

## **LEGISLATIVE COUNCIL BRIEF**

Inland Revenue Ordinance  
(Chapter 112)

### **INLAND REVENUE (DOUBLE TAXATION RELIEF AND PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME) (PORTUGUESE REPUBLIC) ORDER**

#### **INTRODUCTION**

At the meeting of the Executive Council on 8 November 2011, the Council ADVISED and the Acting Chief Executive ORDERED that the Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Portuguese Republic) Order (the Order), at Annex A, should be made under section 49(1A) of the Inland Revenue Ordinance, Cap. 112 (the Ordinance). The Order implements the Agreement between the Hong Kong Special Administrative Region (HKSAR) and the Portuguese Republic (Portugal) for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion signed on 22 March 2011 (the Portuguese Agreement).

#### **JUSTIFICATIONS**

##### **Benefits of Comprehensive Agreements for Avoidance of Double Taxation**

2. Double taxation refers to the imposition of comparable taxes in more than one tax jurisdiction in respect of the same source of income. The international community generally recognises that double taxation hinders the exchange of goods and services, movements of capital, technology and human resources, and poses an obstacle to the development of economic

relations between economies. As a business facilitation initiative, it is our policy to enter into Comprehensive Agreements for Avoidance of Double Taxation (CDTAs) with our trading and investment partners so as to minimise double taxation.

3. Hong Kong adopts the territorial concept of taxation whereby only income sourced from Hong Kong is subject to tax. A local resident's income derived from sources outside Hong Kong would not be taxed in Hong Kong and hence would not be subject to double taxation. Double taxation may occur where a foreign jurisdiction taxes its own residents' income derived from Hong Kong. Although many jurisdictions do provide their residents with unilateral tax relief for the Hong Kong tax they paid on income derived therefrom, the existence of a CDTA will provide enhanced certainty and stability in respect of the elimination of double taxation. Besides, the tax relief provided under a CDTA may exceed the level provided unilaterally by a tax jurisdiction.

### **Benefits of the Portuguese Agreement**

4. In the absence of the Portuguese Agreement, profits of Hong Kong companies doing business through a permanent establishment, such as a sales outlet, in Portugal may be taxed in both places if the income is Hong Kong sourced. Under the Portuguese Agreement, double taxation is avoided in that any Portuguese tax paid by the companies shall be allowed as a credit against the tax payable in Hong Kong.

5. Under the Portuguese Agreement, the income received by a Hong Kong resident, which is not paid by (or on behalf of) and borne by a Portuguese entity, from employment exercised in Portugal will be exempted from Portuguese income tax if his or her aggregate stay in Portugal in any relevant 12-month period does not exceed 183 days.

6. In the absence of a CDTA, Hong Kong residents receiving dividends from Portugal not attributable to a permanent establishment there are subject to Portuguese withholding tax currently at 20% and 21.5% for corporations and individuals respectively. Under the Portuguese Agreement, such withholding tax will be capped at 10%. The withholding tax on dividends will be further reduced to 5% if the beneficial owner of the dividends is a company (other than a partnership) holding directly at least 10% of the capital of the company paying the dividends. Also, currently Hong Kong residents receiving royalties from Portugal are subject to withholding tax at 15% and 21.5% for corporations and individuals respectively in Portugal. Under the Portuguese Agreement, the withholding tax on royalties will be capped at 5%. The Portuguese withholding tax on interest for Hong

Kong residents will be reduced from the current rate of 20% and 21.5% for corporations and individuals respectively to 10% in all cases. Such withholding tax will be exempted if the recipient is the HKSAR Government or the Hong Kong Monetary Authority.

7. Under the Portuguese Agreement, Hong Kong airlines operating flights to and from Portugal will be taxed in Hong Kong only at Hong Kong's corporation tax rate (which is lower than that of Portugal). Profits from international shipping transport earned by Hong Kong residents that arise in Portugal, which are currently subject to tax there, will enjoy tax exemption in Portugal under the Portuguese Agreement.

8. Overall speaking, the Portuguese Agreement sets out clearly the allocation of taxing rights between the two jurisdictions and the relief on tax rates on different types of income. It will help investors of the two economies to better assess their potential tax liabilities from cross-border economic activities, foster closer economic and trade links between the two places, and provide added incentives for enterprises of Portugal to do business with or invest in Hong Kong, and vice versa.

### **Exchange of Information Article under the Portuguese Agreement**

9. The Inland Revenue (Amendment) Ordinance 2010 which enables Hong Kong to adopt the Organisation for Economic Co-operation and Development (OECD) 2004 version of the Exchange of Information (EoI) Article in our CDTAs came into operation in March 2010. During the scrutiny of the relevant bill, the Government presented a sample EoI Article (Annex B) to the Bills Committee and undertook to highlight any deviation from the text in any CDTA that we have signed when we submit the CDTA for vetting.

10. The Portuguese Agreement, which contains an EoI Article (the Article) based on the OECD 2004 version, has adopted all the safeguards in the sample EoI Article, in particular -

- (a) the Article does not oblige the Contracting Parties to exchange information on an automatic or spontaneous basis;
- (b) the scope of information exchange is confined to taxes covered by the Portuguese Agreement;
- (c) the information sought should be foreseeably relevant, i.e. there will be no fishing expedition;
- (d) confidentiality requirements and restrictions on the usage of the information exchanged are as set out in the sample EoI Article;

- (e) information will only be disclosed to the tax authorities and not for release to their oversight body;
- (f) the information requested shall not be disclosed to a third jurisdiction; and
- (g) there is no obligation to supply information under certain circumstances as set out in the sample EoI Article.

