File Ref: TsyB R 183/800-1-1/50/0 (C)

LEGISLATIVE COUNCIL BRIEF

Inland Revenue Ordinance
(Chapter 112)

INLAND REVENUE (DOUBLE TAXATION RELIEF AND PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME) (MALAYSIA) ORDER

INTRODUCTION

At the meeting of the Executive Council on 9 October 2012, the Council ADVISED and the Chief Executive ORDERED that the Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Malaysia) Order (the Order), at Annex A, should be made under section 49(1A) of the Inland Revenue Ordinance, Cap. 112 (the Ordinance). The Order implements the Agreement between the Hong Kong Special Administrative Region (HKSAR) and Malaysia for the Avoidance of Double Taxation with respect to Taxes on Income signed on 25 April 2012 (the Malaysian Agreement).

A

JUSTIFICATIONS

Benefits of Comprehensive Agreements for Avoidance of Double Taxation

2. Double taxation refers to the imposition of comparable taxes in more than one tax jurisdiction in respect of the same source of income. The international community generally recognises that double taxation hinders the exchange of goods and services, movements of capital, technology and human resources, and poses an obstacle to the development of economic relations between economies. As a business facilitation initiative, it is our policy to enter into Comprehensive Agreements for Avoidance of Double

Taxation (CDTAs) with our trading and investment partners so as to minimise double taxation.

3. Hong Kong adopts the territorial concept of taxation whereby only income sourced from Hong Kong is subject to tax. 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. Although 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.

Benefits of the Malaysian Agreement

4. In the absence of a CDTA, profits of Hong Kong companies doing business through a permanent establishment, such as a sales outlet, in Malaysia may be taxed in both places if the income is Hong Kong sourced. Under the Malaysian Agreement, double taxation will be avoided in that any Malaysian tax paid by the companies will be allowed as credit against the tax payable in Hong Kong in respect of the income, subject to the provisions of the tax laws of Hong Kong.

5. Under the Malaysian Agreement, the income derived by a Hong Kong resident, which is not paid by (or on behalf of) and borne by a Malaysian entity, from employment exercised in Malaysia will be exempted from Malaysian income tax if his or her aggregate stay in Malaysia in any relevant 12-month period does not exceed 183 days.

6. In the absence of a CDTA, Hong Kong residents receiving interest from Malaysia are subject to Malaysian withholding tax, which is currently at 15%. Under the Malaysian Agreement, such withholding tax will be capped at 10%. The interest withholding tax rate will be further reduced to 0% if the interest is paid or credited to the HKSAR Government, the Hong Kong Monetary Authority, etc. The Malaysian withholding tax on royalties, currently at 10%, will be capped at 8%. The Malaysian withholding tax on fees for technical services, currently at 10%, will be capped at 5%.

7. Under the Malaysian Agreement, Hong Kong airlines operating flights to Malaysia will be taxed in Hong Kong only at Hong Kong's corporation tax rate (which is lower than that of Malaysia). Profits from international shipping transport earned by Hong Kong residents that arise in

Malaysia, which are currently subject to tax there, will not be taxed in Malaysia under the Malaysian Agreement.

8. Overall speaking, the Malaysian Agreement sets out clearly the allocation of taxing rights between the two jurisdictions and the relief on tax rates on different types of income. It will help investors of the two economies to better assess their potential tax liabilities from cross-border economic activities, foster closer economic and trade links between the two places, and provide added incentives for enterprises of Malaysia to do business with or invest in Hong Kong, and vice versa.

Exchange of Information Article under the Malaysian Agreement

9. The Inland Revenue (Amendment) Ordinance 2010, which enables Hong Kong to adopt the Organisation for Economic Co-operation and Development (OECD) 2004 version of the Exchange of Information (EoI) Article in our CDTAs, came into operation in March 2010. During the scrutiny of the relevant Amendment Bill, the Government presented a sample EoI Article (Annex B) to the Bills Committee and undertook to highlight any deviation from the text in any CDTA that we have signed when we submit the CDTA for vetting.

B

10. The Malaysian Agreement, which contains an EoI Article (the Article) based on the OECD 2004 version, has adopted all the safeguards in the sample EoI Article, in particular -

(a) the Article only obliges the Contracting Parties to exchange information upon receipt of specific request. It does not require the Contracting Parties to exchange information on an automatic or spontaneous basis;

(b) the scope of information exchange is confined to taxes covered by the Malaysian Agreement;

(c) the information sought should be foreseeably relevant, i.e. there will be no fishing expedition;

(d) confidentiality requirements and restrictions on the usage of the information exchanged are as set out in the sample EoI Article;

(e) information will only be disclosed to the tax authorities and not for release to their oversight body;

(f) the information requested shall not be disclosed to a third jurisdiction; and

(g) there is no obligation to supply information under certain

circumstances as set out in the sample EoI Article.

Legal Basis

11. 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. Following the signing of the Malaysian Agreement, it is necessary for the Chief Executive in Council to declare by order that arrangements with Malaysia on double taxation relief have been made so as to bring the Malaysian Agreement into effect.

OTHER OPTIONS

12. An Order made by the Chief Executive in Council under section 49(1A) of the Ordinance is the only way to give effect to the Malaysian Agreement. There is no other option.

THE ORDER

13. **Section 2** of the Order declares that the arrangements specified in section 3 for double taxation relief in relation to income tax and any tax of a similar character imposed by the laws of Malaysia have been made and that those arrangements should take effect. **Section 3** states that the arrangements are those in Articles 1 to 29 of the Malaysian Agreement as well as Paragraphs 1 to 4 of the Protocol to the Malaysian Agreement, the text of which Articles and Paragraphs is set out in the **Schedule** to the Order.

