

立法會
Legislative Council

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(These minutes have been seen
by the Administration)

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

**Minutes of the Second meeting on
Wednesday, 21 May 2014, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

- Members present** : Hon James TO Kun-sun (Chairman)
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon Starry LEE Wai-king, JP
Hon Kenneth LEUNG
Hon Christopher CHEUNG Wah-fung, JP
Hon CHUNG Kwok-pan
- 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 Cindy CHEUK
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

Action

I Meeting with the Administration

(LC Paper No. CB(1)1463/13-14(01) — List of follow-up actions arising from the discussion at the meeting on 13 May 2014

LC Paper No. CB(1)1463/13-14(02) — Administration's response to the issues arising from the meeting on 13 May 2014

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

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

Follow-up actions to be taken by the Administration

2. 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) the measures and procedures adopted by the Inland Revenue Department ("IRD") to ensure that EoI request lodged by the US' competent authority would satisfy the conditions listed in paragraph 5 of Article 5 of the US Agreement regarding foreseeable relevance of the information requested. In particular, IRD should undertake that it would base on evidence instead of claims by the US' competent authority in considering whether an EoI request met the conditions in paragraph 5 of Article 5, including the information requested was foreseeably relevant to tax administration or enforcement of the applicant party, was held in the requested party or was in the possession or control of a person within the jurisdiction of the requested party, etc.;
- (b) how IRD would protect the interests of non-financial institutions which were not subject to requirements of the US Foreign Account Tax Compliance Act ("FATCA") but would be affected by the EoI mechanism under the US Agreement including measures to reduce possible burden on these institutions in provision of information;
- (c) the number of cases and considerations involved in respect of (i) IRD's decline on EoI requests made by partners of comprehensive double taxation agreements; (ii) subjects of EoI requests who had objected to IRD's disclosing the relevant information to the requesting jurisdictions or requested IRD to amend the information; (iii) subjects of EoI requests who had challenged IRD's decisions on information disclosure by applying for judicial review or taking other legal proceedings;
- (d) the Administration's follow-up actions in the event that the Order for implementing the US Agreement was repealed by the Legislative Council ("LegCo"), including whether the Administration would conduct further negotiation with US to pursue exemption for exchange of information held by non-financial institutions in Hong Kong under specified conditions;

- (e) circumstances under which commercial information exchanged under the US agreement would be disclosed/referred to other enforcement authorities; and
- (f) mechanism/measures to resolve disputes regarding implementation of the US Agreement or interpretation of its provisions.

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

- (a) estimated number of US taxpayers in Hong Kong (including US citizens, US resident individuals, or specified entities established in US or controlled by US persons) who were likely to be affected by FATCA;
- (b) template of Model 2 intergovernmental agreement ("IGA") developed by US, a summary to explain its major provisions and a sample "Foreign Financial Institution Agreement" published by the US Internal Revenue Service; and
- (c) a summary of the Hong Kong-US IGA, in particular to demonstrate how FATCA requirements would be simplified in reducing reporting burden on financial institutions in Hong Kong and facilitating their compliance with FATCA, including the meaning of "institutions with a predominantly local clientele" which would be exempted from FATCA reporting requirement.

(Post-meeting note: The Administration's response (LC Paper No. CB(1)1495/13-14(02)) was issued to members vide LC Paper No. CB(1)1495/13-14 and CB(1)1507/13-14 on 26 May 2014.)

II Any other business

Legislative timetable

4. Members noted that the Chairman had given notice to move a motion ("extension motion") at the LegCo meeting of 21 May 2014 for extending the scrutiny period of the Order to 18 June 2014. If the scrutiny period was extended, the deadline for giving notice of amendments to the Order would be 11 June 2014. In the event that the LegCo meeting of 21 or 28 May 2014 was unable to deal with the extension motion, the scrutiny period would lapse at the LegCo meeting of 28 May 2014.

5. Members further noted that the Chairman had given a verbal report of the Subcommittee's deliberations to the House Committee at its meeting held on 16 May 2014.

Date of next meeting

6. Members agreed to hold a further meeting to continue discussion on the Order.

(Post-meeting note: With the concurrence of the Chairman, the third meeting of the Subcommittee was scheduled for 2:30 pm on Tuesday, 27 May 2014. The notice of meeting was issued vide LC Paper No. CB(1)1476/13-14 on 22 May 2014.)

