

立法會
Legislative Council

LC Paper No. CB(1)2806/10-11
(These minutes have been seen
by the Administration)

Ref : CB1/SS/12/10/2

**Subcommittee on Five Orders Made under Section 49 of the Inland
Revenue Ordinance and Gazetted on 13 May 2011**

**First meeting on
Wednesday, 8 June 2011, at 8:30 am
in Conference Room B of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Audrey EU Yuet-mee, SC, JP
Hon Paul CHAN Mo-po, MH, JP

**Public officers
Attending** : Ms Shirley KWAN
Principal Assistant Secretary for Financial Services and
the Treasury (Treasury)

Ms Joan HUNG
Assistant Secretary for Financial Services and the
Treasury (Treasury)

Mr Richard WONG
Deputy Commissioner of Inland Revenue

Mrs Paulina WONG
Senior Assessor
Inland Revenue Department

Miss Agnes CHEUNG
Senior Government Counsel
Department of Justice

Ms Mabel CHEUNG
Senior Government Counsel
Department of Justice

Mr LUNG Wan-pun
Government Counsel
Department of Justice

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)5

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Mr Noel SUNG
Senior Council Secretary (1)5

Ms Haley CHEUNG
Legislative Assistant (1)5

I Election of Chairman

Mr James TO, the member with the highest precedence among those who were present at the meeting, presided over the election of the Chairman of the Subcommittee. He invited nominations for the chairmanship of the Subcommittee.

2. Mr James TO was nominated by Mr Paul CHAN and the nomination was seconded by Ms Audrey EU. Mr James TO accepted the nomination. There being no other nomination, Mr James TO was elected Chairman of the Subcommittee.

II Meeting with the Administration

(L.N. 64 of 2011

— Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Japan) Order

- L.N. 65 of 2011 — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital) (French Republic) Order
- L.N. 66 of 2011 — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital) (Principality of Liechtenstein) Order
- L.N. 67 of 2011 — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (New Zealand) Order
- L.N. 68 of 2011 — Specification of Arrangements (Government of the Grand Duchy of Luxembourg) (Avoidance of Double Taxation on Income and Capital and Prevention of Fiscal Evasion) (Amendment) Order 2011
- File Ref: TsyB R 183/800-1-1/23/1 (C) — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Japan) Order issued by the Financial Services and the Treasury Bureau
- File Ref: TsyB R 183/800-1-1/21/1 (C) — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital) (French Republic) Order issued by the Financial Services and the Treasury Bureau

File Ref: TsyB R 183/800-1-1/48/1 (C) — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital) (Principality of Liechtenstein) Order issued by the Financial Services and the Treasury Bureau

File Ref: TsyB R 183/800-1-1/18/1 (C) — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (New Zealand) Order issued by the Financial Services and the Treasury Bureau

File Ref: TsyB R 183/800-1-1/25/1 (C) — Legislative Council Brief on Specification of Arrangements (Government of the Grand Duchy of Luxembourg) (Avoidance of Double Taxation on Income and Capital and Prevention of Fiscal Evasion) (Amendment) Order 2011 issued by the Financial Services and the Treasury Bureau

LC Paper No. LS60/10-11 — Legal Service Division Report on Subsidiary Legislation gazetted on 13 May 2011

LC Paper No. CB(1)2396/10-11(01) — Letter from Assistant Legal Adviser to the Administration dated 16 May 2011 on L.N. 67 of 2011

LC Paper No. CB(1)2396/10-11(02) — Administration's reply to the letter from Assistant Legal Adviser dated 16 May 2011

LC Paper No. CB(1)2396/10-11(03) — Letter from Assistant Legal Adviser to the Administration dated 23 May 2011 on L.N. 64 of 2011 and L.N. 65 of 2011

LC Paper No. CB(1)2396/10-11(04) — Administration's reply to the letter from Assistant Legal Adviser dated 23 May 2011

LC Paper No. CB(1)2396/10-11(05) — Marked-up copy of L.N. 68 of 2011 prepared by the Legal Service Division

LC Paper No. CB(1)2395/10-11 — Background brief prepared by the Legislative Council Secretariat)

Discussion

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

Follow-up action to be taken by the Administration

4. The Administration was requested to confirm with explanation whether Hong Kong residents having been charged withholding tax on passive income by the contracting parties at the rate provided in the Agreement would be regarded as having completely fulfilled their tax payment obligation with respect to the relevant income.

(Post-meeting note: The relevant information provided by the Administration was issued to members vide LC Paper No. CB(1)2493/10-11(01) on 15 June 2011.)