LEGISLATIVE TIMETABLE

14. The legislative timetable is as follows –

Publication in the Gazette	19 October 2012
Tabling at Legislative Council	24 October 2012
Commencement of the Order	14 December 2012

IMPLICATIONS OF THE PROPOSAL

15. The proposal has financial, economic and civil service implications as set out in Annex C. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The proposal will not affect the binding effect of the existing provisions of the Ordinance and its subsidiary legislation. It has no productivity, environmental or

C

sustainability implications.

PUBLIC CONSULTATION

16. The business and professional sectors have all along supported our policy to conclude more CDTAs with our trading and investment partners.

PUBLICITY

17. We issued a press release on the signing of the Malaysian Agreement on 25 April 2012. A spokesman will be available to answer media and public enquiries.

BACKGROUND

18. The Malaysian Agreement is the twenty-fourth CDTA concluded by Hong Kong with another jurisdiction. A summary of the main provisions of the Agreement is at Annex D.

D

19. As at end September 2012, we have entered into CDTAs with 25 jurisdictions. A list of these jurisdictions is at Annex E.

E

ENQUIRY

20. In case of enquiries about this Brief, please contact Ms Shirley Kwan, Principal Assistant Secretary for Financial Services and the Treasury (Treasury), at 2810 2370.

Financial Services and the Treasury Bureau
17 October 2012

LEGISLATIVE COUNCIL BRIEF

Inland Revenue Ordinance
(Chapter 112)

INLAND REVENUE (DOUBLE TAXATION RELIEF AND PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME) (MALAYSIA) ORDER

ANNEXES

Annex A	Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Malaysia) Order
Annex B	Sample Exchange of Information Article
Annex C	Financial, Economic and Civil Service Implications of the Proposal
Annex D	Summary of the main provisions of the Comprehensive Double Taxation Agreement between Hong Kong and Malaysia
Annex E	List of jurisdictions with which Hong Kong has entered into CDTAs

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Malaysia) Order

(Made by the Chief Executive in Council under section 49(1A) of the Inland Revenue Ordinance (Cap. 112))

1. Commencement

This Order comes into operation on 14 December 2012.

2. Declaration under section 49(1A)

For the purposes of section 49(1A) of the Ordinance, it is declared—

(a) that the arrangements specified in section 3(1) have been made with the Government of Malaysia 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 Malaysia; and

(b) that it is expedient that those arrangements should have effect.

3. Arrangements specified

(1) The arrangements specified for the purposes of section 2(a) are the arrangements in—

(a) Articles 1 to 29 of the agreement titled "Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income", done

in duplicate at Putrajaya on 25 April 2012 in the Chinese, Malay and English languages; and

(b) Paragraphs 1 to 4 of the protocol to the agreement, done in duplicate at Putrajaya on 25 April 2012 in the Chinese, Malay and English languages.

(2) The English text of the Articles referred to in subsection (1)(a) is reproduced in Part 1 of the Schedule.

(3) The English text of the Paragraphs referred to in subsection (1)(b) is reproduced in Part 2 of the Schedule.

Schedule [s. 3]

Part 1

Articles 1 to 29 of the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

Article 1

Persons Covered

This Agreement shall apply to persons who are residents of one or both of the Contracting Parties.

Article 2

Taxes Covered

1. This Agreement shall apply to taxes on income imposed on behalf of a Contracting Party, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property, taxes on the

total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

3. The existing taxes which are the subject of this Agreement are:

(a) in the case of the Hong Kong Special Administrative Region,

(i) profits tax;

(ii) salaries tax; and

(iii) property tax;

whether or not charged under personal assessment;

(b) in the case of Malaysia,

(i) the income tax; and

(ii) the petroleum income tax.

4. This Agreement shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes, as well as any other taxes falling within paragraphs 1 and 2 which a Contracting Party may impose in future. The competent authorities of the Contracting Parties shall notify each other of any significant changes that have been made in their taxation laws.

5. The existing taxes, together with the taxes imposed after the signature of this Agreement, are hereinafter referred to as "Hong

Kong Special Administrative Region tax" or "Malaysian tax", as the context requires.

Article 3

General Definitions

1. For the purposes of this Agreement, unless the context otherwise requires:

(a) (i) the term "Hong Kong Special Administrative Region", when used in a geographical sense, means the land and sea comprised within the boundary of the Hong Kong Special Administrative Region of the People's Republic of China, including Hong Kong Island, Kowloon, the New Territories and the waters of Hong Kong, and any other place where the tax laws of the Hong Kong Special Administrative Region of the People's Republic of China apply;

(ii) the term "Malaysia" means the territories of the Federation of Malaysia, the territorial waters of Malaysia and the sea-bed and subsoil of the territorial waters, and the airspace above such areas, and includes any area extending beyond the limits of the territorial waters of Malaysia, and the sea-bed and subsoil of any such area, which has been or may hereafter be designated under the laws of Malaysia and in accordance with international law as an area over which Malaysia has sovereign rights or jurisdiction for the purposes of exploring and exploiting the natural resources, whether living or non-living;

(b) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;

(c) the term "competent authority" means:

(i) in the case of the Hong Kong Special Administrative Region, the Commissioner of Inland Revenue or his authorised representative;

(ii) in the case of Malaysia, the Minister of Finance or his authorised representative;

(d) the term "Contracting Party" or "the other Contracting Party" means the Hong Kong Special Administrative Region or Malaysia, as the context requires;

(e) the terms "enterprise of a Contracting Party" and "enterprise of the other Contracting Party" mean respectively an enterprise carried on by a resident of a Contracting Party and an enterprise carried on by a resident of the other Contracting Party;

(f) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise of a Contracting Party, except when the ship or aircraft is operated solely between places in the other Contracting Party;

(g) the term "national", in relation to Malaysia means:

(i) any individual possessing the nationality or citizenship of Malaysia; and

(ii) any legal person, partnership or association deriving its status as such from the laws in force in Malaysia;

(h) the term "person" includes an individual, a company and any other body of persons.