7. There being no other business, the meeting ended at 10:49 am.

Council Business Division 1
Legislative Council Secretariat
29 July 2014

**Proceedings of the Subcommittee on Inland Revenue (Exchange of Information
relating to Taxes) (United States of America) Order
Second meeting on Wednesday, 21 May 2014, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000413 – 000531	Chairman	Opening remark	
000532 – 001205	Administration Chairman	Briefing by the Administration on its written response to issues arising from the meeting on 13 May 2014 (LC Paper No. CB(1)1463/13-14(02))	
001206 – 002211	Chairman Assistant Legal Adviser 10 ("ALA10") Administration	<p>ALA 10's enquiry about the reasons for excluding Article 7(6) (i.e. declining an EoI request which discriminated against a national of the requested party as compared with a national of the applicant party in the same circumstances) and Article 5(6) (i.e. time limit for providing information to the applicant party under EoI) which were found in the tax information exchange agreement ("TIEA") model developed by the Organization for Economic Cooperation and Development ("OECD") but excluded from the Agreement between the Hong Kong Special Administration Region and the United States of America ("the US") for the Exchange of Information ("EoI") relating to Taxes ("US Agreement")</p> <p>The Administration advised that –</p> <p>(a) the US dealt with Article 7(6) of the OECD TIEA model either by (i) excluding it from its TIEAs since the tax imposed by the US on branch profits or on the premium income of non-resident insurers might be regarded as discriminatory in the US; or (ii) retaining the article but with modification to expressly state that the relevant article should not be construed to prevent EoI with respect to the above two types of taxes. Further, since the US queried about the concept of "right of abode" adopted by Hong Kong and in view of the rare application of the article, Hong Kong and the US agreed that Article 7(6) should be excluded; and</p> <p>(b) as it was an established international practice and OECD standard to provide</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>information within 90 days of receipt of an EoI request, Hong Kong and the US considered it unnecessary to provide such time limit in the US Agreement.</p>	
<p>002212 – 003103</p>	<p>Mr Kenneth LEUNG Chairman Administration</p>	<p>Mr LEUNG noted that most of the 33 jurisdictions which had signed TIEAs with the US were developing countries or jurisdictions commonly labeled as tax havens. He enquired about the Administration's efforts in pursuing a comprehensive avoidance of double taxation agreement ("CDTA") with the US, and the jurisdictions which Hong Kong was negotiating with for TIEAs.</p> <p>The Administration responded that –</p> <ul style="list-style-type: none"> (a) despite the Administration's repeated efforts to persuade the US through different channels to enter into a CDTA with Hong Kong, the US had expressed no interest for the time being. On the other hand, US considered that signing a TIEA with Hong Kong would help them combat tax evasion by US persons/entities; (b) individual jurisdictions would have different considerations (e.g. trade and investment facilitation, possible loss in tax revenue) in pursuing a CDTA/TIEA with its trading partners; (c) as Hong Kong adopted the territorial source principle of taxation, other jurisdictions which adopted a global tax system might consider it less beneficial to themselves in concluding a CDTA with Hong Kong; and (d) Hong Kong was currently negotiating TIEAs with a number of other jurisdictions, such as Denmark, Norway and Sweden. <p>In reply to Mr LEUNG, the Administration advised that the next round of peer review by the Global Forum on Transparency and Exchange of Information for Tax Purposes was anticipated to commence in 2016. The timetable of reviews on individual member jurisdictions (including Hong Kong) and the assessment criteria were not yet available. As observed, the international trend was</p>	

