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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

Background Brief

Purpose

This paper sets out background information on the three Orders made under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) ("IRO") and gazetted on 4 October 2013 (L.Ns. 148 to 150) to implement the Comprehensive Agreements for Avoidance of Double Taxation ("CDTAs"). The paper also summarizes the views and concerns expressed by Members when the relevant subject of CDTAs was discussed by the committees of the Legislative Council ("LegCo").

Background

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 taxable income. The international community generally recognizes 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 the Government's policy to enter into CDTAs with Hong Kong's trading and investment partners.

3. Hong Kong adopts the territorial basis 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.

Article on exchange of information

Inland Revenue (Amendment) Ordinance 2010

4. A CDTA would normally include an article that provides for the exchange of information ("EoI") necessary for the carrying out of the agreement between the two contracting parties. To enable Hong Kong to adopt the international standard for EoI under CDTAs, i.e. the Organization for Economic Cooperation and Development ("OECD") 2004 version of EoI Article, the Administration introduced the Inland Revenue (Amendment) (No. 3) Bill 2009 into LegCo on 29 June 2009. The Bill was passed on 6 January 2010, and the Inland Revenue (Amendment) Ordinance 2010 came into operation on 12 March 2010.

5. The 2004 version of the OECD EoI Article categorically states that the lack of domestic tax interest does not constitute a valid reason for refusing to collect and supply the information requested by another contracting party. Before enactment of the Inland Revenue (Amendment) Ordinance 2010, the Inland Revenue Department ("IRD") could only collect taxpayers' information for the ascertainment of liability, responsibility and obligation under the domestic tax law. In other words, IRD could not collect any tax information unless such information was for domestic tax purposes. This constraint had reduced the number of Hong Kong's potential CDTA partners, and restricted the progress of the negotiations for CDTAs. Upon the commencement of operation of the Inland Revenue (Amendment) Ordinance 2010, IRD is authorized, among other things, to collect information concerning tax of a foreign territory for the purpose of EoI under a CDTA, and supply such information to the other contracting party of a CDTA.

Inland Revenue (Amendment) Bill 2013

6. In order to cope with recent changes to EoI regime[1], the Administration introduced the Inland Revenue (Amendment) Bill 2013 into LegCo on 12 April

[1] According to the Administration, the Global Forum on Transparency and Exchange of Information for Tax Purposes ("the Global Forum") has launched a two-phase peer review exercise to evaluate jurisdictions' compliance with the international EoI standard. One of the recommendations in the review report of Hong Kong was that Hong Kong should have in place a legal framework for entering into Tax Information Exchange Agreements ("TIEAs"), because the latest international standard on EoI is that a jurisdiction should make available both CDTA and TIEA as EoI instruments with other jurisdictions. It is critical for Hong Kong to have in place the legal framework for TIEAs by mid-2013 before the Global Forum finished the Phase 2 peer review report on Hong Kong in September 2013. OECD also approved in July 2012 an update to the EoI article of its Model Tax Convention and its Commentary.

2013 to enable Hong Kong to enter into standalone Tax Information Exchange Agreements ("TIEAs")[2] with other jurisdictions and to enhance EoI arrangements in respect of tax types and limitation on disclosure under CDTAs. The Bill was passed at the Council meeting of 10 July 2013.

Previous orders made under section 49(1A) of the Inland Revenue Ordinance

7. A list of jurisdictions which have entered into CDTAs with Hong Kong as at 15 September 2013 is in **Appendix I**. Since the enactment of the Inland Revenue (Amendment) Ordinance 2010, the Chief Executive in Council has made a total of 24 orders (excluding L.N. 148 to L.N. 150 of 2013) under section 49(1A) of IRO to give effect to the following CDTAs signed or upgraded based on the 2004 version of the OECD EoI Article -

(a) three CDTAs signed between Hong Kong and Brunei, the Netherlands and Indonesia (relevant orders gazatted on 2 July 2010);

(b) four CDTAs signed between Hong Kong and Hungary, Austria, the United Kingdom and Ireland; and the Third Protocol to the arrangement between the Mainland of China and Hong Kong for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (relevant orders gazetted on 15 October 2010);

(c) four CDTAs signed between Hong Kong and Japan, France, Liechtenstein, and New Zealand; and the protocol signed between Hong Kong and Luxembourg to amend the Agreement between Hong Kong and the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital (relevant orders gazetted on 13 May 2011);

(d) three CDTAs signed between Hong Kong and the Czech Republic, Portugal and Spain (relevant orders gazatted on 18 November 2011);

(e) three CDTAs signed between Hong Kong and Malta, the State of Kuwait and Switzerland (relevant orders gazatted on 18 May 2012);

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[2] Unlike CDTAs, TIEAs provided for EoI mechanism only without double taxation relief. The existing tax laws in Hong Kong only allowed it to enter into tax agreements with other jurisdictions when there is double taxation relief.

