02))	
001052 – 001530	Chairman Ms Miriam LAU Administration	(a) Ms Miriam LAU's reference to the provision in the Singapore legislation requiring the taxation authority to apply for a court order to obtain certain information before acceding to EoI requests. Her concern about protection of taxpayers' right in Hong Kong as IRD was not subject to similar statutory requirement. (b) The Administration's advice that given the restriction of its domestic bank secrecy law, the Singapore authority had to seek a court order to obtain the restricted information from banks in order to accede to EoI requests for such information. This was not the case for Hong Kong as there was no bank secrecy law in Hong Kong. However, if no restricted information would be involved in the EoI request, the Singapore authority would not be required to notify the person concerned nor apply for a court order. Under the existing legislation, IRD could obtain information from banks and would comply with the most prudent safeguards for EoI arrangement acceptable under the OECD standard to protect privacy and confidentiality of information.	
001531 – 003658	Chairman Mr James TO Administration Mr CHAN Kam-lam ALA4	(a) Mr James TO's view that the Administration's policy of not entertaining any request for information relating to a period before the effective date of the respective CDTAs should not be negotiable. His request that the Administration should stipulate clearly its policy	

Time Marker	Speaker	Subject(s)	Action Required
	Department of Justice (DoJ)	<p>that the EoI arrangement would have no retrospective effect in the primary legislation.</p> <p>(b) The Administration's advice that a standard article would be included in all CDTAs setting out that all provisions under the CDTA should have effect from a stipulated date as agreed and should only apply to taxes after the effective date. Hong Kong had not entertained and would not entertain any request for any information relating to a period before the effective date, whether the information was presented in its original form or in other format after compilation. This would be set out in a protocol which formed part of the CDTA (and hence part of the subsidiary legislation) or in other documents of records. The Secretary for Financial Services and the Treasury would also reaffirm this policy in his speech for the resumption of the Second Reading debate.</p> <p>(c) The Chairman's view that the Administration should consider setting out the policy in the Rules, if not in the primary legislation. Mr TO maintained his view that given the importance of the principle that only information in existence after the effective date of the CDTAs should be exchanged, the Administration should not be allowed any flexibility to modify the relevant provision in treaty negotiations. Mr TO's view that the important principle of no retrospective effect of the EoI arrangement should be set out in the primary legislation.</p> <p>(d) The Administration's reiteration that application of the EoI arrangement to taxes after the effective date of CDTAs had been incorporated as a standard provision of CDTAs, which were subsidiary legislation subject to the Legislative Council (LegCo)'s scrutiny. While appreciating Mr TO's view that the above arrangement should not be modified in treaty negotiations, the Administration's advice that the circumstances of different treaty partners had to be taken into account in determining the way of setting out the details.</p> <p>(e) Mr CHAN Kam-lam's view that it was acceptable to provide for the effective date and</p>	<p>The Administration to take action as required in paragraph 2 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>hence no application of the CDTA with retroactivity in the respective CDTAs as subsidiary legislation, as it was a standard international practice commonly adopted.</p> <p>(f) Responding to Mr TO's enquiry, ALA4's advice that according to the common law principle, statutory provisions would not have retrospective effect. Where necessary, specific provision setting out that the legislation would not have retrospective effect could also be included in the primary legislation.</p> <p>(g) DoJ's advice that instead of stating the absence of retroactivity of the provisions in CDTAs, the "Entry into Force" Article in CDTAs stipulated a future date for commencement of the agreements.</p>	
003659 – 004303	Chairman Administration	Briefing by the Administration on the extract of the draft DIPN, setting out the procedural safeguards that IRD should adopt in processing EoI requests (Annex C to LC Paper No.CB(1)106/09-10(02)).	
004304 – 004913	Chairman Mr James TO Administration	<p>(a) Mr James TO's concern about the propriety of the term "foreseeably relevant" adopted to restrict the scope of information exchange under the OECD Model Article. His question on whether an alternative term, such as "relevant", could provide better protection to the right of the persons concerned to seek legal remedies in the context of domestic law.</p> <p>(b) The Administration's advice that in respect of EoI requests under the five CDTAs signed, there had not been case of legal dispute over the interpretation of the term "foreseeably relevant". As the term was commonly adopted by OECD members, its interpretation in most common law jurisdictions should not be a problem. Moreover, there was little flexibility for Hong Kong to adopt a term other than the standard one adopted in the OECD Model Article.</p>	The Administration to take action as required in paragraph 3 (a) of the minutes.
004914 – 010204	Chairman Mr James TO Administration Ms Miriam LAU	(a) Mr James TO's reference to the refusal of assistance provision in MLA0 and recalled that this had been worked out with the consensus of different political parties that requests for assistance in criminal matters on	