2. In this Agreement, the terms "Hong Kong Special Administrative Region tax" and "Malaysian tax" do not include any penalty or fine imposed under the laws of either Contracting Party.

3. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party for the purposes of the taxes to which this Agreement applies, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

Article 4

Resident

1. For the purposes of this Agreement, the term "resident of a Contracting Party" means:

(a) in the case of the Hong Kong Special Administrative Region,

(i) any individual who ordinarily resides in the Hong Kong Special Administrative Region;

(ii) any individual who stays in the Hong Kong Special Administrative Region for more than 180 days during a

year of assessment or for more than 300 days in two consecutive years of assessment one of which is the relevant year of assessment;

(iii) a company incorporated in the Hong Kong Special Administrative Region or, if incorporated outside the Hong Kong Special Administrative Region, being normally managed or controlled in the Hong Kong Special Administrative Region;

(iv) any other person constituted under the laws of the Hong Kong Special Administrative Region or, if constituted outside the Hong Kong Special Administrative Region, being normally managed or controlled in the Hong Kong Special Administrative Region; and

(v) the Government of the Hong Kong Special Administrative Region;

(b) in the case of Malaysia, any person who, under the laws of Malaysia, is a resident by reason of his domicile, residence, place of management and control, place of incorporation or any other criterion of a similar nature, and also includes the Government of Malaysia, any political subdivision, local authority or statutory body thereof.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting Parties, then his status shall be determined as follows:

(a) he shall be deemed to be a resident only of the Party in which he has a permanent home available to him; if he has a permanent home available to him in both Parties, he shall be

deemed to be a resident only of the Party with which his personal and economic relations are closer (centre of vital interests);

(b) if the Party in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Party, he shall be deemed to be a resident only of the Party in which he has an habitual abode;

(c) if he has an habitual abode in both Parties or in neither of them, he shall be deemed to be a resident only of the Party in which he has the right of abode (in the case of the Hong Kong Special Administrative Region) or of which he is a national (in the case of Malaysia);

(d) if he has the right of abode in the Hong Kong Special Administrative Region and is also a national of Malaysia, or if he does not have the right of abode in the Hong Kong Special Administrative Region nor is he a national of Malaysia, the competent authorities of the Contracting Parties shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting Parties, then it shall be deemed to be a resident only of the Party in which its place of effective management is situated.

Article 5

Permanent Establishment

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop; and

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. The term "permanent establishment" also encompasses:

(a) a building site, a construction, installation or assembly project or supervisory activities in connection therewith, but only if such site, project or activities last more than nine (9) months;

(b) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that

nature continue (for the same or a connected project) within a Contracting Party for a period or periods aggregating more than 183 days within any twelve-month period.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting Party on behalf of an enterprise of the other Contracting Party, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting Party in respect of any activities which that person undertakes for the enterprise, if such a person:

(a) has and habitually exercises in that Party an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or

(b) has no such authority, but habitually maintains in the first-mentioned Party a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting Party merely because it carries on business in that Party through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting Party controls or is controlled by a company which is a resident of the other Contracting Party, or which carries on business in that other Party (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Article 6

Income from Immovable Property

1. Income derived by a resident of a Contracting Party from immovable property (including income from agriculture or forestry) situated in the other Contracting Party may be taxed in that other Party.

2. The term "immovable property" shall have the meaning which it has under the law of the Contracting Party in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, quarries, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

Article 7

Business Profits

1. The profits of an enterprise of a Contracting Party shall be taxable only in that Party unless the enterprise carries on business in the other Contracting Party through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Party but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting Party carries on business in the other Contracting Party through a permanent establishment situated therein, there shall in each Contracting Party be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Party in which the permanent establishment is situated or elsewhere.

4. Insofar as it has been customary in a Contracting Party to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, or on the basis of such other method as may be prescribed by the laws of that Party, nothing in paragraph 2 shall preclude that Contracting Party from determining the profits to be

taxed by such an apportionment or other method; the method adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. If the information available to the competent authority is inadequate to determine the profits to be attributed to the permanent establishment of an enterprise, nothing in this Article shall affect the application of any law of that Party relating to the determination of the tax liability of a person by the making of an estimate by the competent authority, provided that the law shall be applied, so far as the information available to the competent authority permits, in accordance with the principles contained in this Article.

6. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

7. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

8. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 8

Shipping and Air Transport

1. Profits of an enterprise of a Contracting Party from the operation of ships or aircraft in international traffic shall be taxable only in that Party.

2. The provisions of paragraph 1 shall also apply to the share of the profits from the operation of ships or aircraft derived by an enterprise of a Contracting Party through participation in a pool, a joint business or an international operating agency.

