

立法會
Legislative Council

LC Paper No. CB(1)1749/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/SS/4/11/2

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

**First meeting on
Monday, 5 December 2011, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex**

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

Public officers : Ms Shirley KWAN
Attending 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

Ms Mabel MEI
Senior Assessor
Inland Revenue Department

Mr LUNG Wan-pun
Government Counsel
Department of Justice

Mr Peter SZE
Government Counsel
Department of Justice

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

Staff in attendance : Miss Carrie WONG
Assistant Legal Adviser 4

Mr Hugo CHIU
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

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|-------------------|----------------------------------------------------------------------------------------------------------------------------------------|
| (L.N. 155 of 2011 | — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Portuguese Republic) Order |
| L.N. 156 of 2011 | — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Kingdom of Spain) Order |

- L.N. 157 of 2011 — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Czech Republic) Order
- File Ref: TsyB R 183/800-1-1/57/1 (C) — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Portuguese Republic) Order issued by the Financial Services and the Treasury Bureau
- File Ref: TsyB R 183/800-1-1/39/1 (C) — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Kingdom of Spain) Order issued by the Financial Services and the Treasury Bureau
- File Ref: TsyB R 183/800-1-1/33/1 (C) — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Czech Republic) Order issued by the Financial Services and the Treasury Bureau
- LC Paper No. LS7/11-12 — Report of the Legal Service Division on subsidiary legislation gazetted on 18 November 2011
- LC Paper No. CB(1)509/11-12 — Background brief prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)510/11-12(01) — Letter dated 22 November 2011 from Assistant Legal Adviser to the Administration on L.N. 155 of 2011 to L.N. 157 of 2011
- LC Paper No. CB(1)510/11-12(02) — Administration's reply dated 29 November 2011 to the letter from Assistant Legal Adviser

LC Paper No. CB(1)510/11-12(03) — Letter dated 1 December 2011 from Assistant Legal Adviser to the Administration on L.N. 155 of 2011 to L.N. 157 of 2011

LC Paper No. CB(1)533/11-12(01) — Administration's reply dated 5 December 2011 to the letter dated 1 December 2011 from Assistant Legal Adviser

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 advise –
 - (a) whether an authority in Hong Kong, to whom the information exchanged under a Comprehensive Agreement for Avoidance of Double Taxation (CDTA) may be disclosed, is allowed to disclose the information exchanged to its counterpart of a third jurisdiction, bearing in mind that there may be already in force a mutual cooperative agreement between the authority in Hong Kong and its counterpart of the third jurisdiction; and
 - (b) if the answer to (a) above is in the negative, whether this restriction under CDAs would affect the effective enforcement of the relevant authorities (including the courts) in Hong Kong on tax related matters.
5. In the light of the observation of the legal adviser to the Subcommittee on the commencement provisions of the three Orders, the Administration was requested to consider adopting a deferred commencement clause in the Orders, as in the Mutual Legal Assistance Criminal Matters Order and the Fugitive Offenders Order, to implement CDAs 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.

III Any other business

6. Members agreed that as more time was required to scrutinize the subsidiary legislation, the Chairman of the Subcommittee would move a motion at the Council meeting on 14 December 2011 to extend the scrutiny period to 11 January 2012.

7. There being no other business, the meeting ended at 5:32 pm.

Council Business Division 1
Legislative Council Secretariat
2 May 2012

**Proceedings of the
Subcommittee on the Three Orders Made under Section 49(1A) of the
Inland Revenue Ordinance and Gazetted on 18 November 2011
First meeting on Monday, 5 December 2011, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000458 – 000650	Mr James TO Mr Paul CHAN Ms Audrey EU	Election of Chairman	
000651 – 000742	Chairman	Introductory remark	
000743 – 001028	Administration	<u>Agreement with Portuguese Republic</u> (L.N. 155 of 2011)	
001029 – 001906	Chairman Administration Department of Justice (DoJ)	<p>Noting that Article 25.2 of the Agreement with Portuguese Republic contained the provision that "They may disclose the information in public court proceedings or in judicial decisions", the Chairman enquired whether this was a new provision. The Administration replied that the provision was included in the Model Tax Convention of the Organisation for Economic Co-operation and Development (OECD) as well as the sample Exchange of Information (EoI) Article that had been scrutinized by the Bills Committee on the Inland Revenue (Amendment) (No. 3) Bill 2009.</p> <p>The Chairman referred to paragraph 10(e) of the Legislative Council Brief and sought confirmation from the Administration that information exchanged under the CDTA would not be released to the oversight body of the tax authorities, including the Ombudsman. The Administration replied in the affirmative and elaborated that in the CDTAs concluded by Hong Kong with the United Kingdom and New Zealand, information was permitted to pass on to their respective Ombudsman because the Ombudsman was responsible for handling complaints against the tax authorities in relation to assessment or collection of, and enforcement of taxes. Taxpayer's authorization must be obtained before the request for the passing of such information. Hence, Hong Kong agreed to the request of the United Kingdom and New Zealand to allow them to disclose information to the Ombudsman. In the case of Hong Kong, the Financial Services and the</p>	

