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on 22 October 2010**

**Legal Service Division Report on
Subsidiary Legislation and Non-Legislative Instrument
Gazetted on 15 October 2010**

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PART I AVOIDANCE OF DOUBLE TAXATION

Inland Revenue Ordinance (Cap. 112)

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with Respect to Taxes on Income) (Republic of Hungary) Order (L.N. 124)

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital) (Republic of Austria) Order (L.N. 125)

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains) (United Kingdom of Great Britain and Northern Ireland) Order (L.N. 126)

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with Respect to Taxes on Income) (Ireland) Order (L.N. 127)

Specification of Arrangements (The Mainland of China) (Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income) (Third Protocol) Order (L.N. 128)

L.N. 124 to L.N. 127

L.N. 124 to L.N. 127 are made by the Chief Executive in Council under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) (the Ordinance) to give effect to the following comprehensive agreements for avoidance of double taxation (CDTAs) respectively:

- (a) the Agreement between the Government of Hong Kong Special Administrative Region of the People's Republic of China (HKSARG) and the Government of the Republic of Hungary for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to

Taxes on Income together with a protocol to the Agreement signed on 12 May 2010 (the Hungarian Agreement);

- (b) the Agreement between HKSARG and the Government of the Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital together with a protocol to the Agreement signed on 25 May 2010 (the Austrian Agreement);
- (c) the Agreement between HKSARG and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains together with a protocol to the Agreement signed on 21 June 2010 (the UK Agreement); and
- (d) the Agreement between HKSARG and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income together with a protocol to the Agreement signed on 22 June 2010 (the Irish Agreement).

2. Under section 49(1A) of the Ordinance, the Chief Executive in Council may, by order, declare that arrangements have been made with the government of any territory outside Hong Kong with a view to affording relief from double taxation in relation to income tax and any tax of a similar character imposed by the laws of that territory.

3. According to the LegCo Briefs issued by the Financial Services and the Treasury Bureau on 13 October 2010 on L.N. 124 to L.N. 127, while a local resident's income derived from sources outside Hong Kong would not be taxed in Hong Kong and hence would not be subject to double taxation, double taxation may occur where a foreign jurisdiction taxes its own residents' income derived from Hong Kong. Despite that 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.

4. L.N. 124 to L.N. 127 declare respectively that for the purposes of section 49(1A) of the Ordinance, the following arrangements have been made as double taxation relief arrangements and it is expedient that those arrangements should have effect -

- (a) the arrangements specified in Articles 1 to 27 of the Hungarian Agreement and Paragraphs 1 to 4 of the Protocol to the Agreement;
- (b) the arrangements specified in Articles 1 to 28 of the Austrian Agreement and Paragraphs I to IV of the Protocol to the Agreement;

- (c) the arrangements specified in Articles 1 to 27 of the UK Agreement and Paragraphs 1 to 4 of the Protocol to the Agreement; and
- (d) the arrangements specified in Articles 1 to 27 of the Irish Agreement and Paragraphs 1 to 5 of the Protocol to the Agreement.

5. The provisions in the Hungarian Agreement, the Austrian Agreement, the UK Agreement and the Irish Agreement set out the allocation of taxing rights between HKSARG and the respective jurisdictions and the relief on tax rates on different types of income. Each of the above Agreements contains an article on exchange of information which is based on the Organisation for Economic Cooperation and Development (OECD) 2004 version of the Exchange of Information (EoI) Article. During the scrutiny of the Inland Revenue (Amendment) (No. 3) Bill 2009, the Administration presented a sample EoI Article to the Bills Committee vide LC Paper No. CB(1)106/09-10(02). According to paragraphs 9 and 10 of the LegCo Briefs for L.N. 124 to L.N. 127 (File Ref: FIN CR 11/10/2041/46, FIN CR 36/10/2041/46, FIN CR 1/10/2041/46 and FIN CR 20/10/2041/46), the Hungarian Agreement, the Austrian Agreement, the UK Agreement and the Irish Agreement have adopted all the safeguards in the sample EoI Article.

6. The effects of the declarations set out in paragraph 4 above are -
- (a) that the arrangements have effect in relation to tax under the Ordinance despite anything in any enactment; and
 - (b) that the arrangements, for the purposes of any provision of those arrangements that requires disclosure of information concerning tax of the Republic of Hungary, the Republic of Austria, the United Kingdom of Great Britain and Northern Ireland, and Ireland, have effect in relation to any tax of the respective jurisdictions that is the subject of that provision.