Article 9

Associated Enterprises

1. Where—

(a) an enterprise of a Contracting Party participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting Party, or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting Party and an enterprise of the other Contracting Party,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have

accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting Party includes in the profits of an enterprise of that Party - and taxes accordingly - profits on which an enterprise of the other Contracting Party has been charged to tax in that other Party and the profits so included are profits which would have accrued to the enterprise of the first-mentioned Party if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other Party shall make an appropriate adjustment to the amount of the tax charged therein on those profits where that other Party considers the adjustment justified. In determining such adjustment, due regard shall be had to the other provisions of this Agreement and for this purpose the competent authorities of the Contracting Parties shall if necessary consult each other.

Article 10

Dividends

1. Dividends paid by a company which is a resident of a Contracting Party to a resident of the other Contracting Party may be taxed in that other Party.

2. However, such dividends may also be taxed in the Contracting Party of which the company paying the dividends is a resident and according to the laws of that Party, but if the beneficial owner of the dividends is a resident of the other Contracting Party, the tax so charged shall not exceed:

(a) five (5) per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly or indirectly at least ten (10) per cent of the capital of the company paying the dividends;

(b) ten (10) per cent of the gross amount of the dividends in all other cases.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the Party of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting Party, carries on business in the other Contracting Party of which the company paying the dividends is a resident through a permanent establishment situated therein, or performs in that other Party independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 15, as the case may be, shall apply.

5. Where a company which is a resident of a Contracting Party derives profits or income from the other Contracting Party, that other Party may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other

Party or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other Party, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other Party.

Article 11

Interest

1. Interest arising in a Contracting Party and paid to a resident of the other Contracting Party may be taxed in that other Party.

2. However, such interest may also be taxed in the Contracting Party in which it arises and according to the laws of that Party, but if the beneficial owner of the interest is a resident of the other Contracting Party, the tax so charged shall not exceed ten (10) per cent of the gross amount of the interest.

3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting Party is exempt from tax in that Party, if it is paid or credited to:

(a) in the case of the Hong Kong Special Administrative Region,

(i) the Government of the Hong Kong Special Administrative Region;

(ii) the Hong Kong Monetary Authority; and

(iii) such other institutions established by the Government of the Hong Kong Special Administrative Region, for the discharge of functions of a public purpose normally carried out by a government, as may be agreed upon from time to time between the competent authorities of the two Contracting Parties;

(b) in the case of Malaysia,

(i) the Government of Malaysia;

(ii) the Governments of the States in Malaysia;

(iii) the local authorities;

(iv) the Bank Negara Malaysia;

(v) the Export-Import Bank of Malaysia Berhad (EXIM Bank); and

(vi) such other institutions established by the Government of Malaysia or the Governments of the States in Malaysia, for the discharge of functions of a public purpose normally carried out by a government, as may be agreed upon from time to time between the competent authorities of the two Contracting Parties.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching

to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

5. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting Party, carries on business in the other Contracting Party in which the interest arises through a permanent establishment situated therein, or performs in that other Party independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 15, as the case may be, shall apply.

6. Interest shall be deemed to arise in a Contracting Party when the payer is a resident of that Party. Where, however, the person paying the interest, whether he is a resident of a Contracting Party or not, has in a Contracting Party a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the Party in which the permanent establishment or fixed base is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest exceeds, for whatever reasons, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain

taxable according to the laws of each Contracting Party, due regard being had to the other provisions of this Agreement.

Article 12

Royalties

1. Royalties arising in a Contracting Party and paid to a resident of the other Contracting Party may be taxed in that other Party.

2. However, such royalties may also be taxed in the Contracting Party in which they arise and according to the laws of that Party, but if the beneficial owner of the royalties is a resident of the other Contracting Party, the tax so charged shall not exceed eight (8) per cent of the gross amount of the royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, know-how or for information concerning industrial, commercial or scientific experience.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting Party, carries on business in the other Contracting Party in which the royalties arise through a permanent establishment situated therein, or performs in that other Party independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected

with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 15, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting Party when the payer is a resident of that Party. Where, however, the person paying the royalties, whether he is a resident of a Contracting Party or not, has in a Contracting Party a permanent establishment or a fixed base in connection with which the obligation to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the Party in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties exceeds, for whatever reasons, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting Party, due regard being had to the other provisions of this Agreement.

Article 13

Fees for Technical Services

1. Fees for technical services arising in a Contracting Party and paid to a resident of the other Contracting Party may be taxed in that other Party.

2. However, such fees for technical services may also be taxed in the Contracting Party in which they arise and according to the laws of that Party, but if the beneficial owner of the fees for technical services is a resident of the other Contracting Party, the tax so charged shall not exceed five (5) per cent of the gross amount of the fees for technical services.

3. The term "fees for technical services" as used in this Article means payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any services of a technical, managerial or consultancy nature.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the fees for technical services, being a resident of a Contracting Party, carries on business in the other Contracting Party in which the fees for technical services arise through a permanent establishment situated therein, or performs in that other Party independent personal services from a fixed base situated therein, and the fees for technical services are effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 15, as the case may be, shall apply.

5. Fees for technical services shall be deemed to arise in a Contracting Party when the payer is a resident of that Party. Where, however, the person paying the fees for technical services, whether he is a resident of a Contracting Party or not, has in a Contracting Party a permanent establishment or a fixed base in connection with which the obligation to pay the fees for technical services was incurred, and such fees for technical services are borne by such permanent establishment or fixed base, then such fees for technical services shall be deemed to arise in the Party in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the fees for technical services paid exceeds, for whatever reasons, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting Party, due regard being had to the other provisions of this Agreement.

