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By fax: 3529 2837

13 December 2011

Ms Anita SIT
Clerk to Subcommittee
Subcommittee on the Three Orders Made
under S.49(1A) of the Inland Revenue Ordinance
Legislative Council Secretariat
Legislative Council Complex
Legislative Council Road
Central, Hong Kong

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 Monday, 5 December 2011

Thank you for your letter of 6 December 2011 on the captioned Orders.
Our responses to the follow-up actions are set out in the following paragraphs.

Item 1 – Disclosure to Third Jurisdictions

2. The provision “[i]nformation shall not be disclosed to any third jurisdiction for any purpose” is found in the respective Exchange of Information (“EoI”) Article of the HK/Portugal, HK/Spain and HK/Czech comprehensive

avoidance of double taxation agreements (“CDTAs”). This provision is in line with paragraph 12.2 of the Commentary on Article 26 (concerning EoI) of the Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development (2010) (upon which the EoI article in the above 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.

3. Furthermore, 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)”.

4. 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 the provision referred to in paragraph 2 above in the orders made under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) (“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.

Item 2 - Commencement of the Orders

5. Incorporation of CDTA into law is achieved under section 49(1A) of the

IRO -

“If the Chief Executive in Council by order declares that arrangements specified in the order 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, and that it is expedient that those arrangements should have effect, those arrangements shall have effect.... *(emphasis added)*”

6. 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. 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 (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 our other CDTA Orders submitted to the Legislative Council (“LegCo”) for approval, is considered to be legally in order.

7. The “Commencement Notice” approach used in the MLA regime should be considered having regard to its own circumstances. MLA empowers law enforcement agencies to offer cross-border assistance on the investigation and prosecution of criminal offences and 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.

8. If the “Commencement Notice” approach were to be adopted for CDTAs, the provisions under the Entry into Force Article of the CDTA shall provide for a buffer period, e.g. a further two months, to allow the Hong Kong Special Administrative Region Government, upon completion of the exchange of note between the two Contracting Parties, to submit a commencement notice to LegCo for negative vetting before the CDTA 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 our experience, it is the common objective and serves the mutual interests of our CDTA partners to bring the CDTAs into force as early as possible. Practically speaking, of the three CDTAs under scrutiny, the HK/Czech CDTA does not provide for a buffer period for making a commencement notice and we would need to seek the agreement of the Czech side to amend the relevant provisions if we were to adopt the "Commencement Notice" approach.

9. As we have explained in our letter dated 29 November 2011 to the Assistant Legal Adviser to LegCo, upon the entry into force of a CDTA, IRD will publish an announcement on its website for public information. IRD will also actively send out 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, we are prepared to issue a press release upon the entry into force of a CDTA. We believe that the current approach has balanced the considerations on legal requirements, efficiency and transparency.

Yours sincerely,



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

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