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**Legislative Council**

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on 25 May 2012**

**Legal Service Division Report on  
Subsidiary Legislation Gazetted on 18 May 2012**

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**Amendment to be made by** : 20 June 2012 (or 11 July 2012 if extended by resolution)

**PART I AVOIDANCE OF DOUBLE TAXATION**

**Inland Revenue Ordinance (Cap. 112)**

**Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (State of Kuwait) Order (L.N. 96)**

**Inland Revenue (Double Taxation Relief with respect to Taxes on Income) (Switzerland) Order (L.N. 97)**

**Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Malta) Order (L.N. 98)**

L.N. 96 to L.N. 98 are made by the Chief Executive (CE) in Council under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) to give effect to the following comprehensive agreements for avoidance of double taxation (CDTA) respectively -

- (a) the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China (HKSARG) and the Government of the State of Kuwait for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income together with a Protocol to the Agreement signed on 13 May 2010 (Kuwaiti Agreement);
- (b) the Agreement between HKSARG and the Swiss Federal Council for the Avoidance of Double Taxation with respect to Taxes on Income together with a Protocol to the Agreement signed on 4 October 2011 (Swiss Agreement); and

- (c) the Agreement between HKSARG and the Government of Malta for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income together with a Protocol thereto signed on 8 November 2011 (Maltese Agreement).

2. Under section 49(1A) of Cap. 112, CE in Council may, by order, declare that arrangements have been made with the government of any territory outside Hong Kong with a view to affording relief from double taxation in relation to income tax and any similar tax imposed by the laws of that territory.

3. According to the LegCo Briefs (File Ref: TsyB R 183/800-1-1/34/0 (C), TsyB R 183/800-1-1/31/0 (C) and TsyB R 183/800-1-1/52/0 (C)) issued by the Financial Services and the Treasury Bureau (FSTB) on 16 May 2012, while a local resident's income derived from sources outside Hong Kong would not be taxed in Hong Kong and hence would not be subject to double taxation, double taxation may occur where a foreign jurisdiction taxes its own residents' income derived from Hong Kong. Although many jurisdictions provide their residents with unilateral tax relief for the Hong Kong tax they paid on income derived from Hong Kong, the existence of a CDTA will provide enhanced certainty and stability for the elimination of double taxation. Besides, the tax relief provided under a CDTA may exceed the level provided unilaterally by a tax jurisdiction.

4. For the purposes of section 49(1A) of Cap. 112, L.N. 96 to L.N. 98 declare respectively that the following arrangements have been made with a view to affording relief from double taxation in relation to income tax and any similar tax, and that it is expedient that those arrangements should have effect -

- (a) the arrangements specified in Articles 1 to 28 of the Kuwaiti Agreement and Paragraphs 1 to 7 of the Protocol thereto;
- (b) the arrangements specified in Articles 1 to 29 of the Swiss Agreement and Paragraphs 1 to 8 of the Protocol thereto; and
- (c) the arrangements specified in Articles 1 to 27 of the Maltese Agreement and Paragraphs I to III of the Protocol thereto.

5. Upon such declaration, the arrangements have effect in relation to tax under Cap. 112 despite anything in any enactment and, for the purposes of any provision of those arrangements that requires disclosure of information concerning tax of the relevant jurisdictions, have effect in relation to any tax of those jurisdictions that is the subject of that provision.

6. The provisions in the Kuwaiti Agreement, the Swiss Agreement and the Maltese Agreement set out the allocation of taxing rights between HKSARG and the respective jurisdictions and the relief on tax rates on different types of income. Each

Agreement contains provisions based on the model text of the Organisation for Economic Cooperation and Development 2004 version of the Exchange of Information Article (sample EoI Article) annexed to LC Paper No. CB(1)106/09-10(02) which was presented to the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009. According to the LegCo Briefs, the Kuwaiti Agreement, the Swiss Agreement and the Maltese Agreement have adopted all the safeguards in the sample EoI Article. It is noted that each Agreement (or its Protocol) provides that information should only be exchanged upon request (i.e. no automatic or spontaneous exchange), that the requested information must be foreseeably relevant, and that the information must be disclosed only to the tax authorities and not their oversight bodies nor any third jurisdiction. However, the Protocol to the Maltese Agreement permits the information to be disclosed to the National Audit Office. The Legal Service Division (LSD) is asking the Administration to clarify the reason for including such a provision.