## **Legal Basis**

11. Under section 49(1A) of the Ordinance, the Chief Executive in Council may, by order, declare that arrangements 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. Following the signing of the Portuguese Agreement, it is necessary for the Chief Executive in Council to declare by order that arrangements with Portugal on double taxation relief have been made so as to put the Portuguese Agreement into effect.

## **OTHER OPTIONS**

12. An Order made by the Chief Executive in Council under section 49(1A) of the Ordinance is the only way to give effect to the Portuguese Agreement. There is no other option.

## **THE ORDER**

13. **Section 2** of the Order declares that the arrangements specified in section 3 for double taxation relief in relation to income tax and any tax of a similar character imposed by the laws of Portugal have been made and that those arrangements should take effect. **Section 3** states that the arrangements are those in Articles 1 to 29 of the Portuguese Agreement as well as Paragraphs 1 to 6 of the Protocol to the Portuguese Agreement, the text of which Articles and Paragraphs is set out in the **Schedule** to the Order.

## **LEGISLATIVE TIMETABLE**

14. The legislative timetable is as follows –

Publication in the Gazette	18 November 2011
Tabling at Legislative Council	23 November 2011
Commencement of the Order	12 January 2012

## **IMPLICATIONS OF THE PROPOSAL**

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15. The proposal has financial, economic and civil service implications as set out in Annex C. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The proposal will not affect the binding effect of the existing provisions of the Ordinance and its subsidiary legislation. It has no productivity, environmental or sustainability implications.

## **PUBLIC CONSULTATION**

16. The business and professional sectors have all along supported our policy to conclude more CDTAs with our trading and investment partners.

## **PUBLICITY**

17. Publicity was arranged for the signing of the Portuguese Agreement on 22 March 2011. A spokesman will be available to answer media and public enquiries.

## **BACKGROUND**

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18. The Portuguese Agreement is the nineteenth CDTA concluded by Hong Kong with another jurisdiction. A summary of the main provisions of the Agreement is at Annex D.

19. We entered into a CDTA with Belgium in December 2003, with Thailand in September 2005, with the Mainland of China in August 2006, with Luxembourg in November 2007, with Vietnam in December 2008, with Brunei, the Netherlands and Indonesia in March 2010, with Hungary, Kuwait and Austria in May 2010, with the United Kingdom and Ireland in June 2010, with Liechtenstein in August 2010, with France in October 2010, with Japan in November 2010, with New Zealand and Switzerland in December 2010, with Portugal in March 2011, with Spain in April 2011, with the Czech Republic in June 2011 and with Malta in November 2011.

## **ENQUIRY**

20. In case of enquiries about this Brief, please contact Ms Shirley Kwan, Principal Assistant Secretary for Financial Services and the Treasury (Treasury), at 2810 2370.

**Financial Services and the Treasury Bureau**  
**16 November 2011**

## **LEGISLATIVE COUNCIL BRIEF**

### **Inland Revenue Ordinance (Chapter 112)**

#### **INLAND REVENUE (DOUBLE TAXATION RELIEF AND PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME) (PORTUGUESE REPUBLIC) ORDER**

### **ANNEXES**

Annex A	Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Portuguese Republic) Order
Annex B	Sample Exchange of Information Article
Annex C	Financial, Economic and Civil Service Implications of the Proposal
Annex D	Summary of the main provisions of the Comprehensive Double Taxation Agreement between Hong Kong and Portugal

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Portuguese Republic) Order

Section 1

1

**Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Portuguese Republic) Order**

(Made by the Chief Executive in Council under section 49(1A) of the Inland Revenue Ordinance (Cap. 112))

**1. Commencement**

This Order comes into operation on 12 January 2012.

**2. Declaration under section 49(1A)**

For the purposes of section 49(1A) of the Ordinance, it is declared—

- (a) that the arrangements specified in section 3(1) have been made with the Government of the Portuguese Republic 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 the Republic; and
- (b) that it is expedient that those arrangements should have effect.

**3. Arrangements specified**

- (1) The arrangements specified for the purposes of section 2(a) are the arrangements in—
  - (a) Articles 1 to 29 of the agreement titled “Agreement between the Hong Kong Special Administrative Region of the People’s Republic of China and the Portuguese Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income”, done in duplicate at Hong Kong on 22 March 2011 in the Chinese, Portuguese and English languages; and

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Portuguese Republic) Order

Section 3

2

- (b) Paragraphs 1 to 6 of the protocol to the agreement, done in duplicate at Hong Kong on 22 March 2011 in the Chinese, Portuguese and English languages.
- (2) The English text of the Articles referred to in subsection (1)(a) is reproduced in Part 1 of the Schedule.
- (3) The English text of the Paragraphs referred to in subsection (1)(b) is reproduced in Part 2 of the Schedule.

## **Schedule**

[s. 3]

### **Part 1**

# **Articles 1 to 29 of the Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and the Portuguese Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income**

## **CHAPTER I**

### **SCOPE OF THE AGREEMENT**

#### **Article 1**

##### **Persons Covered**

This Agreement shall apply to persons who are residents of one or both of the Contracting Parties.