Time Marker	Speaker	Subject(s)	Action Required
		towards greater tax transparency, such as automatic EoI instead of EoI upon request.	
003104 – 003928	Mr Jeffrey LAM Administration Chairman	<p>Mr LAM expressed concern about the Administration's effort in upholding Hong Kong's interests during the negotiation of TIEA with the US, and enquired about the mechanism/measures for resolving disputes when implementing the US Agreement.</p> <p>The Administration advised that -</p> <ul style="list-style-type: none"> (a) the Administration had spared no effort in persuading Hong Kong's investment/trading partners including the US to conclude CDTAs with Hong Kong. As a result of the efforts, Hong Kong had entered into 29 CDTAs which covered more than half of its top 20 trading partners; (b) during CDTA negotiations, Hong Kong upheld stringent principles to protect the interests of businesses operating in Hong Kong and eliminate double taxation, including seeking exclusive taxing rights in respect of airline and shipping income and more relief on tax rates; and (c) Article 9 of the US Agreement provided for the mutual agreement procedure to deal with difficulties or doubts regarding the implementation or interpretation of the Agreement. It also provided flexibility for the contracting parties to communicate with each other directly to reach a mutual agreement. 	The Administration to take action as required in paragraph 2(f) of the minutes.
003929 – 004133	Mr CHUNG Kwok-pan Chairman Administration	<p>Mr CHUNG enquired about the arrangements if the requested party was unable to provide the information within 90 days of receipt of an EoI request.</p> <p>The Administration advised that the requested party could notify the applicant party before expiry of the time limit that it was unable to provide the requested information and the reasons involved (e.g. administrative process required to obtain the information, and pending legal proceedings).</p>	

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004134 – 004940	Chairman Administration	<p>The Chairman's view was that the Administration should be more proactive in upholding Hong Kong's interests while observing the international standard on promoting tax transparency and information exchange lest its competitive advantage of a simple tax system would be undermined. The Administration should pursue exemption for exchange of information held by non-financial institutions ("non-FIs") under the US Agreement as EoI requests involving information held by non-FIs might cause compliance burden on non-FIs in providing information to the Inland Revenue Department ("IRD").</p> <p>The Administration advised that there was limited room for individual jurisdictions to make adjustments to the scope of a TIEA having regard to the OECD TIEA model which provided for EoI in respect of all information relating to taxes covered, which might or might not be held by FIs. The 33 TIEAs signed by the US with other jurisdictions followed the OECD model.</p> <p>At the request of the Chairman, the Administration agreed to provide information on the estimated number of US taxpayers in Hong Kong who were likely to be affected by FATCA.</p>	The Administration to take action as required in paragraph 3(a) of the minutes.
004941 – 010001	Mr Jeffrey LAM Administration Chairman	<p>Mr LAM was concerned that the commercial information exchanged under the US Agreement could be supplied to US/Hong Kong authorities other than those concerned with tax assessment/collection/enforcement.</p> <p>The Administration explained that there were safeguard measures in the US Agreement to protect taxpayers' privacy and confidentiality of information exchanged, including -</p> <ul style="list-style-type: none"> (a) when making an EoI request under the US Agreement, the applicant party must provide information in accordance with paragraphs 5(a) to (i) of Article 5 to demonstrate the "foreseeable relevance" of the information to the request; (b) Article 6 provided for the circumstances under which the requested party could 	

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		<p>decline EoI requests, such as the requested information would disclose any trade, business, industrial, commercial or professional secret or trade process;</p> <p>(c) Article 7 provided for confidentiality of information exchanged, including confining the disclosure of the information exchanged only to persons/authorities in the jurisdictions of the contracting party concerned with tax assessment/collection/enforcement, etc.; and</p> <p>(d) IRD would follow the stringent procedures set out in paragraphs 9 and 10 of the Administration's paper (LC Paper No 1463/13-14(02)) in handling EoI requests.</p> <p>The Administration supplemented that -</p> <p>(a) a valid EoI request required approval by a directorate officer of IRD;</p> <p>(b) IRD had declined EoI requests in the past as the applicant parties had not provided sufficient information to demonstrate the "foreseeable relevance" of the information requested;</p> <p>(c) in some EoI requests, information requested was available in the public domain, e.g. public records of the Companies Registry or IRD's Business Registration Office; and</p> <p>(d) there were so far no cases where the subjects of EoI requests had objected to IRD's disclosure of relevant information to the applicant parties or had requested IRD to amend the information. In some cases, the subject persons had voluntarily provided more information than requested, for instance, to justify their eligibility for certain tax relief in the jurisdictions concerned.</p> <p>At the request of the Chairman, the Administration agreed to provide the number of cases and considerations involved in respect of (a) IRD's decline on EoI requests made by partners of CDTAs; (b) subjects of EoI requests who had objected to IRD's disclosing the relevant</p>	<p>The Administration to take action as required in paragraph 2(c) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>information to the requesting jurisdictions or requested IRD to amend the information; and (c) subjects of EoI requests who had challenged IRD's decisions on information disclosure by applying for judicial review or taking other legal proceedings.</p>	
010002 – 010858	Mr Christopher CHEUNG Administration Chairman	<p>Mr CHEUNG enquired about details of the exemption for FIs with a predominantly local clientele from the FATCA reporting requirement under the intergovernmental agreement to be signed between Hong Kong and the US ("HK-US IGA").</p> <p>The Administration advised that FIs with a local client base satisfying relevant prescribed requirements (i.e. did not have a fixed place of business outside Hong Kong and the Mainland, and which maintained at least 98% of financial accounts, by value, held by residents of Hong Kong and the Mainland) would be exempted as such FIs carried low risks of being used by US taxpayers for tax evasion. To qualify for the exemption, such local FIs would still be required to register with the US Internal Revenue Service ("IRS").</p> <p>In reply to the Chairman and Mr CHEUNG, the Administration supplemented that -</p> <ul style="list-style-type: none"> (a) details of exemption from the FATCA reporting requirement for Hong Kong FIs would be set out in the HK-US IGA; (b) a set of frequently asked questions was available on the website of the Financial Services and the Treasury Bureau providing information on the background and development of the HK-US IGA; (c) Hong Kong and the US had reached consensus in the substance of the IGA. Subject to completion of the relevant procedures by the US, both sides could sign the IGA. The Administration would make appropriate announcement after the formal signing of the IGA and had been reminding FIs through financial regulators to make necessary preparation for FATCA compliance; and 	

