

# 立法會

## *Legislative Council*

LC Paper No. LS16/09-10

### **Paper for the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009**

#### **Background**

At the Bills Committee's meeting held on 12 November 2009, a member requested the legal adviser to the Bills Committee to examine whether it would provide the same level of protection for a taxpayer who seeks legal remedies, if the information to be included in a request for disclosure of information<sup>1</sup> (disclosure request) to a competent authority under an avoidance of double taxation arrangement having effect under the proposed section 49(1A) of the Inland Revenue Ordinance (Cap. 112) (IRO) is set out in the-

- (a) primary legislation like the Eighth Schedule to the Income Tax (Exchange of Information) Act of Singapore;<sup>2</sup>
- (b) subsidiary legislation; or
- (c) Departmental Interpretation and Practice Notes (DIPNs).

#### **Setting out the information of a disclosure request in primary legislation**

2. Statute may impose a duty on an administrative authority to act in certain circumstances. For example the Commissioner of Inland Revenue (CIR) is required under the primary legislation to comply with a disclosure request provided that specified information is supplied by the requesting party. The statute may grant corresponding rights to an individual, i.e. the aggrieved person, if the administrative authority fails to

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<sup>1</sup> Appendix to Annex C to CB(1)106/09-10(02).

<sup>2</sup> Section 105D of the Income Tax (Exchange of Information) Act provides that the competent authority under a prescribed arrangement may make a request to the Comptroller for information concerning the tax position of any person in accordance with the Exchange of Information provision of that arrangement. Unless the Comptroller otherwise permits, the request must set out the information prescribed in the Eighth Schedule to the Act. The Eighth Schedule contains information to be included in a request for information under section 105D.

perform the statutory duty properly, as in the case where the CIR accedes to a disclosure request notwithstanding that certain specified information is not contained in the request. However, if there is no provision in the primary legislation providing for remedies for the administrative authority's failure to perform a statutory duty, the aggrieved person may seek judicial review to quash the decision of the CIR and compel the CIR to perform her duty in accordance with the primary legislation. The general principle is that statute may impose a duty upon an administrative authority to do some specific act. Failure to act will be unlawful and may be remedied by way of judicial review, usually by the grant of mandamus, ordering the administrative authority to carry out its duties.<sup>3</sup> In certain circumstances civil liability may be incurred for causing damage by failure to carry out a statutory duty, as well.<sup>4</sup>

3. As both primary legislation and subsidiary legislation have the force of law, the above principles applicable to statute are equally applicable to subsidiary legislation. As such, it appears that the level of protection for an aggrieved person is the same whether the information of a disclosure request is set out in the primary legislation or the subsidiary legislation. If the CIR fails to ascertain that the information in the disclosure request contains the specified information as set out in the subsidiary legislation before she accedes to the request, the CIR's decision will be subject to judicial review if there is no recourse provided in the subsidiary legislation itself.

## **Setting out the information of a disclosure request in DIPNs**

### Status of the DIPNs

4. The CIR has published a number of DIPNs to explain the Inland Revenue Department's interpretation and practices in relation to the laws on various matters in respect of profits tax and salaries tax, etc. The DIPNs are published on the website of the IRD. There is no mention about the legal status of the DIPNs in the IRO.

5. It appears that the DIPNs have not been challenged in a judicial review except being referred to in *Kam Kiu (Hong Kong) Limited and Commissioner of Inland Revenue* HCAL 61/2009.

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<sup>3</sup> See Clive Lewis, *Judicial Remedies in Public Law*, 2<sup>nd</sup> edition (Sweet & Maxwell 2000) at p. 143 and A.W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, 14<sup>th</sup> edition (Longman 2007) at p. 738. Mandamus has been issued, for example to order a local authority to pay college lecturers: *R. v. Liverpool City Council, ex p. Coade*, *The Times*, 10 October 1986.

<sup>4</sup> *Halsbury's Laws of Hong Kong* (Butterworths 1995) Vol 1, 10.180.

*Kam Kiu (Hong Kong) Limited and Commissioner of Inland Revenue*

6. Kam Kiu complained that profits tax assessments were wrongly raised against it for the year 2002-2003. Kam Kiu's objections to the assessments were still being considered by the CIR. In the meantime, in the exercise of her discretion under section 71(2) of the IRO, the CIR ordered that, in relation to the additional assessment, a sum of \$4,144,056 was to be held over on condition that Kam Kiu purchased an equal amount of Tax Reserve Certificates (TRCs) by 19 May 2009. It was against the decision of the CIR requiring purchase of TRCs that Kam Kiu sought leave to apply for judicial review.

7. Counsel for Kam Kiu argued, among other grounds, that it was an abuse of power for the CIR to require purchase of TRCs. The Court held the following view on the argument. Section 71(2) of the IRO provides that, notwithstanding an objection or appeal against an assessment, "tax shall be paid". The CIR, however retains a discretion under the provision to order that tax be held over unconditionally or conditionally. It was thus incumbent on Kam Kiu to put forward such a case for the CIR's consideration. Unfortunately, prior to issuing its Notice of Application for Judicial Review, Kam Kiu never did so. It was accordingly hard to see how (in the absence of any specific application backed with appropriate evidence from Kam Kiu) the CIR could be faulted from deciding as she did on the question of hold over.