#### **Article 2**

##### **Taxes Covered**

1. This Agreement shall apply to taxes on income imposed on behalf of a Contracting Party or of its political or administrative subdivisions or local authorities, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
3. The existing taxes to which the Agreement shall apply are in particular:
  - (a) in the case of the Hong Kong Special Administrative Region,
    - (i) profits tax;
    - (ii) salaries tax; and
    - (iii) property tax;whether or not charged under personal assessment;
  - (b) in the case of Portugal,
    - (i) the personal income tax (Imposto sobre o Rendimento das Pessoas Singulares – IRS);
    - (ii) the corporate income tax (Imposto sobre o Rendimento das Pessoas Colectivas – IRC); and
    - (iii) the surtaxes on corporate income tax (Derramas).
4. The Agreement shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Agreement in addition to, or in place of, the existing taxes, as well as any other taxes falling within paragraphs 1 and 2 of this Article which a Contracting Party may impose in future. The competent



authorities of the Contracting Parties shall notify each other of any significant changes that have been made in their taxation laws.

5. The existing taxes, together with the taxes imposed after the signature of the Agreement, are hereinafter referred to as “Hong Kong Special Administrative Region tax” or “Portuguese tax”, as the context requires.

## CHAPTER II

### DEFINITIONS

#### Article 3

##### General Definitions

1. For the purposes of this Agreement, unless the context otherwise requires:
- (a) the term “Hong Kong Special Administrative Region” means any territory where the tax laws of the Hong Kong Special Administrative Region of the People’s Republic of China apply;
  - (b) the term “Portugal” when used in a geographical sense comprises the territory of the Portuguese Republic in accordance with international law and Portuguese legislation;
  - (c) the term “company” means any body corporate or any entity that is treated as a body corporate for tax purposes;
  - (d) the term “competent authority” means:

- (i) in the case of the Hong Kong Special Administrative Region, the Commissioner of Inland Revenue or his authorized representative;
  - (ii) in the case of Portugal, the Minister of Finance, the Director General of Taxation (Director-Geral dos Impostos) or their authorized representative;
- (e) the term “Contracting Party” or “Party” means the Hong Kong Special Administrative Region or Portugal, as the context requires;
- (f) the terms “enterprise of a Contracting Party” and “enterprise of the other Contracting Party” mean respectively an enterprise carried on by a resident of a Contracting Party and an enterprise carried on by a resident of the other Contracting Party;
- (g) the term “international traffic” means any transport by a ship or aircraft operated by an enterprise of a Contracting Party except when the ship or aircraft is operated solely between places in the other Contracting Party;
- (h) the term “national”, in relation to Portugal means:
- (i) any individual possessing the nationality of Portugal; and
  - (ii) any legal person, partnership or association deriving its status as such from the laws in force in Portugal;
- (i) the term “person” includes an individual, a company, a trust, a partnership and any other body of persons.

2. In the Agreement, the terms “Hong Kong Special Administrative Region tax” and “Portuguese tax” do not include any penalty or interest imposed under the laws of either Contracting Party relating to the taxes to which the Agreement applies by virtue of Article 2.
3. As regards the application of the Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party for the purposes of the taxes to which the Agreement applies, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

#### Article 4

##### Resident

1. For the purposes of this Agreement, the term “resident of a Contracting Party” means:
  - (a) in the case of the Hong Kong Special Administrative Region,
    - (i) any individual who ordinarily resides in the Hong Kong Special Administrative Region;
    - (ii) any individual who stays in the Hong Kong Special Administrative Region for more than 180 days during a year of assessment or for more than 300 days in two consecutive years of assessment one of which is the relevant year of assessment;
    - (iii) a company incorporated in the Hong Kong Special Administrative Region or, if incorporated outside the Hong Kong Special Administrative Region, being

- normally managed or controlled in the Hong Kong Special Administrative Region;
    - (iv) any other person constituted under the laws of the Hong Kong Special Administrative Region or, if constituted outside the Hong Kong Special Administrative Region, being normally managed or controlled in the Hong Kong Special Administrative Region;
    - (v) the Government of the Hong Kong Special Administrative Region;
  - (b) in the case of Portugal, any person who, under the laws of Portugal, is liable to tax therein by reason of his residence, place of management or any other criterion of a similar nature, and also includes the Contracting Party and any political or administrative subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in Portugal in respect only of income from sources in Portugal.
2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting Parties, then his status shall be determined as follows:
    - (a) he shall be deemed to be a resident only of the Party in which he has a permanent home available to him; if he has a permanent home available to him in both Parties, he shall be deemed to be a resident only of the Party with which his personal and economic relations are closer (centre of vital interests);
    - (b) if the Party in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to

him in either Party, he shall be deemed to be a resident only of the Party in which he has an habitual abode;

- (c) if he has an habitual abode in both Parties or in neither of them, he shall be deemed to be a resident only of the Party in which he has the right of abode (in the case of the Hong Kong Special Administrative Region) or of which he is a national (in the case of Portugal);
- (d) if he has the right of abode in the Hong Kong Special Administrative Region and is also a national of Portugal, or if he does not have the right of abode in the Hong Kong Special Administrative Region nor is he a national of Portugal, the competent authorities of the Contracting Parties shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting Parties, then it shall be deemed to be a resident only of the Party in which its place of effective management is situated.

