

立法會
Legislative Council

LC Paper No. CB(1)1086/09-10
(These minutes have been seen
by the Administration)

Ref : CB1/BC/10/08/2

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

Fifth meeting on
Thursday, 12 November 2009, at 2:30 pm
in Conference Room A of the Legislative Council Building

Members present : Hon Paul CHAN Mo-po, MH, JP (Chairman)
Hon James TO Kun-sun
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon CHIM Pui-chung
Hon CHAN Kin-por, JP

Members absent : Hon CHAN Kam-lam, SBS, JP
Hon Starry LEE Wai-king

Public officers : Ms Julia LEUNG
Attending Under Secretary for
Financial Services and the Treasury

Mr Clement LEUNG
Deputy Secretary for
Financial Services and the Treasury (Treasury)

Mr Kenneth CHENG
Principal Assistant Secretary for
Financial Services and the Treasury (Treasury)

Ms Katherine NG
Political Assistant to Secretary for
Financial Services and the Treasury

Mr CHU Yam-yuen
Deputy Commissioner of Inland Revenue

Miss Fatima NGAN
Senior Assessor
Inland Revenue Department

Mr Michael LAM
Senior Assistant Law Draftsman
Department of Justice

Ms Rayne CHAI
Senior Government Counsel
Department of Justice

Clerk in attendance : Ms Rosalind MA
Chief Council Secretary (1)5

Staff in attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Mr Noel SUNG
Senior Council Secretary (1)4

I Meeting with the Administration

Follow-up to issues raised at previous meetings

(LC Paper No. CB(1)327/09-10(01) — List of follow-up actions arising from the meeting on 5 November 2009 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)327/09-10(02) — Administration's response to the issues raised at the meeting on 5 November 2009

LC Paper No. CB(1)260/09-10(02) — Administration's response to the issues raised at the meeting on

27 October 2009

- IN03/09-10 — Information note on Income Tax (Amendment) (Exchange of Information) Bill 2009 of Singapore prepared by the Research and Library Services Division of the Legislative Council Secretariat
- LC Paper No. CB(1)106/09-10(02) — Administration's response to the issues raised at the meeting on 8 October 2009)

Relevant papers previously issued

- (LC Paper No. CB(3)751/08-09 — The Bill
- FIN CR 12/2041/46 — The Legislative Council Brief issued by the Financial Services and the Treasury Bureau
- LC Paper No. CB(1)2622/08-09(18) — Marked-up copy of the Bill prepared by the Legal Service Division
- LC Paper No. CB(1)2622/08-09(19) — Letter from Assistant Legal Adviser to the Administration dated 14 August 2009
- LC Paper No. CB(1)2682/08-09(08) — Administration's response to the Assistant Legal Adviser's letter)

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

Follow-up actions to be taken by the Administration

2. In connection with members' concerns about details and the way of setting out safeguards to protect individual privacy and confidentiality of information in the exchange of information under comprehensive avoidance of double taxation agreements (CDTAs), the Administration was requested to provide the following information:

- (a) sample of a standard CDTA to illustrate how the safeguard provisions would be incorporated;
- (b) the full version of the draft Departmental Interpretation and Practice Note

(DIPN) in addition to the extract of the part on "Administrative Guidelines" provided in Annex C to LC Paper No. CB(1)106/09-10(02); and

- (c) a consolidated response to members' requests for setting out the safeguards in the primary or subsidiary legislation.

3. In relation to the concern of the Chairman, Mr James TO and Ms Miriam LAU about the interpretation of the term "foreseeably relevant" which would be adopted to restrict the scope of information exchange under CDTAs, the Administration was requested to take the following actions:

- (a) state clearly the principle that the test of relevancy should be based on the information provided by the requesting party in the request; and
- (b) make reference to paragraph 4 of the Eighth Schedule to the Singapore legislation and refine the drafting of paragraph 3(c) of the Appendix to the draft extract of DIPN at Annex C to LC Paper No. CB(1)106/09-10(02), to set out in clear terms that the request should contain information on the relevance of the information to the purpose of the request.

4. The Chairman, Ms Miriam LAU and Mr James TO shared the concern about the application of the provision of the Organization for Economic Cooperation and Development 2004 version of Exchange of Information Article (OECD Model Article) which stipulated that a contracting party had no obligation to supply information which would disclose any trade, business and other secrets. These members were concerned about the types of information which would fall under these categories and the possibility of judicial challenges to the Administration's interpretation in future exchange of information. In this connection, the Administration was requested to explain and provide definition, with examples for illustration, what information would be regarded as trade, business and other secrets and would not be supplied to the requesting party.

