



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : TsyB R2 183/800-1-1/17/0 (C) & TsyB R2 183/800-1-1/65/0 (C)
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By Fax (2523 0642)

22 October 2019

Mr LO Yip-kwong, Stephen
Prin AS for Financial Services & the Treasury
(Treasury)(R2)
Financial Services and the Treasury Bureau
24/F, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Mr LO,

**Inland Revenue (Double Taxation Relief and
Prevention of Fiscal Evasion with respect to Taxes on Income)
(Kingdom of Cambodia) Order (L.N. 117 of 2019) and
Specification of Arrangements (The Mainland of China)
(Avoidance of Double Taxation and the Prevention of Fiscal Evasion with
respect to Taxes on Income) (Fifth Protocol) Order (L.N. 118 of 2019)**

We are scrutinizing L.N. 117 of 2019 and L.N. 118 of 2019 with a view to advising Members on the legal and drafting aspects of the above items of subsidiary legislation.

Please find attached a schedule setting out our observations and enquiries. We should be grateful if you could let us have your response in both English and Chinese as soon as practicable, preferably before the first meeting of the Subcommittee on the above items of subsidiary legislation on 25 October 2019.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Rachel DAI', with a stylized flourish at the end.

(Rachel DAI)
Assistant Legal Adviser

c.c. Department of Justice
(Attn: Ms Carmen CHU, SGC) (By Fax: 3918 4613)
Legal Adviser
Senior Assistant Legal Adviser 3
Clerk to Subcommittee

Schedule

Part I: L.N. 117 of 2019

1. It is noted that while the Exchange of Information ("EoI") arrangements under Article 26 of the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Kingdom of Cambodia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("Cambodia Agreement") signed on 26 June 2019 are largely consistent with those under the sample EoI Article and the relevant part of the Protocol, which is based on the Organisation for Economic Cooperation and Development ("OECD") 2004 version of the EoI Article, presented to the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009 vide LC Paper No. CB(1)466/09-10(02), Article 26 does not contain the provisions in paragraph 10 of the sample Protocol which provide that the EoI Article "does not create obligations as regards automatic or spontaneous exchanges of information between the Contracting Parties" and "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". Please explain the reason for the deviation and whether this would render automatic or spontaneous exchanges of information an obligation.
2. It is also noted that paragraph 2 of the Protocol to the Cambodia Agreement provides that the Cambodian competent authority may disclose information in accordance with its confidentiality provisions and Article 26 to the Legislature of Cambodia (National Assembly and Senate) and government bodies of Cambodia with a supervisory function over tax administration and enforcement, including the Office of the Council of Ministers, Ministry of Economy and Finance, Ministry of Interior, Ministry of National Assembly-Senate Relations and Inspection, and National Audit Authority. Please confirm whether the government bodies of Cambodia with a supervisory function over tax administration and enforcement set out in paragraph 2 of the Protocol are meant to be exhaustive.

Part II: L.N. 118 of 2019

General

3. To facilitate Members' scrutiny of L.N. 118 of 2019, please provide a marked-up version of the relevant provisions of the Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("the Arrangement") and the Protocol to the Arrangement, the Second Protocol to the Arrangement and the Fourth Protocol to the Arrangement, signed in 2006, 2008 and 2015 respectively, showing (in revision mode) the modifications specified in the Fifth Protocol to the Arrangement in the Schedule to L.N. 118 of 2019.

4. According to paragraph 13 of the Legislative Council Brief (File Ref: TsyB R2 183/800-1-1/17/0 (C) and TsyB R2 183/800-1-1/65/0 (C)) issued by the Financial Services and the Treasury Bureau on 2 October 2019, the technical amendments to the Arrangement and the relevant Protocols seek to ensure that the Arrangement and its Protocols follows the latest international tax standards promulgated by the OECD to combat base erosion and profit shifting by multinational enterprises. Please identify the international standards concerned, and explain how the amendments to the relevant Articles of the Arrangement and its Protocols align with the international standards concerned.

Article 2

5. Article 2 of the Fifth Protocol amends the rule under Article 4 of the Arrangement for determining residence in case of dual residence of a person other than an individual to provide that the competent authorities of both sides (i.e. the Mainland and Hong Kong) shall endeavor to determine by mutual agreement the residence of such person for the purpose of the Arrangement, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the Arrangement. Please explain:
 - (i) whether the Inland Revenue Department would inform the subject person what information has been provided to the

competent authority of the Mainland in the mutual agreement procedure; and

- (ii) in case the competent authorities of both sides do not reach a mutual agreement, whether the subject person would be informed of the reason for the outcome and whether the outcome would be subject to review or appeal.

Article 3

- 6. Article 3 of the Fifth Protocol introduces a wider definition for permanent establishment constituted through an agent. Please clarify, in the situation where a person is acting in One Side on behalf of an enterprise and habitually concludes contracts, whether the contracts "for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use" referred to in paragraph 5(2) of Article 5 of the Arrangement introduced by Article 3 of the Fifth Protocol and the contracts "for the provision of services by that enterprise" referred to in paragraph 5(3) of Article 5 of the Arrangement introduced by Article 3 of the Fifth Protocol have to be concluded in the name of that enterprise.
- 7. Please explain the meaning of "almost exclusively on behalf of one or more enterprises to which that person is closely related" in paragraph 6 of Article 5 introduced by paragraph 1 of Article 3 of the Fifth Protocol and provide examples of the circumstances under which a person would be considered as acting "almost exclusively on behalf of one or more enterprises to which that person is closely related".

Article 5

- 8. Article 5 of the Fifth Protocol adds a new Article 18A to the Arrangement. Please clarify the scope of "university", "college", "school", and "educational institution or scientific research institution recognized by the Government" to which Article 18A apply, in particular, the criteria for being recognized by the Government of the Mainland.