## Article 5

### Permanent Establishment

- 1. For the purposes of this Agreement, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
- 2. The term “permanent establishment” includes especially:
  - (a) a place of management;
  - (b) a branch;

- (c) an office;
- (d) a factory;
- (e) a workshop; and
- (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. The term “permanent establishment” also encompasses:

- (a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;
- (b) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting Party for a period or periods aggregating more than 183 days within any twelve month period.

4. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:

- (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
  - (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
  - (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
  - (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting Party on behalf of an enterprise of the other Contracting Party, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting Party in respect of any activities which that person undertakes for the enterprise, if such a person:
- (a) has, and habitually exercises, in the first-mentioned Contracting Party an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph, or

- (b) has no such authority, but habitually maintains in the first-mentioned Party a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.
6. An enterprise shall not be deemed to have a permanent establishment in a Contracting Party merely because it carries on business in that Party through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.
7. The fact that a company which is a resident of a Contracting Party controls or is controlled by a company which is a resident of the other Contracting Party, or which carries on business in that other Party (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

### CHAPTER III

### TAXATION OF INCOME

#### Article 6

#### Income from Immovable Property

- 1. Income derived by a resident of a Contracting Party from immovable property (including income from agriculture or forestry) situated in the other Contracting Party may be taxed in that other Party.
- 2. The term “immovable property” shall have the meaning which it has under the law of the Contracting Party in which the property in

question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, quarries, sources and other natural resources; ships and aircraft shall not be regarded as immovable property.

3. Any property or right referred to in paragraph 2 shall be regarded as situated where the land, standing timber, mineral deposits, quarries, sources or natural resources, as the case may be, are situated or where the working may take place.
4. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.
5. The provisions of paragraphs 1 and 4 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

#### Article 7

##### Business Profits

1. The profits of an enterprise of a Contracting Party shall be taxable only in that Party unless the enterprise carries on business in the other Contracting Party through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Party but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting Party carries on business in the other Contracting Party through a permanent establishment situated therein, there shall in each Contracting Party be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.
3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Party in which the permanent establishment is situated or elsewhere.
4. Insofar as it has been customary in a Contracting Party to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, or on the basis of such other method as may be prescribed by the laws of that Party, nothing in paragraph 2 shall preclude that Contracting Party from determining the profits to be taxed by such apportionment or other method; the method adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.
5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.
6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

### **Article 8**

#### **Shipping and Air Transport**

1. Profits of an enterprise of a Contracting Party from the operation of ships or aircraft in international traffic shall be taxable only in that Party.
2. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

### **Article 9**

#### **Associated Enterprises**

1. Where:
  - (a) an enterprise of a Contracting Party participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting Party, or
  - (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting Party and an enterprise of the other Contracting Party,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting Party includes in the profits of an enterprise of that Party - and taxes accordingly - profits on which an enterprise of the other Contracting Party has been charged to tax in that other Party and the profits so included are profits which would have accrued to the enterprise of the first-mentioned Party if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other Party, if it agrees that the adjustment made by the first-mentioned Party is justified, shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Agreement and for this purpose the competent authorities of the Contracting Parties shall if necessary consult each other.

### **Article 10**

#### **Dividends**

1. Dividends paid by a company which is a resident of a Contracting Party to a resident of the other Contracting Party may be taxed in that other Party.
2. However, such dividends may also be taxed in the Contracting Party of which the company paying the dividends is a resident and according to the laws of that Party, but if the beneficial owner of

the dividends is a resident of the other Contracting Party, the tax so charged shall not exceed:

- (a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends;
- (b) 10 per cent of the gross amount of the dividends in all other cases.

The competent authorities of the Contracting Parties shall by mutual agreement settle the mode of application of these limitations.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

- 3. The term “dividends” as used in this Article means income from shares, “jouissance” shares or “jouissance” rights, mining shares, founders’ shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the Party of which the company making the distribution is a resident.
- 4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting Party, carries on business in the other Contracting Party of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other Party independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed

base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

- 5. Where a company which is a resident of a Contracting Party derives profits or income from the other Contracting Party, that other Party may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other Party or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other Party, nor subject the company’s undistributed profits to a tax on the company’s undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other Party.

## Article 11

### Interest

- 1. Interest arising in a Contracting Party and paid to a resident of the other Contracting Party may be taxed in that other Party.
- 2. However, such interest may also be taxed in the Contracting Party in which it arises and according to the laws of that Party, but if the beneficial owner of the interest is a resident of the other Contracting Party, the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the Contracting Parties shall by mutual agreement settle the mode of application of this limitation.
- 3. Notwithstanding the provisions of paragraph 2 of this Article, interest arising in a Contracting Party is exempt from tax in that Party, if it is paid:

- (a) in the case of the Hong Kong Special Administrative Region,
    - (i) to the Government of the Hong Kong Special Administrative Region;
    - (ii) to the Hong Kong Monetary Authority, or to such other similar institution wholly owned or funded by the Government of the Hong Kong Special Administrative Region which may be established in the future, as mutually agreed upon by the competent authorities of the two Contracting Parties;
  - (b) in the case of Portugal,
    - (i) to the Contracting Party or any political or administrative subdivision or local authority thereof;
    - (ii) to the Central Bank of Portugal.
4. The term “interest” as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor’s profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.
5. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting Party, carries on business in the other Contracting Party in which the interest arises through a permanent establishment situated therein, or performs in that other Party independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with

- such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.
6. Interest shall be deemed to arise in a Contracting Party when the payer is a resident of that Party. Where, however, the person paying the interest, whether he is a resident of a Contracting Party or not, has in a Contracting Party a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the Party in which the permanent establishment or fixed base is situated.
7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest exceeds, for whatever reasons, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting Party, due regard being had to the other provisions of this Agreement.