L.N. 128

7. On 21 August 2006, the Mainland of China and the Hong Kong Special Administrative Region (the Parties) entered into an arrangement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (the Arrangement) together with a protocol to the Arrangement (the First Protocol). By the Specification of Arrangements (The Mainland of China) (Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income) Order (Cap. 112 sub. leg. AY) made in October 2006, the arrangements in Articles 1 to 27 of the Arrangement and Paragraphs 1 to 3 of the First Protocol are specified as double taxation relief arrangements under section 49 of the Ordinance.

8. Subsequent to the making of the Arrangement on 21 August 2006, the Parties signed a further protocol to the Arrangement (the Second Protocol) in Beijing on 30 January 2008 to clarify some post-implementation issues of the Arrangement in order to provide greater certainty in the interpretation of certain provisions of the

Arrangement. On 27 May 2010, the Parties signed another protocol to the Arrangement (the Third Protocol) to upgrade the Exchange of Information (EoI) Article in the Arrangement to the 2004 version of the EoI Article. According to paragraphs 4 and 5 of the LegCo Brief (File Ref: FIN CR 17/10/2041/46) issued by the Financial Services and the Treasury Bureau on 13 October 2010, the Third Protocol has adopted all the safeguards in the sample EoI Article.

9. L.N. 128 specifies the arrangements in Articles 1 and 2 of the Third Protocol as double taxation relief arrangements under section 49(1A) of the Ordinance and declares that it is expedient that those arrangements should have effect. The effects of such a declaration are -

- (a) that the arrangements have effect in relation to tax under the Ordinance despite anything in any enactment; and
- (b) that the arrangements, for the purposes of any provision of those arrangements that requires disclosure of information concerning tax of the Mainland of China, have effect in relation to any tax of the Mainland that is the subject of that provision.

10. L.N. 124 to L.N. 128 will come into operation on 9 December 2010.

11. The Panel on Financial Affairs has not been consulted on L.N. 124 to L.N. 128.

12. The Legal Service Division is scrutinizing the legal and drafting aspects of L.N. 124 to L.N. 128. A further report will be provided if necessary.

PART II MISCELLANEOUS AMENDMENTS

Waterworks Ordinance (Cap. 102)

Waterworks (Amendment) Regulation 2010 (L.N. 129)

13. This Amendment Regulation is made by the Secretary for Financial Services and the Treasury under section 29A of the Interpretation and General Clauses Ordinance (Cap. 1) by virtue of section 37 of the Waterworks Ordinance (Cap. 102).

14. The Amendment Regulation seeks to revise 18 items of fees and charges as specified in Schedule 1 to the Waterworks Regulations (Cap. 102 sub. leg. A). The proposed revisions are in relation to the following services -

- (a) reconnecting a fire service or inside service;
- (b) providing and installing a meter on a fire service or inside service;
- (c) resealing a fire service or meter;

- (d) testing a meter or a private check meter (including removal and refixing);
- (e) issuance of plumber's licence, renewal and examination; and
- (f) examination of a water sample, attendance to collect water sample and additional copy of examination report.

15. The Amendment Regulation will come into effect on 1 January 2011.

16. According to the LegCo Brief (with no file reference) issued by the Development Bureau in October 2010, the revisions are proposed with a view to recovering full cost of providing the services. As such, charges of 16 items are proposed to increase from 9.8 % to 16.2% and two items are proposed to decrease by 13.4% and 82.1% respectively. Among the 18 items, 16 items were last revised in 1996 and two items in 2001. Members may refer to the LegCo Brief for details of proposed revisions and a comparison of the existing and proposed charges.

17. An Information Note on this revision proposal was submitted by the Development Bureau to the Panel on Development in July 2010 for circulation to members. There was no discussion by the Panel.

Clubs (Safety of Premises) Ordinance (Cap. 376)

Clubs (Safety of Premises) (Exclusion) (Amendment) Order 2010 (L.N. 130)

18. This Amendment Order is made by the Secretary for Home Affairs under section 3 of the Clubs (Safety of Premises) Ordinance (Cap. 376) (the Ordinance). By this Order, item 5 of the Schedule to the Club (Safety of Premise) (Exclusion) Order (Cap. 376 sub. leg. C) (the Exclusion Order) is updated by amending the names of three clubs and locations of three club-houses and deleting one club-house.

19. The Ordinance provides for the regulation, control and safety of club-houses. The Schedule to the Exclusion Order sets out the clubs or club-houses which are excluded from the application of the Ordinance. The club-houses listed under item 5 of the Schedule are situated in Government premises.

