

**立法會**  
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**Paper for House Committee**

**Report of the Subcommittee on the Three Orders Made under Section  
49(1A) of the Inland Revenue Ordinance and  
Gazetted on 18 November 2011**

**Purpose**

This paper reports on the deliberations of the Subcommittee on the Three Orders Made under Section 49(1A) of the Inland Revenue Ordinance and Gazetted on 18 November 2011. The three Orders are –

- (a) Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Portuguese Republic) Order (L.N. 155);
- (b) Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Kingdom of Spain) Order (L.N. 156); and
- (c) Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Czech Republic) Order (L.N. 157).

**Background**

2. Double taxation refers to the imposition of comparable taxes in more than one tax jurisdiction in respect of the same taxable income. The international community generally recognizes that double taxation hinders the exchange of goods and services, movements of capital, technology and human resources, and poses an obstacle to the development of economic relations between economies. As a business facilitation initiative, it is the Government's

policy to enter into Comprehensive Agreements for Avoidance of Double Taxation (CDTAs) with Hong Kong's trading and investment partners.

3. Hong Kong adopts the territorial basis of taxation whereby only income sourced from Hong Kong is subject to tax. 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.

### **The three Orders**

4. L.N. 155, L.N. 156 and L.N. 157 are made by the Chief Executive in Council under section 49(1A) of IRO to give effect to the following CDTAs respectively:

- (a) L.N. 155 - 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) L.N. 156 - 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) L.N. 157 - 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).

## **The Subcommittee**

5. At the House Committee meeting held on 25 November 2011, Members agreed to form a subcommittee to study the three Orders. Hon James TO was elected chairman of the Subcommittee, and the membership list of the Subcommittee is in **Appendix I**. The Subcommittee has held two meetings to meet with the Administration and scrutinize the three Orders.

## **Deliberations of the Subcommittee**

6. In examining the three Orders, the Subcommittee has focused on whether and how Hong Kong residents and enterprises will benefit from the CDTAs concerned, and whether there are sufficient safeguards in these agreements to protect the privacy and confidentiality of local taxpayers' information.

### Exchange of information

7. The Subcommittee has been informed by the Administration that the three CDTAs concerned, i.e. the Portuguese Agreement, Spanish Agreement and Czech Agreement, have adopted all the safeguards in the sample Exchange of Information (EoI) Article presented to the Bills Committee on the Inland Revenue (Amendment) (No.3) Bill 2009.<sup>1</sup> In particular, the Administration has removed the reference to "oversight body" from paragraph 2 of the EoI Article in the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention so that the information exchanged will not be released to the oversight bodies of the tax authorities of the contracting parties.

8. The Subcommittee has noted that in all the three CDTAs, the Administration has added, at the end of paragraph 2 of the EoI Article, an explicit provision to require that "Information shall not be disclosed to any third jurisdiction for any purpose.". As Hong Kong has entered into mutual assistance agreements with various jurisdictions, the Subcommittee has sought clarification on the following issues –

- (a) whether an authority in Hong Kong, to whom the information exchanged under a CDTA may be disclosed, is allowed to disclose

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<sup>1</sup> To enable Hong Kong to adopt the latest international standard for exchange of information under CDTAs, i.e. the Organisation for Economic Cooperation and Development 2004 version of the EoI Article, the Administration introduced the Inland Revenue (Amendment) (No.3) Bill 2009 into the Legislative Council on 29 June 2009. A Bills Committee was formed to scrutinize the Bill. The Bill was passed on 6 January 2010, and the Inland Revenue (Amendment) Ordinance 2010 came into operation on 12 March 2010.

the information to its counterpart of a third jurisdiction, if there is in force a mutual assistance agreement in related matters between Hong Kong and the third jurisdiction; and

- (b) if the answer to (a) above is in the negative, whether the "non-disclosure to third jurisdictions" provision under CDTAs would affect the effective implementation of the mutual assistance agreements between Hong Kong and other jurisdictions.

9. The Administration has advised that the provision "[i]nformation shall not be disclosed to any third jurisdiction for any purpose" in the respective EoI Article of the three CDTAs is in line with paragraph 12.2 of the Commentary on Article 26 (concerning EoI) of the OECD Model Tax Convention (2010) (upon which the EoI article in the three CDTAs is modeled), which states (in English) that "[t]he information received by a Contracting State may not be disclosed to a third country". The provision is binding on and must be observed by the Contracting Parties (including their authorities, such as courts and administrative bodies), and obligations under this provision are not affected by other bilateral agreements in place such as agreements for mutual legal assistance in criminal matters ("MLA") with third jurisdictions.