## Article 12

### Royalties

- 1. Royalties arising in a Contracting Party and paid to a resident of the other Contracting Party may be taxed in that other Party.
- 2. However, such royalties may also be taxed in the Contracting Party in which they arise and according to the laws of that Party, but if the beneficial owner of the royalties is a resident of the other



Contracting Party, the tax so charged shall not exceed 5 per cent of the gross amount of the royalties. The competent authorities of the Contracting Parties shall by mutual agreement settle the mode of application of this limitation.

3. The term “royalties” as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting Party, carries on business in the other Contracting Party in which the royalties arise through a permanent establishment situated therein, or performs in that other Party independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.
5. Royalties shall be deemed to arise in a Contracting Party when the payer is a resident of that Party. Where, however, the person paying the royalties, whether he is a resident of a Contracting Party or not, has in a Contracting Party a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the Party in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties exceeds, for whatever reasons, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting Party, due regard being had to the other provisions of this Agreement.

### Article 13

#### Capital Gains

1. Gains derived by a resident of a Contracting Party from the alienation of immovable property referred to in Article 6 and situated in the other Contracting Party may be taxed in that other Party.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting Party has in the other Contracting Party or of movable property pertaining to a fixed base available to a resident of a Contracting Party in the other Contracting Party for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other Party.
3. Gains derived by an enterprise of a Contracting Party from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in that Party.

4. Gains derived by a resident of a Contracting Party from the alienation of shares of, or of a comparable interest in, a company deriving more than 50 per cent of its asset value directly or indirectly from immovable property situated in the other Contracting Party may be taxed in that other Party.
5. Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting Party of which the alienator is a resident.

#### **Article 14**

##### **Independent Personal Services**

1. Income derived by a resident of a Contracting Party in respect of professional services or other activities of an independent character shall be taxable only in that Party except in the following circumstances, when such income may also be taxed in the other Contracting Party:
  - (a) if he has a fixed base regularly available to him in the other Contracting Party for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting Party; or
  - (b) if his stay in the other Contracting Party is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve month period commencing or ending in the taxable period concerned; in that case, only so much of the income as is derived from his activities performed in that other Party may be taxed in that other Party.

2. The term “professional services” includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

#### **Article 15**

##### **Dependent Personal Services**

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting Party in respect of an employment shall be taxable only in that Party unless the employment is exercised in the other Contracting Party. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other Party.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting Party in respect of an employment exercised in the other Contracting Party shall be taxable only in the first-mentioned Party if:
  - (a) the recipient is present in the other Party for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the taxable period concerned, and
  - (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other Party, and
  - (c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other Party.

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting Party shall be taxable only in that Party.

#### **Article 16**

##### **Directors' Fees**

Directors' fees and other similar payments derived by a resident of a Contracting Party in his capacity as a member of the board of directors of a company which is a resident of the other Contracting Party may be taxed in that other Party.

#### **Article 17**

##### **Artistes and Sportsmen**

1. Notwithstanding the provisions of Articles 14 and 15, income derived by a resident of a Contracting Party as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting Party, may be taxed in that other Party.
2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting Party in which the activities of the entertainer or sportsman are exercised.

#### **Article 18**

##### **Pensions**

1. Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration (including a lump sum payment) paid to a resident of a Contracting Party in consideration of past employment or self-employment shall be taxable only in that Party.
2. Notwithstanding the provisions of paragraph 1, payments made under a mandatory provident fund scheme in a Contracting Party, and any other similar schemes or arrangements which may be established in that Party to replace that scheme, may be taxed in that Party.

#### **Article 19**

##### **Government Service**

1. Salaries, wages and other similar remuneration, other than a pension, paid by a Contracting Party or a political or administrative subdivision or a local authority thereof to an individual in respect of services rendered to that Party or subdivision or authority shall be taxable only in that Party. However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting Party if the services are rendered in that Party and the individual is a resident of that Party who:
  - (a) in the case of the Hong Kong Special Administrative Region, has the right of abode therein and in the case of Portugal, is a national thereof; or
  - (b) did not become a resident of that Party solely for the purpose of rendering the services.

2. Any pension (including a lump sum payment) paid by, or paid out of funds created or contributed by, a Contracting Party or a political or administrative subdivision or a local authority thereof to an individual in respect of services rendered to that Party or subdivision or authority shall be taxable only in that Party. However, such pensions (whether a payment in lump sum or by instalments) shall be taxable only in the other Contracting Party if the services were rendered in that Party and the individual is a resident of that Party, and that the case falls within subparagraph (a) or (b) of paragraph 1 of this Article.
3. The provisions of Articles 15, 16, 17 and 18 shall apply to salaries, wages, pensions (including a lump sum payment), and other similar remuneration in respect of services rendered in connection with a business carried on by a Contracting Party or a political or administrative subdivision or a local authority thereof.

#### **Article 20**

##### **Students**

Payments which a student who is or was immediately before visiting a Contracting Party a resident of the other Contracting Party and who is present in the first-mentioned Party solely for the purpose of his education receives for the purpose of his maintenance or education shall not be taxed in that Party, provided that such payments arise from sources outside that Party.

