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By fax: 2877 5029

29 November 2011

Ms Carrie WONG
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
Legislative Council Road
Central, Hong Kong

Dear Ms WONG,

**Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion
with respect to Taxes on Income) Orders re the Portuguese Republic,
Kingdom of Spain and Czech Republic Orders (L.N. 155 – L.N. 157)**

Thank you for your letter of 22 November 2011 on the captioned Orders.
Our responses to your questions are set out in the following paragraphs.

Mutual Agreement Procedure

2. The use of arbitration to resolve cross-border tax disputes and the relevant provisions were first introduced into the Organization for Economic Co-operation and Development (OECD) Model Tax Convention in 2008.

Whether arbitration or any other method of dispute resolution is to be specified in the Comprehensive Avoidance of Double Taxation Agreement (CDTA) is a matter to be agreed with our individual treaty partners. We have only recently started to adopt provisions on arbitration in our CDTAs with the Netherlands, Japan and Liechtenstein. Depending on the circumstances, we will continue to seek to include the provisions on arbitration in our future CDTAs.

Exchange of Information (EoI)

3. In the three CDTAs, we have adopted all of the safeguards as undertaken in the sample Article on EoI presented to the Bills Committee. In particular, we have removed the reference to "oversight body" from paragraph 2 of the EoI Article in the OECD Model Tax Convention: "Any information received under paragraph 1 by a Contracting Party shall 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, the determination of appeals in relation to the taxes referred to in paragraph 1, ~~or the oversight of the above.~~" so as to restrict the disclosure of the information to oversight bodies of the tax authorities.

4. In these three CDTAs, we have also added, at the end of paragraph 2 of the EoI Article, an explicit provision to require that "Information shall not be disclosed to any third jurisdiction for any purpose."

5. While the "Board of Review" is considered as "persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1", we consider that other oversight bodies (e.g. the Financial Services and the Treasury Bureau being the oversight body of the Inland Revenue Department) fall outside the scope of the above provisions.

6. The EoI Article does not provide for any obligation to exchange information either spontaneously or automatically. To clarify the understanding, we have included explicit provisions in the Protocol to the HK / Portugal CDTA. For the Czech and Spain CDTAs, while it was agreed that there would be no obligation for automatic or spontaneous exchange of information, the Czech and Spanish delegations did not think it was necessary to include explicit provisions on this in the CDTAs or the Protocols. The understanding has already been

captured in the relevant records of the meeting as has been done in the case of the HK/Japan CDTA and we have explained the same to the Subcommittee during its scrutiny of the HK/Japan CDTA.

7. In any event, we are obliged to comply with the Inland Revenue (Disclosure of Information) Rules (Cap. 112BI) (EoI Rules) which only allows exchange of information pursuant to specific requests. We have explained the EoI Rules to the Portuguese, Czech and Spanish delegations during the discussion. We agreed with the Subcommittee's suggestion that we would seek to include the understanding that there is no obligation for automatic or spontaneous EoI in the Protocol in future as far as possible.

8. Paragraph 6 of the Protocol to the HK/Portugal CDTA was added upon the request of the Portuguese side to put the matter beyond doubt. In fact, the provisions on "fishing expeditions" and protection of personal data are already covered in paragraphs 1 (i.e. in the provision "as is foreseeably relevant") and 2 (on maintenance of secrecy of information) respectively of the EoI Article of the other two CDTAs.

9. There are no provisions prohibiting the exchange of tax information relating to the business counterparts and associates of the target taxpayer. The essence is that the treaty partner must demonstrate that such tax information requested is foreseeably relevant for carrying out the provisions of the CDTA or to the administration or enforcement of its domestic laws concerning taxes covered by the CDTA. Any exchange must also comply with the EoI Rules. Furthermore, the treaty partner is prohibited from making a reference to or relying on the information exchanged concerning any third party (such as business counterparts and associates) against that third party.

Entry into Force

10. According to Article on Entry into Force, the Contracting Parties shall notify each other in writing that the internal procedures required for the entry into force of the CDTA have been completed. The CDTA shall enter into force after the later notification. Upon the entry into force of the CDTA, the Inland Revenue Department will publish an announcement on its website for public information. The announcement has no legislative effect and does not need to be published as Legal Notice in the Gazette.

Yours sincerely,



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