III Any other business

Legislative time-table

5. The Chairman said that the Subcommittee had completed the scrutiny of the five Orders: i.e. L.N. 64 to 68 of 2011. In view of the tight time-frame for reporting to the House Committee and the notice requirement for moving amendments to the subsidiary legislation, members agreed to seek extension of the scrutiny period to 6 July 2011. A report on the Subcommittee's deliberations would be made to the House Committee on 17 or 24 June 2011. The Chairman said that he would speak on the deliberations of the Subcommittee at the relevant Council meeting.

6. There being no other business, the meeting ended at 10:00 am.

**Proceedings of the
Subcommittee on Five Orders Made under Section 49 of the
Inland Revenue Ordinance and Gazetted on 13 May 2011
First meeting on Wednesday, 8 June 2011, at 8:30 am
in Conference Room B of the Legislative Council Building**

| Time Marker | Speaker | Subject(s) | Action Required |
|--------------------|--|---|-----------------|
| 000102 – 000220 | Mr James TO Mr Paul CHAN Ms Audrey EU | Election of Chairman | |
| 000221 – 000341 | Chairman | Introductory remark | |
| 000342 – 000724 | Administration | Briefing by the Administration on the proposals | |
| 000725 – 002229 | ALA2 Administration Department of Justice (DoJ) | <p><u>Agreement with Japan</u> (File Ref: TsyB R 183/800-1-1/23/1 (C) and L.N. 64 of 2011)</p> <p>(a) ALA2 enquired, in computing the three-year period for presenting a case under Article 24(1) on "Mutual Agreement Procedure" ("MAP"), when the relevant date of the "first notification" was.</p> <p>(b) The Administration responded that in most cases, the date of the "first notification" would be the date of the notice of assessment, official demand or other instrument for the collection of levy or tax. For Hong Kong, under section 58(3) of the Inland Revenue Ordinance (Cap. 112), any notice sent by post shall be deemed, unless the contrary was shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post.</p> <p>(c) DoJ supplemented that based on paragraph 21 in page 359 of the Commentaries on the Articles of the Organization for Economic Cooperation and Development Model Tax Convention on Income and on Capital (July 2010 version)("OECD Commentaries"), the provisions should be interpreted in the way most favourable to the taxpayer.</p> <p>(d) ALA2 enquired, in computing the two-year period referred to in Article 24(5)(b), when the relevant date of the "presentation of the</p> | |

| Time Marker | Speaker | Subject(s) | Action Required |
|--------------------|---|---|-----------------|
| | | <p>case to the competent authority of the other contracting party" was.</p> <p>(e) The Administration responded that according to the OECD Commentaries, in computing the two-year period under Article 24(5)(b), a case would only be considered to have been presented to the competent authority of the other treaty partner if sufficient information had been presented to that competent authority to allow it to decide whether the objection underlying the case appeared to be justified.</p> | |
| 002230 – 003330 | ALA2 Chairman Administration DoJ | <p>(a) ALA2 pointed out that in the Japanese Agreement, neither Article 25 nor the Protocol expressly provided that there shall be no automatic or spontaneous exchanges of information between the Contracting Parties. However, paragraph 10 of the Protocol to the French Agreement clarified that Article 25 of the French Agreement did not create obligations as regards automatic or spontaneous exchange of information.</p> <p>(b) The Administration replied to the Chairman as set out in paragraph 9 of LC Paper No. CB(1)2396/10-11(04).</p> <p>(c) The Chairman opined that the Administration should seek to include provisions similar to paragraph 10 of the Protocol to the Comprehensive Agreement for Avoidance of Double Taxation ("CDTA") signed with France in all CDTAs, so as to avoid possible misunderstanding between the contracting parties in this regard.</p> <p>(d) DoJ advised that in the negotiation process, Hong Kong would attempt to include provisions in the CDTAs, as far as possible, to clarify that automatic and/or spontaneous exchange of information was not allowed. The OECD Model Tax Convention did not include provision on automatic or spontaneous exchanges of information, though the OECD Commentaries encouraged the exchange of information between the contracting parties. Moreover, in the Article on Exchange of Information in all CDTAs</p> | |

