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**Subcommittee on Two Orders Made under Section 49(1A) of
the Inland Revenue Ordinance and Gazetted on 4 October 2019**

Background Brief

Purpose

This paper sets out background information on the two Orders made under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) ("IRO") and gazetted on 4 October 2019 (L.N. 117 and L.N. 118) 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 will not be taxed in Hong Kong and hence will 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

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 Organisation for Economic Co-operation 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 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.

6. As at 30 September 2019, a total of 42 jurisdictions have entered into CDTAs with Hong Kong. A list of the jurisdictions is in **Appendix I**. According to the Administration, two¹ and 37 CDTAs are based on the pre-2004 and 2004 version of the OECD EoI Article respectively. The Administration has also indicated that the prevailing international standard is

¹ The two jurisdictions involved are Belgium and Thailand.

to adopt the 2012 version of the OECD EoI Article,² and the CDTAs signed with three jurisdictions (i.e. India, Finland and Estonia) are based on that version. It is envisaged that such an arrangement will apply to CDTAs to be signed by Hong Kong with other jurisdictions in future.

The two Orders gazetted on 4 October 2019

7. L.N. 117 and L.N. 118 are made by the Chief Executive in Council under section 49(1A) of IRO to give effect to the CDTA signed between Hong Kong and the Kingdom of Cambodia and to implement the Fifth Protocol to the CDTA signed between Hong Kong and the Mainland³ respectively. The two Orders will come into operation on 6 December 2019. The salient features of the two CDTAs are summarized in paragraphs 19 and 20 of and Annexes E and F to LegCo Brief (File Ref: TsyB R2 183/800-1-1/17/0 (C) and TsyB R2 183/800-1-1/65/0 (C)), and paragraphs 2 to 12 of the relevant Legal Service Division Report (LC Paper No. LS93/18-19).

Concerns and views expressed by Members

8. Subcommittees have been formed to study some of the previous orders made under section 49(1A) of IRO. The major issues studied by these subcommittees include the Administration's approach and strategy for the negotiation of CDTAs, consultation with the local community and relevant stakeholders on the negotiations, financial and economic implications of CDTAs, scope of taxes covered by individual CDTAs, adequacy of safeguards under the respective EoI Articles to protect taxpayers' right to privacy and confidentiality of the tax information exchanged, the procedures for handling EoI requests, use of exchanged information for non-tax related purposes, provisions for arbitration, determination of the resident status of a taxpayer, and the approach to bringing the CDTAs into force.

² A major feature of the 2012 version of the Organisation for Economic Co-operation and Development's Exchange of Information Article is to allow the use of exchanged information for limited non-tax related purposes.

³ The Mainland and Hong Kong signed 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 Mainland Arrangement") and its First Protocol on 21 August 2006. The Second Protocol, the Third Protocol and the Fourth Protocol were signed in 2008, 2010 and 2015 respectively. These Protocols form integral parts of the Mainland Arrangement.

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

Latest development

10. At the House Committee meeting on 11 October 2019, Members agreed to form a subcommittee to study the two Orders gazetted on 4 October 2019.

Relevant papers

11. A list of relevant papers is in **Appendix III**.

Council Business Division 1
Legislative Council Secretariat
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Appendix I

**List of jurisdictions with which Hong Kong has entered into
Comprehensive Avoidance of Double Taxation
Agreements/Arrangements
(as at 30 September 2019)**

	Jurisdictions	Month of Signing
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

	Jurisdictions	Month of Signing
27.	Italy	January 2013
28.	Guernsey	April 2013
29.	Qatar	May 2013
30.	Korea	July 2014
31.	South Africa	October 2014
32.	United Arab Emirates	December 2014
33.	Romania	November 2015
34.	Russia	January 2016
35.	Latvia	April 2016
36.	Belarus	January 2017
37.	Pakistan	February 2017
38.	Saudi Arabia	August 2017
39.	India	March 2018
40.	Finland	May 2018
41.	Cambodia [#]	June 2019
42.	Estonia [#]	September 2019

[#] The CDTAs with Cambodia and Estonia have not yet entered into force pending completion of the ratification procedures.

(Source: Annex D of the LegCo Brief ref. TsyB R2 183/800-1-1/17/0 (C) and TsyB R2 183/800-1-1/65/0 (C) issued on 2 October 2019.)

