

立法會
Legislative Council

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**Subcommittee on Inland Revenue (Exchange of Information
relating to Taxes) (United States of America) Order**

**Minutes of the First meeting on
Tuesday, 13 May 2014, at 10:45 am
in Conference Room 2B of the Legislative Council Complex**

- Members present** : Hon James TO Kun-sun (Chairman)
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon Kenneth LEUNG
Hon Christopher CHEUNG Wah-fung, JP
Hon CHUNG Kwok-pan
- Members absent** : Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Starry LEE Wai-king, JP
- Public officers
Attending** : Ms Shirley KWAN
Principal Assistant Secretary for Financial Services and
the Treasury (Treasury) (Revenue)
- Mr Jackie LIU
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services) 5
- Mr CHIU Kwok-kit, JP
Deputy Commissioner (Technical)
Inland Revenue Department
- Ms Alice CHOY
Senior Government Counsel (Treaties and Law)1
Department of Justice

Miss Emma WONG
Senior Government Counsel
Department of Justice

Clerk in attendance : Ms Connie SZETO
Chief Council Secretary (1)4

Staff in attendance : Miss Evelyn LEE
Assistant Legal Adviser 10

Ms Angel SHEK
Senior Council Secretary (1)4

Ms Sharon CHAN
Legislative Assistant (1)4

Action

I Election of Chairman

Mr James TO, 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 Kenneth LEUNG and the nomination was seconded by Mr Andrew LEUNG. Mr James TO accepted the nomination. There being no other nomination, Mr James TO was elected Chairman of the Subcommittee.
3. Members agreed that there was no need to elect a Deputy Chairman.
4. Members agreed to accept the application from Mr Christopher CHEUNG for late membership of the Subcommittee.

II Meeting with the Administration

(File Ref: TsyB R 183/800-1-1/4/0 (C) — Legislative Council Brief

L.N. 54 of 2014 — Inland Revenue (Exchange of Information relating to Taxes) (United States of America) Order

LC Paper No. LS49/13-14 — Legal Service Division Report

LC Paper No. CB(1)1397/13-14(01) — Background brief on the Inland Revenue (Exchange of Information relating to Taxes) (United States of America) Order prepared by the Legislative Council Secretariat)

Discussion

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

Follow-up actions to be taken by the Administration

6. In respect of the Agreement between the Hong Kong Special Administrative Region and the United States of America ("US") for the Exchange of Information ("EoI") relating to Taxes ("the US Agreement"), the Administration was requested to provide information on –

- (a) comparison of the US Agreement with the 2002 version of tax information exchange agreement ("TIEA") developed by the Organization for Economic Cooperation and Development, including explanation for the differences, if any;
- (b) how the US Agreement would complement operation of the future intergovernmental agreement ("IGA") to be entered into with US to facilitate compliance by Hong Kong's financial institutions with the requirements under the US Foreign Account Tax Compliance Act ("FATCA");
- (c) justifications for signing the US Agreement to provide for the EoI mechanism, given the concern that TIEA covered a wider scope including non-financial institutions while FATCA involved reporting by financial institutions only; and why the EoI mechanism under the US Agreement could not be restricted to EoI covering financial institutions only; and
- (d) list of jurisdictions which had entered into TIEAs with US.

7. As regards the implementation of FATCA in US with effect from 1 July 2014, the Administration was requested to provide information on –

- (a) details of available models (i.e. Model 1 and Model 2) for Hong Kong's financial institutions to comply with FATCA, including the respective requirements on financial institutions under the two

models, e.g. the agreements that the financial institutions had to enter into with the US Internal Revenue Service ("IRS");

- (b) the impact on Hong Kong's financial institutions with the Government entering into the IGA with US (i.e. Model 2), and compliance difficulties for Hong Kong's financial institutions to enter into agreement with IRS without the basis of an IGA/TIEA;
- (c) customer due diligence ("CDD") and other requirements (e.g. identification of US accounts and account information storage/reporting) under FATCA, including –
 - (i) comparison of the CDD requirements under FATCA and similar requirements under the anti-money laundering ("AML") regime, or stipulated by the financial regulators; and
 - (ii) impacts, if any, of the implementation of FATCA and the IGA on existing CDD requirements under AML or other financial regulatory regimes in Hong Kong;
- (d) the basis for calculating the 30% withholding tax on all US-sourced payments made to a Hong Kong's financial institution if it failed to register or report the required information to IRS under FATCA;
- (e) liability of Hong Kong's financial institutions if their clients provided false information on whether they were US persons;
- (f) the procedures to be adopted by the Inland Revenue Department ("IRD") in processing EoI requests under the US Agreement, including IRD's powers to demand or compel provision of information in respect of "non-consenting accounts" under FATCA;
- (g) how Hong Kong's financial institutions, in particular those which were not under the purview of any financial regulator, would be apprised of their obligations/requirements under FATCA, and measures to be taken by the Administration to promote awareness of Hong Kong's financial institutions in this respect;
- (h) views or submissions from the financial services industry and institutions on the arrangement for Hong Kong to enter into the IGA in question with US for the purpose of FATCA;

