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LEGISLATIVE COUNCIL SECRETARIAT
LEGAL SERVICE DIVISION

CB(1)2396/10-11(03)

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23 May 2011

Ms Shirley KWAN
Principal Assistant Secretary for Financial Services and
the Treasury (Treasury)
Financial Services and the Treasury Bureau
4/F, Main Wing and East Wing
Central Government Offices
Hong Kong

Dear Ms KWAN,

**Inland Revenue (Double Taxation Relief and
Prevention of Fiscal Evasion with respect to Taxes on Income)
(Japan) Order (L.N. 64)**

**Inland Revenue (Double Taxation Relief and
Prevention of Fiscal Evasion with respect to Taxes on Income and Capital)
(French Republic) Order (L.N. 65)**

For the purposes of our scrutiny of the above items of subsidiary legislation including the comprehensive agreements for avoidance of double taxation (CDTAs) signed with Japan (the Japanese Agreement) and France (the French Agreement) and the protocols thereto, we should be grateful for your clarifications on the legal and drafting issues set out in **Annexes 1 and 2** respectively. Your early reply in both languages, preferably **by 27 May 2011**, will be appreciated. Please also send an electronic copy to ftse@legco.gov.hk.

Yours sincerely,

(Bonny LOO)

Assistant Legal Adviser

c.c. LA
SALA1
ALA2

Comments on the Japanese Agreement

Article 2

1. Paragraph 3 of Article 2 enumerates the types of taxes to which the Agreement applies. The relevant Japanese taxes are income tax, corporation tax and local inhabitant taxes. What is the reason for not including in this paragraph "the enterprise tax" in relation to international traffic referred to in paragraph 2 of Article 8?

Article 5

2. Is it necessary to clarify whether an agent whose activities are devoted wholly or almost wholly on behalf of an enterprise will be considered an "agent of an independent status" within the meaning of paragraph 6 of Article 5? See the same paragraph under the French Agreement.

Article 16

3. Paragraph 1 of Article 16 of both the Japanese Agreement and the French Agreement provides certain examples of the term "entertainer". Please confirm that such examples are not exhaustive. Does the term "musician" (樂師) include vocalists as well as those who play or conduct musical instruments?

Article 24

4. In computing the three-year period for presenting a case under paragraph 1 of Article 24, when is the relevant date of the "first notification"? Is it the date when the notification is issued by the relevant Contracting Party, or the date when the notification is received by the person affected by such notification? How is the person to present his case? Presumably it must be in writing, but will there be prescribed forms for the person to complete?

5. Again, in computing the two-year period referred to in paragraph 5(b) of Article 24, when is the relevant date of the "presentation of the case to the competent authority of the other Contracting Party"? Is it the date when it is sent or the date when it is received?

Article 25

6. In relation to the further provisions on the exchange of information under Article 25 as set out in Paragraphs 6(b)(iv) and 7 of the Protocol, it is noted that under paragraph 2 of Article 25, persons and authorities to whom confidential information is disclosed may further disclose the information in public court proceedings or in judicial decisions. Please clarify whether the arbitration panel established under Article 24 of the Agreement and Paragraph 6 of the Protocol will be at liberty to disclose in its arbitration decisions confidential information received under Article 25.

7. Neither Article 25 nor the Protocol expressly provides that there shall be no automatic or spontaneous exchanges of information between the Contracting Parties. We note, however, that Paragraph 10 of the Protocol to the French Agreement clarifies that Article 25 of the French Agreement does not create obligations as regards automatic or spontaneous exchange of information. In the absence of such an express provision, how will the Administration ensure that tax information will only be exchanged upon request by the competent authorities of Japan? According to paragraph 8 of Annex A to your letter to the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009 (Bills Committee) dated 21 October 2009 (LC Paper No. CB(1)106/09-10(02)), other documents of record (e.g. a Memorandum of Understanding between the two contracting parties) may be signed to confirm that automatic or spontaneous exchange will not be accepted. Does the Administration intend to sign such a Memorandum of Understanding with the Government of Japan?

Protocol

8. Paragraph 1 of the Protocol excludes from the term "tax" any amount which represents a penalty or interest. Is "additional tax" (which could be as much as treble the amount of any undercharged tax) under section 82A of the Inland Revenue Ordinance (Cap. 112) also excluded? See Paragraph 3 of the Protocol to the French Agreement.

Chinese text

9. In paragraph 1(a)(i) of Article 4, the phrase "has a... permanent home or habitual abode" is rendered as "擁有永久性住所或慣常居所". "擁有" suggests that the permanent home or habitual abode must be owned (not rented),

since "擁有" means "owned" elsewhere in the Agreement: paragraph 2(a) of Article 10, paragraph 1 of Article 17, paragraph 1 of Article 21, paragraph 3 of Article 22 and paragraph 5 of Article 23. In paragraph 2(a) of Article 4, the expression "has a permanent home available to him" is rendered as "有可供其使用的永久性住所". Please clarify whether "有" or "擁有" is more appropriate in the context of paragraph 1(a)(i) of Article 4.

