

立法會
Legislative Council

LC Paper No. CB(1)1241/13-14
(These minutes have been seen
by the Administration)

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**Subcommittee on the Three Orders Made under Section 49(1A) of the
Inland Revenue Ordinance and Gazetted on 4 October 2013**

**Minutes of the second meeting on
Wednesday, 6 November 2013, at 9:00 am
in Conference Room 2A of the Legislative Council Complex**

- Members present** : Hon James TO Kun-sun (Chairman)
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP
- Public officers
Attending** : Ms Shirley KWAN
Principal Assistant Secretary for Financial Services and
the Treasury (Treasury) (Revenue)
- Mr CHIU Kwok-kit, JP
Deputy Commissioner (Technical)
Inland Revenue Department
- Ms Alice CHOY
Senior Government Counsel (Treaties and Law)¹
Department of Justice
- Miss Michelle FUNG
Government Counsel (Treaties and Law)
Department of Justice
- Miss Cindy CHEUK
Government Counsel
Department of Justice

Clerk in attendance : Ms Connie SZETO
Chief Council Secretary (1)4

Staff in attendance : Miss Evelyn LEE
Assistant Legal Adviser 10

Mr Hugo CHIU
Council Secretary (1)4

Ms Sharon CHAN
Legislative Assistant (1)4

Action

I Meeting with the Administration

Follow-up to issues arising from previous meeting

- (LC Paper No. CB(1)215/13-14(01) -- List of follow-up actions arising from the discussion at the meeting on 22 October 2013
- LC Paper No. CB(1)215/13-14(02) -- Administration's response to the issues arising from the meeting held on 22 October 2013
- L.N. 148 of 2013 -- Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Guernsey) Order
- L.N. 149 of 2013 -- Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Italian Republic) Order
- L.N. 150 of 2013 -- Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (State of Qatar) Order

- File Ref: TsyB R 183/800-1-1/94/0 (C) -- Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Guernsey) Order
- File Ref: TsyB R 183/800-1-1/28/0 (C) -- Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Italian Republic) Order
- File Ref: TsyB R 183/800-1-1/63/0 (C) -- Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (State of Qatar) Order
- LC Paper No. LS3/13-14 -- Legal Service Division Report
- LC Paper No. CB(1)95/13-14(01) -- Background brief on the Three Orders Made under Section 49(1A) of the Inland Revenue Ordinance and Gazetted on 4 October 2013 prepared by the Legislative Council Secretariat)

Discussion

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

Follow-up action to be taken by the Administration

- Admin 2. In respect of the exchange of information ("EoI") mechanism under a comprehensive avoidance of double taxation agreement ("CDTA"), the Administration was requested to take the following actions:
- (a) To consider and provide written responses on members' suggestion of disclosing the name of the relevant CDTA pertaining to an EoI request in the formal notice issued by the Inland Revenue Department ("IRD") to the third party (i.e. the information holder who held the relevant information or documents requested for exchange) so that the third party could take necessary actions with the relevant jurisdiction or tax authority to protect its own interests (e.g. claiming privilege against self-incrimination); and

- (b) To provide information on the legal and contractual obligations which would bind IRD in disclosing information on the requesting jurisdictions or tax authorities in handling EoI requests.

II Any other business

3. Members agreed that the Subcommittee would hold another meeting, and invite the Financial Secretary or the Secretary for Financial Services and the Treasury to attend the meeting to discuss issues relating to handling of EoI requests.
4. There being no other business, the meeting ended at 9:40 am.

Council Business Division 1
Legislative Council Secretariat
9 April 2014

**Proceedings of the
Subcommittee on the Three Orders Made under Section 49(1A) of the Inland
Revenue Ordinance and Gazetted on 4 October 2013
Second meeting on Wednesday, 6 November 2013, at 9:00 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
001322 – 001401	Chairman	Introductory remark	
001402 – 002711	Chairman Administration	<p>Briefing by the Administration on its responses to issues raised at the meeting on 22 October 2013 (LC Paper No. CB(1)215/13-14(02)).</p> <p>On handling exchange of information ("EoI") requests from comprehensive avoidance of double taxation agreements ("CDTAs") partners, the Administration advised as follows:</p> <p>(a) Under the CDTAs that Hong Kong had signed with other jurisdictions, Hong Kong had a duty to exchange tax information with its corresponding CDTA counterpart under the treaty concerned to provide relevant information upon request made by that counterpart. Information exchanged pursuant to an EoI request could only be used for tax-related purposes in respect of those taxes covered by the relevant CDTA and could not be used for enforcement or prosecution of other purposes. The requested information might be provided by the subject person (i.e. the taxpayer concerned) or a third party (i.e. the information holder).</p> <p>(b) Paragraphs 7 and 8 of the Administration's paper set out the relevant international standard/practice on confidentiality rules in handling EoI requests.</p> <p>(c) In handling an EoI request made by a requesting jurisdiction, the Inland Revenue Department ("IRD") would disclose the minimum information contained in the requesting authority's letter (but not the letter itself) necessary for IRD to be able to obtain or provide the requested information to the requesting jurisdiction.</p>	

