



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2179 5848)
15 December 2011

Ms Shirley KWAN
Principal Assistant Secretary for Financial Services and
the Treasury (Treasury)
Financial Services and the Treasury Bureau
Room 2416, 24/F, Central Government Offices
2 Tim Mei Avenue
Admiralty
Hong Kong

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
(L.N. 155 - L.N. 157)**

At the subcommittee meeting held yesterday morning, the Chairman of the subcommittee invited the Administration to consider whether the notice specifying the date on which Comprehensive Agreement for Avoidance of Double Taxation (CDTA) comes into force is subsidiary legislation.

I would be grateful if the Administration could provide its views, in particular, on the following issues which were mentioned at the meeting and elaborated below for the subcommittee's consideration –

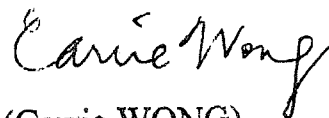
- (a) Section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) defines subsidiary legislation as "any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect". It would appear that any notice (Notice) announcing the date when the CDTA enters into force which will

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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 the Inland Revenue Ordinance (Cap. 112). 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 is stated in paragraph 6 of your letter of 13 December 2011 to the Clerk to the subcommittee 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 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." However, it would appear that the entry into force of the CDTA cannot be so determined simply because the later notification 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.

Yours sincerely,



(Carrie WONG)
Assistant Legal Adviser

c.c. DoJ (Attn: Ms Agnes CHEUNG, SGC) (By Fax: 2877 2130)
DoJ (Attn: Mr LUNG Wan-pun, SGC (Acting)) (By Fax: 2877 2130)
DoJ (Attn: Mr Peter SZE, GC) (By Fax: 2845 2215)
Clerk to Subcommittee