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		<p>(d) the Administration was aware that the European Union ("EU") had put in place a mechanism similar to FATCA for financial account reporting among EU's member states.</p> <p>At the request of the Chairman, the Administration undertook to provide -</p> <p>(a) template of Model 2 IGA developed by the US for the implementation of FATCA and a summary to explain the major provisions; and</p> <p>(b) a summary of the HK-US IGA, in particular to demonstrate how FATCA requirements would be simplified in reducing reporting burden on FIs in Hong Kong and facilitating their compliance with FATCA, including the meaning of "institutions with a predominantly local clientele" which would be exempted from FATCA reporting requirement.</p>	<p>The Administration to take action as required in paragraph 3(b) and 3(c) of the minutes.</p>
010859 – 011600	Mr Kenneth LEUNG Administration Chairman	<p>Mr LEUNG noted that certain regulated collective investment schemes and employee incentive share schemes would be exempted from the FATCA reporting requirements, and enquired whether the HK-US IGA would set out the specific schemes to be exempted.</p> <p>The Chairman suggested that the Administration should disseminate information on FATCA requirements and exemptions to the industry through the relevant trade organizations.</p> <p>The Administration advised that -</p> <p>(a) the HK-US IGA would set out the exemption eligibility criteria of and related requirements for the collective investment schemes and employee incentive share schemes; and</p> <p>(b) the Administration had conducted briefings for the relevant trade bodies to explain the FATCA requirements and the prospective exemptions under the HK-US IGA. It would continue to communicate with the industry to clarify issues of concern.</p>	