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		<p>(d) In order to strike a proper balance between CDTA partners' expectation in line with the international standard/practice and information holders' interests, the Administration would disclose information on the requesting jurisdiction to a third party under the mechanism set out in paragraph 9 of the paper.</p> <p>(e) IRD had not received any request from a third party for disclosing information on the identity of the requesting jurisdiction/tax authority before.</p> <p>The Chairman reiterated his views that a third party information holder, in providing the requested information to IRD, might need to protect its own interests; and IRD should disclose to the third party the identity of the requesting jurisdiction/tax authority to enable the third party to take necessary action to protect its own interests, such as to initiate legal proceedings for claiming privilege against self-incrimination with the appropriate jurisdiction/tax authority to defend its rights. He was concerned that the Administration's proposal to seek prior agreement from all parties concerned would cause difficulty to the third party in obtaining the information on the identity of the requesting jurisdiction.</p> <p>The Chairman further enquired whether the "minimum information" in paragraph 8 of the Administration's paper would cover the name of the requesting jurisdiction of the EoI request. He was concerned that information exchanged in an EoI request might be used by the requesting jurisdiction for other criminal investigation and prosecution, and without providing the information on the identity of the requesting jurisdiction, a third party could not take necessary actions with the relevant jurisdiction/tax authority concerned to defend its own interests.</p> <p>The Administration responded as follows:</p> <p>(a) The EoI Article of Hong Kong's CDTAs was largely based on the relevant model developed by the Organization for Economic Cooperation and Development Model Tax Convention on Income and on Capital. IRD</p>	

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		<p>would refer to the OECD Commentary concerning the exchange of information ("the Commentary") for interpretation of the EoI Article. The Commentary provided that the confidentiality rules should apply to all types of information received through such exchanges, including both the information provided in an EoI request and that transmitted in response to an EoI request.</p> <p>(b) The Commentary recognized that a requesting jurisdiction could not request its CDTA partner to obtain information from a person where such information could cause self-incrimination of the person concerned. Hence, IRD would not accede to an EoI request which might cause self-incrimination to a third party holding the relevant information. However, the privilege against self-incrimination was personal and could only be claimed by an individual who himself was at risk of criminal prosecution. Hence, the issue of self-incrimination usually arose in the case of the subject person of an EoI request rather than a third party (normally an institution) providing the relevant information under the request.</p>	
002712 – 004116	Mr SIN Chung-kai Administration Chairman Department of Justice	<p>Mr SIN enquired whether, in handling EoI requests, there were legal or contractual obligations which restricted IRD in disclosing information about the identity of the requesting jurisdictions/tax authorities to a third party.</p> <p>The Administration responded that the basic principle underlying the Commentary was that any information received by a jurisdiction under an EoI request must be treated as confidential or secret. The arrangement set out in paragraph 9 of the Administration's paper was an enhancement of the present information disclosure mechanism.</p> <p>The Chairman did not subscribe to the Administration's response, and suggested that IRD should disclose the name of the relevant CDTA or the name of the requesting jurisdiction pertaining to an EoI request in the formal notice issued by IRD to the third party.</p>	<p>The Administration to take action as per paragraph 2(b) of the minutes.</p> <p>The Administration to take action as per paragraph 2(a) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Administration explained that it had to consider the circumstances of each case in determining the extent of information disclosure, and reiterated the need for IRD to observe the confidentiality rules in handling EoI requests in line with international standard/practice and the expectation of CDTA partners. Moreover, there would be concern that disclosure of information on the requesting jurisdiction to the third party would jeopardize on-going investigation by the requesting jurisdiction on the subject person of the EoI request.</p> <p>The Chairman reiterated the importance to protect the interest of the third party and his views that the Administration should disclose the identity of the requesting jurisdiction to the third party if it asked for such information on grounds that the provision of the requested information could be self-incriminating to the third party. He considered that the Subcommittee should invite the Financial Secretary or the Secretary for Financial Services and the Treasury to attend another meeting on this matter.</p> <p>The Administration advised that the Commentary had stipulated that only minimum information necessary for the information holder to provide the requested information should be disclosed and most jurisdictions complied with this requirement. The relevant wordings of the Commentary were to disclose "minimum information" and the confidentiality rules covered the "competent authority's letter(s)".</p> <p>In response to the Chairman's enquiry about whether disclosing the identity of the requesting jurisdiction to a third party information holder would violate the terms of the CDTAs, the Department of Justice pointed out that the CDTAs did not specifically provide for whether the disclosure of a particular matter would violate the CDTAs. However, an important principle enshrined in the Commentary regarding the confidentiality rules was that a jurisdiction's investigations on taxation matters should not be impaired although the circumstances of each individual case had to be considered.</p>	

Time Marker	Speaker	Subject(s)	Action Required
004117 – 004314	Mr SIN Chung-kai Administration Chairman	<p>In response to Mr SIN's enquiry about the practice of CDTA partners in disclosing information on the identity of the requesting jurisdiction/tax authority to a third party, the Administration responded as follows:</p> <p>(a) It had made reference to the practice of other relevant jurisdictions. The standard practice adopted by IRD in seeking information from a third party for an EoI request had been examined and commented by OECD experts in order to ensure that Hong Kong fulfilled the relevant international practice/standard.</p> <p>(b) as far as IRD understood, in general, Hong Kong's CDTAs partners would not disclose information on the identity of the requesting jurisdiction/tax authority to the third party information holder.</p>	
004315 – 004427	Chairman Administration	<p>The Chairman considered that his suggestion was relevant to the subsidiary legislation under scrutiny and urged the Administration to consider his views carefully or he would consider making amendments to the subsidiary legislation.</p> <p>Members agreed to hold another meeting to discuss the matter, and invite the Financial Secretary or the Secretary for Financial Services and the Treasury to attend the said meeting.</p>	