

立法會
Legislative Council

LC Paper No. CB(1)267/18-19
(These minutes have been seen
by the Administration)

Ref : CB1/SS/15/17/1

**Subcommittee on
Two Orders Made under Section 49(1A) of the
Inland Revenue Ordinance and Gazetted on 14 September 2018**

**Minutes of the second meeting on
Monday, 5 November 2018, at 4:30 pm
in Conference Room 2B of the Legislative Council Complex**

Members present : Hon Kenneth LEUNG (Chairman)
Hon James TO Kun-sun
Hon Charles Peter MOK, JP
Hon Alvin YEUNG

Member absent : Hon WONG Ting-kwong, GBS, JP

**Public officers
attending** : **Agenda item I**

Financial Services and the Treasury Bureau

Mr Andrew LAI, JP
Deputy Secretary (Treasury)²

Mr Stephen LO
Principal Assistant Secretary (Treasury)(R2)

Inland Revenue Department

Mr Brian CHIU, JP
Deputy Commissioner (Technical)

Ms Janny WU
Senior Assessor (Tax Treaty)3

Clerk in attendance : Ms Doris LO
Chief Council Secretary (1)2

Staff in attendance : Miss Evelyn LEE
Assistant Legal Adviser 10

Mr Raymond CHOW
Senior Council Secretary (1)6

Ms Christina SHIU
Legislative Assistant (1)2

Action

I Meeting with the Administration

- (L.N. 155 of 2018 — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of India) Order
- L.N. 156 of 2018 — Inland Revenue (Double Taxation Relief with respect to Taxes on Income and Prevention of Tax Evasion and Avoidance) (Republic of Finland) Order
- File Ref: TsyB R2 — Legislative Council Brief
183/800-1-1/29/0 (C) and TsyB R2
183/800-1-1/37/0 (C)
- LC Paper Nos. LS92/17-18 and — Legal Service Division Reports
LS94/17-18
- LC Paper No. CB(1)43/18-19(01) — Paper on the two Orders made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 14 September 2018 prepared by the Legislative Council Secretariat (Background brief)

Action

- LC Paper No. CB(1)43/18-19(02) — Letter from Assistant Legal Adviser to the Administration dated 20 September 2018
- LC Paper No. CB(1)43/18-19(03) — Administration's response to Assistant Legal Adviser's letter dated 20 September 2018 [LC Paper No. CB(1)43/18-19(02)]
- LC Paper No. CB(1)99/18-19(01) — List of follow-up actions arising from the discussion at the meeting on 19 October 2018
- LC Paper No. CB(1)99/18-19(02) — Administration's response to the issues raised at the meeting on 19 October 2018)

The Chairman said that the Subcommittee had completed the scrutiny of the provisions of the Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of India) Order (L.N. 155) and the Inland Revenue (Double Taxation Relief with respect to Taxes on Income and Prevention of Tax Evasion and Avoidance) (Republic of Finland) Order (L.N. 156) (collectively referred to as the "two Orders") at the last meeting on 19 October 2018. Today's meeting was to discuss the Administration's response (LC Paper No. CB(1)99/18-19(02)) to the issues raised by members at the last meeting (LC Paper No. CB(1)99/18-19(01)).

2. The Chairman further advised that the scrutiny period of the two Orders had been extended to the Council meeting of 28 November 2018 and the deadline for giving notice of motion to amend the two Orders would be 21 November 2018. He would report the deliberations of the Subcommittee to the House Committee at its meeting on 16 November 2018.

Discussion

3. The Subcommittee deliberated (index of proceedings attached at **Appendix**).

Follow-up actions to be taken by the Administration

4. Further to the Administration's response to issues raised by members at the last meeting (LC Paper No. CB(1)99/18-19(02)), in which the Administration had advised that "on every occasion where the requesting party would like to use the exchanged tax information (*that is supplied for tax purposes under the relevant Comprehensive Avoidance of Double Taxation*

Action

Agreements ("CDTAs")) for such specified non-tax related purposes,¹ the competent authorities of the requesting party have to seek prior authorization from the Inland Revenue Department, which will then consult the relevant law enforcement agencies and the Department of Justice ("DoJ"), and given that Hong Kong had respectively made arrangements for mutual legal assistance with India and Finland under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) under which any request for relevant assistance was handled by DoJ, the Subcommittee had requested DoJ to provide its views, in writing, on the application of the relevant CDTAs (i.e. the agreements specified in L.N. 155 ("India Agreement") and L.N. 156 ("Finland Agreement")) and Cap. 525 (in particular, section 5 of Cap. 525, Cap. 525AD and Cap. 525Y) to tax information requested and received by India or Finland under the relevant CDTA:

- in cases where the tax information requested and received by India or Finland under the relevant CDTA was or concerned a criminal matter covered by Cap. 525 and the state concerned requested to use such information for such other purposes as referred to in Article 26(2) of the India Agreement or Article 25(2) of the Finland Agreement;
 - (a) whether the requesting state should seek such information by making a request under Cap. 525 if no such request had been made beforehand; and
 - (b) the guiding principles (including any legal and policy considerations) in determining whether such request would be handled under the exchange of information arrangements provided in the relevant CDTAs or in accordance with the relevant mutual legal assistance arrangements under Cap. 525.

5. The Subcommittee also noted a letter from Mr James TO to the Chairman, which was tabled at the meeting, expressing his views on the Administration's response to issues raised by members at the last meeting (LC Paper No. CB(1)99/18-19(02)) and requesting further response/undertakings from the Administration.

¹ According to paragraph 9 of the response, under the laws of Hong Kong, tax information may only be used for limited non-tax related purposes (i.e. specified non-tax related purposes), covering purposes relating to recovery of proceeds from drug trafficking, organized and serious crimes and terrorist acts under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), the Organized and Serious Crimes Ordinance (Cap. 455) and the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) respectively.

Action

(Post-meeting notes:

- Mr James TO's letter tabled at the meeting was circulated to members vide LC Paper No. CB(1)145/18-19(01) on 6 November 2018; and
- the English and Chinese versions of the written response provided by the Administration were circulated to members vide LC Paper No. CB(1)163/18-19(02) on 9 November 2018 and 12 November 2018 respectively.)

Meeting arrangement

6. The Chairman said that subject to any views members might have on the supplementary information provided by the Administration, he would decide on the need to hold a further meeting.

(Post-meeting note: Members were notified vide LC Paper No. CB(1)165/18-19 issued on 12 November 2018 that a Subcommittee meeting was scheduled for Friday, 16 November 2018, from 8:30 am to 9:30 am.)