(f) two CDTAs signed between Hong Kong and Malaysia and the United Mexican States (relevant orders gazatted on 19 October 2012); and

(g) two CDTAs signed between Hong Kong and Canada and Jersey; and the Second Protocol to the arrangement between the Republic of Austria and Hong Kong for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (relevant orders gazatted on 3 May 2013)

The three Orders gazetted on 4 October 2013

8. L.N. 148 to L.N. 150 are made by the Chief Executive in Council under section 49(1A) of the IRO to give effect to the CDTAs signed between Hong Kong and Guernsey, the Italian Republic and the State of Qatar respectively. The orders will come into operation on 29 November 2013. The salient features of the three CDTAs are summarized in the relevant Legal Service Division Report (LC Paper No. LS3/13-14).

Concerns and views expressed by Members

Panel on Financial Affairs

9. The FA Panel discussed issues relating to expansion of CDTAs and the latest developments with regard to EoI arrangements at the meetings held on 4 May 2009 and 5 November 2012. Members were briefed on the detailed legislative proposals to enhance EoI arrangements for tax purposes on 4 February 2013. Major views and concerns expressed by members are summarized in **Appendix II**.

Bills Committee on Inland Revenue (Amendment) (No.3) Bill 2009

10. During the deliberations of the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009, members were mainly concerned about the adequacy of safeguards to protect taxpayers' right to privacy and confidentiality of the information disclosed to the requesting party in the EoI under CDTAs. In this connection, apart from scrutinizing the Bill, the Bills Committee also examined the various safeguards to be provided in the form of subsidiary legislation and departmental guidelines. The major concerns of members and the Administration's responses are summarized in **Appendix III**.

Bills Committee on Inland Revenue (Amendment) Bill 2013

11. During the deliberations of the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2013, while members generally supported the proposals in the Bill for the purpose of meeting the latest international standard for EoI, they expressed concerns on a number of issues, including the extent of the relaxation of the limitation on information disclosure, possible additional burden on taxpayers in respect of retention and reporting of tax information, adequacy of the safeguards for protecting taxpayers' privacy and confidentiality of tax information exchanged, use of tax information for non-tax related purposes by CDTA partners, and the Administration's strategies for pursuing CDTAs or TIEAs. The major concerns of members and the Administration's responses are summarized in **Appendix IV**.

Subcommittees formed to study the previous orders made under section 49(1A) of IRO

12. Subcommittees have been formed to study the four batches of orders mentioned in paragraph 7(a) to 7(d) above. The major issues studied by these subcommittees include progress of the Administration's work on negotiating CDTAs and the approach and strategy adopted for the negotiation work as well as consultation with the local community on CDTA negotiations, financial and economic implications of CDTAs, scope of taxes covered by the CDTAs, adequacy of safeguards under the respective EoI Articles to protect taxpayers' right to privacy and confidentiality of the tax information exchanged, the non-discrimination provisions in the CDTAs, the mutual agreement procedure in the CDTAs, determination of the resident status of a taxpayer under the CDTAs, and the approach to bring the CDTAs into force.

13. The advice given by the Administration on the general or policy issues during the deliberations of the subcommittees is summarized in **Appendix V.**

Relevant papers

14. A list of relevant papers is in **Appendix VI**.

Council Business Division 1
Legislative Council Secretariat
21 October 2013

Appendix I

List of Jurisdictions with which Hong Kong has entered into CDTAs

(as at 15.9.2013)

	Jurisdictions	Date of Signing (month and year)
1.	Belgium	December 2003
2.	Thailand	September 2005
3.	Mainland China	August 2006
4.	Luxembourg	November 2007
5.	Vietnam	December 2008
6.	Brunei	March 2010
7.	The Netherlands	March 2010
8.	Indonesia	March 2010
9.	Hungary	May 2010
10.	Kuwait	May 2010
11.	Austria	May 2010
12.	The United Kingdom	June 2010
13.	Ireland	June 2010
14.	Liechtenstein	August 2010
15.	France	October 2010
16.	Japan	November 2010
17.	New Zealand	December 2010
18.	Portugal	March 2011
19.	Spain	April 2011
20.	The Czech Republic	June 2011
21.	Switzerland	October 2011
22.	Malta	November 2011
23.	Jersey	February 2012
24.	Malaysia	April 2012
25.	Mexico	June 2012
26.	Canada	November 2012
27.	Italy	January 2013
28.	Guernsey	April 2013
29.	Qatar	May 2013

(Source: Annex D of the LegCo Brief ref. TsyB R 183/800-1-1/94/0 (C) issued on 2 October 2013.)