- (i) clarification on the scope/definition of foreign financial institutions and their investing/trading activities under FATCA; and
- (j) information on other jurisdictions adopting Model 1 or Model 2 for complying with FATCA.

8. The Administration was requested to explain the legal mechanism and considerations in determining whether an IGA between Hong Kong and another jurisdiction should be subject to approval of the Legislative Council ("LegCo") either under the positive or negative vetting procedures, and the reasons that the IGA to be signed with US in respect of FATCA would not require LegCo's vetting.

(Post-meeting note: The Administration's written response was issued to members vide LC Paper No. CB(1)1463/13-14(02) on 20 May 2014.)

III Any other business

Legislative timetable

9. As the scrutiny period of the Inland Revenue (Exchange of Information relating to Taxes) (United States of America) Order ("the Order") would expire at the Council meeting of 28 May 2014, in order to allow more time to study the Order, members agreed that the Subcommittee Chairman would move a motion at the Council meeting of 21 May 2014 to extend the scrutiny period to 18 June 2014. The meeting agreed that the Chairman would give a verbal report of the Subcommittee's deliberations at the House Committee meeting on 16 May 2014.

Date of next meeting

10. Members agreed that the Subcommittee would hold a further meeting to continue discussion on the Order.

(Post-meeting note: With the concurrence of the Chairman, the second meeting of the Subcommittee was scheduled for 8:30 am on Wednesday, 21 May 2014. The notice of meeting was issued vide LC Paper No. CB(1)1423/13-14 on 14 May 2014.)

11. There being no other business, the meeting ended at 12:34 pm.

**Proceedings of the Subcommittee on Inland Revenue (Exchange of Information relating to Taxes) (United States of America) Order
First meeting on Tuesday, 13 May 2014, at 10:45 am
in Conference Room 2B of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000139 – 000215	Mr James TO Mr Kenneth LEUNG Mr Andrew LEUNG	Election of Chairman	
000216 – 000236	Chairman	Late membership	
000237 – 000452	Chairman	Meeting arrangements	
000453 – 001245	Administration Chairman	Briefing by the Administration on the Inland Revenue (Exchange of Information relating to Taxes) (United States of America) Order ("the Order") to implement the Agreement between the Hong Kong Special Administrative Region and the United States of America ("the US") for the Exchange of Information ("EoI") relating to Taxes ("US Agreement"). (Legislative Council Brief (File Ref: TsyB R 183/800-1-1/4/0(C)))	
001246 – 002513	Mr Andrew LEUNG Administration Chairman	Mr Andrew LEUNG enquired about – (a) the reasons for Hong Kong to sign the US Agreement, which was a tax information exchange agreement ("TIEA")), instead of entering into a comprehensive agreement for avoidance of double taxation ("CDTA") with the US; (b) benefits for Hong Kong in signing the US Agreement; (c) justifications for signing the US Agreement to provide for the EoI mechanism to underpin the Intergovernmental Agreement ("IGA") for the implementation of the US Foreign Account Tax Compliance Act ("FATCA"), given the concern that FATCA involved reporting by financial institutions ("FIs") only while the US Agreement covered a wider scope including non-FIs;	The Administration to take action as required in paragraph 6(c) of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		<p>(d) mechanism and procedures for processing EoI requests to prevent fishing expedition, and protecting confidentiality of taxpayers' information, including commercial sensitive information pertaining to Hong Kong companies; and</p> <p>(e) cost arrangements for handling EoI requests under the US Agreement.</p> <p>The Administration advised that -</p> <p>(a) while it remained a policy priority to expand Hong Kong's network of CDTAs, it was the prevailing international standard that a jurisdiction should make available both CDTA and TIEA as instruments for EoI with other jurisdictions, and preference for a CDTA over a TIEA could not be a reason for refusing to enter into an EoI agreement with other jurisdictions;</p> <p>(b) the US Agreement would serve the primary purpose of fulfilling Hong Kong's international obligation in enhancing tax transparency. Notwithstanding repeated efforts to persuade the US to sign a CDTA with Hong Kong, the US had indicated no interest for the time being. Given the imminent implementation of FATCA in July 2014, Hong Kong needed to enter into the US Agreement in a timely manner to provide for the EoI mechanism with the US under FATCA;</p> <p>(c) the US Agreement would not preclude the possibility of concluding a CDTA with the US in future. The Administration would continue its efforts in this direction;</p> <p>(d) the operation of the EoI mechanism under the US Agreement would be the same as that under a CDTA. The US Agreement had included safeguard measures to protect taxpayers' privacy and confidentiality of information exchanged in addition to those provided for under the Inland Revenue (Disclosure of Information) Rules (Cap. 112 sub. leg. BI) ("Disclosure Rules"), and the Inland Revenue Department ("IRD") would ensure that the information sought must be</p>	

