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LC Paper No. LS7/11-12

**Paper for the House Committee Meeting
on 25 November 2011**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 18 November 2011**

Date of tabling in LegCo : 23 November 2011

Amendment to be made by : 21 December 2011 (or 11 January 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) (Portuguese Republic) Order
(L.N. 155)**

**Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion
with respect to Taxes on Income) (Kingdom of Spain) Order (L.N. 156)**

**Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion
with respect to Taxes on Income) (Czech Republic) Order (L.N. 157)**

L.N. 155 to L.N. 157

L.N. 155 to L.N. 157 are made by the Chief Executive in Council under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) (the Ordinance) 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 Portuguese Republic 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 22 March 2011 (Portuguese Agreement);

- (b) the Agreement between HKSARG and the Government of the Kingdom of Spain 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 1 April 2011 (Spanish Agreement); and
- (c) the Agreement between HKSARG and the Government of the Czech Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income signed on 6 June 2011 (Czech Agreement).

2. Under section 49(1A) of the Ordinance, the Chief Executive 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 tax of a similar character imposed by the laws of that territory.

3. According to the LegCo Briefs (File Ref: TsyB R 183/800-1-1/57/1 (C), TsyB R 183/800-1-1/39/1 (C) and TsyB R 183/800-1-1/33/1 (C)) issued by the Financial Services and the Treasury Bureau on 16 November 2011 on L.N. 155 to L.N. 157, 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 do provide their residents with unilateral tax relief for the Hong Kong tax they paid on income derived therefrom, the existence of a CDTA will provide enhanced certainty and stability in respect of the elimination of double taxation. Besides, the tax relief provided under a CDTA may exceed the level provided unilaterally by a tax jurisdiction.

4. L.N. 155 to L.N. 157 declare respectively that for the purposes of section 49(1A) of the Ordinance, the following arrangements have been made as double taxation relief arrangements and it is expedient that those arrangements should have effect -

- (a) the arrangements specified in Articles 1 to 29 of the Portuguese Agreement and Paragraphs 1 to 6 of the Protocol to the Portuguese Agreement;
- (b) the arrangements specified in Articles 1 to 27 of the Spanish Agreement and Paragraphs 1 to 7 of the Protocol to the Spanish Agreement; and

- (c) the arrangements specified in Articles 1 to 27 of the Czech Agreement.

5. The provisions in the Portuguese Agreement, the Spanish Agreement and the Czech 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 of the above Agreements contains an article on exchange of information which is based on the Organisation for Economic Cooperation and Development (OECD) 2004 version of the Exchange of Information (EoI) Article. During the scrutiny of the Inland Revenue (Amendment) (No. 3) Bill 2009, the Administration presented a sample EoI Article to the Bills Committee vide LC Paper No. CB(1)106/09-10(02). According to the LegCo Briefs for L.N. 155 to L.N. 157, the Portuguese Agreement, the Spanish Agreement and the Czech Agreement have adopted all the safeguards in the sample EoI Article.

6. The effects of the declaration made under section 49(1A) in respect of the arrangements set out in paragraph 4 above are -

- (a) that the arrangements have effect in relation to tax under the Ordinance despite anything in any enactment; and
- (b) that the arrangements shall, for the purposes of any provision of those arrangements that requires disclosure of information concerning tax of the jurisdictions, have effect in relation to any tax of the jurisdictions that is the subject of that provision.

7. L.N. 155 to L.N. 157 will come into operation on 12 January 2012.

8. The Panel on Financial Affairs has not been consulted on L.N. 155 to L.N. 157.

9. The Legal Service Division is scrutinizing the legal and drafting aspects of L.N. 155 to L.N. 157. A copy of Legal Service Division's letter to the Administration of 22 November 2011 seeking clarifications is annexed for Members' reference (Annex). A further report will be provided if necessary.

PART II CIVIL AVIATION

Civil Aviation Ordinance (Cap. 448)

Air Transport (Licensing of Air Services) (Amendment) Regulation 2011 (L.N. 158)

10. The Amendment Regulation is made by the Chief Executive (CE) in Council under section 13 of the Civil Aviation Ordinance.

11. The Air Transport (Licensing of Air Services) Regulations require a person that uses a Hong Kong-registered aircraft to provide scheduled air services to and from Hong Kong to hold a valid licence. The Air Transport Licensing Authority (ATLA) is responsible for granting licences to local airlines to operate the said air services. According to the LegCo Brief, the existing regulatory regime of ATLA needs to be improved to meet the trend of global liberalization of air services.