Article 14

Capital Gains

1. Gains derived by a resident of a Contracting Party from the alienation of immovable property referred to in Article 6 and situated in the other Contracting Party may be taxed in that other Party.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting Party has in the other Contracting Party or of movable property pertaining to a fixed base available to a resident of a Contracting Party in the other Contracting Party for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other Party.

3. Gains derived by an enterprise of a Contracting Party from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in that Party.

4. Gains derived by a resident of a Contracting Party from the alienation of shares of a company deriving more than fifty (50) per cent of its asset value directly or indirectly from immovable property situated in the other Contracting Party may be taxed in that other Party. However, this paragraph does not apply to gains derived from the alienation of shares:

   (a) quoted on such stock exchange as may be agreed between the Parties; or

   (b) alienated or exchanged in the framework of a reorganisation of a company, a merger, a scission or a similar operation; or

   (c) in a company deriving more than fifty (50) per cent of its asset value from immovable property in which it carries on its business.

5. Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting Party of which the alienator is a resident.

Article 15

Independent Personal Services

1. Subject to the provisions of Article 13, income derived by a resident of a Contracting Party in respect of professional services or

other activities of an independent character shall be taxable only in that Party except in the following circumstances, when such income may also be taxed in the other Contracting Party:

(a) if he has a fixed base regularly available to him in the other Contracting Party for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting Party; or

(b) if his stay in the other Contracting Party is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the taxable period concerned; in that case, only so much of the income as is derived from his activities performed in that other Party may be taxed in that other Party.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 16

Dependent Personal Services

1. Subject to the provisions of Articles 17, 19 and 20, salaries, wages and other similar remuneration derived by a resident of a Contracting Party in respect of an employment shall be taxable only in that Party unless the employment is exercised in the other Contracting Party. If the employment is so exercised, such

remuneration as is derived therefrom may be taxed in that other Party.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting Party in respect of an employment exercised in the other Contracting Party shall be taxable only in the first-mentioned Party if:

(a) the recipient is present in the other Party for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the taxable period concerned; and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other Party; and

(c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other Party.

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting Party shall be taxable only in that Party.

Article 17

Directors' Fees

Directors' fees and other similar payments derived by a resident of a Contracting Party in his capacity as a member of the board of directors of a company which is a resident of the other Contracting Party may be taxed in that other Party.

Article 18

Artistes and Sportspersons

1. Notwithstanding the provisions of Articles 15 and 16, income derived by a resident of a Contracting Party as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from that person's personal activities as such exercised in the other Contracting Party, may be taxed in that other Party.

2. Where income in respect of personal activities exercised by an entertainer or a sportsperson in that person's capacity as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Articles 7, 15 and 16, be taxed in the Contracting Party in which the activities of the entertainer or sportsperson are exercised.

3. The provisions of paragraphs 1 and 2 shall not apply to remuneration or profits derived from activities exercised in a Contracting Party if the visit to that Party is wholly or mainly supported by public funds of the other Contracting Party, a political subdivision or a local authority thereof. In such case, the remuneration or profits is taxable only in the Contracting Party in which the artiste or the sportsperson is a resident.

Article 19

Pensions

1. Subject to the provisions of paragraph 2 of Article 20, pensions and other similar remuneration (including a lump sum payment) paid to a resident of a Contracting Party in consideration of past employment or self-employment shall be taxable only in that Party.

2. Notwithstanding the provisions of paragraph 1, pensions and other similar remuneration (including a lump sum payment) made under a pension or retirement scheme which is:

   (a) a public scheme that is part of the social security system of a Contracting Party; or

   (b) a scheme in which individuals may participate to secure retirement benefits and which is recognised for tax purposes in a Contracting Party,

   shall be taxable only in that Contracting Party.

Article 20

Government Service

1. (a) Salaries, wages and other similar remuneration, other than pensions, paid by the Government of a Contracting Party or a political subdivision or a local authority thereof to an individual in respect of services rendered to that Party or political subdivision or local authority shall be taxable only in that Party.

(b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting Party if the services are rendered in that other Party and the individual is a resident of that other Party who:

(i) in the case of the Hong Kong Special Administrative Region, has the right of abode therein and in the case of Malaysia, is a national thereof; or

(ii) did not become a resident of that other Party solely for the purpose of rendering the services.

2. (a) Any pension (including a lump sum payment) paid by, or paid out of funds created or contributed by, the Government of a Contracting Party or a political subdivision or a local authority thereof to an individual in respect of services rendered to that Party or political subdivision or local authority shall be taxable only in that Party.

(b) However, if the individual who rendered the services is a resident of the other Contracting Party and the case falls within subparagraph (b) of paragraph 1, any corresponding pension (whether a payment in lump sum or by instalments) shall be taxable only in that other Contracting Party.

3. The provisions of Articles 16, 17, 18 and 19 shall apply to salaries, wages, pensions (including a lump sum payment), and other similar remuneration in respect of services rendered in connection with a business carried on by the Government of a Contracting Party or a political subdivision or a local authority thereof.

Article 21

Students

An individual who is a resident of a Contracting Party immediately before making a visit to the other Contracting Party and is temporarily present in the other Party solely:

(a) as a student at a recognised university, college, school or other similar recognised educational institution in that other Party; or

(b) as a recipient of a grant, allowance or award for the primary purpose of study, research or training from the Government of either Party or from a scientific, educational, religious or charitable organisation or under a technical assistance programme entered into by the Government of either Party,

shall be exempted from tax in that other Party on:

(i) all remittances from abroad for the purposes of his maintenance, education, study, research or training; and

(ii) the amount of such grant, allowance or award.