10. The Administration has further advised that according to the EoI Article of the respective CDTAs, persons or authorities to whom information exchanged is disclosed shall use the information only for purposes concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the CDTAs. As explained in paragraph 12.3 of the Commentary on Article 26 of the OECD Model Tax Convention (in English), "if the information appears to be of value to the receiving State, that State may not use the information for such other purposes ... but it must resort to means specifically designed for those purposes (e.g. in case of a non-fiscal crime, to a treaty concerning judicial assistance)".

11. As regards the conduct of business under MLA agreements, the Administration has advised that in the case of Hong Kong, the MLA agreements concluded by Hong Kong generally include provisions to the effect that requests for assistance are to be executed in accordance with the laws of the requested party. This would mean that requests for MLA are to be executed in accordance with the laws of Hong Kong, including "non-disclosure to third jurisdictions" provision in the orders made under section 49(1A) of IRO implementing the CDTAs. Moreover, section 3(3) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("MLACMO") provides that the provisions of the MLACMO shall not operate to prejudice the generality of section 4 of the IRO, which makes provisions for "official secrecy".

Hence, the MLACMO cannot be invoked to obtain tax information held by the Inland Revenue Department ("IRD"), including those received under the EoI Article.

### Financial implications

12. The Subcommittee has noted that for all the three CDTAs, the Administration's assessment (as stated in Annex C to the Legislative Council Briefs on the three Orders) is that the overall financial implications, in terms of the government revenue foregone, would be insignificant. Hon Paul CHAN has enquired about the basis for such assessment and whether IRD maintains a database for recording the amount of government revenue forgone as a result of the implementation of CDTAs.

13. The Administration has advised that currently, IRD does not maintain records on the resident status of taxpayers because Hong Kong charges taxes based on the territorial source principle, i.e. income sourced from Hong Kong would be subject to tax irrespective of the resident status of taxpayers. The assessment of the financial implications of the implementation of individual CDTAs is a general assessment having regard to relevant factors. As there are relatively few tax types in Hong Kong and the tax rates are generally low, it is estimated that the implementation of individual CDTAs would not have significant financial implications on Hong Kong in terms of government revenue foregone. It is not possible to estimate the financial implications of a prospective CDTA based on historical data, as it is only after a CDTA has been implemented that a taxpayer may claim tax credit in respect of income that has been taxed by the other contracting party of the CDTA.

14. Taking note of the Administration's advice, Hon Paul CHAN has suggested that IRD should start collecting data systematically on the effects of the implementation of CDTAs, including the benefits attained by Hong Kong residents and the costs to government revenue. He considers that such data would provide useful reference for the work on negotiating CDTAs. He has also requested the Administration to provide annual reports to the Panel on Financial Affairs ("FA Panel") on CDTAs, with information on the costs and benefits of those CDTAs that have been implemented. The Administration has responded that IRD would collect relevant information based on the applications for tax credits. It should however be noted that only information on revenue foregone due to CDTAs can be collected, because the other contracting parties of CDTAs would not disclose information on tax credits granted to their residents for their incomes earned and taxed in Hong Kong, and Hong Kong residents who have enjoyed tax benefits granted by the other contracting parties of CDTAs are not obliged to report such information to IRD. As regards Mr CHAN's request for provision of information on CDTAs to the

FA Panel, the Administration has agreed to consider how best it could provide relevant information to the Panel for reference.

### Income from employment

15. According to the Legislative Council ("LegCo") Briefs on the three Orders, under the three CDTAs, the income received by a Hong Kong resident, which is not paid by (or on behalf of) and borne by an entity of the other contracting party, from employment exercised in the other contracting party will be exempt from the income tax of the other contracting party if his or her aggregate stay in the other contracting party in any relevant 12-month period does not exceed 183 days. In response to the Subcommittee's enquiry, the Administration has advised that this tax benefit is based on Article 14 on "Income from Employment" of the Spanish and Czech Agreements and under Article 15 on "Dependent Personal Services" of the Portuguese Agreement. The tax arrangement, including the "183 days" condition, follows the standard arrangement provided in the OECD Model Tax Convention.