12. Under the Amendment Regulation, ATLA is no longer required to consider whether any uneconomical overlapping of air services will be resulted before deciding to grant or renew a licence. Rather, ATLA must pay regard to public interest, the development of air services and satisfy itself that the applicant is (and will continue to be) financially capable to operate the air services that it seeks to provide. A licence holder must inform ATLA if it is likely to become unable to meet the financial obligations required. Further, to minimize the administrative burden on both the airlines and ATLA, licences granted are changed from specific-route-based to airline-based. The structure of fees chargeable for the licences is also adjusted in the light of the said change. Arrangements during the transitional period is also provided for licences which would otherwise be valid on or after the commencement date of the Amendment Regulation but for the commencement. In addition, the Amendment Regulation also raises the existing penalties substantially to bring them up-to-date and empowers the CE to appoint persons to assist or advise ATLA in discharging its duties.

13. At present, ATLA is regulating both local and non-local airlines. The practice is inconsistent with ATLA's role to regulate local airlines only. To resolve the inconsistency, the Amendment Regulation provides that any non-local airline may use a Hong Kong registered aircraft to provide scheduled air services to and from Hong Kong by holding a document equivalent to an Air Operator's Certificate (AOC) and use the aircraft in accordance with an operating permit issued by the Civil Aviation Department (CAD).

14. Between the first half of 2010 and early 2011, the Administration conducted consultations on the proposals to improve the regulatory regime of ATLA and changes to the proposals. On 19 April 2011, the Administration discussed with the Panel on Economic Development on the outcome of the consultations. The Panel in general supported the improvements made to the regulatory regime of ATLA and the changes to the proposals.

15. The Amendment Regulation will come into operation on a day to be appointed by the Secretary for Transport and Housing by notice published in the Gazette.

16. Members may refer to the LegCo Brief (File Ref: THB(T)CR 8/951/68) issued by Transport and Housing Bureau and dated 16 November 2011 for further information.

Civil Aviation Ordinance (Cap. 448)

Hong Kong Air Navigation (Fees) (Amendment) Regulation 2011 (L.N. 159)

Civil Aviation (Aircraft Noise) Ordinance (Cap. 312)

Civil Aviation (Aircraft Noise) (Certification) (Amendment) Regulation 2011 (L.N. 160)

17. According to the LegCo Brief, the policy of the government is that fees and charges should in general be set at a level sufficient to recover the full cost of providing the services. To achieve the said policy, the Administration has reviewed the prescribed fees and charges that relate to civil aviation under the Hong Kong Air Navigation (Fees) Regulations (Fees Regulations) and the Civil Aviation (Aircraft Noise) (Certification) Regulations (Certification Regulations) and has proposed to amend those regulations as specified respectively by L.N. 159 and L.N. 160.

L.N. 159

18. L.N. 159 is made by the CE under Article 97 of the Air Navigation (Hong Kong) Order 1995 (principal Order) after consultation with the Executive Council to amend the Fees Regulations.

19. In L.N. 159, fees for items that are currently over-charged are lowered whereas fees which are under-recovered are raised. New chargeable items are introduced and certain items which are currently subsumed under the AOC fees are being singled out and charged separately. An obsolete fee item

is removed and the official flying tests together with its fees are abolished. In addition, the existing structure of fees chargeable on various pilots and flight engineers examinations are streamlined into 2 chargeable items.

20. Further, L.N. 159 also provides for the time and manner of fees payable to and refund from Director-General of Civil Aviation¹ (DGCA). In addition, provisions are introduced for the recovery of cost on investigations conducted in connection with applications submitted pursuant to the principal Order.

L.N. 160

21. L.N. 160 is made by the Secretary for Financial Services and the Treasury under section 29A of the Interpretation and General Clauses Ordinance (Cap. 1) by virtue of the Civil Aviation (Aircraft Noise) Ordinance (Cap. 312) (Aircraft Noise Ordinance) to amend the Certification Regulations.

22. The Aircraft Noise Ordinance provides that, unless exempted, an aircraft shall not land or take off in Hong Kong without a valid noise certificate being granted by the DGCA and the certificate must be carried by the relevant aircraft. The owner or operator of an aircraft registered in Hong Kong may apply to the DGCA for a noise certificate to be issued for the aircraft subject to the payment of any fee prescribed under Schedule 2 to the Certification Regulations. L.N. 160 proposes to reduce the prescribed fees as follows -

Item	Current fee (HK\$)	Proposed fee (HK\$)
Grant of a noise certificate limited to a combination or combinations of aircraft and engine types, where a noise certificate has previously been granted in respect of the identical combination or combinations	\$1,105	\$505
Grant of a noise certificate other than in the circumstances referred to in the above item	\$1,105	\$505
Issue of duplicate noise certificate	\$580	\$200

¹ Pursuant to the Air Navigation (Hong Kong) Order 1995 (Amendment) Order 2011 (L.N. 139 of 2011), the DGCA is empowered to prescribe the time and manner in which the fees are payable and to make refund (if any).