Time Marker	Speaker	Subject(s)	Action Required
		<p>taxation-related offences should be refused. His concern whether the proposed amendments in the Bill to extend the power of IRD to collect and disclose tax information under CDTAs would be at variance with the provision in MLAO. His view that reference should be made to the refusal of assistance provision in MLAO as to the compatibility with the provision in the Bill. He also questioned whether the provision in MLAO would have any impact on the EoI arrangement and vice versa.</p> <p>(b) The Administration's advice that the provision in MLAO had excluded the request for assistance on taxation-related offences as these would be dealt with under the legal framework for CDTAs. While tax information could be provided to the requesting party under CDTAs for the investigation of both civil and criminal offences, the assistance provided under CDTAs was of a much restricted scope and mode (i.e. for provision of tax information only) compared with that under MLAO. The proposed amendments in the Bill sought to enable Hong Kong to adopt the necessary international standard for EoI arrangement under CDTAs.</p> <p>(c) Ms Miriam LAU's view that the exclusion of taxation-related offences in MLAO should not affect the practicability of EoI arrangement to be made under CDTAs.</p>	<p>The Administration to take action as required in paragraph 4 of the minutes.</p>
010205 – 010658	Chairman Mr James TO Administration	<p>(a) Concern shared by Mr James TO and the Chairman about the meaning of "information that is obtainable under the laws or in the normal course of the administration of Hong Kong".</p> <p>(b) The Administration's advice that while the power of IRD to collect taxpayers' information would be extended to that concerning tax of a foreign territory for the purpose of EoI under CDTAs through the proposed amendments in the Bill, IRD would still be subject to the restrictions in information collection under local tax laws, e.g. records beyond the 7-year statutory requirement for record-keeping under IRO would not be collected.</p>	

Time Marker	Speaker	Subject(s)	Action Required
010659 – 012045	Chairman Administration Ms Miriam LAU Ms Starry LEE	<p>(a) Concern shared by the Chairman, Ms Miriam LAU and Ms Starry LEE that the procedural safeguards in relation to IRD's handling of EoI requests would have significant implications on the operation of the business and professional sectors. Their requests that the safeguards be provided in the legislation, such as the Rules or in the form of a technical memorandum, instead of DIPN which was not subject to the scrutiny of LegCo.</p> <p>(b) The Administration's advice that the DIPN set out the operational guidelines for IRD in processing EoI requests to ensure the requests were in line with the provisions in the CDTAs and other procedures as laid down in the Rules. The proposed procedures followed international common practice. It would be more appropriate to stipulate the operational details in a departmental practice note rather than in the legislation, as from time to time, more details might have to be provided to facilitate interpretation of the procedures, e.g. giving more examples on the circumstances of EoI requests.</p>	The Administration to take action as required in paragraph 5 of the minutes.
012046 – 013546	Chairman Mr James TO Administration	<p>(a) Mr James TO's concern whether a contracting party would be asked to provide information not obtainable under the requesting party's domestic law. In response, the Administration's advice that in accordance with the OECD Model Article, a contracting party had no obligation to provide information not obtainable under its domestic law. This safeguard would be incorporated in the provisions of individual CDTAs.</p> <p>(b) Mr James TO's reference to the proposed section 51(4AA) (Clause 5 of the Bill) on "obtaining full information" for a foreign territory under CDTAs and his concern about the protection of the right of the persons concerned in terms of the scope of information exchange.</p> <p>(c) The Administration's response that in processing a disclosure request, IRD would review the provisions of the relevant CDTA to see whether the provisions relating to the request were fully complied with, including whether the</p>	

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		<p>information being requested was "foreseeably relevant" for carrying out the provisions of the agreement or to the administration or enforcement of the domestic laws of the requesting party. According to the OECD standard, the requesting party had to specify its disclosure request to prevent "fishing expeditions". Consideration could be given to setting out in greater details in the DIPN the information/confirmation to be contained in the disclosure request to prove the "relevancy" of the information requested.</p> <p>(d) Responding to Mr James TO's further enquiry on the channels for objection and appeal, the Administration's advice that if a person thought that IRD had not properly discharged its responsibility to ensure that the information requested was within the scope of the relevant CDTA or the law, he could seek challenge of the Government's actions through the judicial system.</p>	<p>The Administration to take action as required in paragraph 3(b) of the minutes.</p>
013547 – 013818	Chairman Administration	<p>(a) The Chairman's concern about the authority for reviewing IRD's decisions on corrections to the requested information. His remark that the view of deputations in this regard should be considered, i.e. a District Judge or an independent tribunal outside the Administration should be the authority for review.</p> <p>(b) The Administration's advice that putting in place an elaborate review mechanism might affect the efficiency of information exchange, which was one of the compliant standards required by OECD. The Administration had to balance all factors, such as personal privacy, the effective implementation of EoI and compliance with international treaty obligations.</p>	
013819 – 014219	Chairman Ms Miriam LAU Ms Starry LEE	<p>(a) Concern shared by Ms Miriam LAU and Ms Starry LEE about the need of providing sufficient safeguards in the legislation to protect an individual's right to privacy in the EoI arrangement. Ms LAU's view that more time would be required to study and make reference to the relevant safeguard provisions in the Singapore legislation. Ms Starry LEE's view that the safeguards provisions in the</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>legislation of other jurisdictions would also be relevant.</p> <p>(b) The Administration's advice while the Singapore authority had to seek a court order to obtain the restricted information from banks due to its bank secrecy law, the notification system proposed in Hong Kong to provide the persons concerned with a copy of the information exchanged and the review procedures would provide more protection to the right of the persons concerned than the notification system in Singapore.</p>	
014220 – 014226	Chairman	Date of next meeting	