20. According to the LegCo Brief (with no file reference) issued by Home Affairs Department in October 2010, the proposed revisions are made upon requests from various Government departments since the last amendment in 1998. As it is a routine updating exercise, public consultation is considered by the Administration to be not necessary. Members may refer to the LegCo Brief for the details of the clubs concerned and other information.

Deposit Protection Scheme Ordinance (Cap. 581)

Deposit Protection Scheme (Representation on Scheme Membership and Protection of Financial Products under Scheme) (Amendment) Rules 2010 (L.N. 131)

21. These Amendment Rules are made by the Hong Kong Deposit Protection Board (the Board) under section 51 of the Deposit Protection Scheme Ordinance (Cap. 581) (the Ordinance).

22. The Deposit Protection Scheme (Representation on Scheme Membership and Protection of Financial Products under Scheme) Rules (Cap. 581 sub. leg. A) (the Representation Rules) provides for the disclosure requirements in relation to the protection status of financial products offered by the members of Deposit Protection Scheme (the Scheme) and the offences for non-compliance of the requirements under the Representation Rules.

23. The Amendment Rules seek to amend the Representation Rules to -

- (a) amend all references to the protection limit of the Scheme from HK\$100,000 to HK\$500,000 per depositor to reflect the new protection limit introduced by the Deposit Protection Scheme (Amendment) Ordinance 2010 (11 of 2010);
- (b) require disclosures by the Scheme members as to financial products not protected by the Scheme on a transaction basis except for automatic re-investment of financial products, transactions with institutional customers and money invested into financial products for payment purpose (new sections 6A to 6D);
- (c) restrict the use of the term "structured deposit" by Scheme members (new section 6E);
- (d) require disclosures by Scheme members as to the deposits maintained or to be taken by them that are qualified for protection under the Scheme (new sections 6F to 6K);
- (e) require Scheme members to reply to depositors' enquiries on the protection status of their deposits in specified manner and within a specified timeframe (new section 7A); and
- (f) require that the notices be given or displayed according to specified standards on size and location (new section 7B).

24. The Amendment Rules will come into operation on 1 January 2011 except for new section 6E which will come into operation on 1 July 2011 to allow sufficient time for Scheme members to make relevant changes to their product nomenclatures.

25. According to the LegCo Brief (Ref: B9/2/2C) dated 13 October 2010 issued by the Financial Services and the Treasury Bureau, the proposed amendments are to implement the tightening of disclosure requirements recommended in a review of the Scheme concluded in 2009 and to reflect the new protection limit of the Scheme with effect from 1 January 2011. The Board has, in accordance with section 51 of the Ordinance, consulted the Hong Kong Association of Banks and the Financial Secretary on the Amendment Rules. The Board has also consulted other interested parties including industry associations, statutory advisory committees including Banking Advisory Committee and Deposit-Taking Companies Advisory Committee, the Consumer Council and professional bodies.

26. The Panel on Financial Affairs was briefed on 1 February 2010 of the progress of the review including the proposed amendments on disclosure requirements. No objection has been raised by members in relation to the proposal.

27. No difficulties have been identified in the legal and drafting aspects of L.N. 129 and L.N. 130. The scrutiny of L.N. 131 is still continuing and a further report will be provided if necessary.

PART III COMMENCEMENT NOTICES

Companies Ordinance (Cap. 32)

Companies (Amendment) Ordinance 2010 (12 of 2010)

Companies (Amendment) Ordinance 2010 (Commencement) Notice 2010 (L.N. 132)

28. Under section 2 of the Companies (Amendment) Ordinance 2010 (12 of 2010) (the Amendment Ordinance), the Secretary for Financial Services and the Treasury appoints 10 December 2010 as the commencement date for the following provisions of the Amendment Ordinance -

- (a) Part 1 (preliminary provisions);
- (b) Part 3 (amendments relating to company name);
- (c) Part 4 (amendments relating to statutory derivative actions);
- (d) Part 6 (amendments relating to communications by company to another person (other than Registrar of Companies)); and
- (e) Part 8 (miscellaneous amendments).

29. No LegCo Brief has been issued by the Financial Services and the Treasury Bureau. Upon enquiry, the Administration informed the Legal Service Division that it is their intention to bring the remaining provisions under Part 2 (amendments relating to company formation) and Part 5 (amendments relating to electronic communications with Registrar of Companies) into operation in early 2011 while Part 7 (amendments relating to paperless holding and transfer of shares and

debentures) can only take effect when amendments to other related ordinances including Securities and Futures Ordinance (Cap. 571), have been made.