7. L.N. 96 to L.N. 98 will come into operation on 13 July 2012.

8. The Panel on Financial Affairs has not been consulted on L.N. 96 to L.N. 98.

## **PART II MISCELLANEOUS ITEMS**

### **Banking Ordinance (Cap. 155)**

#### **Banking Ordinance (Amendment of Seventh Schedule) Notice 2012 (L.N. 99)**

9. L.N. 99 is made by CE in Council under section 135(1) of the Banking Ordinance (Cap. 155) to amend the minimum criteria for authorization under the Seventh Schedule to Cap. 155 so as to remove the following requirements for a company seeking authorization to carry on banking business in Hong Kong:

- (a) the requirement to have total customer deposits of not less than \$3 billion and total assets of not less than \$4 billion (the size criteria); and
- (b) (in the case of a company incorporated in Hong Kong) the requirement to have been a deposit-taking company (DTC) or a restricted licence bank (or any combination thereof) for not less than three continuous years, or to be a subsidiary of a bank incorporated outside Hong Kong or a holding company of such a bank that has been authorized to carry on banking business in Hong Kong for not less than three continuous years (the three-year requirement).

10. Under section 16(2) of Cap. 155, the Monetary Authority shall refuse an application for authorization to carry on a banking business or a business of taking deposits if any criteria specified in the Seventh Schedule (including the size criteria and the three-year requirement) are not fulfilled.

11. According to the LegCo Brief (no file reference provided) issued by FSTB on 16 May 2012, the removal of the size criteria and the three-year requirement would help to enhance Hong Kong's status as an international financial centre as the United Kingdom, the United States of America, Germany, Switzerland, Australia and Singapore impose no similar requirements.

12. The LegCo Brief further states that the Hong Kong Monetary Authority (HKMA) has consulted the Banking Advisory Committee, the DTC Advisory Committee, the Hong Kong Association of Banks and the DTC Association, all of whom have indicated support for the proposed amendments.

13. The Panel on Financial Affairs was briefed on the proposal at its meeting held on 2 March 2012. Members did not make any adverse comments but raised various questions. In response, HKMA provided supplementary information after the meeting vide LC Paper No. CB(1)1356/11-12(01) confirming that in its assessment the removal of the size criteria and the three-year requirement would not undermine the stability of the banking sector.

14. L.N. 99 will come into operation on 12 July 2012.

**Public Health and Municipal Services Ordinance (Cap. 132)**  
**Public Health and Municipal Services (Fees and Charges) (Leisure Facilities)**  
**Regulation (L.N. 100)**

15. L.N. 100 is made by the Secretary for Home Affairs under section 124J of the Public Health and Municipal Services Ordinance (Cap. 132) to provide for the fees payable for a monthly ticket for unlimited entries to all public swimming pools (except Wan Chai Swimming Pool<sup>1</sup>) designated by section 42A of, and specified in the Fourteenth Schedule to, Cap. 132.

16. According to paragraph 3 of the LegCo Brief (File Ref.: HAB/CS/CR 6/8/160) issued by the Home Affairs Bureau (HAB) in May 2012, the Public Swimming Pool Monthly Ticket Scheme (the Scheme) is introduced to lighten the financial burden of frequent elderly swimmers and to promote swimming among the public. L.N. 100 prescribes two levels of monthly fees, namely:

- (a) a "concessionary rate" of \$150 for –
  - (i) a person aged 3 or above, but below 14;
  - (ii) a person aged 60 or above;
  - (iii) a disabled person;
  - (iv) an accompanying carer of a disabled person; or
  - (v) a full-time student; and

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<sup>1</sup> According to HAB, Wan Chai Swimming Pool is excluded because it is designated for group training.