8. At paragraph 27 of the judgment, the Court had the following observation-

"In coming to a decision on hold over, the Commissioner was guided by reference to Departmental Interpretation and Practice Note No. 6 (DIPN 6). Although the complaint does not appear in Kam Kiu's Notice for Judicial Review, it is suggested by Mr. Ho that this reliance on DIPN 6 was wrong or unreasonable.<sup>5</sup>"

9. The Court noted the CIR's opinion that Kam Kiu had a chance of success in its objections to tax. In those circumstances, in line with DIPN 6 and absence of any financial hardship from Kam Kiu, the CIR granted a condition hold over. The Court found nothing to complain of in that reasoning.

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<sup>5</sup> Paragraph 9 of DIPN 6 sets out the CIR's policy on the issue of unconditional stand-over, no stand-over and purchase of TRCs. In relation to purchase of TRCs, where it is shown to the CIR's satisfaction that the purchase of TRCs would cause financial hardship to a taxpayer, the CIR may accept a bank undertaking in lieu of TRCs. Following the commencement of the judicial review, the CIR had indicated that she was prepared to accept a bank undertaking in lieu of TRCs. But that offer was rejected by Kam Kiu, apparently because (among other things) there would be a bank charge of 1.5% per annum on such an undertaking. However, since Kam Kiu did not raise the point on the CIR's willingness to accept a bank undertaking at the time of the Judicial Review Notice, the Court refused to treat the CIR's stance as some sort of decision which should then be subject to judicial review in the absence of leave being sought, or granted for that purpose.

### Legitimate expectation

10. In Kam Kiu's case, the legal status of the DIPNs in relation to judicial review was not fully argued before the Court. That said, under the administrative law, a person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment.<sup>6</sup> The existence of a legitimate expectation may give locus standi to the aggrieved person to seek leave to apply for judicial review.<sup>7</sup> An expectation will be derived from either-

- (a) an express promise or representation; or
- (b) a representation implied from established practice based upon the past actions or the settled conduct of the decision maker.<sup>8</sup>

11. It may be argued that the DIPNs justify a legitimate expectation because they are published by the CIR on the website of the IRD informing the taxpayers about the information to be contained in a disclosure request. Therefore, if the information of a disclosure request is provided in the DIPNs and if it is accepted that the DIPNs are express representation by the CIR as to the circumstances in which she will accede to a disclosure request, it can be argued that legitimate expectation arises. Based on case law, it seems that if the CIR fails to comply with the DIPNs, an aggrieved person may on that ground seek redress by way of judicial review.

### Protection for a taxpayer in relation to a disclosure request

12. Assuming that the DIPNs raise a legitimate expectation of the taxpayer that the CIR will comply with it, information to be contained in a disclosure request set out in the DIPNs may have the following setbacks as compared to the same being set out in primary or subsidiary legislation:-

- (a) First, an expectation need not endure eternally. It may come to an end naturally or it may be cancelled. A change in a departmental circular

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<sup>6</sup> See *O'Reilly v. Mackman* [1983] 2 AC 237 at 275.

<sup>7</sup> In *AG v. Ng Yuen Shiu* [1983] 2 All ER 346, the Privy Council was of the opinion that the government undertaking that each illegal immigrant's case would be dealt with on its own merits created legitimate expectation of a hearing. An order of certiorari was granted to quash the removal order made against the respondent, as an illegal immigrant, who had not been given a hearing before the removal order against him was made.

<sup>8</sup> See Woolf, Jowell and Le Sueur, *De Smith's Judicial Review*, 6<sup>th</sup> edition (Sweet & Maxwell 2007) at p. 615 - p. 617.

would, if properly communicated, although not necessarily personally to any particular individual, serve as an express representation of revocation. Compared to the scenario where the information of a disclosure request is set out in the primary legislation, any change of it is to be effected by an amendment bill to be tabled in the Council. Compared to the scenario where the information concerned is set out in subsidiary legislation, any change of it is subject to the negative or positive vetting by the Council.

- (b) Secondly, assuming that an aggrieved person may seek judicial review of the CIR's decision by reference to the DIPNs on the ground of legitimate expectation, it would be difficult to predict the court's decision in light of the fluid state of the law in this area. In *R. v. North Devon Health Authority, ex p Coughlam* [2001] QB 213, the court held that the concept of legitimate expectation may be invoked by those who, on judicial review, either claim that an authority's decision should be quashed or seek a substantive benefit that has been denied to them. This judgment breaks new ground in two ways: (i) it held that a legitimate expectation enables the court to confer the substantive benefit that the claimant is seeking (and not merely a procedural remedy); (ii) it also held that the court must conduct a balancing exercise in considering whether the effect of a changed policy on a claimant is "fair", not merely whether the policy met the *Wednesbury* test of unreasonableness.<sup>9</sup> The decision in *Coughlam's* case is welcome, but it raises difficult questions as to how the court should balance individual expectations against the necessity for official bodies to act in the public interest as they see it.

## Conclusion

13. The level of protection for an aggrieved person in the scenario where the information of a disclosure request is set out in the primary or subsidiary legislation is comparable to each other. The aggrieved person may seek remedies as provided for in the legislation. If there is no internal recourse in the legislation, the aggrieved person may seek judicial review of the CIR's decision.

14. As to the scenario where the information of a disclosure request is set out

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<sup>9</sup> A court may set aside a decision for unreasonableness only when the authority has come to a conclusion "so unreasonable that no reasonable authority could ever have come to it": *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1983] QB 962.

in the DIPNs, the aggrieved person must establish to the court in a judicial review that the DIPNs justify legitimate expectation. Having done that, it would raise difficult questions as to how the court should balance individual expectations against the necessity for official bodies to act in the public interest as they see it. Finally, the DIPNs could be changed administratively; whereas amendment to primary or subsidiary legislation is subject to the legislative process.

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24 November 2009