#### **Article 21**

##### **Other Income**

1. Items of income of a resident of a Contracting Party, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that Party.
2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting Party, carries on business in the other Contracting Party through a permanent establishment situated therein, or performs in that other Party independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

#### **CHAPTER IV**

#### **METHODS FOR ELIMINATION OF DOUBLE TAXATION**

##### **Article 22**

##### **Elimination of Double Taxation**

1. In the case of the Hong Kong Special Administrative Region, double taxation shall be eliminated as follows:

Subject to the provisions of the laws of the Hong Kong Special Administrative Region relating to the allowance of a credit against Hong Kong Special Administrative Region tax of tax paid in a jurisdiction outside the Hong Kong Special Administrative Region (which shall not affect the general principle of this Article), Portuguese tax paid under the laws of Portugal and in accordance with this Agreement, whether directly or by deduction, in respect of income derived by a person who is a resident of the Hong Kong

Special Administrative Region from sources in Portugal, shall be allowed as a credit against Hong Kong Special Administrative Region tax payable in respect of that income, provided that the credit so allowed does not exceed the amount of Hong Kong Special Administrative Region tax computed in respect of that income in accordance with the tax laws of the Hong Kong Special Administrative Region.

2. In the case of Portugal, double taxation shall be eliminated as follows:

Where a resident of Portugal derives income which, in accordance with the provisions of this Agreement, may be taxed in Hong Kong Special Administrative Region, Portugal shall allow as a deduction from the tax on the income of that resident an amount equal to the income tax paid in Hong Kong Special Administrative Region. Such deduction shall not, however, exceed that part of the income tax as computed before the deduction is given, which is attributable to the income which may be taxed in Hong Kong Special Administrative Region.

3. Where in accordance with any provisions of this Agreement income derived by a resident of a Contracting Party is exempt from tax in that Party, that Party may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

## CHAPTER V

### SPECIAL PROVISIONS

#### Article 23

#### Non-Discrimination

1. Persons who, in the case of the Hong Kong Special Administrative Region, have the right of abode or are incorporated or otherwise constituted therein, and, in the case of Portugal, are Portuguese nationals, shall not be subjected in the other Contracting Party to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which persons who have the right of abode or are incorporated or otherwise constituted in that other Party (where that other Party is the Hong Kong Special Administrative Region) or nationals of that other Party (where that other Party is Portugal) in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting Parties.
2. Stateless persons who are residents of a Contracting Party shall not be subjected in either Contracting Party to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which persons who have the right of abode in the Party (where the Party is the Hong Kong Special Administrative Region) or nationals of the Party (where the Party is Portugal) in the same circumstances, in particular with respect to residence, are or may be subjected.
3. The taxation on a permanent establishment which an enterprise of a Contracting Party has in the other Contracting Party shall not be less favourably levied in that other Party than the taxation levied on enterprises of that other Party carrying on the same activities. This provision shall not be construed as obliging a Contracting Party to grant to residents of the other Contracting Party any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

4. Except where the provisions of paragraph 1 of Article 9, paragraph 7 of Article 11, or paragraph 6 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting Party to a resident of the other Contracting Party shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned Party.
5. Enterprises of a Contracting Party, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting Party, shall not be subjected in the first-mentioned Party to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned Party are or may be subjected.
6. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

#### **Article 24**

##### **Mutual Agreement Procedure**

1. Where a person considers that the actions of one or both of the Contracting Parties result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those Parties, present his case to the competent authority of the Contracting Party of which he is a resident or, if his case comes under paragraph 1 of Article 23, to that of the Contracting Party in which he has the right of abode or is incorporated or otherwise constituted (in the case of the Hong Kong Special Administrative Region) or of which he is a national (in the case of Portugal). The case must be presented within three years from the first notification

- of the action resulting in taxation not in accordance with the provisions of the Agreement.
2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Parties.
3. The competent authorities of the Contracting Parties shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.
4. The competent authorities of the Contracting Parties may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

#### **Article 25**

##### **Exchange of Information**

1. The competent authorities of the Contracting Parties shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws of the Contracting Parties concerning taxes covered by the Agreement, insofar as the taxation

thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by a Contracting Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Information shall not be disclosed to any third jurisdiction for any purpose.
3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting Party the obligation:
  - (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting Party;
  - (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting Party;
  - (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).
4. If information is requested by a Contracting Party in accordance with this Article, the other Contracting Party shall use its information gathering measures to obtain the requested information, even though that other Party may not need such information for its

own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting Party to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting Party to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

#### Article 26

##### Fiscal Privileges

Nothing in this Agreement shall affect the fiscal privileges, including those of members of consular posts, under the general rules of international law or under the provisions of special agreements.

#### Article 27

##### Miscellaneous Rules

Nothing in this Agreement shall prejudice the right of each Contracting Party to apply its domestic laws and measures concerning tax avoidance, whether or not described as such.

#### CHAPTER VI

##### FINAL PROVISIONS

## Article 28

### Entry into Force

1. Each Contracting Party shall notify the other, in writing and through appropriate channels, that all the domestic procedures necessary for the entry into force of this Agreement have been completed. The Agreement shall enter into force on the thirtieth day following the date of the latter notification.
2. The provisions of the Agreement shall have effect:
  - (a) in the Hong Kong Special Administrative Region,

in respect of Hong Kong Special Administrative Region 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;
  - (b) in Portugal,
    - (i) in respect of taxes withheld at source, the fact giving rise to them appearing on or after the first day of January of the calendar year next following that in which the Agreement enters into force;
    - (ii) in respect of other taxes, as to income arising in any fiscal year beginning on or after the first day of January of the calendar year next following that in which the Agreement enters into force.