Appendix II

Major concerns raised by members of the Panel on Financial Affairs on issues relating to expansion of CDTAs and the latest developments on EoI arrangements

Expanding the exchange of tax information regime and introducing a new regime on tax information exchange arrangements

On the proposal to expand the coverage of tax types and usage of tax-related information under the existing EoI regime in CDTAs and introducing a legislative framework for TIEA, some Panel members expressed strong reservation in view of the great differences between the tax regime of Hong Kong and those of other jurisdictions, and the risk of jeopardizing the attractiveness of Hong Kong as an international financial centre to foreign investment. These members considered that the Administration should not be too proactive in bringing the EoI arrangements on par with the international standard. They urged the Administration to enhance the EoI regime only where absolutely necessary to meet the minimum requirements, in particular as the Administration still managed to conclude CDTAs with jurisdictions which had raised concerns on the limitations of Hong Kong's EoI regime during negotiations, and as long as the situation did not give rise to any critical problem, such as imposition of unilateral sanctions on Hong Kong or negative impact on the diplomatic relations between Hong Kong and other jurisdictions. There was also a suggestion that the Administration should take into account similar policy initiatives in the Mainland regarding the development of the EoI regime.

2. A member expressed concern about the practicability to trace and exchange tax information that was generated a long time ago before the effective date of the relevant CDTA/TIEA agreements, and suggested that, instead of relaxing the disclosure limitation, treaty partners should make preparation in the transitional period before the CDTA/TIEA took effect, such that the information to be exchanged for tax purposes would only cover those after the effective date of the relevant provisions of CDTA/TIEA.

3. The Administration advised that the latest international standard for EoI arrangements was reflected in the 2012 version of EoI article of OECD's Model Tax Convention and its Commentary. Hong Kong would only meet the minimum requirements even if the legislative proposals were passed. For instance, Hong Kong would still not entertain requests for tax information relating to retrospective tax assessments; tax examinations abroad; and assistance in the collection of taxes which were considered as desirable in the 2012 version of the OECD's Model Tax Convention and its Commentary. The Administration further emphasized that the current proposal still upheld the

policy of no retrospectivity for EoI as it only relaxed the limitation on disclosure slightly by allowing the Commissioner of Inland Revenue ("CIR") to disclose information in response to an EoI request only if he was satisfied that such information related to tax assessments in respect of any period after the date on which the relevant CDTA/TIEA came into operation.

4. The Panel also discussed whether the availability of a TIEA regime might hamper the ongoing efforts in the negotiation of CDTAs with potential partners as it was a bilateral matter to be discussed between two jurisdictions concerns as to whether a CDTA or a TIEA was more suitable if both options were available. The Administration assured members that, given the economic benefits of CDTAs, it would remain the policy priority of the Administration in future to expand Hong Kong's network of CDTAs with its major trading and investment partners.

Privacy protection

5. Some members expressed concern about protection of the confidentiality of the tax information exchanged with another jurisdiction under a CDTA, and the mechanism to ensure that only legitimate and justifiable requests could be entertained. There were also worries among small and medium-sized enterprises about the potential impacts of the exchange of information relating to their business operations. Some members took the view that extending IRD's power to gather information from taxpayers and provide the information to the contracting parties of CDTA should be examined and taken forward in a prudent manner, taking into consideration the uniqueness of Hong Kong's small and open financial market and the possible number of requests for information from the contracting parties.

6. The Administration further stressed that information exchange was conducted on a case-specific basis and prudent safeguards had been put in place to protect the confidentiality of the information exchanged. IRD would carefully consider requests for tax information having regard to a set of prescribed criteria, including whether the information under request was directly related to tax purposes and within the coverage of CDTAs or the future TIEAs. The Administration supplemented that, if treaty partners were considered to have violated their obligations, including the confidentiality requirements, Hong Kong would, if warranted, take necessary action against the treaty partner in question, including termination of the relevant CDTA/TIEA.