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		<p>foreseeably relevant to the administration and enforcement of domestic tax laws of the contracting parties, i.e. no fishing expedition; and</p> <p>(e) the US Agreement provided that the requested party shall bear the ordinary costs incurred in providing assistance in response to an EoI request, while the applicant party shall bear the associated extraordinary costs, if any, such as fees charged by third parties for carrying out research and costs of engaging experts.</p> <p>The Chairman asked why EoI requests could give rise to the need to "conduct research" and "engage experts" by IRD.</p> <p>The Administration responded that IRD would consider any special requests from the US carefully, which might involve carrying out of research or engagement of experts, for instance, to perform valuation on the market price of transactions between connected entities.</p>	
002514 – 003353	Mr Andrew LEUNG Mr Kenneth LEUNG Chairman Administration	<p>Mr Andrew LEUNG's and Mr Kenneth LEUNG's enquiry about comparison of the US Agreement with the 2002 version of TIEA developed by the Organization for Economic Cooperation and Development ("OECD"), and reasons for the differences, if any.</p> <p>The Administration advised that the OECD model of TIEA contained 16 articles whereas the US Agreement had 11 articles. The US Agreement had not adopted model articles in relation to tax examination abroad, implementation legislation, language, other international agreements/arrangements, and depositary's functions. The Administration would provide supplementary information in this regard.</p> <p>In reply to Mr Kenneth LEUNG, the Administration advised that -</p> <p>(a) the Administration had no official contact with the US tax authorities stationed in Hong Kong regarding tax examination matters in relation to US persons/entities;</p>	The Administration to take action as required in paragraph 6(a) of the minutes.

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		<p>(b) the "competent authority" of the US in respect of the US Agreement was the Secretary of the Treasury or the Secretary's delegate; and</p> <p>(c) for existing CDTAs signed by Hong Kong and its partners, IRD communicated direct with the relevant overseas competent authorities for EoI matters instead of through the offices of such authorities established in Hong Kong.</p>	
003354 – 004451	Mr Christopher CHEUNG Chairman Administration	<p>The Chairman sought clarification on the relationship between FATCA and the US Agreement.</p> <p>Mr Christopher CHEUNG enquired about the operation of FATCA –</p> <p>(a) the basis of calculating the 30% withholding tax on all US-sourced payments made to an FI if the latter failed to register or report the US accounts information to the US Internal Revenue Service ("IRS"); and</p> <p>(b) whether FI could refuse to provide the US accounts information to IRS on grounds of a confidentiality agreement signed with the client.</p> <p>The Administration advised that -</p> <p>(a) The US offered two models of IGA to facilitate foreign financial institutions ("FFIs") to comply with the requirements under FATCA:</p> <p>(i) Model 1 IGA would provide for reporting of US accounts information to IRS at governmental level and on an automatic basis; and</p> <p>(ii) Model 2 IGA, which Hong Kong was pursuing, required FFIs to enter into agreements with IRS ("FFI Agreements") directly, under which FFIs would identify accounts held by US taxpayers and seek account holders' consent to report their account information to IRS annually. Hong Kong would need to enter into an IGA</p>	The Administration to take action as required in paragraphs 6(b), 6(c), 7(a) and 7(d) of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		<p>with the US which would facilitate the compliance work of FIs in Hong Kong and provide exemptions for FIs to relieve their reporting burden. The IGA must be underpinned by an EoI agreement with the US which would allow IRS to file EoI requests to IRD if FFIs' clients refused to provide the information (i.e. "non-consenting accounts");</p> <p>(b) the US Agreement would complement the HK-US IGA by providing the necessary EoI mechanism;</p> <p>(c) the 30% withholding tax in question was an arrangement under FATCA and did not relate to the US Agreement; and</p> <p>(d) FFIs should seek the consent of their clients concerned and provide the account information to IRS in accordance with the FFI agreements.</p> <p>The Chairman enquired whether the EoI mechanism under the US Agreement could be restricted to cover FIs only.</p> <p>The Administration reiterated that the primary purpose of the US Agreement was to meet international standard regarding enhancement in tax transparency. The Administration also explained that there was limited room for individual jurisdictions to make adjustments to the scope of a TIEA since there was a model agreement developed by OECD. The EoI mechanism provided for under the OECD's model TIEA included all information relating to taxes covered, which might or might not be held by FIs. Any major deviations from the model agreement, e.g. limiting the scope of information to be exchanged to information held by FIs only, would run the risk of the TIEA not being internationally regarded as a compliant EoI agreement.</p> <p>The Administration agreed to provide written responses to members' enquiries above.</p>	