| Time Marker | Speaker | Subject(s) | Action Required |
|--------------------|--------------------------------|--|-----------------|
| | | <p>into which Hong Kong had entered, there was a paragraph (paragraph 3 of Article 25 in the Japanese Agreement) specifying that the provisions in the Article should not be construed as to impose on a Contracting Party the obligation to supply information which was not obtainable under the laws or in the normal course of the administration of that or of the other Contracting Party. As the laws of Hong Kong did not allow for automatic or spontaneous exchange of information by the Inland Revenue Department with the tax authorities of other jurisdictions, there was no basis for the other Contracting Parties who had entered into CDTAs with Hong Kong to expect that Hong Kong had obligation as regards automatic and/or spontaneous exchanges of information. The Government was confident that there was no misunderstanding between Hong Kong and Japan in this regard.</p> <p>(e) The Chairman suggested that where no express provision to clarify that automatic and/or spontaneous exchange of information was not allowed was included in the CDTA because of the stance of the other contracting party concerned, the Government should seek to put on record in official negotiation documents, such as the agreed minutes of meetings, the mutual understanding that there shall be no automatic and/or spontaneous exchange of information under the CDTA. The Administration responded that the Chairman's proposed arrangement would be adopted in future negotiation of CDTAs.</p> | |
| 003331 – 003536 | Mr Paul CHAN Administration | <p><u>Agreement with New Zealand</u> (File Ref: TsyB R 183/800-1-1/18/1 (C)) (L.N. 67 of 2011)</p> <p>In reply to Mr Paul CHAN's enquiry regarding the scope of information that might be disclosed by the New Zealand competent authority to the Office of the Ombudsmen, the Administration referred to paragraph 4(b) of the Protocol to the New Zealand Agreement which stated that "the New Zealand competent authority may disclose information to the Office of the Ombudsmen in the investigation of complaints against the administrative actions of the New Zealand Inland Revenue Department".</p> | |

| Time Marker | Speaker | Subject(s) | Action Required |
|--------------------|---|---|--|
| 003537 – 004820 | Mr James TO Ms Audrey EU Administration | <p data-bbox="536 271 1206 338"><u>Agreement with French Republic</u> (File Ref: TsyB R 183/800-1-1/21/1 (C)) (L.N. 65)</p> <p data-bbox="536 378 1206 1070">(a) The Chairman and Ms Audrey EU doubted whether a Hong Kong resident having been charged withholding tax by a jurisdiction with which Hong Kong had signed a CDTA for the dividends, interests and/or royalties earned in the jurisdiction should be regarded as having completed his tax payment obligation for the relevant income. They were concerned that the Hong Kong resident might also be obliged to complete certain other procedures such as submitting tax returns, and that the final amount of withholding tax charged might not be the amount of tax that the Hong Kong resident was obliged to pay. Ms Audrey EU further pointed out that a Hong Kong resident might have earned other incomes in addition to dividends, interests, and/or royalties in the jurisdiction concerned.</p> <p data-bbox="536 1111 1206 1619">(b) The Administration responded that three types of passive income, i.e. dividends, interest and royalties, were covered in the CDTAs signed between Hong Kong and other jurisdictions. As far as these income types were concerned, the amount of withholding tax charged by the tax authority of another contracting party on a Hong Kong resident should be the amount the Hong Kong resident was obliged to pay, and after the withholding tax had been charged, the Hong Kong resident would be considered as having completed his obligation for payment of the relevant tax.</p> <p data-bbox="536 1659 1206 1800">(c) The Chairman requested that the Administration to provide a written reply to address his and Ms EU's concerns on this issue.</p> | The Administration to take action as per paragraph 4 of the minutes. |
| 004821 – 005514 | ALA2 Administration Chairman | <p data-bbox="536 1883 667 1912"><u>Article 23</u></p> <p data-bbox="536 1953 1206 2094">(a) ALA2 pointed out that unlike the Agreements with Japan, the Principality of Liechtenstein and New Zealand, paragraph 1 of Article 23 of the French Agreement did not include a</p> | |

| Time Marker | Speaker | Subject(s) | Action Required |
|--------------------|------------------------------------|--|-----------------|
| | | <p>sentence specifying that the non-discrimination provisions stated in that paragraph also applied to persons who were not residents of one or both of the contracting parties.</p> <p>(b) DoJ responded that the OECD Model Tax Convention had included a similar sentence specifying the application of non-discrimination provisions for persons who were not residents of one or both of the contracting parties. That sentence, however, might or might not be included in a CDTA at the discretion of the contracting parties. At the request of the French government, that sentence was not included in the CDTA between Hong Kong and France. The CDTA between Hong Kong and Vietnam also did not include such provision. As the non-discrimination provisions did not apply to persons who were not residents of one or both of the contracting parties under CDTA signed with France, a person who was not a resident of Hong Kong or France would not benefit from the non-discriminatory entitlement as provided under paragraph 1 of Article 23 of the Agreement.</p> <p>(c) DoJ added that as Hong Kong adopted the territorial basis of taxation whereby only income sourced from Hong Kong was subject to tax therein, Hong Kong would apply the same tax treatment/requirement to a person irrespective of whether the person was or was not a resident of a contracting party of a CDTA.</p> | |
| 005515 – 005835 | ALA2 Administration Chairman | <p>(a) ALA2 pointed out that unlike the CDTA signed with Japan, Article 24 of the CDTA signed with France did not provide for arbitration or any other method of dispute resolution in the event that the competent authorities of the contracting parties were unable to resolve a case by mutual agreement.</p> <p>(b) DoJ responded that the use of arbitration to resolve cross-border tax disputes was a recent development in the OECD and the relevant provisions were only added into the MAP Article in the OECD Model Tax Convention</p> | |