23. On 28 March 2011, the Administration consulted the Panel on Economic Development on the fee proposals. On 27 June 2011, the Administration provided the Panel with more information on the fee proposals. The Panel supported the fee proposals and urged the Administration to explore if the fees could be further reduced to enhance the competitiveness of Hong Kong. The Administration has assured Members that CAD would conduct regular reviews to keep the costs of its services to a minimum. Further, the Panel has also suggested the Administration to consider imposing higher charges for the operation of noisier aircraft. The Administration has replied that the suggestion does not accord with its existing policy.

24. L.N. 159 and L.N. 160 will come into operation on 13 January 2012.

25. Members may refer to the LegCo Brief (File Ref: THB(T)A 26/15/6) issued by Transport and Housing Bureau and dated 16 November 2011 for further information.

PART III STRATEGIC COMMODITIES

Import and Export Ordinance (Cap. 60)

Import and Export (Strategic Commodities) Regulations (Amendment of Schedule 1) Order 2011 (L.N. 161)

26. The Order was made by the Director-General of Trade and Industry (DGTI) under section 6B of the Import and Export Ordinance (Cap. 60) to amend Schedule 1 to the Import and Export (Strategic Commodities) Regulations (principal regulations). Schedule 1 specifies the articles of strategic commodities, including munitions and commodities which can be used for both industrial and military purposes (dual-use commodities). A person shall not import or export any article specified in Schedule 1 except under and in accordance with an import or export licence issued by DGTI.

27. The Order made certain textual amendments and reflects the revisions adopted in the relevant international regimes subsequent to the last amendment to the principal regulations. The latest changes generally reflect the on-going relaxation of control on dual-use strategic commodities. According to the LegCo Brief, the amendments do not involve items which represent significant trading activities in Hong Kong.

28. The Order will come into operation on a day to be appointed by the DGTI by notice published in the Gazette. To ensure that the trade can benefit from the relaxation at the earliest opportunity, the Administration intends to bring the Order into effect on 3 January 2012 upon gazettal of a commencement notice on 30 December 2011. In the circumstances, Members may wish to note that the vetting period of the Order will expire on 21 December 2011, if not extended to 11 January 2012 by resolution.

29. The Panel on Commerce and Industry has not been consulted on the Order.

30. Members may refer to LegCo Brief (File Ref: TRA CR 1506/2) issued by Trade and Industry Department and dated 16 November 2011 for further information.

PART IV COMMENCEMENT NOTICES

**Fugitive Offenders (South Africa) Order (Cap. 503 sub. leg. AH)
Fugitive Offenders (South Africa) Order (Commencement) Notice
(L.N. 162)**

**Mutual Legal Assistance in Criminal Matters (South Africa) Order
(Cap. 525 sub. leg. AC)
Mutual Legal Assistance in Criminal Matters (South Africa) Order
(Commencement) Notice (L.N. 163)**

31. L.N. 162 and L.N. 163 appoint 2 December 2011 as the date on which the Fugitive Offenders (South Africa) Order (Cap. 503 sub. leg. AH) (Fugitive Order) and the Mutual Legal Assistance in Criminal Matters (South Africa) Order (Cap. 525 sub. leg. AC) (MLA Order) will come into operation.

32. The Fugitive Order is made under section 3 of the Fugitive Offenders Ordinance (Cap. 503) to direct that the procedures in Cap. 503 for the surrender of fugitive offenders shall apply as between Hong Kong and South Africa. The Fugitive Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into between Hong Kong and South Africa signed on 20 February 2009 (Agreement). The Agreement is recited in the Schedule to the Order. Under section 2 of the Fugitive Order, the relevant procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the Agreement.

33. The MLA Order is made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525). It directs that Cap. 525, subject to specified modifications, shall apply between Hong Kong and South Africa. The MLA Order is made in consequence of the agreements for mutual legal assistance entered into by Hong Kong and South Africa on 20 February 2009.

34. A Subcommittee was formed to scrutinize the Fugitive Order and the MLA Order. The Subcommittee recommended to the House Committee at its meeting on 11 June 2010 that the Orders be supported (LC Paper No. CB(2)1752/09-10).

35. The Panel on Security has not been consulted on these commencement notices.

Legislation Publication Ordinance (Cap. 614)

Legislation Publication Ordinance (Commencement) Notice 2011 (L.N. 164)

36. The Legislation Publication Ordinance (13 of 2011) (the Ordinance) provides for the establishment of an electronic database of Hong Kong legislation and approval of a website on which copies of legislation with a legal status may be published. The Ordinance also provides for the making of editorial amendments and revisions to Ordinances, including the consolidation of existing provisions for doing so.