## Article 29

### Termination

1. This Agreement shall remain in force indefinitely.
2. However, after the expiration of a period of five years from the date of its entry into force, either Contracting Party may terminate the Agreement. The termination shall be notified in writing and through appropriate channels, before the thirtieth day of June of a calendar year.
3. In the event of termination, the Agreement shall cease to have effect:
  - (a) in the Hong Kong Special Administrative Region,

in respect of Hong Kong Special Administrative Region tax, for any year of assessment beginning on or after 1 April in the calendar year next following that in which the notice is given;
  - (b) in Portugal,
    - (i) in respect of taxes withheld at source, the fact giving rise to them appearing on or after the first day of January of the calendar year next following that in which the notice is given;
    - (ii) in respect of other taxes, as to income arising in the fiscal year beginning on or after the first day of January of the calendar year next following that in which the notice is given.



## Part 2

### **Paragraphs 1 to 6 of the Protocol to the Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and the Portuguese Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income**

#### 1. With respect to Article 3 (General Definitions)

In respect of paragraph 2 of Article 3, it is understood that the term “any penalty or interest” includes, in the case of the Hong Kong Special Administrative Region, any sum added to the Hong Kong Special Administrative Region tax by reason of default and recovered therewith and “additional tax” under Section 82A of the Inland Revenue Ordinance.

#### 2. With respect to Article 6 (Income from Immovable Property)

In the case of Portugal, it is understood that the provisions of Article 6 shall also apply to income derived from movable property or from services, which are connected with the use or the right to use the immovable property, and which, under the taxation law of Portugal, is assimilated to income from immovable property.

#### 3. With respect to Articles 10 (Dividends), 11 (Interest), 12 (Royalties), 13 (Capital Gains) and 21 (Other Income)

It is understood that the provisions of Articles 10, 11, 12, 13 and 21 shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of shares or other rights in respect of which the dividends are paid, the creation or assignment of

debt-claim in respect of which the interest is paid, the creation or assignment of rights in respect of which the royalties are paid, the alienation of property out of which the gains are made, the creation or assignment of rights in respect of which income is paid to take advantage of these Articles by means of that creation or assignment.

#### 4. With respect to Article 10 (Dividends)

In respect of paragraph 3 of Article 10, in the case of Portugal, the term “dividends” also includes profits attributed under an arrangement for participation in profits (“associação em participação”).

#### 5. With respect to Article 16 (Directors' Fees)

It is understood that where a company is a resident of Portugal, Article 16 also applies to a member of the supervisory board or organ of a company, that is, “conselho fiscal” and “fiscal Único”.

#### 6. With respect to Article 25 (Exchange of Information)

In respect of Article 25, it is understood that:

- (a) the Article does not obligate the Contracting Parties to exchange information on a spontaneous or automatic basis;
- (b) the exchange of information provided in the Article does not include measures which constitute “fishing expeditions”;
- (c) the provisions of the Article shall not apply retrospectively;
- (d) the Contracting Parties shall ensure the protection of personal data transferred according to the Agreement and their domestic laws.

Clerk to the Executive Council

COUNCIL CHAMBER

2011

### Explanatory Note

The Hong Kong Special Administrative Region Government and the Government of Portugal signed an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (*Agreement*) together with a protocol to the Agreement (*Protocol*) on 22 March 2011. This Order specifies the arrangements in Articles 1 to 29 of the Agreement and Paragraphs 1 to 6 of the Protocol as double taxation relief arrangements under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) and declares that it is expedient that those arrangements should have effect. The Agreement and Protocol were signed in the Chinese, Portuguese and English languages.

2. The effects of the declaration are—
  - (a) that the arrangements have effect in relation to tax under the Inland Revenue Ordinance (Cap. 112) despite anything in any enactment; and
  - (b) that the arrangements, for the purposes of any provision of those arrangements that requires disclosure of information concerning tax of Portugal, have effect in relation to any tax of Portugal that is the subject of that provision.

**Extracts of Hong Kong's Sample CDTA Text**

**ARTICLE 25**

**EXCHANGE OF INFORMATION**

1. The competent authorities of the Contracting Parties shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting Parties, or of their political subdivisions or local or territorial authorities, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1<sup>1</sup>.
2. Any information received under paragraph 1 by a Contracting Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting Party the obligation:
  - (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting Party;
  - (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting Party;

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<sup>1</sup> Article 1: "PERSONS COVERED: This Agreement shall apply to persons who are residents of one or both of the Contracting Parties."

- (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).
- 4. If information is requested by a Contracting Party in accordance with this Article, the other Contracting Party shall use its information gathering measures to obtain the requested information, even though that other Party may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting Party to decline to supply information solely because it has no domestic interest in such information.
- 5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting Party to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

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## PROTOCOL

At the time of signing of the Agreement between the Government of Country A and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, the two Governments have agreed on the following provisions which shall form an integral part of the Agreement.

1-9. ....