| Time Marker | Speaker | Subject(s) | Action Required |
|----------------------------|---|--|-----------------|
| | | <p>in 2008. The provisions on arbitration were first adopted in the CDTAs with the Netherlands, Japan and Luxembourg. The CDTA negotiation with France had started in 2003, and in the recent negotiation communications, the French government was reluctant to reopen discussions on provisions which had been agreed in previous rounds of discussion. Without the arbitration provisions, it was possible that there was no final resolution of a dispute if the dispute could not be settled by mutual agreement between the contracting parties. The HKSAR Government was prepared to include provisions for arbitration in future CDTAs.</p> | |
| <p>005836 – 010638</p> | <p>ALA2 Administration Chairman</p> | <p><u>Article 25</u></p> <p>(a) ALA2 pointed out that paragraph 7 of the Protocol to the CDTA signed with Japan expressly provided that a contracting party was not obliged to exchange information concerning taxes other than those covered by Article 2. However, neither Article 25 nor the Protocol to the CDTA signed with France included a similar provision.</p> <p>(b) The Administration responded that the confinement of exchange of information to taxes covered by a CDTA was effected by the removal of "Article 2" from the last sentence of Article 25(1), which reads "The exchange of information is not restricted by Articles 1 and 2" in the OECD Model Tax Convention. Article 25(1) of the CDTA signed with France was the same as the sample exchange of information Article submitted to the Bills Committee during the scrutiny of the Inland Revenue (Amendment) (No.3) Bill 2009. DoJ supplemented that the provision in paragraph 7 of the Protocol to the CDTA signed with Japan in fact was included at the request of the Japanese side and was intended to cater for possible future expansion of the scope of information subject to exchange under the Agreement. Such intention was revealed in the later part of paragraph 7.</p> | |

| Time Marker | Speaker | Subject(s) | Action Required |
|----------------------------|------------------------------------|---|-----------------|
| | | <p>(c) In response to the Chairman's enquiry, ALA2 said that he concurred with the Administration that the removal of "Article 2" from the last sentence of Article 25(1) of the CDTA signed with France had the effect that only information relating to taxes covered by the Agreement would be exchanged between the contracting parties.</p> | |
| <p>010639 – 010833</p> | <p>Administration Chairman</p> | <p><u>Agreement with the Principality of Liechtenstein</u> (File Ref: TsyB R 183/800-1-1/48/1 (C)) (L.N. 66 of 2011)</p> <p>In response to the Chairman's observation that the types of taxes covered by the CDTA signed with Liechtenstein were less than those for other CDTAs, the Administration responded that as Liechtenstein did not impose any tax on dividends, interests and royalties, the tax relief that Hong Kong residents would benefit from the Agreement therefore did not need to cover taxes on dividends, interests and royalties.</p> | |
| <p>010834 – 011917</p> | <p>Chairman Administration</p> | <p><u>Agreement with New Zealand</u> (File Ref: TsyB R 183/800-1-1/18/1 (C)) (L.N. 67 of 2011)</p> <p>(a) The Chairman enquired about the tax obligations for a Hong Kong resident who had emigrated to New Zealand.</p> <p>(b) The Administration responded that the status of a taxpayer was subject to the definition of resident in Article 4 of the Agreement. DoJ supplemented that where by reason of the provisions of paragraph 1 of Article 4 an individual was a resident of both contracting parties, the status of the individual would be determined under the provisions in paragraph 2 of Article 4. Where necessary, the status of the individual had to be resolved through mutual agreement between the contracting parties.</p> <p>(c) The Chairman opined that the Government should draw up relevant policy guidelines relating to the determination of the status of a resident who might satisfy the definitions of "resident" of both contracting parties.</p> | |

| Time Marker | Speaker | Subject(s) | Action Required |
|--------------------|------------------------------------|--|------------------------|
| 011918 – 012539 | ALA2 Chairman Administration | <u>Agreement with the Government of the Grand Duchy of Luxembourg</u> (File Ref: TsyB R 183/800-1-1/25/1 (C)) (L.N. 68 of 2011) The Administration explained that the Luxembourg Protocol sought to upgrade the Exchange of Information Article in the Luxembourg Agreement to the 2004 version. The Administration also pointed out that the proposed amendment to Article 5 of the Agreement sought to more accurately define the term "permanent establishment" in the context of the Agreement. | |
| 012540 – 012716 | Chairman Clerk ALA2 | Way forward | |

Council Business Division 1
Legislative Council Secretariat
22 July 2011