10. In paragraph 1(b) of Article 4, the expression "is liable to tax" is rendered as "有繳稅義務". However, "liability" is rendered as "法律責任" in paragraph 5 of Article 12. In paragraph 1 of Article 4 of the Chinese translation of the French Agreement, "liable to tax" is translated as "有...繳稅的法律責任". Please consider whether paragraph 1(b) of Article 4 of the Japanese Agreement should also use "有繳稅責任", rather than "有繳稅義務".

11. In paragraph 2 of Article 6 of both the Japanese Agreement and the French Agreement, the term "variable or fixed payments" is rendered as "不固定或固定收入". In paragraph 1 of Article 6, "收入" means "income", and "payments" is referred to as "付款" in paragraph 3 of Article 12 and Article 19. For the sake of consistency and to avoid confusing with the term "income", should "payments" be rendered as "付款" in paragraph 2 of Article 6?

12. In paragraph 2 of Article 8, "an enterprise" is referred to as "企業", whereas "enterprise tax" is rendered as "事業稅". Should the Chinese text for "enterprise tax" be revised to "企業稅"?

13. Paragraph 3 of Article 9 renders "default" as "瞞稅", which is a rather narrow rendition, given that "default" could mean any failure, omission or non-compliance. Please consider whether "失責" or "違規" is more appropriate in this context.

14. Paragraph 2 of Article 22 renders the expressions "the amount of Hong Kong Special Administrative Region tax" and "the Japanese tax" respectively as "香港特別行政區稅額" and "日本國稅額". Since "Hong Kong Special Administrative Region tax" and "Japanese tax" are defined terms under paragraph 5 of Article 2 which renders them respectively as "香港特別行政區稅項" and "日本國稅項", it may be more accurate to use "香港特別行政區稅項款額" and "日本國稅項" in paragraph 2 of Article 22.

15. Paragraph 8 of the Protocol renders "clients" as "委託人", but "clients" are referred to as "當事人" in a similar context in section 51(4)(a) of the Inland Revenue Ordinance (Cap. 112). Please explain the discrepancy.

Comments on the French Agreement

Article 2

1. Please explain the nature of the French "tax on salaries" (*la taxe sur les salaires*) referred to in paragraph 3(a)(iv) of Article 2. Why does Paragraph 2 of the Protocol provide that this tax on salaries is regulated by the provisions of the Agreement applicable to business profits (Article 7) rather than those applicable to income from employment (Article 14)?

Article 21

2. The meaning of paragraph 1(b) of Article 21 is not immediately clear from the English text. Based on the Chinese translation of that paragraph, we assume that its intended meaning is as follows:

"If more than 50 per cent of the value of the assets or property of a company, trust or comparable institution consists of, or is derived (directly or indirectly through the interposition of one or more other companies, trusts or comparable institutions) from, immovable property referred to in Article 6 and situated in a Contracting Party or rights connected with such immovable property, capital represented by shares or other rights in such a company, trust or comparable institution may be taxed in that Party."

As presently drafted, the English text does not seem to convey this meaning. Please consider if it is necessary to improve the drafting of the English text.

Article 23

3. Please clarify whether the non-discrimination provisions under paragraph 1 of Article 23 also apply to persons who are not residents of one or both of the Contracting Parties, as is the case under the Japanese Agreement.

Article 24

4. In relation to Article 24, we repeat our observations set out in paragraphs 4 to 5 of Annex 1. In addition, unlike the Japanese Agreement, Article 24 of the French Agreement does not provide for arbitration or any other method of dispute resolution in the event that the competent authorities are unable to resolve a case by mutual agreement, although we note that Paragraph 13 of the Protocol provides that the competent authorities of the Contracting Parties may settle jointly or separately administrative measures necessary to carry out the provisions of the Agreement. How will disputes under the French Agreement be resolved if they cannot be settled by mutual agreement?

Article 25

5. Paragraph 1 of Article 25 permits exchange of information "concerning taxes of every kind and description imposed on behalf of the Contracting Parties, or of their political subdivisions or local or territorial authorities". Neither Article 25 nor the Protocol seeks to confine the scope of exchange to information concerning taxes covered by Article 2. We note, however, that Paragraph 7 of the Protocol to the Japanese Agreement expressly provides that a Contracting Party is not obliged to exchange information concerning taxes other than those covered by Article 2. It is noted that as a safeguard to be incorporated in CDTAs, the Administration will seek to confine the scope of information exchange to "taxes covered by the Agreement" (i.e. income taxes as stated in Article 2 of the CDTA): see paragraph 3 of Annex A to your letter to the Bills Committee dated 21 October 2009. Why is such a provision not included in the French Agreement or its Protocol?

Protocol

6. Paragraph 8 of the Protocol provides that payments received as a consideration for technical, engineering, consultant or supervisory services or for the right to distribute software are to be dealt with as "commercial income" in accordance with Article 7. However, Article 7 refers to "business profits" or "profits" rather than "commercial income". Please clarify the relationship, if any, between these terms.

Chinese text

7. The Chinese translation of the French Agreement refers to "local authority" or "local authorities" as "地區主管當局" (e.g. paragraph 1 of Article 2, paragraph 1 of Article 4, Article 18, paragraph 6 of Article 23 and paragraph 1 of Article 25). Please consider whether this is likely to cause confusion since "competent authority" (which is a defined term under paragraph and "主管當局" (e.g. paragraph 1(8) of Article 3). Would the Administration consider using "地方當局" as the Chinese text for "local authorities"?