5. The Chairman expressed concern about the time allowed for the person concerned to request a copy of the information to be disclosed and to amend the information upon receipt of the notification by the Commissioner of Inland Revenue (CIR). In this connection, the Administration was requested to examine the feasibility of giving prior notification to the person concerned at an earliest possible date upon receipt of the EoI request, so that more time would be allowed (instead of 14 days in the current proposal) for the person concerned to respond and take necessary actions in respect of the information to be disclosed.

6. In relation to Mr James TO's concern about the channels available to the persons concerned to raise objections against the collection or disclosure of information under the EoI arrangement, the Administration was requested to:

- (a) consider Mr TO's suggestion of empowering the Financial Secretary (FS)

to review the question of law on the decision of the Inland Revenue Department (IRD) on the collection or disclosure of information, in addition to the current review procedure for FS to review the question of fact only; and

- (b) consider Mr Andrew LEUNG's suggestion of reporting to the Panel on Financial Affairs (FA Panel) the operation of the proposed notification system, say 18 months after implementation.

7. The Chairman was concerned that the prohibition of "whistle-blowing" under the anti-money laundering (AML) regime might affect the operation of the proposed notification system. In this connection, the Administration was requested to provide a written response to address the concern.

Paper to be provided by the legal adviser to the Bills Committee

8. In relation to Mr James TO's concern, the legal adviser to the Bills Committee would examine whether it would provide the same level of protection to a taxpayer who sought legal remedies, if the information of a disclosure request was set out in:

- (a) the primary legislation like the Eighth Schedule to the Singapore legislation;
- (b) the subsidiary legislation; or
- (c) the DIPN.

(Post-meeting note: The Administration's response to the requests in paragraphs 2 to 7 and the legal adviser's paper in respect of paragraph 8 were circulated to members vide LC Paper Nos. CB(1)466/09-10(02) and LS16/09-10 respectively on 24 November 2009.)

II Any other business

Meeting arrangements

9. Members agreed that the next meeting originally scheduled for 24 November 2009 be rescheduled to 26 November 2009 to avoid clashing with the meeting of the Subcommittee to Study Issues Arising from Lehman Brothers-related Minibonds and Structured Financial Products. Members also agreed with the Chairman's suggestion that additional meetings be arranged in December 2009.

(Post-meeting note: Notice of meeting on 26 November 2009 and schedule of additional meetings in December 2009 were issued to members vide LC Paper Nos. CB(1)369/09-10 and CB(1)438/09-10 on 13 and 23 November 2009 respectively.)

10. There being no other business, the meeting ended at 4:40 pm.

Council Business Division 1
Legislative Council Secretariat
4 February 2010

**Proceedings of the
Bills Committee on Inland Revenue (Amendment) (No.3) Bill 2009
Fifth meeting on Thursday, 12 November 2009, at 2:30 pm
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000153 – 000253	Chairman	Introductory remarks	
Follow-up to issues raised at previous meetings			
000254 – 000739	Chairman Administration	Briefing by the Administration on the response to issues raised at the meeting on 5 November 2009 (LC Paper No. CB(1)327/09-10(02)).	
000740 – 004417	Chairman Mr James TO Administration Department of Justice (DoJ) Ms Miriam LAU	<p>(a) Mr James TO's enquiry whether the Administration would stipulate clearly in the primary legislation its policy that the EoI arrangement would have no retrospective effect.</p> <p>(b) The Administration's reiteration of its clear policy that the "no retrospective effect" safeguard had been and would be implemented in CDTAs. It would examine ways to address members' concern.</p> <p>(c) Responding to Mr TO's concern about the interpretation of the term "foreseeably relevant" in restricting the scope of information exchange, DoJ's advice that the concept of "foreseeability" was the most common test of proximate cause in tort law. In the context of CDTAs, the test would be whether it was reasonably able to predict that the piece of information requested would be relevant to the case in question. DoJ's advice that only two United Kingdom cases could be found where the term "foreseeably relevant" was mentioned without elaboration.</p> <p>(d) Mr TO's query whether the common test in tort law was applicable to EoI arrangement under CDTAs. His concern that the scope of information exchange might be excessive if the term "foreseeably relevant" was adopted.</p> <p>(e) The Administration's response that the term "foreseeably relevant" was commonly adopted by OECD members in CDTAs to guard against</p>	