16. The Subcommittee has sought clarification on whether the above tax arrangement applies to Hong Kong entertainers. The Administration has advised that owing to the special nature of the activities of entertainers and sportsmen, there is a separate article, i.e. Article on "Artistes and Sportsmen", in the three CDTAs (as well as other CDTAs that Hong Kong has entered into) that provides for the tax arrangement for the income of the entertainers and sportsmen who are residents of either contracting party derived from their activities exercised in such capacities in the other contracting party. Under the Article on "Artistes and Sportsmen", the income of a Hong Kong entertainer or sportsman derived from his or her activities exercised in such capacity in the other contracting party, irrespective of his or her employment status and length of stay in the other contracting party, may be taxed by the other contracting party.

### Commencement of the Orders and entry into force of the Agreements

17. Section 1 of the three Orders provides that the Orders will come into operation on 12 January 2012. For each of the CDTAs Hong Kong has entered into, there is an Entry into Force Article which provides for when the tax arrangements under the CDTA are to enter into force. According to the Article, the contracting parties shall notify each other in writing that the internal procedures required for the entry into force of the CDTA have been completed. The CDTA shall enter into force after the later notification. The Entry into Force Article also provides that the provisions of the CDTA shall have effect in the Hong Kong Special Administrative Region (HKSAR) in respect of HKSAR tax, for any year of assessment beginning on or after 1 April in the calendar year

next following that in which the Agreement enters into force. In response to the enquiry of the legal adviser of the Subcommittee, the Administration has advised that upon the entry into force of a CDTA, IRD will publish an announcement on its website for public information. The Administration has also advised that the announcement has no legislative effect and does not need to be published as Legal Notice in the Gazette.

18. Taking note of the Administration's response, the Subcommittee's legal adviser has raised concern that as the relevant CDTAs under the three Orders would only become operational until certain procedures have been completed, it appears that their actual commencement should have legislative effect in the same way that commencement notices have legislative effect as the instruments they seek to commence are subsidiary legislation. The legal adviser has also pointed out that section 49(1A) of IRO, under which the three Orders are made, provides that if an Order is made, the arrangements specified in the Order "shall have effect". However, as the Orders are now made, the commencement dates which are provided only relate to the commencement of the Orders. The entry into force of the relevant CDTAs may well be after the commencement of the Orders, which does not seem to tally with the plain meaning of section 49(1A) of IRO.

19. In the light of the above observations of the Subcommittee's legal adviser, the Subcommittee has requested the Administration to consider the suggestion of the legal adviser of adopting a deferred commencement clause in the Orders, as in the Mutual Legal Assistance Criminal Matters Order and the Fugitive Offenders Order, to implement CDTAs so that the relevant authority will appoint a commencement date for each of the three Orders when the date of entry into force of the relevant CDTA is ascertained.

20. The Administration has made the following points in response –

- (a) Incorporation of CDTAs into law is achieved under section 49(1A) of IRO. Upon making of an Order implementing a CDTA, the CDTA concerned shall form part of the domestic law and shall have been given effect under section 49(1A) of IRO. For each CDTA, there is an Entry into Force Article which provides for when those tax arrangements under the CDTA are to enter into force. It follows that as a matter of domestic law, the taking effect of the tax arrangements on such determined date pursuant to the Entry into Force Article (which has already become a legislative provision) must have the force of law. It is therefore not necessary for another piece of subsidiary legislation (in the form of a commencement notice) to give legislative effect to the tax arrangements or to "appoint" a commencement date for the

entry into force of the CDTA which has already been determined by law. The current approach, which has been adopted in other CDTA Orders submitted to LegCo for approval, is considered to be legally in order.