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 Comprehensive Agreements for Avoidance of Double Taxation ("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 the Inland Revenue Department ("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. While the Administration would make the best endeavour to attain the most favourable terms for Hong Kong residents in CDTAs for the avoidance of double taxation and other tax measures (including reduction in caps on withholding taxes imposed by other contracting parties), the outcome of negotiation would hinge on other factors, especially the taxation policies of other tax jurisdictions.

Privacy protection and confidentiality safeguards in the Exchange of Information Article

5. Based on the Organisation for Economic Co-operation and Development ("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 Inland Revenue (Disclosure of Information) Rules (Cap. 112BI) ("the Rules") to the treaty partners, and provide them with copies of the Rules during the course of negotiation.

7. The provision "[i]nformation shall not be disclosed to any third jurisdiction for any purpose" in the respective exchange of information ("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.

Procedures for handling exchange of information requests under CDTAs

8. Before acceding to an EoI request from a contracting party, IRD will examine whether the request is foreseeably relevant to the carrying out of the CDTA or to the administration and enforcement of the contracting party's local tax laws, and consider carefully the supporting evidence and facts of

proof provided by the contracting party. Moreover, when gathering information from the subject persons or relevant third parties who hold the relevant information or documents under the EoI request, IRD will consider their objections, if any, to the disclosure of the information to the contracting party.

9. To gather information, IRD will issue a formal notice to the information holder requesting for the relevant information or documents. If the information holder has the need to know the name of the requesting treaty partner (e.g. claiming privilege against self-incrimination), IRD is prepared to take a pragmatic approach to deal with the situation after striking a balance between the international standard and information holder's need. Specifically, where the information holder has reasonable grounds to know the name of the requesting treaty partner, IRD would seek prior consent of the requesting treaty partner before disclosure of the name. If the requesting treaty partner declines to give any consent, IRD will inform the information holder accordingly. If the information holder refuses to provide the information requested as the name of the requesting treaty partner is not known, IRD will, having considered the circumstances of the case, decline the disclosure request for reason that it could not disclose to the information holder the name of the requesting treaty partner, which is considered necessary to facilitate the gathering of the requested information.

Use of exchanged information for non-tax related purposes

10. According to the Administration, the use of the exchanged information for non-tax related purposes has become an integral provision in the 2012 version of the EoI Article in the Model Tax Convention on Income and on Capital ("Model Tax Convention") promulgated by OECD, and the international community expects such a provision to be incorporated into the new CDTAs in line with the prevailing international requirement. In this connection, the two CDTAs signed by Hong Kong in 2018 with the Republic of India and the Republic of Finland respectively are the first two CDTAs which allow the use of the exchanged information for limited non-tax related purposes. The Administration also indicates that CDTAs to be signed by Hong Kong with other jurisdictions in future are expected to include the same provision.¹ The Administration further stresses that Hong Kong will reject any request for information based on purely non-tax related grounds. If the receiving party of tax information exchanged under a relevant CDTA

¹ According to the Administration, the Comprehensive Agreement for Avoidance of Double Taxation signed between Hong Kong and the Kingdom of Cambodia contains an article on exchange of information ("EoI") which is based on the Organisation for Economic Co-operation and Development ("OECD") 2004 version of EoI Article.

subsequently intends to use such information for non-tax related purposes, OECD's requirement stipulates that this is permissible only where such use is allowed under the laws of both contracting parties and the competent authority of the supply party authorizes such use.

Provisions for arbitration

11. The provisions for arbitration were added to the OECD Model Tax Convention in 2008, and Hong Kong 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"

12. 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 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. The mutual agreement procedure is transparent and the subject person would be informed of, amongst others, the scope of information to be provided by IRD to the tax jurisdiction concerned for resolving the resident status. It would also be unlikely for IRD to withhold from other tax jurisdictions any information presented by the subject person.

Approach of bringing CDTAs into force

13. 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. In addition, IRD will update its Departmental Interpretation and Practice Notes as appropriate. 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.