Time Marker	Speaker	Subject(s)	Action Required
004452 – 005312	Chairman Mr Christopher CHEUNG Administration	<p>The Chairman and Mr Christopher CHEUNG enquired about -</p> <p>(a) customer due diligence requirements ("CDD") for FIs in Hong Kong in meeting FATCA requirements, for instance, whether FIs would be required to verify information provided by clients to ascertain whether they were US persons/entities; and</p> <p>(b) liability of FIs if their clients provided false information about their US person/entity status.</p> <p>The Administration advised that –</p> <p>(a) to alleviate the compliance costs on FIs, the HK-US IGA would allow FIs to use simplified CDD procedures in identifying /reporting existing US accounts. For instance, no identification/reporting would be required for individual accounts with balance below US\$50,000;</p> <p>(b) FIs would not be liable for false information provided by their clients if the FIs had exercised due diligence in the identification process.</p> <p>The Administration agreed to provide written responses to members' enquiries above.</p>	The Administration to take action as required in paragraph 7(c) and 7(e) of the minutes.
005313 – 011514	Mr CHUNG Kwok-pan Chairman Mr Kenneth LEUNG Administration	<p>Mr CHUNG Kwok-pan enquired -</p> <p>(a) whether information on Hong Kong companies with business connection with US persons/companies would be covered by the EoI mechanism under the US Agreement; and</p> <p>(b) the benefits for Hong Kong in signing a CDTA vis-à-vis a TIEA with the US; and</p> <p>(c) the considerations of the US in not signing a CDTA with Hong Kong.</p> <p>The Administration advised that -</p> <p>(a) the TIEA partner needed to provide supporting information to justify its EoI request. IRD must be satisfied that the</p>	The Administration to take action as required in paragraphs 6(c), 7(a), 7(b), 7(f) and 7(j) of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		<p>information sought was foreseeably relevant, and the tax types and tax periods involved in the request were covered under the agreement, etc. IRD could not supply information which was not obtainable under the laws of Hong Kong;</p> <p>(b) CDTAs carried double taxation relief, and benefits might include lowering tax rates for passive income (e.g. income from dividends and interest) which would be beneficial to the business sector of Hong Kong; and</p> <p>(c) individual tax jurisdictions would have their own considerations in considering whether to enter into a CDTA with other jurisdictions, such as concern about potential loss in tax revenue, and availability of means other than CDTA to address issues of double taxation.</p> <p>Mr CHUNG Kwok-pan, the Chairman and Mr Kenneth LEUNG considered that restricting the EoI scope under the US Agreement to information held by FIs would provide Hong Kong with more bargaining power in pursuing a CDTA with the US in future. They enquired about –</p> <p>(a) the compliance difficulties for FIs in Hong Kong to enter into agreement with IRS without the basis of an IGA/TIEA; and</p> <p>(b) the need for IRD to request tax information from the US under the US Agreement.</p> <p>The Administration explained that –</p> <p>(a) the US Agreement was based on OECD's model TIEA. Modifications in provisions from the model version would be subject to the US' consent. As observed, other jurisdictions had also signed TIEAs with the US adopting the OECD model TIEA;</p> <p>(b) Model 2 IGA would provide FIs in Hong Kong with certain exemptions from the FATCA reporting requirements, such as financial products/transactions of low risks of being used by US taxpayers for tax-avoidance. This would reduce the</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>compliance burden on FIs. The financial services industry supported early conclusion of the HK-US IGA;</p> <p>(c) as Hong Kong adopted the territorial source principle of taxation while the US practised global taxation system, the possibility for Hong Kong making EoI requests to the US would be relatively low; and</p> <p>(d) Hong Kong could not pursue Model 1 IGA as the domestic laws did not provide for automatic EoI with other jurisdictions.</p> <p>The Administration agreed to provide written responses to members' enquiries above.</p>	