7. As to whether the taxpayer concerned would be informed of the request for information on his case, the Administration advised that CIR was required to inform the taxpayer concerned of the disclosure request from CDTA or future TIEA partners. The taxpayer might request a copy of the information that CIR was prepared to disclose, and amend the information if it was factually incorrect.

The Inland Revenue (Disclosure of Information) Rules (Cap. 112 sub. leg. BI) ("the Disclosure Rules") also provided for a review system in handling appeals, whereby the taxpayer in question might request the Financial Secretary to direct CIR to make the amendments to the information to be disclosed.

Appendix III

Major concerns raised by members of the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009 and the Administration's responses

Approach for setting out the EoI safeguards

Some members and deputations considered that the fundamental safeguards on the scope and usage of information exchanged should be provided in the primary legislation. The Administration explained that according to available information and its enquiries, other jurisdictions did not provide standard OECD EoI safeguards in their primary legislation. Instead, the following safeguards would be put in place –

(a) incorporating the most prudent safeguards acceptable under the OECD Model Article in individual CDTAs, which would be implemented as subsidiary legislation subject to the negative vetting procedure, or in documents of record between the two contracting parties;

(b) putting in place domestic safeguards through a set of rules (known as the Inland Revenue (Disclosure of Information) Rules) to be made under section 49(6) of the Inland Revenue Ordinance[1]; and

(c) setting out the procedural guidelines for IRD in the processing of EoI requests in a Departmental Interpretation and Practice Note (DIPN).

2. To address members' concerns, the Administration presented a sample EoI Article to the Bills Committee (LC Paper No. CB(1)106/09-10(02) and undertook to set out clearly all the safeguards adopted in individual CDTAs and any deviation from the sample text in its submissions to LegCo on subsidiary legislation to implement CDTAs. The Administration also agreed to subject the proposed Inland Revenue (Disclosure of Information) Rules (the Rules) to the positive vetting procedure, rather than the negative vetting procedure as originally proposed.

No retrospective effect of EoI arrangements under CDTAs

3. Members considered that the EoI arrangements under CDTAs should have no retrospective effect, i.e. IRD would not entertain any request for

[1] At the Council meeting on 3 March 2010, LegCo approved the Inland Revenue (Disclosure of Information) Rules by way of a resolution made under section 49 of the Inland Revenue Ordinance (Cap. 112).

information relating to a period before the effective date of the respective CDTAs. The Administration advised that a standard article would be included in all CDTAs setting out that all provisions under the CDTA should have effect from a stipulated date as agreed and should only apply to taxes after the effective date, and IRD would not disclose any information in response to a disclosure request unless the information did not relate to any period before the relevant CDTA came into operation.

4. Having considered members' views, the Administration agreed to add a provision in the Rules stipulating that there shall be no retrospective effect for EoI arrangements under CDTAs, and that no information existing at any time prior to the effective date of a CDTA shall be disclosed.

Scope of information exchanged

5. Under the 2004 version of the EoI Article, the requesting party should satisfy IRD that the information requested was "foreseeably relevant" for the carrying out of the CDTAs or to the administration or enforcement of the requesting party's local tax laws. Members were concerned whether the term "foreseeably relevant" could adequately restrict the scope of information exchanged. The Administration explained that the term "foreseeably relevant" was recommended by OECD and adopted internationally in the EoI article of CDTAs to guard against "fishing expeditions".

6. To provide greater clarity in the restriction of the scope of information exchanged, the Administration agreed to make reference to the Eighth Schedule of the Income Tax (Amendment) (Exchange of Information) Act of Singapore, and set out in the Rules the information that should be provided in an EoI request. Moreover, the Administration would expand the relevant part of IRD's DIPN to set out the principle that the test of relevancy should be based on the information provided by the requesting party in the EoI request, and that the EoI request must contain information on the relevance of the information to the purpose of the request.

Confidentiality and usage of information exchanged

7. Members expressed concern about the disclosure of information exchanged to a third party such as the oversight body of the tax authorities and/or another jurisdiction. The Administration advised that as part of the safeguards in CDTAs, the requesting party should be restricted from sharing the information provided with any third party (including a third jurisdiction or another government department of its own jurisdiction). Some of the additional measures such as confining disclosure of information to the tax authorities but not their oversight bodies would need to be worked out during the negotiation of individual CDTAs.