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		<p>"fishing expeditions". The requesting party had to set out the specific information of the taxpayer concerned in its request, e.g. information of a taxpayer's bank account in a certain bank. IRD would examine the relevancy of the information to the purpose of the request and seek clarification with the requesting party, where necessary.</p> <p>(f) Mr TO's request that the principle that the test of relevancy should be based on the information provided by the requesting party in the request should be stated clearly in the legislation. The Chairman's reference to similar concern expressed by the business and professional organizations and his view that the scope of information exchange should be properly restricted, say by setting out clearly the test of relevancy in DIPN. Requests of Mr TO and the Chairman for provision of the full version of the draft DIPN.</p> <p>(g) The Administration's response that the principle that the contracting parties did not have obligations as regards automatic or spontaneous exchanges of information would be set out in the protocols of CDTAs or other documents of records. Based on the OECD Model Article, the requesting party would be required to substantiate in the EoI request the relevance of the information to a taxation case. The taxpayer concerned might also raise objection to the disclosure of part or all of the information to the requesting party through the judicial review process.</p> <p>(h) Ms Miriam LAU's view that the Administration should make reference to section 105D and the Eighth Schedule of the Singapore legislation, and stipulate in clear terms the requirement for the requesting party to prove the relevance of the requested information to the investigation of a taxation case.</p> <p>(i) The Administration's response that the term "foreseeably relevant" was used in the OECD Model Article, and was commonly adopted by jurisdictions in CDTAs. The Administration's advice that section 105D(2) of the Singapore legislation actually allowed the Comptroller</p>	<p>The Administration to take action as required in paragraphs 2(b) and 3(a) of the minutes.</p>

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		<p>(i.e. equivalent to CIR in the Hong Kong context) to exercise discretion in accepting EoI requests not fully in conformity with the information prescribed in the Eighth Schedule.</p> <p>(j) Concern shared by Ms LAU and the Chairman that the procedures with which a disclosure request must comply in the Appendix to Annex C of LC Paper No. CB(1)106/09-10(02) did not provide sufficient details as those set out in paragraph 4 of the Eighth Schedule to the Singapore legislation.</p>	<p>The Administration to take action as required in paragraph 3(b) of the minutes.</p>
<p>004418 – 011029</p>	<p>Chairman Mr Alan LEONG Administration Ms Miriam LAU Mr James TO Mr CHAN Kin-por</p>	<p>(a) Mr Alan LEONG's concern about the different legislative approaches adopted by Hong Kong and Singapore in complying with the same OECD Model Article. His query why Hong Kong had not provided the safeguards in the primary legislation in the way which Singapore had done. Instead, the Administration proposed to set out the majority of the safeguards in the Rules and the DIPN. Mr LEONG's view that as the DIPN was not legally binding, setting out procedures and safeguards for processing EoI requests only in the DIPN but not in the primary legislation might not provide adequate protection to individuals' right to privacy and confidentiality of information.</p> <p>(b) The Administration's explanation that while it was not in a position to comment on the framework adopted by Singapore, it had given due consideration to the appropriate legislative framework when formulating the current proposal. In addition to amendments to the Inland Revenue Ordinance (Cap.112) (IRO), prudent safeguards would be incorporated in CDTAs which were subsidiary legislation subject to LegCo's scrutiny. The DIPN set out the operational guidelines and procedures for IRD in processing EoI requests to ensure that the requests were in line with the provisions in the CDTAs and other procedures laid down in the Rules. The DIPN also provided examples to facilitate the business and professional sectors to understand the operation of the EoI arrangement.</p> <p>(c) Ms Miriam LAU's view that while she would</p>	