Article 22

Other Income

1. Items of income of a resident of a Contracting Party, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that Party.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting Party, carries on business in the other Contracting Party through a permanent establishment situated therein, or performs in that other Party independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 15, as the case may be, shall apply.

3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting Party not dealt with in the foregoing Articles of this Agreement and arising in the other Contracting Party may also be taxed in that other Party.

Article 23

Elimination of Double Taxation

1. In the Hong Kong Special Administrative Region, double taxation shall be eliminated as follows:

Subject to the provisions of the laws of the Hong Kong Special Administrative Region relating to the allowance of a credit against Hong Kong Special Administrative Region tax of tax paid in a jurisdiction outside the Hong Kong Special Administrative Region (which shall not affect the general principle of this Article), Malaysian tax paid under the laws of Malaysia and in accordance with this Agreement, whether directly or by deduction, in respect of income derived by a person who is a resident of the Hong Kong

Special Administrative Region from sources in Malaysia, shall be allowed as a credit against Hong Kong Special Administrative Region tax payable in respect of that income, provided that the credit so allowed does not exceed the amount of Hong Kong Special Administrative Region tax computed in respect of that income in accordance with the tax laws of the Hong Kong Special Administrative Region.

2. In Malaysia, double taxation shall be eliminated as follows:

Subject to the laws of Malaysia regarding the allowance as a credit against Malaysian tax of tax payable in any country other than Malaysia (which shall not affect the general principle of this Article), the Hong Kong Special Administrative Region tax payable under the laws of the Hong Kong Special Administrative Region and in accordance with this Agreement by a resident of Malaysia in respect of income derived from the Hong Kong Special Administrative Region shall be allowed as a credit against Malaysian tax payable in respect of that income. The credit shall not, however, exceed that part of the Malaysian tax, as computed before the credit is given, which is appropriate to such item of income.

3. For the purpose of allowance as a credit in a Contracting Party, the tax paid in the other Contracting Party shall be deemed to include the tax which is otherwise payable in that other Contracting Party but which has been reduced or exempted in accordance with special incentive laws designed to promote economic development in that other Contracting Party.

4. The provisions of paragraph 3 shall cease to have effect after ten (10) years from the year of assessment beginning on the first day of January of the calendar year immediately following that in which

this Agreement enters into force. The competent authorities of the Contracting Parties may consult each other to determine whether this period shall be extended.

Article 24

Non-Discrimination

1. Persons who, in the case of the Hong Kong Special Administrative Region, have the right of abode or are incorporated or otherwise constituted therein, and, in the case of Malaysia, are nationals, shall not be subjected in the other Contracting Party to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which persons who have the right of abode or are incorporated or otherwise constituted in that other Party (where that other Party is the Hong Kong Special Administrative Region) or nationals of that other Party (where that other Party is Malaysia) in the same circumstances, in particular with respect to residence, are or may be subjected.

2. The taxation on a permanent establishment which an enterprise of a Contracting Party has in the other Contracting Party shall not be less favourably levied in that other Party than the taxation levied on enterprises of that other Party carrying on the same activities. This provision shall not be construed as obliging a Contracting Party to grant to residents of the other Contracting Party any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

3. Except where the provisions of paragraph 1 of Article 9, paragraph 7 of Article 11, paragraph 6 of Article 12 or paragraph 6 of Article 13 apply, interest, royalties, fees for technical services and other disbursements paid by an enterprise of a Contracting Party to a resident of the other Contracting Party shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned Party provided that the provisions of the domestic laws of that Contracting Party have been compiled with in respect of withholding tax.

4. Enterprises of a Contracting Party, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting Party, shall not be subjected in the first-mentioned Party to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned Party are or may be subjected.

5. In this Article, the term "taxation" means taxes to which this Agreement applies.

Article 25

Mutual Agreement Procedure

1. Where a resident of a Contracting Party considers that the actions of one or both of the Contracting Parties result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic laws of those Parties, present his case to the competent authority of the Contracting Party of which he is a resident or, if his case comes

under paragraph 1 of Article 24, to that of the Contracting Party in which he has the right of abode or is incorporated or otherwise constituted (in the case of the Hong Kong Special Administrative Region) or of which he is a national (in the case of Malaysia). The case must be presented within three (3) years from the first notification of the action resulting in taxation not in accordance with the provisions of this Agreement.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with this Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic laws of the Contracting Parties.

3. The competent authorities of the Contracting Parties shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.

4. The competent authorities of the Contracting Parties may communicate with each other for the purpose of reaching an agreement in the preceding paragraphs.

Article 26

Exchange of Information

1. The competent authorities of the Contracting Parties shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by a Contracting Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party and 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, or the determination of appeals in relation to the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Information shall not be disclosed to any third jurisdiction for any purpose.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting Party the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting Party;

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting Party;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade

process, or information the disclosure of which would be contrary to public policy.

4. If information is requested by a Contracting Party in accordance with this Article, the other Contracting Party shall use its information gathering measures to obtain the requested information, even though that other Party may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting Party to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting Party to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

Article 27

Fiscal Privileges

Nothing in this Agreement shall affect the fiscal privileges, including those of members of consular posts, under the general rules of international law or under the provisions of special agreements.

Article 28

Entry into Force

1. Each of the Contracting Parties shall notify the other in writing of the completion of the procedures required by its law for the bringing into force of this Agreement. This Agreement shall enter into force on the date of the later of these notifications.