Notification of disclosure of information

8. On the mechanism for notifying the relevant taxpayers, the Bills Committee noted that the Administration would prescribe in the Rules the notification procedures that the Commissioner of Inland Revenue shall follow before any information was disclosed. The person concerned might request a copy of the information, make a request for amendments to the information, and apply to the Financial Secretary for a review of the IRD's decision on the request for information amendments. To address the concern of the Bills Committee, the Administration agreed to extend the time allowed for the person concerned to submit proposed amendments to the Commissioner of Inland Revenue from 14 days to 21 days. IRD would also send out the first notice as soon as practicable upon its decision to proceed with the EoI request.

9. Some members were concerned that on request of the requesting party, IRD might give no notification or prior notification to the person concerned, thus depriving the person of the protection of the right of being notified. In this connection, the Administration explained that a requesting party who made such a request must provide explanations and evidence relating to the making of such a request. The Administration agreed to elaborate further on the details to be provided by the requesting party in this aspect in the Schedule to the Rules.

Review of decision of IRD

10. Under the Rules, where the Commissioner of Inland Revenue partially approves or refuses a request for amendments, the person concerned may request the Financial Secretary ("FS") to direct the Commissioner to make the amendments. Given the standard 90-day response time set by OECD for EoI, members were concerned whether the information would have been transmitted to the requesting party before completion of the review procedure. The Administration advised that it would be stipulated in the DIPN that the relevant information would not be transmitted to the requesting party before completion of the review procedure, if a review was requested.

11. There were views that an independent tribunal/appeal panel/the Board of Review should be authorized to review IRD's decisions on disclosure of information under a CDTA, and that FS be empowered to review the question of law on the decisions of IRD on collection or disclosure of information, in addition to the power to review the question of fact, i.e. the accuracy of the information to be disclosed by IRD.

12. The Administration advised that FS, as the oversight body under the law, would review submissions on factual accuracy of the information. If a person thought that IRD had not properly discharged its responsibility to ensure that the

information requested was within the scope of the relevant CDTA or the law, he could challenge IRD's decisions/actions through judicial review.

Precedence effect of arrangements in CDTAs

13. Members were concerned that the proposed section 49(1A)(a) of IRO, which stipulated that arrangements specified in CDTAs "shall have effect in relation to tax under this Ordinance despite anything in any enactment", might result in excessive overriding effect on provisions concerning protection of fundamental human rights in other ordinances.

14. The Administration explained that CDTAs allocated taxing rights between two treaty partners. A company that would otherwise be subject to tax at a certain rate under Hong Kong laws might be entitled to a lower rate (or not taxed at all) because of a piece of subsidiary legislation that implemented a CDTA. In such a case, that piece of subsidiary legislation would take precedence over the said Hong Kong laws. The effect of any CDTA and its implementing subsidiary legislation would be limited to "tax under the IRO" and any precedence effect would be accordingly limited.

Appendix IV

Major concerns raised by members of the Bills Committee on Inland Revenue (Amendment) Bill 2013 and the Administration's responses

Benefits of TIEAs and possible additional burdens to Hong Kong taxpayers

Noting that TIEAs would bring no double taxation relief but would involve the provision of confidential information of taxpayers to other tax jurisdictions, some members expressed concern about the benefits for Hong Kong in entering into TIEAs with other jurisdictions and the possible burden on Hong Kong taxpayers on retention and reporting of tax information.

2. The Administration explained that the introduction of the TIEA framework was essential to Hong Kong's international reputation and competitiveness. Without a legal framework for TIEAs, Hong Kong might fail the Phase 2 peer review of the Global Forum and run the risk of being labelled as an uncooperative jurisdiction, which in turn would undermine its position and competitiveness as an international business and financial centre. The Administration stressed that it would only disclose the relevant information requested according to the provisions of CDTAs/TIEAs and the laws of Hong Kong, and would not make any investigation or take enforcement actions on behalf of tax authorities of other jurisdictions.

Relaxation of limitation on information disclosure

3. On the proposal under the Bill to amend section 4 of the Disclosure Rules to allow the Commissioner of Inland Revenue to disclose tax information generated prior to the effective date of the relevant CDTA or TIEA, some members expressed concern that the proposal might lead to compulsory disclosure of information generated longer than the existing requirement on taxpayers to retain business records for seven years under sections 51C and 51D of IRO. Some members considered that the Administration should consider restricting disclosure of information to that generated within seven years prior to the effective date of the relevant CDTA/TIEA.