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		<p>Treasury Bureau, though an oversight authority of the Inland Revenue Department (IRD), was not involved in the assessment and collection of taxes, and enforcement. Hence, information exchanged could not be passed on to the Bureau.</p> <p>The Chairman referred to paragraph 10(f) of the Legislative Council Brief and pointed out that the Hong Kong Judiciary might have entered into mutual assistance agreements with the judiciaries of other jurisdictions. The Chairman enquired whether, given the restriction in the CDTA that "the information requested shall not be disclosed to a third jurisdiction", a court of Hong Kong to which information exchanged under the CDTA had been disclosed would not be allowed to disclose such information to a court of a third jurisdiction, notwithstanding the existence of a mutual assistance agreement between the Hong Kong Judiciary and the judiciary of the third jurisdiction.</p> <p>In reply, the Administration advised that the CDTA applied to all authorities including the judicial authorities of the Contracting Parties, and therefore any organ of a Contracting Party, including a court, would not be allowed to disclose information exchanged under the CDTA to an organ (such as a court) of a third jurisdiction.</p> <p>The Chairman requested the Administration to provide a written response on the issue, and suggested that the Administration consider the issue from a wider perspective and take into account other considerations such as the need to seek assistance from the judiciary of a third jurisdiction to serve a notice on a Hong Kong taxpayer staying outside Hong Kong.</p>	<p>The Administration to take action as per paragraph 4 of the minutes.</p>
001907 – 002059	Administration	<u>Agreement with Kingdom of Spain</u> (L.N. 156 of 2011)	
002100 – 002806	Chairman Administration	<p>The Chairman enquired whether the conditions specified in paragraph 5 of the Legislative Council Brief followed the standard arrangement provided in the OECD model text for CDTAs. The Administration replied in the affirmative.</p> <p>The Chairman enquired about the taxation arrangement for a Hong Kong resident working in Spain as a singer for a short duration. The</p>	

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		<p>Administration advised that the arrangement set out in paragraph 5 of the Legislative Council Brief, which was based on the provisions under Article 14 on "Income from Employment" in the CDTA, would not apply to income derived by Hong Kong residents from their personal activities as entertainers and sportsmen exercised in Spain. Rather, Article 16 on "Artistes and Sportsmen" applied.</p> <p>The Chairman asked whether Article 14 would apply if the Hong Kong singer was employed by a Hong Kong company and the income derived from the singer's activities in Spain accrued to the Hong Kong company instead of the singer. The Administration advised that the situation was covered by Article 16 and thus the income might be taxed in Spain.</p>	
002807 – 003946	Mr Paul CHAN Chairman Administration	<p>Mr CHAN noted that for all the three CDTAs under scrutiny, the Administration's assessment (as stated in Annex C to the three Legislative Council Briefs) was that the overall financial implications, in terms of the government revenue forgone, would be insignificant. Mr CHAN enquired about the basis for such assessment.</p> <p>The Administration advised that the assessment was mainly based on the fact that there were relatively few taxes in Hong Kong and the tax rates were generally low. The Administration then generally described how the revenue from the direct taxes and withholding tax on passive income might be affected due to the implementation of CDTAs.</p> <p>Noting that the Administration had only made a general assessment on the financial implications of the CDTAs, Mr CHAN enquired whether the database of the IRD contained relevant data for estimating the amount of revenue foregone as a result of the implementation of CDTAs.</p> <p>The Administration responded that currently there was no such data because IRD charged taxes based on the territorial source principle, i.e. income sourced from Hong Kong would be subject to tax. IRD did not maintain records on the resident status of taxpayers. Besides, it was not possible to estimate the financial implications of a prospective</p>	