2. The provisions of this Agreement shall thereupon have effect:

(a) in the Hong Kong Special Administrative Region,

in respect of Hong Kong Special Administrative Region tax, for any year of assessment beginning on or after the first day of April in the calendar year following the year in which this Agreement enters into force;

(b) in Malaysia,

in respect of Malaysian tax, to tax chargeable for any year of assessment beginning on or after the first day of January in the calendar year following the year in which this Agreement enters into force.

Article 29

Termination

This Agreement shall remain in effect indefinitely, but either Contracting Party may terminate this Agreement by giving the other Contracting Party written notice of termination on or before June 30th in any calendar year

after the period of five (5) years from the date on which this Agreement enters into force. In such event, this Agreement shall cease to have effect:

(a) in the Hong Kong Special Administrative Region,

in respect of Hong Kong Special Administrative Region tax, for any year of assessment beginning on or after the first day of April in the calendar year following the year in which the notice is given;

(b) in Malaysia,

in respect of Malaysian tax, to tax chargeable for any year of assessment beginning on or after the first day of January in the calendar year following the year in which the notice is given.

Part 2

Paragraphs 1 to 4 of the Protocol to the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

1. With reference to Article 11

In relation to sub-paragraph (b)(vi) of paragraph 3 of this Article, such would include all statutory bodies in Malaysia at the time of formal signing of the Agreement.

2. With reference to Article 18

It is understood that paragraph 3 of this Article also applies to funds provided by institutions established by the respective Government of the Contracting Parties (including in the case of Malaysia, the Governments of the States in Malaysia) for the discharge of functions of a public purpose normally carried out by a government.

3. With reference to Article 20

It is understood that the provisions of this Article also apply to salaries, wages and other similar remuneration, and to pensions, paid by any institution set up by the Government of Malaysia or the Governments of the States in Malaysia for the discharge of functions of a public purpose normally carried out by a government.

4. With reference to Article 26

It is understood that this Article only obliges the Contracting Parties to exchange information upon request and a Contracting Party shall only request information relating to taxable periods for which the provisions of the Agreement have effect for that Party.

Clerk to the Executive Council

COUNCIL CHAMBER

2012

Explanatory Note

The Hong Kong Special Administrative Region Government and the Government of Malaysia signed an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (***Agreement***) together with a protocol to the Agreement (***Protocol***) on 25 April 2012. This Order specifies the arrangements in Articles 1 to 29 of the Agreement and Paragraphs 1 to 4 of the Protocol as double taxation relief arrangements under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) and declares that it is expedient that those arrangements should have effect. The Agreement and Protocol were signed in the Chinese, Malay and English languages.

2. The effects of the declaration are—

(a) that the arrangements have effect in relation to tax under the Inland Revenue Ordinance (Cap. 112) 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 Malaysia, have effect in relation to any tax of Malaysia that is the subject of that provision.

Annex B

Extracts of Hong Kong's Sample CDTA Text

ARTICLE 25

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting Parties shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting Parties, or of their political subdivisions or local or territorial authorities, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1[1].

2. Any information received under paragraph 1 by a Contracting Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party and 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. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting Party the obligation:

   (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting Party;

   (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting Party;

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[1] Article 1: "PERSONS COVERED: This Agreement shall apply to persons who are residents of one or both of the Contracting Parties."

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting Party in accordance with this Article, the other Contracting Party shall use its information gathering measures to obtain the requested information, even though that other Party may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contacting Party to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting Party to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

* * * *

PROTOCOL

At the time of signing of the Agreement between the Government of Country A and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, the two Governments have agreed on the following provisions which shall form an integral part of the Agreement.

1-9. .....

10. It is understood that Article 25 does not create obligations as regards automatic or spontaneous exchanges of information between the Contracting Parties. In respect of the same Article, it is also understood that information requested shall not be disclosed to a third jurisdiction. In the case of the Hong Kong Special Administrative Region, the judicial decisions in which information may be disclosed include the decisions of the Board of Review.

* * * *

Annex C

Financial, Economic and Civil Service Implications of the Proposal

Financial Implications

The Government would have to forgo some revenue which is currently being collected in respect of profits of Malaysian resident companies not attributable to a permanent establishment in Hong Kong, as well as shipping and air services profits of Malaysian operators. However, the overall financial implications would be insignificant.

Economic Implications

2. The Malaysian Agreement will facilitate business development between Hong Kong and Malaysia and contribute positively to the economic development of Hong Kong. It will enhance the economic interaction between Hong Kong and Malaysia by providing enhanced certainty and stability to the tax liabilities of investors.

Civil Service Implications

3. There will be additional work for the Inland Revenue Department (IRD) in handling requests for exchange of information from Malaysia under the Malaysian Agreement. Additional manpower resources would be sought in accordance with the established resource allocation mechanism. IRD has also obtained the approval of the Finance Committee of the Legislative Council to create a supernumerary directorate post for three years with effect from 1 April 2011 to support the implementation of CDTA-related initiatives.

Annex D

Comprehensive Double Taxation Agreement (CDTA) Between Hong Kong and Malaysia

Summary of Main Provisions

1. The CDTA with Malaysia ("the Malaysian Agreement") covers the following types of taxes:

(a) in respect of Hong Kong – (i) salaries tax;
(ii) profits tax; and
(iii) property tax;

(b) in respect of Malaysia – (i) the income tax; and
(ii) the petroleum income tax.

2. The Malaysian Agreement deals with the taxing of income of the resident of one Contracting Party ("resident jurisdiction") derived from another Contracting Party ("source jurisdiction").