4. The Administration explained that when conducting EoI under the CDTA framework, it had all along adopted a policy of imposing a limitation on the information to be exchanged. That is, the information disclosed to CDTA partners must relate to the carrying out of the provisions of the relevant CDTA or the administration or enforcement of the tax laws of the CDTA partner concerning taxes imposed in the periods after the provisions of the CDTA came into effect. The Administration stressed that it had no intention to deviate from this policy. In respect of the concern about burden on taxpayers in the retention of records to beyond seven years, the Administration advised that it

had no plan to change the existing record-keeping requirements under sections 51C and 51D of IRO.

Safeguards to protect taxpayers' privacy and confidentiality of information exchanged

5. The Bills Committee was gravely concerned about the safeguards to be put in place under the Bill and the future TIEAs to ensure IRD would not release information for inappropriate reasons and the protection on taxpayers' privacy and confidentiality of information exchanged.

6. The Administration advised that, after the legal framework for TIEAs was in place following the passage of the Bill, in order to afford legal protection to taxpayers in terms of privacy and confidentiality of information exchanged, it would follow the current approach on CDTAs to strive to provide relevant safeguards in the texts of TIEAs. Each CDTA and TIEA signed would be implemented as subsidiary legislation domestically, subject to negative vetting by LegCo. The existing Disclosure Rules, providing for domestic statutory safeguards in addition to those provided in individual agreements, would be extended and become applicable to EoI under both CDTAs and TIEAs.

7. As regards whether taxpayers could challenge the Administration on inappropriate disclosure of tax information to be exchanged, the Administration responded that a person may challenge the validity of the decision in respect of a disclosure request made under the Disclosure Rules, including approval of a disclosure request, permission to waive particulars in the Schedule to the Disclosure Rules, and partial approval or refusal of amendments to information to be disclosed, by way of an application to court for a judicial review. The Administration stressed that the particulars to be contained in an EoI request as set out in the Schedule to the Disclosure Rules, including the statement about the relevance of the information to the purpose of the request to be made by the requesting party, together with the legal status of the Rules, should provide adequate protection to the concerned taxpayers.

8. In response to the view of some members and deputations for the Administration to set up an independent oversight body to ensure the handling of individual EoI requests by IRD in a fair and consistent manner and strict adherence of IRD's actions and decisions to the internal procedures and guidelines, the Administration advised that IRD would extend the ambit of its Users' Committee, which comprised members from various sectors including legal practitioners, tax practitioners and academics and met quarterly to review the services of IRD, to cover the performance of IRD in respect of the handling of EoI matters. IRD would provide report on its compliance in respect of EoI to the Users' Committee on a regular basis. However, there were comments that expansion of the ambit of the Users' Committee, which would not deal with

confidential information and had no role in conducting reviews on individual cases, could not address the concern.

Use of tax information exchanged for non-tax related purposes

9. Members noted that the Administration was prepared to abide by OECD's new requirement by allowing future CDTA partners to use the tax information exchanged for other purposes. The Administration reiterated that the purpose of the Bill was only to put in place a legal framework for Hong Kong to enter into standalone TIEAs with other jurisdictions and to enhance the existing EoI arrangements under CDTAs in terms of tax types and limitation on information disclosure to facilitate Hong Kong to meet the international standard on EoI. The purposes (including non-tax related purposes) for which the tax information exchanged might be used were to be governed by the terms of the relevant CDTAs, which was a matter of agreement between Hong Kong and its future CDTA partners. The Administration further confirmed that Hong Kong would not accept the 2012 version of the EoI Article lightly unless both jurisdictions had similar legislation on use of tax information for non-tax related purposes together with law enforcement cooperation arrangements in place between them.

Strategies for pursuing CDTAs or TIEAs and review of CDTAs

10. Regarding the views of some members and deputation that the Administration should uphold its policy of giving greater priority to negotiation of a CDTA than a TIEA and only consider signing a TIEA when concluding a CDTA is not an option, the Administration responded that given the benefits of CDTAs, it would remain a future policy priority to seek to conclude CDTAs with Hong Kong's trading and investment partners. As it is the international standard that preference for CDTA over TIEA could not be a reason for refusing to enter into an EoI agreement, while the Administration would continue its efforts in persuading trading and investment partners to pursue CDTAs with Hong Kong, it could not preclude the possibility of entering into TIEAs but not CDTAs with some jurisdictions.