United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)

United Nations (Anti-Terrorism Measures) Ordinance (Commencement) Notice 2010 (L.N. 133)

United Nations (Anti-Terrorism Measures) (Amendment) Ordinance 2004 (Commencement) Notice 2010 (L.N. 134)

30. By these two Commencement Notices, the Secretary for Security has appointed 1 January 2011 as the date on which the uncommenced provisions of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (the principal Ordinance) and the United Nations (Anti-Terrorism Measures) (Amendment) Ordinance 2004 (the Amendment Ordinance) shall come into operation.

31. The principal Ordinance and the Amendment Ordinance were passed by the Legislative Council (LegCo) on 12 July 2002 and 3 July 2004 respectively. By L.N. 137 of 2002 and L.N. 172 of 2004, certain provisions of the principal Ordinance came into operation on 23 August 2002 and 7 January 2005 respectively. By L.N. 173 of 2004, certain provisions of the Amendment Ordinance came into operation on 7 January 2005.

32. According to the LegCo Brief (with no file reference) issued by the Security Bureau in October 2010, the provisions of the principal Ordinance and the Amendment Ordinance which have remained uncommenced can only take effect after relevant court rules and code of practice have been made. Since the court rules namely, the Rules of High Court (Amendment) Rules 2009 (L. N. 186 of 2009), and code of practice, namely the Code of Practice for Requiring Persons to Furnish Information or Produce Material, were passed by LegCo in December 2009 and July 2010 respectively, the commencement of these provisions may now proceed.

33. The Panel on Security has not been consulted on the two Commencement Notices.

34. No difficulties have been identified in the legal and drafting aspects of the three Commencement Notices.

PART IV NON-LEGISLATIVE INSTRUMENT

Air Pollution Control Ordinance (Cap. 311)

Second Technical Memorandum for Allocation of Emission Allowances in Respect of Specified Licences (S. S. No. 5 to Gazette No. 41/2010)

35. The Second Technical Memorandum for Allocation of Emission Allowances in Respect of Specified Licences is issued by the Secretary for the Environment under section 26G of the Air Pollution Control Ordinance (Cap. 311) (the Ordinance).

36. This Technical Memorandum seeks to reduce from the emission year of 2015 the quantities of emission allowances for the three specified pollutants, namely sulphur dioxide (SO₂), nitrogen oxides (NO_x) and respirable suspended particulates (RSP) allocated to the power plants in Hong Kong as determined under the First Technical Memorandum issued in 2008. The allocation of the emission allowances set out in this Technical Memorandum will be reviewed not less than once every three years after the commencement of this Technical Memorandum.

37. Pursuant to section 37B of the Ordinance, where a technical memorandum has been laid on the table of LegCo, LegCo may, by resolution passed at its sitting held before the expiration of a period of 28 days after the sitting at which it was so laid, provide that the technical memorandum shall be amended in any manner consistent with the power to issue the technical memorandum. Before expiry of the 28-day period, LegCo may by resolution extend that period to the first LegCo sitting held not earlier than twenty-first day after the day of its expiry.

38. Pursuant to section 37C of the Ordinance, the technical memorandum shall commence to have effect upon the expiry of the above amendment period or the period as extended if LegCo does not pass a resolution to amend it. In the case where LegCo passes a resolution amending the technical memorandum, it shall come into effect on the day of the publication in the Gazette of such resolution.

39. According to the LegCo Brief (with no reference number) issued by the Environmental Protection Department in October 2010, the proposed reduction of emission allowances is the result of a recent review on the First Technical Memorandum as undertaken by the Administration during the deliberations of the Subcommittee formed for the scrutiny of the First Technical Memorandum in 2008. The proposal, when compared with the emission allowances for 2010, represents a reduction of 50% for SO₂, 35% for NO_x and 34% for RSP as from 2015. The two local power companies, namely the CLP Power Hong Kong Limited and the Hongkong Electric Co. Ltd., have been consulted on the proposal. Members may refer to the LegCo Brief for further and background information.

40. At its meeting held on 22 September 2010, the Panel on Environmental Affairs was briefed by the Secretary for the Environment on the proposal to issue a second technical memorandum to reduce the emission allowances for power plants from 2015 onwards. While members generally supported the proposal, some members expressed concern that in order to meet the new emission allowances, the two local power companies would have to increase the use of natural gas for power generation and might tend to recoup the cost by increasing electricity tariff given the price difference between coal and natural gas.

41. No difficulties have been identified in the legal and drafting aspects of this Technical Memorandum.

Concluding Remarks

42. No difficulties have been identified in the legal or drafting aspects of the above items except L.N. 124 to L.N. 128 and L.N. 131 of which scrutiny is still continuing. A further report will be issued if necessary.

Prepared by

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