011515 – 012220	Mr CHUNG Kwok-pan Administration Chairman	<p>In reply to Mr CHUNG Kwok-pan, the Administration explained that according to the Disclosure Rules, IRD was required to notify the taxpayer concerned about an EoI request on him. The relevant taxpayer could request a copy of the information that IRD was prepared to disclose and amendments to the information if it was factually incorrect or not related to him. The Disclosure Rules also provided for a review system in handling appeals.</p> <p>At the request of the Chairman and Mr CHUNG Kwok-pan, the Administration undertook to provide –</p> <p>(a) the list of jurisdictions which had signed TIEAs with the US; and</p> <p>(b) views and submissions from the financial services industry and institutions on the arrangement for Hong Kong to enter into the IGA in question with the US.</p>	The Administration to take action as required in paragraphs 6(d) and 7(h) of the minutes.
012221 – 012641	Mr Kenneth LEUNG Administration Chairman	<p>In reply to Mr Kenneth LEUNG about whether the HK-US IGA would be subject to approval of the Legislative Council ("LegCo"), the Administration advised that the Order itself was made under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) ("IRO") to give effect to the US Agreement. While the US Agreement would provide the necessary EoI mechanism to underpin the HK-US IGA for the purposes of FATCA, the IGA was independent of the Order.</p>	The Administration to take action as required in paragraph 8 of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		The Administration agreed to provide supplementary information in response to members' enquiries above.	
012642 – 013537	Chairman Administration	<p>The Chairman enquired about -</p> <ul style="list-style-type: none"> (a) arrangements for handling non-consenting accounts under FATCA, including whether IRD could exercise powers to demand or compel provision of information; and (b) impacts, if any, of the implementation of FATCA and IGA on existing CDD requirements under anti-money laundering ("AML") or other financial regulatory regimes in Hong Kong. <p>The Administration advised that –</p> <ul style="list-style-type: none"> (a) IRS could make EoI requests for information in respect of the non-consenting accounts. IRD would examine whether the requests met the criterion on "foreseeable relevance", and if so, would enquire the FIs concerned about the non-consenting accounts. IRD would notify the taxpayers concerned about the EoI requests and the information to be disclosed; (b) while IRD could exercise the power to compel subject parties to provide information sought under an EoI request, IRD had not invoked such power in processing EoI requests under CDTAs so far; and (c) financial regulators had been reminding FIs on a regular basis to avoid aiding clients to engage in tax evasion activities. FIs were required to comply with the existing CDD requirements under the AML regime. They should also suitably leverage their CDD practices in meeting the requirements of tax-avoidance regimes of other jurisdictions where applicable. <p>At the request of the Chairman, the Administration agreed to provide supplementary information on the above enquiries.</p>	The Administration to take action as required in paragraph 7(c) of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
013538 – 013857	Chairman Mr Kenneth LEUNG Administration	<p>Mr Kenneth LEUNG relayed the request from the business and professional sectors for the Government to conclude a CDTA with the US. He enquired about the Administration's efforts in negotiating TIEAs with other jurisdictions.</p> <p>The Administration responded that –</p> <ul style="list-style-type: none"> (a) while it remained a policy priority to enter into CDTAs with Hong Kong's trading/investment partners, it would be necessary to conclude TIEAs with individual partners if they indicated no interest in CDTAs for the time being given the prevailing international standard that preference for a CDTA over a TIEA could not be a reason for refusing to enter into an EoI agreement with relevant partners; (b) the Administration was currently negotiating TIEAs with a number of other jurisdictions, such as Denmark, Norway and Sweden; and (c) the Administration had been maintaining communication with relevant chambers of commerce so as to facilitate the commencement of CDTA negotiations with relevant jurisdictions. 	
013858 – 014726	Chairman Mr CHUNG Kwok-pan Administration	At the request of the Chairman, the Administration undertook to provide information on how FIs, in particular those which were not under the purview of any financial regulators, would be apprised of their obligations/requirements under FATCA, and measures to be taken by the Administration to promote awareness of FIs in this respect.	The Administration to take action as required in paragraphs 7(g) and 7(i) of the minutes.
014727 – 015010	Chairman Clerk	Legislative timetable Meeting arrangements	