11. The Bills Committee urged the Administration to conduct regular reviews of the CDTAs/future TIEAs that Hong Kong had entered/would enter into in order to ensure that Hong Kong taxpayers' interests were not adversely affected by the agreements. The Administration advised that IRD would keep under constant review the relevant agreements and stood ready to raise with the competent authorities of the CDTA/TIEA partners any particular issues arising from the implementation of the agreements.

Appendix V

Summary of the advice given by the Administration on general or policy issues during the deliberations of the relevant subcommittees

Approach and strategy for the negotiation work

The Government's strategy in negotiating CDTAs is that Hong Kong would attempt first to conclude a CDTA with an identified country in each major region, such as the northern Asian region, the Asian Pacific Region, Europe and the Middle East, so that other countries in the same region would make reference to that CDTA and be more prepared to negotiate a CDTA with Hong Kong.

Consultation with the local community

2. The Administration would bear in mind the need to assure the overall interests of Hong Kong, pay heed to the views of local stakeholders on tax issues of their concern and ensure that Hong Kong's residents and enterprises would benefit from such agreements. The Administration would step up efforts in soliciting views from the relevant sectors for the CDTA negotiations.

Financial and economic implications

3. The impact of the CDTAs on Hong Kong's loss of Government revenue would be minimal since Hong Kong adopts the territorial basis of taxation whereby only income sourced from Hong Kong was subject to tax. There is no precise information with regard to the extent of benefits that would be gained by Hong Kong enterprises and residents under the CDTAs, because the enterprises and residents would not provide such information to the Government unless they have to provide such information to IRD in seeking taxation relief.

Scope of taxes covered by CDTAs

4. The taxes covered by CDTAs are "income taxes" and "capital taxes" (as appropriate) in the broad sense. In each CDTA, there is an Article on "Taxes Covered" and the provisions therein specify the types of taxes to which the Agreement should apply. Owing to the special nature of the activities of entertainers and sportsmen, there is a separate article in the CDTAs that provides for the tax arrangement for the income of the entertainers and sportsmen who are residents of either Contracting Party derived from their activities exercised in such capacities in the other contracting party.

Exchange of information

5. Based on the OECD model text for CDTAs, oversight bodies of tax authorities of the contracting parties are allowed access to the tax information exchanged. However, during the scrutiny of the Inland Revenue (Amendment) (No. 3) Bill 2009, in view of the concern of the Bills Committee, the Administration undertook to seek to confine disclosure of information to the tax authorities but not their oversight bodies when negotiating individual CDTAs.

6. In the negotiation process, Hong Kong would attempt to include express provisions in the CDTAs, as far as possible, to forbid automatic and/or spontaneous exchange of information. The inclusion of such provisions would depend on the stance of the particular treaty partner. The Administration would explain the legal requirements of the Rules to the treaty partners, and provide them with copies of the Rules during the course of negotiation[1].

7. The provision "[i]nformation shall not be disclosed to any third jurisdiction for any purpose" in the respective EoI Article of certain CDTAs is binding on and must be observed by the Contracting Parties (including their authorities, such as courts and administrative bodies), and obligations under this provision are not affected by other bilateral agreements in place such as agreements for mutual legal assistance in criminal matters with third jurisdictions.

Mutual agreement procedure

8. The provisions for arbitration were added to the OECD Model Tax Convention in 2008, and the HKSARG would be prepared to include provisions for arbitration in negotiating for a CDTA. Without the arbitration provisions, it is theoretically possible that a case remains unresolved for an indefinite period if it cannot be settled by mutual agreement between the contracting parties.

Definition of "resident"

9. In all the CDTAs Hong Kong has entered into, paragraph 1 of the Article on "Resident" provides the definition of the term "resident of a Contracting Party" for the purposes of the respective Agreements. Where by reason of the provisions of paragraph 1 of the Article an individual was a resident of both contracting parties, the status of the resident would be

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[1] The Subcommittee on Five Orders Made under section 49 of the Inland Revenue Ordinance and Gazetted on 13 May 2011 considered that the Administration should seek to include an express provision to forbid automatic and/or spontaneous exchange of information in all CDTAs, so as to avoid possible misunderstanding between the contracting parties on the issue. Where such express provision was not included in a CDTA because of the stance of the treaty partner, the Administration should seek to put on record in official negotiation documents, such as the minutes of meetings, the mutual understanding that there should be no automatic and/or spontaneous exchange of information under the CDTA. The Administration accepted this suggestion.