Time Marker	Speaker	Subject(s)	Action Required
011601 – 014544	Mr CHUNG Kwok-pan Mr Andrew LEUNG Mr Jeffrey LAM Chairman Administration	<p>Mr CHUNG reiterated his concern about the wide EoI scope under the US Agreement covering information held by non-FIs.</p> <p>The Chairman opined that the Administration should conduct further negotiation with the US to pursue exemption for exchange of information held by non-FIs in Hong Kong under specified conditions.</p> <p>The Administration explained that -</p> <ul style="list-style-type: none"> (a) under the US Agreement, information would be provided only for EoI requests meeting the relevant requirements and IRD would gather information from the subjects of EoI requests only where necessary; (b) as regards the concern about possible burden on non-FIs in providing information under EoI requests, IRD would duly exercise its gatekeeping role to ensure that the information sought must be foreseeably relevant, i.e. no fishing expedition. Besides, the subjects of EoI requests had no obligation to supply information beyond the existing record-keeping requirements or period under the Inland Revenue Ordinance (Cap. 112); and (c) if necessary, IRD might consult the Department of Justice in deciding whether an EoI request was valid. <p>Discussion on (a) situations in which IRD could collect information from the subject of an EoI request and other relevant information holders; (b) how the applicant party should demonstrate the "foreseeable relevance" of the information to an EoI request; and (c) how IRD would consider whether an EoI request was valid with reference to an hypothetical EoI request made pursuant to the US Agreement.</p> <p>The Chairman and Mr LAM emphasized that IRD should base on supporting evidence and facts of proof instead of claims made by the US' competent authority in considering whether an EoI request met the conditions in paragraph 5 of Article 5 of the US Agreement.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>At the request of the Chairman, the Administration agreed to provide supplementary information to address members' concerns above.</p> <p>The Chairman indicated that he would give notice to move a motion at the Legislative Council ("LegCo") meeting of 28 May 2014 to repeal the Order.</p> <p>In reply to Mr LAM, the Administration confirmed that commercial information exchanged under the US Agreement would <u>not</u> be used for non-tax purposes, e.g. disclosure/referral to other enforcement authorities.</p>	<p>The Administration to take action as required in paragraph 2(a) and 2(e) of the minutes.</p>
014645 – 015626	Mr CHUNG Kwok-pan Mr Andrew LEUNG Chairman Administration	<p>Mr CHUNG reiterated his view that non-FIs should be exempted from the EoI mechanism under the US Agreement.</p> <p>At the request of the Chairman, the Administration agreed to provide information on its follow-up actions in the event that the Order was repealed by LegCo, including whether the Administration would conduct further negotiation with the US to pursue exemption for exchange of information held by non-FIs in Hong Kong under specified conditions.</p> <p>Mr LEUNG remarked that there would be adverse impact on FIs in Hong Kong if the Order was repealed as the HK-US IGA would not be concluded. This would increase FIs' compliance burden for the FATCA requirements. However, the Administration should protect the interests of non-FIs undertaking lawful business and minimize possible burden on them in the provision of information.</p>	<p>The Administration to take action as required in paragraph 2(d) of the minutes.</p>
015627 – 020102	Mr Kenneth LEUNG Administration Chairman	<p>In reply to Mr LEUNG, the Administration confirmed that the EoI scope and arrangement under TIEAs were essentially the same as those under CDTAs.</p> <p>The Administration supplemented that the subjects of past EoI requests were usually large multi-national corporations.</p>	

Time Marker	Speaker	Subject(s)	Action Required
020103 – 020300	Chairman Administration	In reply to the Chairman, the Administration briefed members on the customer due diligence ("CDD") requirements for FIs in Hong Kong under FATCA and the Administration's engagement with the financial services industry, as set out in paragraphs 9 and 10 of the Administration's paper (LC Paper No. 1463/13-14(02)).	
020301 – 020732	Chairman	Suspension of the meeting for five minutes to enable Subcommittee members to participate in the voting on a public works proposal at the meeting of the Public Works Subcommittee, and extension of the meeting to 10:45 am when the meeting resumed.	
020733 – 021634	Administration Mr Christopher CHEUNG Chairman	<p>In reply to the Chairman, the Administration advised that no additional requirements to the current CDD requirements would be imposed on FIs under relevant anti-money laundering legislation for the purpose of FATCA. Financial regulators had been in communication with FIs reminding them to assess their relevant FATCA compliance implications, including the signing of Foreign Financial Institution Agreement ("FFI Agreement") with US IRS, and effects on their operation and clientele.</p> <p>Mr CHEUNG expressed concern that FIs had to fulfill necessary CDD requirements in accordance with the FFI Agreements in identifying US accounts and reporting information, and FIs could breach the confidentiality undertaking signed with their clients in reporting account information to US IRS.</p> <p>At the request of the Chairman, the Administration agreed to provide a sample FFI agreement published by US IRS.</p>	The Administration to take action as required in paragraph 3(b) of the minutes.
021635 – 021947	Chairman Clerk	<p>Legislative timetable</p> <p>Meeting arrangements</p> <p>The Chairman suggested that issues relating to the implementation of the US Agreement (e.g. number of EoI requests received and impact on IRD's resources) and development of issues related to</p>	The Clerk

Time Marker	Speaker	Subject(s)	Action Required
		FATCA should be referred to the Panel on Financial Affairs for follow-up.	

Council Business Division 1
Legislative Council Secretariat
29 July 2014