

財經事務及庫務局



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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
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 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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