determined according to the criteria set out in paragraph 2 of the Article. If based on those criteria the status of the individual remains unresolved, the matter would have to be settled through mutual agreement of the Contracting Parties.[2]

Approach of bringing the CDTAs into force

10. The Entry Into Force Article of CDTAs contains provisions as to what procedures are required for a CDTA to enter into force and in which assessment year the tax arrangements set out in a CDTA will become effective. Upon the entry into force of a CDTA, IRD will publish an announcement on its website for public information. IRD will also actively send emails to tax practitioners and registered foreign and local business associations upon the entry into force of a CDTA. With the knowledge of a CDTA through a relevant Order published in the Gazette, residents of the contracting parties would make arrangements for their activities with a view to reaping tax benefits when the tax arrangements of the CDTA become effective. No complaints or objections regarding such approach have been received from the public.

[2] The Chairman of the Subcommittee on Five Orders Made under section 49 of the Inland Revenue Ordinance and Gazetted on 13 May 2011 suggested that the Administration should get prepared and draw up relevant policy guidelines for the determination of the resident status of a taxpayer in case the issue might have to be settled in future through mutual agreement of the Contracting Parties.

Appendix VI

List of relevant papers

Date	Event	Papers/Minutes of meeting
4 May 2009	The Panel on Financial Affairs ("FA Panel") discussed the extension the network of agreements for avoidance of double taxation	Discussion paper (LC Paper No. CB(1)1408/08-09(03)) Minutes of meeting (LC Paper No. CB(1)2092/08-09)
6 January 2010	The Legislative Council passed the Inland Revenue (Amendment) (No. 3) Bill 2009	Report of the Bills Committee (LC Paper No. CB(1)755/09-10) Sample Exchange of Information Article (LC Paper No. CB(1)106/09-10(02))
8 October 2010	The Subcommittee on the three Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) Orders gazetted on 2 July 2010 submitted its report to the House Committee	Report (LC Paper No. CB(1)2975/09-10)
12 November 2010	The Subcommittee on the Five Orders Made under Section 49(1A) of the Inland Revenue Ordinance and Gazetted on 15 October 2010 submitted its report to the House Committee	Report (LC Paper No. CB(1)390/10-11)
24 June 2011	The Subcommittee on Five Orders Made under Section 49 of the Inland Revenue Ordinance and Gazetted on 13 May 2011 submitted its report to the House Committee	Report (LC Paper No. CB(1)2552/10-11)

Date	Event	Papers/Minutes of meeting
16 December 2011	The Subcommittee on the Three Orders Made under Section 49(1A) of the Inland Revenue Ordinance and Gazetted on 18 November 2011 submitted its report to the House Committee	Report (LC Paper No. CB(1)753/11-12)
23 May 2012	The three orders made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 18 May 2012 were introduced into the Legislative Council	Legislative Council Brief: Order on Malta Order on the State of Kuwait Order on Switzerland Legal Service Division Report (LC Paper No. LS65/11-12)
24 October 2012	The two orders made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 19 October 2012 were introduced into the Legislative Council	Legislative Council Brief: Order on Malaysia Order on United Mexican States Legal Service Division Report (LC Paper No. LS5/12-13)
5 November 2012	FA Panel was briefed by the Administration on its policy regarding the exchange of tax information with other jurisdictions	Administration's paper (LC Paper No. CB(1)91/12-13(04)) Minutes (LC Paper No. CB(1)359/12-13)
4 February 2013	FA Panel was briefed by the Administration on the detailed legislative proposals to enhance the exchange of information arrangements for tax purposes.	Administration's paper (LC Paper No. CB(1)484/12-13(05)) Minutes (LC Paper No. CB(1)930/12-13)
8 May 2013	The three orders made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 3 May 2013 were introduced into the Legislative Council	Legislative Council Brief: Order on Canada Order on Jersey Order on the Republic of Austria Legal Service Division Report (LC Paper No. LS52/12-13)

Date	Event	Papers/Minutes of meeting
10 July 2013	The Legislative Council passed the Inland Revenue (Amendment) Bill 2013	Hansard The Bill passed Report of the Bills Committee (LC Paper No. CB(1)1426/12-13)
9 October 2013	The three orders made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 4 October 2013 were introduced into the Legislative Council	Legislative Council Brief: Order on Guernsey Order on the Italian Republic Order on the State of Qatar Legal Service Division Report (LC Paper No. LS3/13-14)