10. It is understood that Article 25 does not create obligations as regards automatic or spontaneous exchanges of information between the Contracting Parties. In respect of the same Article, it is also understood that information requested shall not be disclosed to a third jurisdiction. In the case of the Hong Kong Special Administrative Region, the judicial decisions in which information may be disclosed include the decisions of the Board of Review.

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**Financial, Economic and Civil Service Implications  
of the Proposal**

**Financial Implications**

The Government would have to forgo some revenue which is currently being collected in respect of profits of Portuguese resident companies not attributable to a permanent establishment in Hong Kong, as well as shipping and air services profits of Portuguese operators. However, the overall financial implications would be insignificant.

**Economic Implications**

2. The Portuguese Agreement will facilitate business development between Hong Kong and Portugal and contribute positively to the economic development of Hong Kong. It will enhance the economic interaction between Hong Kong and Portugal by providing enhanced certainty and stability to the tax liabilities of investors.

**Civil Service Implications**

3. There will be additional work for the Inland Revenue Department (IRD) in handling requests for exchange of information from Portugal under the Portuguese Agreement. Additional manpower resources would be sought in accordance with the established resource allocation mechanism. IRD has also obtained the approval of the Finance Committee of the Legislative Council to create a supernumerary directorate post for three years with effect from 1 April 2011 to support the implementation of CDTA-related initiatives.

**Comprehensive Double Taxation Agreement (CDTA)  
Between Hong Kong and Portugal**

**Summary of Main Provisions**

1. The CDTA with Portugal (the “Portuguese Agreement”) covers the following types of taxes:

- (a) in respect of Hong Kong – (i) salaries tax;  
(ii) profits tax; and  
(iii) property tax;
- (b) in respect of Portugal – (i) the personal income tax;  
(ii) the corporate income tax; and  
(iii) the local surtax on corporate income tax.

2. The Portuguese Agreement deals with the taxing of income of the resident of one Contracting Party (“resident jurisdiction”) derived from another Contracting Party (“source jurisdiction”).

**Exclusive taxing right**

3. Where the right to tax income is allocated exclusively to one Contracting Party under the Portuguese Agreement (the resident jurisdiction or the source jurisdiction), there is no double taxation. It is provided in the Portuguese Agreement that the following types of income shall only be taxed in the resident jurisdiction:

- (a) profits of an enterprise, unless the enterprise carries on business in the source jurisdiction through a permanent establishment therein (i.e. a fixed place of business through which the business of an enterprise is wholly or partly carried on);
- (b) profits from operation of ships and aircraft in international

traffic and gains from alienation of ships or aircraft operated in international traffic;

- (c) capital gains not expressly dealt with in the Portuguese Agreement;
- (d) income from professional services, including services performed in the source jurisdiction provided that the services are not provided through a fixed base situated therein and the person is present in the source jurisdiction for aggregate periods not exceeding 183 days in the fiscal year concerned;
- (e) income from non-government employment, including employment exercised in the source jurisdiction provided that the employee is present in the source jurisdiction for aggregate periods not exceeding 183 days in any relevant 12-month period, etc.;
- (f) remuneration from non-government employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of the resident jurisdiction; and
- (g) other income not expressly dealt with in the Portuguese Agreement.

4. Employment income and pensions paid by the government of a Contracting Party is, in general, taxable only in that Party (source jurisdiction).

### **Shared taxing rights**

5. Where both tax jurisdictions are given the right to tax the same item of income, the resident jurisdiction is required under the Portuguese Agreement to give double taxation relief to its resident for any income doubly assessed (i.e. the source jurisdiction has the primary right to tax and the resident jurisdiction is left with a secondary right). It is provided in the Portuguese Agreement that the following types of income

may be taxed in both jurisdictions:

- (a) income generated from immovable property situated in the source jurisdiction and gains from the alienation of such property;
- (b) profits of an enterprise which carries on business in the source jurisdiction through a permanent establishment, to the extent that such profits are attributable to the permanent establishment, and gains from the alienation of the business property of such permanent establishment;
- (c) passive income of dividends, interest and royalties received from residents of a source jurisdiction. The source jurisdiction's right to tax is subject to a specified limit in tax rates:
  - for dividends, 5% if the beneficial owner is a company which holds directly at least 10 percent of the capital of the paying company and 10% in all other cases;
  - for interest, 0% if the recipient is the HKSAR government, the Hong Kong Monetary Authority, the Portuguese Republic and the Central Bank of Portugal and 10% in all other cases; and
  - for royalties, 5%;
- (d) gains from alienation of shares of a company deriving more than 50% of its asset value directly or indirectly from immovable property situated in the source jurisdiction;
- (e) income from non-government employment exercised in the source jurisdiction, where the employee is present in the source jurisdiction for aggregate periods exceeding 183 days in any relevant 12-month period, etc.;
- (f) directors' fees from a company resident in the source



jurisdiction;

- (g) non-government pensions paid out from a mandatory provident fund scheme in the source jurisdiction; and
- (h) income of entertainers and sportspersons who conduct their professional activities in the source jurisdiction.

6. In general, in case of shared taxing rights, double taxation relief may be given to a taxpayer either through the exemption method, where income taxable in the source jurisdiction is exempted from taxation in the resident jurisdiction; or through the credit method, where income taxable in the source jurisdiction is subject to tax in the resident jurisdiction but the tax levied in the source jurisdiction is credited against the tax levied in the resident jurisdiction on such income. Both Hong Kong and Portugal will provide double taxation relief for its residents by the credit method.