Exclusive taxing rights

3. Where the right to tax income is allocated exclusively to one Contracting Party under the Malaysian Agreement (the resident jurisdiction or the source jurisdiction), there is no double taxation. It is provided in the Malaysian Agreement that the following types of income shall only be taxed in the resident jurisdiction:

(a) profits of an enterprise, unless the enterprise carries on business in the source jurisdiction through a permanent establishment therein (i.e. a fixed place of business through which the business of an enterprise is wholly or partly carried on);

(b) profits from operation of ships and aircraft in international traffic and gains from alienation of ships or aircraft operated in international traffic;

(c) income from professional services, including services performed in the source jurisdiction provided that the services is not provided through a fixed base situated therein and the person is present in the source jurisdiction for

aggregate periods not exceeding 183 days in any relevant 12-month period;

(d) income from non-government employment, including employment exercised in the source jurisdiction provided that the employee is present in the source jurisdiction for aggregate periods not exceeding 183 days in any relevant 12-month period, etc.;

(e) remuneration from non-government employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of the resident jurisdiction;

(f) non-government pensions, except those paid under the social security legislation or retirement benefits schemes recognized for tax purposes in the source jurisdiction;

(g) income of entertainers and sportspersons who conduct their professional activities in the source jurisdiction provided that the visit to the source jurisdiction is wholly or mainly supported by public funds of the resident jurisdiction;

(h) capital gains not expressly dealt with in the Malaysian Agreement; and

(i) other income not expressly dealt with in the Malaysian Agreement, except where the income is derived from the source jurisdiction.

4. Employment income and pensions paid by the government of a Contracting Party are, in general, taxable only in that Party (source jurisdiction).

Shared taxing rights

5. Where both tax jurisdictions are given the right to tax the same item of income, the resident jurisdiction is required under the Malaysian Agreement to give double taxation relief to its resident for any income doubly assessed (i.e. the source jurisdiction has the primary right to tax and the resident jurisdiction is left with a secondary right). It is provided in the Malaysian Agreement that the following types of income may be taxed in both jurisdictions:

(a) income generated from immovable property and gains from the alienation of such property situated in the source jurisdiction;

(b) profits of an enterprise which carries on business in the source jurisdiction through a permanent establishment, to the extent that such profits are attributable to the permanent establishment, and gains from the alienation of the business property of such permanent establishment;

(c) passive income of dividends, interest and royalties received from residents of a source jurisdiction. The source jurisdiction's right to tax is subject to a specified limit in tax rates:

- for dividends, 5% if the beneficial owner is a company (other than a partnership) which holds directly or indirectly at least 10% of the capital of the dividend-paying company; and 10% in all other cases;

- for interest, 0% if paid to the HKSAR Government, the Hong Kong Monetary Authority, the Government of Malaysia, the Government of the States in Malaysia, the local authorities, the Bank Negara Malaysia, the Export-Import Bank of Malaysia Berhad (EXIM Bank), or any institution established by either Government, for the discharge of functions of a public purpose normally carried out by a government, as may be agreed upon from time to time between the competent authorities; and 10% in all other cases;

- for royalties, 8%;

(d) income of fees for technical services arising from the source jurisdiction whose right to tax is limited to 5%;

(e) gains from alienation of shares of a company (except gains from quoted shares or gains arising from corporate re-organization or merger) deriving more than 50% of its asset value directly or indirectly from immovable property (other than premises in which the company carries on business) situated in the source jurisdiction;

(f) income from professional services performed in the source jurisdiction provided that the services is provided through a fixed base situated therein or the person is present in the source jurisdiction for aggregate periods exceeding 183 days in any relevant 12-month period;

(g) remuneration from non-government employment exercised in the source jurisdiction, where the employee is present in the source jurisdiction for aggregate periods exceeding 183 days in any relevant 12-month period, etc.;

(h) directors' fees from a company resident in the source jurisdiction; and

(i) income of entertainers and sportspersons who conduct their professional activities in the source jurisdiction, except where the visit to the source jurisdiction is wholly or mainly supported by public funds of the resident jurisdiction.

6. In general, in case of shared taxing rights, double taxation relief may be given to a taxpayer either through the exemption method, where income taxable in the source jurisdiction is exempted from taxation in the resident jurisdiction; or through the credit method, where income taxable in the source jurisdiction is subject to tax in the resident jurisdiction but the tax levied in the source jurisdiction is credited against the tax levied in the resident jurisdiction on such income. Both Hong Kong and Malaysia will provide double taxation relief for its residents by the credit method.

Annex E

List of Jurisdictions with which Hong Kong has entered into CDTAs
(as at 30.9.2012)

	Jurisdictions	Date of Signing (month and year)
1	Belgium	December 2003
2	Thailand	September 2005
3	Mainland China	August 2006
4	Luxembourg	November 2007
5	Vietnam	December 2008
6	Brunei	March 2010
7	Netherlands	March 2010
8	Indonesia	March 2010
9	Hungary	May 2010
10	Kuwait	May 2010
11	Austria	May 2010
12	United Kingdom	June 2010
13	Ireland	June 2010
14	Liechtenstein	August 2010
15	France	October 2010
16	Japan	November 2010
17	New Zealand	December 2010
18	Portugal	March 2011
19	Spain	April 2011
20	Czech Republic	June 2011
21	Switzerland	October 2011
22	Malta	November 2011
23	Jersey	February 2012
24	Malaysia	April 2012
25	Mexico	June 2012