- (b) The use of a "Commencement Notice" to appoint a date to bring a MLA agreement into force was based on different considerations. A MLA agreement empowers law enforcement agencies to offer cross-border assistance on the investigation and prosecution of criminal offences. Such agreement may entail concerns from the law and order as well as human rights perspectives. On the other hand, CDTAs mainly deal with the granting of double taxation relief and tax benefits. The business community has always been asking for taking effect of CDTA tax arrangements early such that they can reap the tax benefits soonest possible.
- (c) If a "Commencement Notice" is used to appoint a date to bring CDTA into force, the provisions under the Entry into Force Article of CDTAs shall provide for a buffer period, e.g. a further two months, to allow the HKSAR Government, upon completion of the exchange of note between the two contracting parties, to undergo the negative vetting procedure before the CDTAs can enter into force. As the tax arrangements under a CDTA will become effective for the assessment year in the calendar year next following that in which the CDTA enters into force, deferring the date of entry into force by two months in some cases, say from December 2011 to February 2012, could cause a delay in the effective date of the tax arrangements by one whole year. According to past experience, it is the common objective and serves the mutual interests of Hong Kong's CDTA partners to bring the CDTAs into force as early as possible. Practically speaking, of the three CDTAs under scrutiny, the Czech Agreement does not provide for a buffer period for making a commencement notice and the Administration would need to seek the agreement of the Czech Republic to amend the relevant provisions if a "Commencement Notice" is used to appoint a date to bring the CDTA into force.
- (d) Upon the entry into force of a CDTA, IRD will publish an announcement on its website for public information. IRD will also actively send emails to tax practitioners and registered foreign and local business associations upon the entry into force of a CDTA. To further enhance transparency of the procedures, the Administration is prepared to issue a press release upon the entry into force of a CDTA.

- (e) The Administration considers that the current approach has balanced the considerations on legal requirements, efficiency and transparency.

21. The Subcommittee's legal adviser agrees with the Administration's view that upon making of an Order implementing a CDTA, the CDTA concerned shall form part of the domestic law and shall have been given effect under section 49(1A) of the IRO. The legal adviser is however concerned that the commencement provision of the Orders as drafted might mislead the public to believe that the CDTAs, which have become part of the domestic law, would enter into force on the commencement date of the Orders (i.e. on 12 January 2012). She is also concerned that the suggested approach of publishing an announcement on the website of IRD to inform the public of the entry into force of a CDTA is not legally in order. In this regard, the legal adviser has raised the following issues for the Subcommittee's consideration –

- (a) Section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) defines subsidiary legislation as "any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect". It would appear that any notice ("Notice") announcing the date when the CDTA enters into force which will be published for public information is an instrument made under or by virtue of the relevant Entry into Force Article set out in the Schedule to such an Order, which Order is clearly subsidiary legislation made under IRO. It would also appear that the Notice has legislative effect because, similar to an ordinary commencement notice, it specifies the date when the substantive tax provisions of the CDTA set out in the Order affecting the taxpayers concerned, as opposed to the declaratory provisions of the Order, come into operation.
- (b) It would appear that the entry into force of the CDTA cannot be determined by law as asserted by the Administration (paragraph 20(a) above refers) simply because the notification of the entry into force of the CDTA cannot be ascertained in any way by the general public including the taxpayers affected by the CDTA. Hence, there will definitely be a need to announce the actual date of the entry into force of the CDTA after the date of the later notification can be ascertained. If it is conceded that "the taking effect of the tax arrangements on such determined date pursuant to the Entry into Force Article (a legislative provision) must have the force of law", it seems logical that the said announcement should also have

the force of law.

22. In its written response (**Appendix II**), the Administration states its view that in the present case, the Notice does not fall within the definition of "subsidiary legislation" provided under section 3 of Cap. 1. The "Entry into Force" provision sets out the mechanism under which the date of entry into force of the CDTA is determined. Such date is clearly ascertainable from the provision and cannot be determined in any other manner. The legality of the entry into force of the CDTA derives from a legal provision (the "Entry into Force" provision) and not from the Notice (an announcement).

23. The Subcommittee has considered both the views of the Subcommittee's legal adviser and the Administration on the issues surrounding the commencement provision of the Orders and the notice of the entry into force of the CDTAs, which are based on different interpretation of the relevant legislative provisions. The Subcommittee considers that there is little prospect of resolving such difference in opinion through further deliberation by the Subcommittee. The Subcommittee has therefore focused on the practical aspects by examining whether the current approach adopted by the Administration would give rise to any operational problem and/or have any adverse effect on taxpayers. In this regard, the Subcommittee has enquired whether the Administration is aware of any such operational problem such as taxpayers having been misled to wrongly believe that the tax arrangements set out in a CDTA took effect on the date the relevant Order commenced operation.

