

立法會
Legislative Council

LC Paper No. CB(1)642/10-11
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by the Administration)

Ref : CB1/SS/2/10/2

**Subcommittee on the Five Orders Made under Section 49(1A) of the Inland
Revenue Ordinance and Gazetted on 15 October 2010**

**First meeting on
Tuesday, 2 November 2010, at 4:30 pm
in Conference Room B of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Albert HO Chun-yan
Hon Paul CHAN Mo-po, MH, JP

**Public officers
Attending** : Ms Shirley KWAN
Principal Assistant Secretary for Financial Services
and the Treasury (Treasury)

Ms Joan HUNG
Assistant Secretary for Financial Services and the
Treasury (Treasury)

Mr Richard WONG
Deputy Commissioner of Inland Revenue

Miss Agnes CHEUNG
Senior Government Counsel
Department of Justice

Mr Peter SZE
Government Counsel
Department of Justice

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)5

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Mr Noel SUNG
Senior Council Secretary (1)4

Ms Haley CHEUNG
Legislative Assistant (1)8

Action

I Election of Chairman

Mr Albert HO, the member with the highest precedence among those who were present at the meeting, presided over the election of the Chairman of the Subcommittee. He invited nominations for the chairmanship of the Subcommittee.

2. Mr James TO was nominated by Mr Paul CHAN and the nomination was seconded by Mr Albert HO. Mr James TO accepted the nomination. There being no other nomination, Mr James TO was elected Chairman of the Subcommittee.

II Meeting with the Administration

(L.N. 124 of 2010) — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of Hungary) Order

L.N. 125 of 2010 — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital) (Republic of Austria) Order

- L.N. 126 of 2010 — 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. 127 of 2010 — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Ireland) Order
- L.N. 128 of 2010 — 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
- FIN CR 11/10/2041/46 — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of Hungary) Order issued by the Financial Services and the Treasury Bureau
- FIN CR 36/10/2041/46 — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital) (Republic of Austria) Order issued by the Financial Services and the Treasury Bureau
- FIN CR 1/10/2041/46 — Legislative Council Brief on 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 issued by the Financial Services and the Treasury Bureau

- FIN CR 20/10/2041/46 — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Ireland) Order issued by the Financial Services and the Treasury Bureau
- FIN CR 17/10/2041/46 — Legislative Council Brief on 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 issued by the Financial Services and the Treasury Bureau
- LC Paper No. LS2/10-11 — Legal Service Division report on Subsidiary Legislation and Non-Legislative Instrument gazetted on 15 October 2010
- LC Paper No. CB(1)287/10-11(01) — Letter from Assistant Legal Adviser to the Administration dated 27 October 2010 on 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 of 2010)
- LC Paper No. CB(1)286/10-11 — Background brief on the Five Orders Made under Section 49(1A) of the Inland Revenue Ordinance and Gazetted on 15 October 2010 prepared by the Legislative Council Secretariat)

3. The Subcommittee deliberated (Index of proceedings attached at **Appendix**).

III Any other business

Way forward

4. The Chairman said that the Subcommittee had completed the scrutiny of the five Orders: i.e. L.N. 124 to 128 of 2010, and he would make a verbal report on the Subcommittee's deliberations to the House Committee on 5 November 2010, and would speak on the subsidiary legislation at the Council meeting on 17 November 2010.