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		<p>not insist on adoption of Singapore approach to provide the safeguards in the primary legislation, the Administration should provide the same level of certainty and clarity in the DIPN. Instead of keeping flexibility to IRD for future amendments of the procedural guidelines in the DIPN, Ms LAU's request that the Administration should undertake in writing or in the Secretary for Financial Services and the Treasury's speech for resumption of the Second Reading debate of the Bill, that it would consult the stakeholders and LegCo before making any changes to the procedures set out in the DIPN.</p> <p>(d) The Administration's response that it noted members' views on the clarity of the procedure in the DIPN. Its undertaking to consult the FA Panel if any changes were proposed to the procedures in the future.</p> <p>(e) Mr James TO's comment that he would not support the Bill if the Administration refused to take forward members' requests for setting out the safeguards in the primary or subsidiary legislation. His concern about the level of protection to the taxpayers, in particular, the right to seek legal remedies, if the safeguards were only set out in the DIPN.</p> <p>(f) Ms LAU's disappointment that the Administration had not responded positively to members' request for providing clarity and certainty for the safeguards by setting out details of the safeguards in the legislation or the DIPN.</p> <p>(g) Mr CHAN Kin-por's concern that Hong Kong had lagged behind other countries such as Singapore in the adoption of the OECD Model Article. His request that the Administration should consider views of members and the deputations, and make appropriate changes to its legislative proposal to solicit the support of members as soon as possible.</p> <p>(h) The Chairman's suggestion that the Administration should provide a consolidated response to members' requests for setting out the safeguards in the primary or subsidiary</p>	<p>The Administration to take action as required in</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>legislation, before the next meeting of the Bills Committee.</p> <p>(i) Mr TO's request for the legal adviser to the Bills Committee to examine whether it would provide the same level of protection to a taxpayer who sought legal remedies, if the information of a disclosure request was set out in the primary legislation like the Eighth Schedule to the Singapore legislation; the subsidiary legislation; or the DIPN.</p>	<p>paragraph 2(c) of the minutes.</p> <p>ALA4 to take action as required in paragraph 8 in the minutes.</p>
<p>011030 – 013100</p>	<p>Chairman Mr James TO Administration Ms Miriam LAU Mr Andrew LEUNG</p>	<p>(a) Mr James TO's concern about the channels available to the persons concerned to raise objection against the collection or disclosure of information under the EoI arrangements, as FS was only empowered under the Rules to review objections to the accuracy of information to be exchanged.</p> <p>(b) The Administration's response that it had to balance all factors, such as personal privacy, the effective implementation of EoI and compliance with international treaty obligations. 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 CDTAs or the law, he could seek to challenge the Administration's actions through judicial review.</p> <p>(c) Mr TO's request that consideration should be given to empowering FS to review the question of law on the decision of IRD on the collection or disclosure of information, in addition to the current review procedure for FS to review the question of fact only.</p> <p>(d) Mr Andrew LEUNG's view that FS should not be involved in handling reviews on question of law, which should be dealt with by the court. His suggestion that the Administration should report to the FA Panel sometime after the implementation of the proposed notification system instead.</p> <p>(e) The Chairman's remark that some deputations had proposed that an independent tribunal/appeal panel/the Board of Review,</p>	<p>The Administration to take action as required in paragraph 6(a) of the minutes.</p> <p>The Administration to take action as required in paragraph 6(b) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>instead of FS, should be responsible for the reviews.</p> <p>(f) The Administration's response that it would not be cost-effective to set up a new board/panel for review of IRD's decisions, given the small number of EoI requests. Moreover, putting in place a complicated review mechanism might affect the efficiency of information exchange, which was one of the compliant standards required by OECD. The Administration's view that it was more appropriate to leave reviews on legal issues to the judiciary, and for FS to review IRD's discussion on the question of fact only.</p>	
013101 – 013612	Chairman Administration	The Chairman's concern about the time allowed for the person concerned to request a copy of the information to be disclosed and to amend the information upon receipt of the notification by the CIR.	The Administration to take action as required in paragraph 5 of the minutes.
013613 – 014151	Mr James TO Chairman Administration	In response to Mr TO's enquiry, the Administration's explanation that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO) excluded a request under the MLAO framework the primary purpose of which was for tax assessment and collection (section 5(2)). This should not prevent the Government from making any law or arrangement outside MLAO to specifically provide for mutual assistance on tax assessment and collection as it thought fit.	
014152 – 014557	Chairman Administration Mr James TO	Concern shared by the Chairman and Mr James TO that the prohibition of "whistle-blowing" under the AML regime might affect the operation of the proposed notification system.	The Administration to take action as required in paragraph 7 of the minutes.
014558 – 015821	Chairman Mr James TO Administration Ms Miriam LAU ALA4	(a) Noting that a provision in the OECD Model Article stipulated that a contracting party had no obligation to supply information which would disclose any trade, business and other secrets, concern shared by the Chairman, Mr James TO and Ms Miriam LAU about the type of information which would fall within these categories and the possibility of judicial challenges to the Administration's interpretation	The Administration to take action as required in paragraph 4 of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		in future exchange of information. (b) ALA4's suggestion that to address members' concerns about details and the way of setting out safeguards to protect individual privacy and confidentiality of information in the exchange of information under CDTAs, the Administration should provide a sample of a standard CDTA to illustrate how the safeguard provisions would be incorporated.	The Administration to take action as required in paragraph 2(a) of the minutes.
015822 – 020722	Chairman Mr James TO Ms Miriam LAU Mr Andrew LEUNG Administration	Meeting arrangements.	