37. By section 1(3) of the Ordinance, Part 1, Part 5 and Division 1, Division 2 (except section 27), Division 4 (except sections 29 and 30) and Division 5 of Part 7 came into operation on its gazettal (i.e. 30 June 2011). These provisions deal with commencement, interpretation, revisions to Ordinances, repeals and consequential amendments.

38. By L.N. 164 made under section 1(2) of the Ordinance, the Secretary for Justice (SJ) appoints 16 January 2012 as the day on which the following provisions come into operation –

- (a) Part 6 (except section 22) – Part 6 provides for additional editorial powers for loose-leaf edition of the laws of Hong Kong, whereas section 22 provides for SJ's power to omit a verified Ordinance from the loose-leaf;

- (b) section 30 – this section repeals section 98A of the Interpretation and General Clauses Ordinance (Cap. 1), which relates to rectification of errors; and
- (c) Division 6 of Part 7 of the Ordinance – this Division repeals section 113C(5) of the Criminal Procedure Ordinance (Cap. 221), which relates to provision for fines for offences.

39. A Bills Committee was formed to scrutinize the Legislation Publication Bill. Members may wish to refer to the report of the Bills Committee on the Legislation Publication Bill (LC Paper No. CB(2)1999/10-11) for further information. According to the Information Paper on the commencement arrangement of the Legislation Publication Bill (LC Paper No. CB(2)1344/10-11(03)), it is estimated that an electronic database of the legislation applying in Hong Kong with legal status would be available for use by the public in around 2015 or 2016.

40. The Panel on Administration of Justice and Legal Services has not been consulted on the commencement notice.

Concluding Observations

41. Apart from L.N. 155 to L.N. 157 that are still being scrutinized by the Legal Service Division, no difficulties in the legal and drafting aspects have been identified.

Encl

Prepared by

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22 November 2011

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Principal Assistant Secretary for Financial Services and
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Dear Ms KWAN,

**Inland Revenue (Double Taxation Relief and
Prevention of Fiscal Evasion with respect to Taxes on Income) Orders
re the Portuguese Republic, Kingdom of Spain and Czech Republic Orders
(L.N. 155 - L.N. 157)**

To assist me in scrutinizing the legal and drafting aspects of the English text of the above Orders, please let me have your clarification on the following matters.

Mutual Agreement Procedure

At the subcommittee meeting on five similar Orders on 8 June 2011 (Subcommittee meeting), the Administration indicated its willingness to include provisions for arbitration in future Comprehensive Agreements for Avoidance of Double Taxation (CDTA). It is however noted that the relevant Articles in the Agreements signed with Portugal, Spain and the Czech Republic do not provide for arbitration or any other method of dispute resolution in the event that the competent authorities of the contracting parties are unable to resolve a case by mutual agreement.

Exchange of Information (EoI)

At the Subcommittee meeting, members expressed concern about the disclosure of information exchanged to a third party, including the oversight body of the tax authorities. The reason for not incorporating the Sample Protocol into the three Agreements is not explained in the LegCo Briefs. Please also clarify whether the Board of Review and the oversight bodies of the tax authorities are caught by "persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1" under the relevant EoI Article of the three Agreements.

The Administration also advised at the Subcommittee meeting that Hong Kong would attempt to include provisions in the CDTA, as far as possible, to clarify that automatic and/or spontaneous exchange of information was not allowed. In all the three Agreements, there is no such clarification in the EoI Articles or the Protocols to the Agreements.

Paragraph 6 of the Protocol to the Agreement signed with Portugal states that in respect of Article 25 on exchange of information, it is understood that (i) the exchange of information provided in the Article does not include measures which constitute 'fishing expeditions'; (ii) the provisions of the Article shall not apply retrospectively; (iii) the Contracting Parties shall ensure the protection of personal data transferred according to the Agreement and their domestic laws. Please confirm whether there are similar provisions giving such safeguards in the Spanish Agreement and its Protocol, and the Czech Agreement. Please also clarify whether there are any provisions in the three Agreements to limit the exchange of information to information relating to a specific taxpayer in a case, but not to that relating to the taxpayer's business counterparts and associates.

Entry into Force

Although the above Orders, subject to the negative vetting procedure, will come into operation on 12 January 2012, the three Agreements and their Protocols (if any) will not enter into force before the requirements set out in the relevant Article on Entry into Force have been satisfied. When the relevant Order enters into force, please clarify whether any public notice will be published; and if so, whether such a notice has legislative effect and needs to be published as Legal Notice in the Gazette.

I would appreciate it if you could let me have the Administration's reply in both languages by 29 November 2011.

Yours sincerely,

(Carrie WONG)
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