5. There being no other business, the meeting ended at 5:43 pm.

Council Business Division 1
Legislative Council Secretariat
2 December 2010

**Proceedings of the Subcommittee on the Five Orders Made under Section 49(1A)
of the Inland Revenue Ordinance and Gazetted on 15 October 2010
First meeting on Tuesday, 2 November 2010, at 4:30 pm
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000706 000844	– Mr Albert HO Mr Paul CHAN Mr James TO	Election of Chairman	
000845 001415	– Chairman Administration	Briefing by the Administration on the progress of the work on negotiating Comprehensive Agreements for Avoidance of Double Taxation (CDTAs) and the safeguards in the five Orders under scrutiny for protection of the privacy and confidentiality of local taxpayers' information.	
001416 002142	– Chairman Administration	<p><u>Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of Hungary) Order (L.N. 124)</u></p> <p>In response to the Chairman's enquiries regarding the benefits brought to Hong Kong residents and enterprises under the CDTA signed with Hungary, the Administration advised that -</p> <p>(a) the terms of the CDTA, as in the case of the other CDTAs signed, were made on a reciprocal and equitable basis;</p> <p>(b) the arrangement for allocation of taxing right in respect of employment income described in paragraph 5 of the Legislative Council (LegCo) Brief mirrors the relevant provision in the model text for CDTAs provided by the Organization for Economic Cooperation and Development (OECD);</p> <p>(c) regarding profits of enterprises from the operation of ships or aircraft in international traffic, according to the OECD model text for CDTAs, the taxing right for such profits was given to the country in which the enterprise's place of effective management was situated. The Administration would seek to secure exclusive taxing right in respect of profits of Hong Kong enterprises from operation of shipping and air transport services, as this arrangement in general was</p>	

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		<p>more beneficial to the relevant Hong Kong enterprises.</p> <p>Referring to paragraph 10(g) of the LegCo Brief, the Chairman enquired about the circumstances under which there would be no obligation for the contracting parties to supply information under an Exchange of Information (EoI) request.</p> <p>The Administration advised that the circumstances were specified in paragraph 3 of Article 24 of the CDTA. This paragraph was the same as the relevant provision in Hong Kong's sample EoI Article, which was in turn based on the OECD model text for CDTAs.</p>	
002143 – 004348	Chairman Mr Paul CHAN Administration ALA2	<p><u>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)</u></p> <p>In response to the Chairman's enquiry about the amount of government revenue forgone due to the royalties withholding tax cap at 3% under the CDTA signed with Austria (Austrian Agreement), the Administration advised that it could not provide an estimate in this regard since under the Inland Revenue Ordinance (Cap. 112), royalties were taxable so long as they were sourced from Hong Kong and Inland Revenue Department (IRD) did not differentiate between the taxpayers concerned based on their resident status in maintaining relevant tax records.</p> <p>The Chairman enquired about the types of taxes covered under the Austrian Agreement and the other three CDTAs under scrutiny. The Administration advised that the taxes covered by the CDTAs were "taxes on income" and "taxes on capital" (as appropriate) in the broad sense. The tax types in all the four CDTAs were invariably profits tax, salaries tax and property tax in the case of Hong Kong, while the tax types in the case of the Contracting Parties varied, as the tax systems of the Contracting Parties were not the same.</p> <p>ALA2 drew members' attention to sub-paragraph 1 of Paragraph III of the Protocol to the Austrian Agreement. According to the sub-paragraph, the competent authority of the applicant Party shall</p>	

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		<p>provide, in particular, six specified items of information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request.</p> <p>The Chairman enquired about the effect of this provision in the Protocol on the safeguards for taxpayers' privacy protection provided in the EoI Article of the Austrian Agreement and the safeguards provided in the Inland Revenue (Disclosure of Information) Rules (Cap. 112 sub. leg. BI) (the Rules).</p> <p>The Administration advised that -</p> <ul style="list-style-type: none"> (a) in some CDTAs, the Contracting Parties might prefer to set out in greater detail the agreed arrangements in the form of a Protocol to the Agreement. In the negotiation process, the Administration would exercise vigilance to ensure that the provisions in the Protocol would not give rise to any effect of undermining, limiting or expanding the agreed arrangements in the main text of the Agreement; (b) according to the Rules, an EoI request should contain the particulars (i.e. the 12 information items) set out in the Schedule to the Rules; (c) given the way it was construed, sub-paragraph 1 of Paragraph III of the Protocol would not have the effect of restricting the scope of information that might be sought by the competent authority of the requested Party from the competent authority of the applicant Party to the information set out in that sub-paragraph; and (d) Paragraph 3(a) of Article 25 of the Austrian Agreement provided that "in no case shall the provisions of Paragraphs 1 and 2 of the same Article be construed so as to impose on a Contracting Party the obligation to carry out administrative measures at variance with the laws and administration practice of that 	