(b) a "normal rate" of \$300 for all other persons.

17. According to HAB, the District Council Chairmen and Vice-Chairmen have been consulted, and are supportive of the proposal.

18. The Panel on Home Affairs was briefed on the proposal at its meeting held on 10 February 2012. Members were generally supportive of the proposal. The Panel also passed a motion at the meeting calling on the Administration to introduce the Scheme as soon as possible and set the price of the monthly ticket at a level of no more than \$300.

19. L.N. 100 will come into operation on 5 July 2012.

### **Dangerous Drugs Ordinance (Cap. 134)**

### **Dangerous Drugs Ordinance (Amendment of First and Third Schedules) Order 2012 (L.N. 101)**

20. L.N. 101 is made by CE under section 50(1) of the Dangerous Drugs Ordinance (Cap. 134) after consultation with the Executive Council:

- (a) to amend Part I of the First Schedule to Cap. 134 in order to specify gamma-butyrolactone (GBL), *Salvia divinorum* (or any part of it) and its active ingredient, salvinorin-A, as dangerous drugs so that their trafficking, manufacture, possession, supply, import and export would be subject to strict control under Cap. 134;
- (b) to include in Part II of the First Schedule to Cap. 134 an exemption in respect of a preparation of GBL containing not more than 0.1% of GBL which has no, or a negligible, risk of abuse; and
- (c) to make minor textual amendments to Parts I, II, III and IV of the First Schedule and to the Third Schedule to Cap. 134.

21. Members may refer to the LegCo Brief (File Ref.: NCR 2/1/8 S/F (5) Pt. 2) issued by the Narcotics Division of the Security Bureau in May 2012 for details of the potential harmful effects of the substances referred to above.

22. According to paragraph 21 of the LegCo Brief, the Action Committee Against Narcotics has been consulted and supports the legislative proposal. The pharmaceutical and chemical trades, as well as the food industry, have also been consulted and have no objection.

23. At its meeting on 13 March 2012, the Panel on Security was consulted on the Administration's proposal. Members supported it in principle.

24. L.N. 101 will come into operation on 14 July 2012.

**Road Traffic Ordinance (Cap. 374)**

**Road Traffic (Breath Analysing Instruments, Screening Devices and Pre-screening Devices) (Amendment) Notice 2012 (L.N. 102)**

25. L.N. 102 is made by the Commissioner of Police under section 39F(1)(b) and (c) of the Road Traffic Ordinance (Cap. 374) to amend Schedules 2 and 3 to the Road Traffic (Breath Analysing Instruments, Screening Devices and Pre-screening Devices) Notice (Cap. 374 sub. leg. S) in order to add Alcotest 6810 manufactured by Dräger, Lubeck, Germany (the Device) as:

- (a) an approved screening device for the purpose of indicating whether the proportion of alcohol in a person's breath is likely to exceed the prescribed limit; and
- (b) an approved pre-screening device for the purpose of indicating whether or not the proportion of alcohol in a person's breath reaches such a level that it would be reasonable to suspect that such proportion is likely to exceed the prescribed limit.

26. According to the LegCo Brief (File Ref.: LM (1/11) in CP/T 228/22) issued by the Police in May 2012, the Device has been tested to be accurate, reliable and suitable for performing both screening and pre-screening tests.

27. The Panel on Transport has not been consulted on L.N. 102.

28. L.N. 102 will come into operation on 22 July 2012.

**Concluding Observations**

29. No difficulties have been identified in relation to the legal or drafting aspects of L.N. 99 to L.N. 102. LSD is, however, seeking the Administration's clarifications on certain technical issues in relation to L.N. 96 to L.N. 98. If necessary, a further report will be issued after considering the Administration's response.

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