24. The Administration has advised that the Entry Into Force Article of each CDTA contains clear provisions as to what procedures are required for a CDTA to enter into force and in which assessment year the tax arrangements set out in a CDTA will become effective. With the knowledge of a CDTA through a relevant Order published in the Gazette, residents of the contracting parties would make arrangements for their activities with a view to reaping tax benefits when the tax arrangements of the CDTA become effective. The Administration is not aware of any complaint or objection from the public regarding the current approach for handling the matter.

25. As there is no evidence to suggest that the current approach to bringing the CDTAs into force adopted by the Administration has given or would give rise to any operational problem or that the public or taxpayers affected have found the current approach objectionable, the Subcommittee has concluded that it is not necessary for the Administration to change the current approach.

## **Recommendation**

26. The Subcommittee supports the three Orders. The Subcommittee and the Administration have not proposed any amendment to any of the Orders.

## **Advice sought**

27. Members are requested to note the deliberations and recommendation of the Subcommittee.

Council Business Division 1  
Legislative Council Secretariat  
4 January 2012

**Subcommittee on the Three Orders Made under Section 49(1A) of the  
Inland Revenue Ordinance and Gazetted on 18 November 2011**

**Membership list**

**Chairman**                      Hon James TO Kun-sun

**Members**                      Hon Audrey EU Yuet-mee, SC, JP  
   Hon Starry LEE Wai-king, JP  
   Hon Paul CHAN Mo-po, MH, JP

(Total: 4 Members)

**Clerk**                              Ms Anita SIT

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By fax: 3529 2837

20 December 2011

Ms Anita SIT  
Clerk to Subcommittee  
Subcommittee on the Three Orders Made  
under S.49(1A) of the Inland Revenue Ordinance  
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Dear Ms SIT,

**Subcommittee on the Three Orders Made under Section 49(1A) of the Inland Revenue Ordinance and Gazetted on 18 November 2011**

**Follow-up to meeting on 14 December 2011**

I refer to your letter of 14 December 2011 and the letter of LegCo Assistant Legal Adviser of 15 December 2011 on the captioned Orders. Our responses to the letters are set out in the following paragraphs.

2. Upon the coming into force of an Order under section 49(1A) of the Inland Revenue Ordinance (Cap 112), the arrangements specified in the Order shall be incorporated into and form part of our domestic law. The entry into force of a comprehensive avoidance of double taxation agreement (“CDTA”) and

the taking effect of the provisions of the CDTA shall be governed by the “Entry Into Force” provision.

3. It follows that as a matter of domestic law, the entry into force of the CDTA on the date determined pursuant to and in accordance with the Entry Into Force provision (which has already become a legislative provision) must have the force of law. It is therefore not necessary for another piece of subsidiary legislation to give it legislative effect.

4. Under section 3 of the Interpretation and General Clauses Ordinance (Cap 1), “subsidiary legislation” is defined to mean -

“any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect”.

Hence, an instrument is “subsidiary legislation” if -

- (a) it is issued under or by virtue of an Ordinance; and
- (b) it has legislative effect.

5. In the present case, any notice (“Notice”) announcing the date of the entry into force of the CDTA as determined pursuant to and in accordance with the “Entry Into Force” provision is not subsidiary legislation. The publication of such Notice is merely an administrative arrangement for the purpose of promulgating the relevant law and thus facilitating its administration. There is no legal requirement under the “Entry Into Force” provision (or any provision of Inland Revenue Ordinance (Cap 112) or its subsidiary legislation) for such Notice to be issued. Therefore, the Notice is not an instrument issued under or by virtue of the Inland Revenue Ordinance (Cap 112) and does not fall within the definition of “subsidiary legislation”.

6. The Notice is distinguishable from an ordinary commencement notice (subsidiary legislation) both in nature and in effect. The issue of the Notice is discretionary whereas the issue of a commencement notice is mandatory (made under or by virtue of a commencement provision). The commencement notice determines the date on which a provision takes effect and forms part of our law whereas the Notice merely publicizes the date of entry into force of the CDTA as determined by law and does not form part of our law.

7. The "Entry into Force" provision sets out the mechanism under which the date of entry into force of the CDTA is determined. Such date is clearly ascertainable from the provision and cannot be determined in any other manner. The legality of the entry into force of the CDTA derives from a legal provision (the "Entry into force" provision) and not from the Notice (an announcement).

Yours sincerely,



( Ms Joan Hung )  
for Secretary for Financial Services  
and the Treasury

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