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		<p>or of the other Contracting Party". Accordingly, for any EoI request from the Austrian competent authority, IRD might ask for more information, as laid down in the Rules, to substantiate the EoI request.</p> <p>The Administration remarked that in accordance with its usual practice for all CDTA negotiations, it had provided a copy of the Rules to the Austrian side, and their acknowledgement of the Rules had been recorded in the agreed minutes of the relevant negotiation meeting.</p> <p>ALA2 said that given the phrase "shall provide, in particular" in sub-paragraph 1 of Paragraph III of the Protocol, the provision would not have the effect of restricting the scope of information that might be sought by the competent authority of the requested Party from the competent authority of the applicant Party to the information set out in the provision.</p> <p>Mr Paul CHAN opined that as the provision in sub-paragraph 1 of Paragraph III of the Protocol was consistent with the Rules, it was acceptable.</p>	
004349 – 005612	Chairman ALA2 Administration	<p><u>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)</u></p> <p>In response to the Chairman's enquiry regarding the arrangement for the CDTA to supersede the existing limited double taxation avoidance agreements for airline income and shipping income, ALA2 pointed out that the relevant provisions for avoidance of double taxation were stipulated in Article 8 of the CDTA with the United Kingdom (UK Agreement).</p> <p>ALA2 pointed out that according to paragraph 2 of Article 24 of the UK Agreement, any information received by the contracting parties under paragraph 1 of the Article should be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in</p>	

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		<p>paragraph 1. This was the same as the relevant provision in Hong Kong's sample Exchange of Information Article. However, in paragraph 4(c) of the Protocol to the Agreement (which was reproduced in Part 2 of the Schedule), it was provided that the UK competent authority might disclose information to the Information Commissioner, the Adjudicator and the Parliamentary Ombudsman and their staff in the investigation of complaints against the administrative actions of Her Majesty's Revenue and Customs (HMRC).</p> <p>The Administration responded that -</p> <p>(a) during the negotiations, the UK side explained that the Information Commissioner, the Adjudicator and the Parliamentary Ombudsman would need to examine the tax information relating to the relevant taxpayer in the course of their investigation of any complaint against the HMRC. Such disclosure of information was necessary for review of the assessment and enforcement actions of the tax authorities. The Administration considered the UK's request justifiable and therefore accepted it;</p> <p>(b) according to the UK side, investigation by any of the three authorities against the HMRC would be initiated by the taxpayers concerned. The disclosure of tax information exchanged under EoI requests to these authorities was either statutorily allowed or based on the consent of the relevant taxpayers; and</p> <p>(c) the Privacy Commissioner for Personal Data and the Ombudsman in Hong Kong, whose functions were similar to the Information Commissioner, Adjudicator and Parliamentary Ombudsman in UK respectively, also had the power to access the tax information exchanged under EoI requests if such information was required for their investigation of any complaint against IRD.</p>	

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005613 – 005849	Chairman Administration	<p data-bbox="598 230 1265 338"><u>Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Ireland) Order (L.N. 127)</u></p> <p data-bbox="598 376 1265 521">In response to the Chairman's enquiry, the Administration advised that "income levy" was another form of income tax, imposed in Ireland in the aftermath of the global financial crisis.</p>	
005850 – 010309	Chairman Administration ALA2	<p data-bbox="598 560 1265 705"><u>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)</u></p> <p data-bbox="598 743 1265 1001">In response to the Chairman's enquiry, the Administration explained that since the CDTA signed with the Mainland of China in 2006 was based on the OECD 1995 version of the EoI Article, it was necessary to update the EoI Article of the CDTA to the OECD 2004 version to align with international practice.</p>	
010310 – 010525	Chairman Clerk	Legislative timetable	

Council Business Division 1
Legislative Council Secretariat
 2 December 2010