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		<p>CDTA based on historical data, as it was only after a CDTA had been implemented that a taxpayer might claim tax credit in respect of income that had been taxed by the other contracting party of the CDTA.</p> <p>Mr CHAN suggested that IRD should collect data on the effects of the implementation of CDТАs, including the benefits attained by Hong Kong residents and the costs to government revenue. He considered that such data would provide useful reference for the work on negotiating CDТАs. Mr CHAN also suggested the Administration submit an annual report to the Panel on Financial Affairs on CDТАs, with information on the costs and benefits of those CDТАs that had been implemented. The Chairman expressed support for the suggestion.</p> <p>The Administration responded that IRD would collect relevant information based on the applications for tax credits. It should however be noted that only information on revenue forgone due to CDТАs could be collected because the contracting parties of CDТАs would not disclose information on tax credits granted to their residents for their incomes earned and taxed in Hong Kong.</p> <p>The Chairman noted that the Spanish withholding tax on interest on Hong Kong residents would be exempted if the recipient was the HKSAR Government, the Hong Kong Monetary Authority, a financial institution or an approved pension fund, if the interest was paid by the Spanish government. He enquired whether the following arrangement would be feasible: a Hong Kong resident holding Spanish assets transferred the nominal ownership of the assets to the HKSAR Government so as to enjoy the withholding tax exemption.</p> <p>In reply, the Administration pointed out that the contracting parties should act in good faith and the application of the exemption arrangement would be based on beneficial ownership of the relevant assets.</p>	
003947 – 004135	Administration	<p><u>Agreement with Czech Republic</u> (L.N. 157 of 2011)</p> <p>Members raised no question on the agreement.</p>	

Time Marker	Speaker	Subject(s)	Action Required
004136 – 010024	ALA4 DoJ Chairman Administration	<p>ALA4 reiterated her views as set out in her two letters to the Administration (LC Paper No. CB(1)510/11-12(01) and LC Paper No. CB(1)510/11-12(03)) that in accordance with section 49(1A) of the Inland Revenue Ordinance (Cap. 112)(IRO), the arrangements specified in an Order that was made by the Chief Executive in Council "shall have effect" (即屬有效). However, the entry into force of the three CDTAs might well be after the commencement of the Orders, which did not seem to tally with the plain meaning of section 49(1A) of IRO. The Chairman enquired whether section 49(1A) of IRO had to be amended to tackle the issue.</p> <p>In reply, the Administration clarified that two dates were involved:</p> <ul style="list-style-type: none"> (a) the date of entry into force of a CDTA per se was based on the arrangement specified in the Article on "Entry Into Force" of the CDTA; and (b) the commencement date of the respective local legislation of the contracting parties for enabling the implementation of a CDTA was determined by the relevant legislation of the contracting parties. <p>The Administration advised that the two dates were on different planes and needed not be the same.</p> <p>ALA4 expressed reservation over the Administration's reply as it was stipulated in the Order that the Order would come into operation on 12 January 2012, but the CDTA did not specify the date of its entry into force, and this might cause confusion to the public. Also, the Administration did not intend to inform the public about the dates of entry into force of the CDTAs by a Legal Notice published in the Gazette.</p> <p>The Chairman enquired whether the Administration would announce the dates of entry into force of the CDTAs by publishing a Legal Notice in the Gazette. In reply, the Administration advised that while no Legal Notice would be gazetted, relevant information would be uploaded onto the website of IRD. Tax practitioners would also be informed of such information.</p>	

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		<p>The Chairman suggested the Administration notify the public about the dates of entry into force of CDTAs by publishing a General Notice in the Gazette. In reply, the Administration remarked that it could consider announcing the information through press releases. The Chairman suggested that in the relevant press releases, the Administration should also set out basic information about the CDTAs concluded in the past, including the dates on which they had entered into force.</p> <p>In reply to the Chairman, ALA4 suggested that the Administration could consider 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 would appoint a commencement date for each of the three Orders when the date of entry into force of the relevant CDTA was ascertained.</p> <p>DoJ responded that there appeared no legal prohibition against ALA4's suggestion, but discussion with the Bureau was needed as policy issues were involved.</p>	
010025 – 010111	Ms Audrey EU	Ms EU said that she was inclined to support the suggestion of ALA4.	
010112 – 010522	Chairman DoJ Clerk Administration	<p>The Chairman requested the Administration to provide a written response setting out the pros and cons of the current drafting and the alternative drafting as suggested by ALA4 regarding the commencement provisions of the Orders. The scrutiny of the three Orders would be extended and the Subcommittee would hold another meeting to determine how the commencement provisions of the Orders should be drafted.</p> <p>In response to the Chairman's enquiry, the Clerk advised that the deadline for giving notice of motion to extend the scrutiny period was 9 December 2011.</p>	The Administration to take action as per paragraph 5 of the minutes.