II Any other business

7. There being no other business, the meeting ended at 5:06 pm.

Council Business Division 1
Legislative Council Secretariat
4 December 2018

**Proceedings of the second meeting of the
Subcommittee on Two Orders Made under Section 49(1A) of the
Inland Revenue Ordinance and Gazetted on 14 September 2018
on Monday, 5 November 2018, at 4:30 pm
in Conference Room 2B of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
Agenda item I — Meeting with the Administration			
000654– 000853	Chairman	Opening remarks	
000854– 001542	Chairman Administration	<p>Briefing by the Administration on its response (LC Paper No. CB(1)99/18-19(02)) to the issues raised by members at the meeting on 19 October 2018 (LC Paper No. CB(1)99/18-19(01))</p> <p>The Subcommittee noted a letter from Mr James TO to the Chairman, which was tabled at the meeting, expressing his views on the above Administration's response and requesting further response/undertakings from the Administration.</p>	
001543– 001854	Chairman Assistant Legal Adviser 10 ("ALA10") Administration	<p>ALA10 referred to section 5 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) for members' reference. The section provides for the situations under which a request for mutual legal assistance ("MLA") under Cap. 525 should be refused. In particular, section 5(2) provides for how an MLA request for criminal matter concerning taxation should be dealt with under Cap. 525.</p> <p>At the invitation of the Chairman, the Administration confirmed that ALA10's understanding on section 5(2) of Cap. 525 was correct.</p>	
001855– 003513	Chairman Mr James TO Administration	<p>Mr James TO expressed staunch opposition to permitting the use of the information exchanged through the Comprehensive Avoidance of Double Taxation Agreements ("CDTAs") by the CDTA partners (including that under the agreements specified in L.N. 155 ("India Agreement") and L.N. 156 ("Finland Agreement")) for non-tax related purposes without having resorted to the pre-existing regime under MLA, and stressed his views that:</p> <p>(a) if the requesting party considered that the tax information requested or exchanged under the relevant CDTA was of value for non-tax related purposes, it should resort to the relevant MLA arrangements implemented by Cap. 525, because MLA provided more comprehensive statutory protection for the subject person concerned;</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) upon receipt of such a request under the relevant CDTA, the Inland Revenue Department ("IRD") should first asked the requesting party to seek such information through Cap. 525 if no such request had been made; and</p> <p>(c) unless IRD could implement appropriate mechanism or administrative means to improve the handling of requests for use of information exchanged under CDTAs for non-tax related purposes, he would maintain his objection.</p> <p>The Administration replied that:</p> <p>(a) the use of the exchanged information for non-tax related purposes was an integral provision in the latest (2012) version of the exchange of information ("EoI") Article in the Model Tax Convention on Income and on Capital promulgated by the Organization for Economic Co-operation and Development, and was hence included in the respective EoI Article of the India Agreement and Finland Agreement, and would also be included in other CDTAs to be signed by Hong Kong with other jurisdictions in future;</p> <p>(b) IRD would not entertain any request for information from its CDTA partners based on purely non-tax related grounds. In such circumstances, the CDTA partner would instead be asked to resort to other means as appropriate;</p> <p>(c) the use of the exchanged tax information by a CDTA partner for non-tax related purposes should only be allowed where such use was allowed under the laws of both Hong Kong and the CDTA partner and IRD authorized such use;</p> <p>(d) in case a CDTA partner intended to use the information exchanged under CDTAs for non-tax related purposes, it should seek prior authorization from IRD, which would then consult the relevant law enforcement agencies of Hong Kong and the Department of Justice ("DoJ") on the request for such use. IRD would reject such request if the relevant law enforcement agencies or DoJ objected to the disclosure; and</p> <p>(e) members' concerns on the handling of requests for the use of the information exchanged under CDTAs for non-tax related purposes would be relayed to DoJ for consideration.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>At the request of Mr TO, DoJ was required to provide its views, in writing, on the application of the relevant CDTAs (i.e. the India Agreement and the Finland Agreement) and Cap. 525 (in particular, section 5 of Cap. 525, Cap. 525AD and Cap. 525Y) to tax information requested and received by India or Finland under the relevant CDTA in cases where the tax information requested and received by India or Finland under the relevant CDTA was or concerned a criminal matter covered by Cap. 525 and the state concerned requested to use such information for such other purposes as referred to in Article 26(2) of the India Agreement or Article 25(2) of the Finland Agreement:</p> <ul style="list-style-type: none"> (a) whether the requesting state should seek such information by making a request under Cap. 525 if no such request had been made beforehand; and (b) the guiding principles (including any legal and policy considerations) in determining whether such request would be handled under the EoI arrangements provided in the relevant CDTAs or in accordance with the relevant MLA arrangements under Cap. 525. <p>At the request of Mr TO, the Chairman advised that he would decide on the need to hold a further meeting to discuss the further written response provided by the Administration. Mr TO also indicated that he would decide whether to propose amendments to the two Orders after considering the further written response on DoJ's views.</p>	Administration (paragraph 4 of the minutes refers)
003514–004026	Chairman Mr James TO Administration	<p>The Chairman enquired:</p> <ul style="list-style-type: none"> (a) whether a request for EoI under a CDTA should first be initiated for the primary purpose of assessment or collection of tax; and if so, whether, in the light of section 5(2)(b) of Cap. 525, requests for the use of information exchanged under CDTAs for non-tax related purposes that were covered under Cap. 525 should in principle be rejected; and (b) about the circumstances under which the competent authorities of the requesting party would seek prior authorization from IRD for the use of the exchanged tax information for non-tax related purposes. <p>The Administration explained that:</p> <ul style="list-style-type: none"> (a) an EoI should first be conducted for tax purposes in accordance with the provisions of the relevant CDTA; and 	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) as an illustration, in the cases where the law enforcement agency of India sought information related to a criminal case under investigation from the tax authority of India, and if the information sought was or concerned the tax information exchanged with Hong Kong under the India Agreement, the tax authority of India should seek prior authorization from IRD before disclosing the relevant information to the law enforcement agency for non-tax related purposes.</p> <p>Mr James TO considered that section 5(2)(b) of Cap. 525 should apply where the criminal matter to which a request for assistance under Cap. 525 concerned an external offence relating to taxation.</p>	
Agenda item II — Any other business			
004027– 004028	Chairman	Concluding remarks	