

立法會
Legislative Council

LC Paper No. CB(1)1705/11-12
(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**

**Second meeting on
Wednesday, 14 December 2011, at 8:30 am
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

Miss Agnes CHEUNG
Senior Government Counsel
Department of Justice

Mr LUNG Wan-pun
Acting Senior 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 Meeting with the Administration

(LC Paper No. CB(1)610/11-12(01) — List of follow-up actions arising from the discussion at the meeting on 5 December 2011

LC Paper No. CB(1)610/11-12(02) — Administration's response to issues raised at the meeting on 5 December 2011

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)

Discussion

The Committee deliberated (Index of proceedings attached at **Appendix**).

2. The Administration was requested to provide a written response on the view of the legal adviser to the Subcommittee that the Administration should consider whether the notice specifying the date on which a Comprehensive Agreement for Avoidance of Double Taxation came into force was subsidiary legislation.

III Any other business

3. The Chairman remarked that upon the receipt of the Administration's written response, another meeting might be arranged if necessary.

4. Members noted the following legislative timetable-

(a) the Chairman would make a verbal report at the meeting of the House Committee on 16 December 2011;

(b) the Chairman would move a motion at the Council meeting on 14 December 2011 to extend the scrutiny period of the subsidiary legislation to 11 January 2012; and

(c) the deadline for giving notice of amendment to the subsidiary legislation would be 4 January 2012.

5. There being no other business, the meeting ended at 9:13 am.

Council Business Division 1
Legislative Council Secretariat
26 April 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
Second meeting on Wednesday, 14 December 2011, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000723 – 000842	Chairman	Introductory remark	
000843 – 001649	Administration	Briefing by the Administration on LC Paper No. CB(1)610/11-12(02) ("the Paper")	
001650 – 002137	Chairman Administration Department of Justice (DoJ)	<p>The Chairman enquired whether a contracting party of a Comprehensive Agreement for Avoidance of Double Taxation (CDTA) could pass the information received under the Exchange of Information (EoI) Article to a third jurisdiction 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 CDTA in the initial receiving jurisdiction.</p> <p>The Administration replied in the negative. The Administration added that the Commentary on the EoI Article of the Model Tax Convention on Income and on Capital of the Organization for Economic Co-operation and Development stated that a contracting state might not disclose information received to a third country unless otherwise agreed by both contracting states. The CDTAs concluded between Hong Kong and other jurisdictions expressly specified that information received under the EoI Article by a contracting party could not be disclosed to a third jurisdiction.</p> <p>In reply to the Chairman's enquiry, the Administration confirmed that the EoI Article in the CDTAs under scrutiny did not contain any provision that allowed exception to the obligation that information received under the EoI Article should not be disclosed to a third jurisdiction.</p>	
002138 – 004222	Chairman ALA4 DoJ	ALA4 remarked that an Order made under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) (IRO) incorporated a CDTA into the domestic law of Hong Kong. The section provided that if an Order was made, the arrangements specified in the Order "shall have effect", and based on the	

Time Marker	Speaker	Subject(s)	Action Required
		<p>plain meaning of the section, the CDTA shall take full effect rather than nominal effect when the Order is to commence operation.</p> <p>In reply, the Administration remarked that it was not necessary for the date on which a CDTA as an international agreement entered into force to be the same as the commencement date of the Order which implemented the CDTA as a piece of domestic law of Hong Kong. In signing a CDTA with another jurisdiction, the HKSAR Government made a commitment that it would pursue the necessary procedure according to Hong Kong's legislation to enable the CDTA to enter into force, and the necessary procedure was the enactment of the CDTA as a piece of local legislation. The HKSAR Government would notify the other contracting party after such necessary procedure had been completed, in accordance with the Entry Into Force Article of a CDTA.</p> <p>The Chairman remarked that the issue at stake was that ALA4 and the Administration had different interpretations over section 49(1A) of IRO. He enquired whether the Administration agreed with the view that the CDTA concerned shall have full effect when an Order made under section 49(1A) of IRO commenced operation.</p> <p>The Administration replied as follows:</p> <ul style="list-style-type: none"> (a) It had reservation on ALA4's interpretation of section 49(1A) of IRO; (b) The phrase "shall have effect" in section 49(1A) of IRO could be read as "shall have effect" in accordance with the relevant provisions stipulated in the Agreement; (c) From the perspective of local legislation, the provisions in the Orders under scrutiny indeed would take effect on 12 January 2012, though they lacked the subject matters (i.e. the tax arrangements provided in the CDTAs concerned) on which they could act as yet. The tax arrangements in the CDTAs would take effect in accordance with the provisions specified in the Entry Into Force Article of the Agreements. 	

Time Marker	Speaker	Subject(s)	Action Required
		<p>ALA4 agreed with the Administration's view stated in paragraph 6 of the Paper 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". She was concerned that the current drafting of the commencement provision of the Orders might mislead the public to believe that the CDTAs, which had become part of the domestic law, would enter into force on the commencement date of the Orders (i.e. on 12 January 2012).</p> <p>The Chairman enquired whether there were any specific examples where the commencement provision of the Orders would cause any problems, e.g. a taxpayer might wrongly believe that the tax arrangements would take effect on the date when the Orders would commence operation, and filed tax relief applications with the Inland Revenue Department based on his wrong understanding.</p> <p>The Administration pointed out that while the three Orders would commence operation on 12 January 2012, it was stated under the Entry Into Force Article of the CDTAs that "the provisions of the Agreement shall thereupon have effect, in the 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;". Thus the public would not be confused and think that the tax arrangements in the CDTAs would take effect on the commencement date of the Orders. However, with the knowledge of the CDTAs through the Orders, the residents of the contracting parties could make arrangements for their activities with a view to reaping tax benefits when the tax arrangements in the CDTAs became effective.</p> <p>ALA4 was of the view that the commencement provisions of the Orders should contain reference to the entry into force of the CDTAs.</p> <p>The Chairman concluded that ALA4 and the Administration had expressed their legal views. While members did not consider that it was necessary for the Administration to adopt the approach suggested by ALA4, the views of both parties should be recorded.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>ALA4 referred to paragraph 9 of the Paper and expressed concern over the Administration's administrative arrangement that upon the entry into force of a CDTA, the Inland Revenue Department would publish an announcement on its website for public information. ALA4 pointed out that section 34(1) of the Interpretation and General Clauses Ordinance (Cap. 1) stipulated that "All subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting thereof after the publication in the Gazette of that subsidiary legislation" and considered that the notice specifying the date on which a CDTA entered into force could be subsidiary legislation and.</p> <p>The Administration remarked that its preliminary thinking was that the notice specifying the date on which a CDTA entered into force was not subsidiary legislation. However, it would further examine the issue.</p>	
004223 – 004353	Chairman Clerk	<p>The Clerk advised members on the legislative timetable.</p> <p>The Chairman requested the Administration to provide a written response on whether the notice specifying the date on which a CDTA would come into force would be subsidiary legislation. He said that ALA4 might further respond, if necessary. The need for another meeting would then be decided. He would make a verbal report at the meeting of the House Committee on 16 December 2011.</p>	The Administration to take action as per paragraph 2 of the minutes.