Interface with the automatic exchange of financial information in tax matters

14. The enactment of the Inland Revenue (Amendment) (No. 3) Ordinance 2016 ("the Ordinance") in June 2016 has put in place a legal framework for the implementation of the automatic exchange of financial information in tax matters ("AEOI")² in Hong Kong. According to the Administration, the Ordinance will not affect the application of the EoI Articles in CDTAs concluded by Hong Kong because EoI will be conducted on a request basis under the CDTAs. If any AEOI is to be conducted between Hong Kong and its CDTA partners, separate competent authority agreements (in addition to the CDTA signed) will have to be entered into with the partners concerned.³

² OECD released in July 2014 the standard on automatic exchange of financial account information in tax matters, calling on governments to collect from their financial institutions financial account information of overseas tax residents and exchange the information with jurisdictions of residence of the relevant account holders on an annual basis.

³ At the meetings of the Panel on Financial Affairs on 5 June 2017, 8 January and 3 July 2018, the Administration briefed members on the proposal of extending the application of the Convention on Mutual Administrative Assistance in Tax Matters ("the Convention") to Hong Kong. L.N. 142 of 2018, which gave effect to the Convention in Hong Kong, came into operation on the day of publication in the Gazette, i.e. 13 July 2018. It enabled Hong Kong to conduct the first round of AEOI with other jurisdictions, including the Member States of the European Union, by September 2018.

List of relevant papers

Date	Event	Papers/Minutes of meeting
6 January 2010	The Legislative Council ("LegCo") 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 (one of the Orders was the Mainland Third Protocol signed between Hong Kong and the Mainland)	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 tabled in LegCo	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 tabled in LegCo	Legislative Council Brief: Order on Malaysia Order on United Mexican States Legal Service Division Report (LC Paper No. LS5/12-13)
8 May 2013	The three orders made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 3 May 2013 were tabled in LegCo	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)
20 November 2013	The Subcommittee on the Three Orders Made under Section 49(1A) of the Inland Revenue Ordinance and Gazetted on 4 October 2013 submitted its report to the House Committee	Report (LC Paper No. CB(1)350/13-14)

Date	Event	Papers/Minutes of meeting
27 November 2014	The Subcommittee on the Two Orders Made under Sections 49 and 49(1A) of the Inland Revenue Ordinance and Gazetted on 17 October 2014 submitted its report to the House Committee	Report (LC Paper No. CB(1)290/14-15)
30 October 2015	The Subcommittee on Specification of Arrangements (The Mainland of China) (Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income) (Fourth Protocol) Order	Report (LC Paper No. CB(1)70/15-16)
18 May 2016	The Subcommittee on the Two Orders Made under Section 49(1A) of the Inland Revenue Ordinance and Gazetted on 13 May 2016 submitted its report to the House Committee	Report (LC Paper No. CB(1)1057/15-16)
5 July 2017	Three orders made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 30 June 2017 were tabled in LegCo	Legislative Council Brief: Order on the Republic of Latvia Order on the Republic of Belarus Order on the Islamic Republic of Pakistan Legal Service Division Report (LC Paper No. LS90/16-17)

Date	Event	Papers/Minutes of meeting
18 October 2017	An order made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 6 October 2017 were tabled in LegCo	Legislative Council Brief: <u>Order on New Zealand</u> <u>Legal Service Division Report</u> (LC Paper No. LS1/17-18)
23 May 2018	An order made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 18 May 2018 were tabled in LegCo	Legislative Council Brief: <u>Order on the Kingdom of Saudi Arabia</u> <u>Legal Service Division Report</u> (LC Paper No. LS61/17-18)
10 October 2018	Two orders made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 14 September 2018 were tabled in LegCo	Legislative Council Brief: <u>Order on the Republic of India</u> <u>Order on the Republic of Finland</u> <u>Legal Service Division Report</u> (LC Paper No. LS92/17-18) <u>Report</u> (LC Paper No. CB(1)184/18-19)
16 October 2019	Two orders made under section 49(1A) of the Inland Revenue Ordinance and gazetted on 4 October 2019 were tabled in LegCo	Content of the subsidiary legislation <u>1</u> and <u>2</u> (L.N. 117 and L.N. 118 of 2019) Legislative Council Brief: <u>Order on the Kingdom of Cambodia</u> <u>Order on the Fifth Protocol to CDTA with Mainland</u> <u>Legal Service Division Report</u> (LC Paper No. LS93/18-19)