

**立法會**  
**Legislative Council**

LC Paper No. CB(1)361/14-15  
(These minutes have been seen  
by the Administration)

Ref : CB1/SS/1/14/1

**Subcommittee on the Two Orders Made under Sections 49 and 49(1A)  
of the Inland Revenue Ordinance and Gazetted on 17 October 2014**

**Minutes of the second meeting on  
Tuesday, 11 November 2014, at 8:30 am  
in Conference Room 3 of the Legislative Council Complex**

- Members present** : Hon James TO Kun-sun (Chairman)  
Hon Andrew LEUNG Kwan-yuen, GBS, JP  
Hon Kenneth LEUNG
- Public officers attending** : Ms Shirley KWAN  
Principal Assistant Secretary for Financial Services and  
the Treasury (Treasury) (Revenue)
- Mr CHIU Kwok-kit, JP  
Deputy Commissioner (Technical)  
Inland Revenue Department
- Ms Alice CHOY  
Senior Government Counsel (Treaties and Law)<sup>1</sup>  
Department of Justice
- Miss Queenie WU  
Government Counsel  
Department of Justice

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

**Staff in attendance** : Miss Carrie WONG  
Assistant Legal Adviser 4

Mr Ken WOO  
Senior Council Secretary (1)5

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Action

**I Meeting with the Administration**

(L.N. 119 of 2014 — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of Korea) Order

L.N. 120 of 2014 — Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Socialist Republic of Vietnam) (Amendment) Order 2014

File Ref: Tsy B R 183/800-1-1/19/0(C) — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of Korea) Order

File Ref: Tsy B R 183/800-1-1/32/0(C) — Legislative Council Brief on Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Socialist Republic of Vietnam) (Amendment) Order 2014

LC Paper No. LS6/14-15 — Legal Service Division Report

- LC Paper No. CB(1)196/14-15(01) — Marked-up copy of L.N. 120 of 2014 prepared by the Legal Service Division (Restricted to members)
- LC Paper No. CB(1)196/14-15(02) — Background brief prepared by the Legislative Council Secretariat)

### Discussion

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

## **II Any other business**

### Legislative timetable and way forward

2. The Chairman said that the Subcommittee had completed scrutiny of the two items of subsidiary legislation.
3. Members agreed that the Chairman would report the Subcommittee's deliberations to the House Committee at its meeting on 28 November 2014. The Chairman would move a motion at the Council meeting of 12 November 2014 to extend the scrutiny period of the two Orders to the Council meeting of 10 December 2014. The deadline for giving notice of motion to amend the two Orders was 3 December 2014.

*(Post-meeting note: Arrangement was made for the proposed motion to extend the scrutiny period of the two Orders to be moved at the Council meeting of 19 November 2014 instead. However, as the date of the Council meeting of 19 November 2014 was changed to 20 November 2014, the Chairman could not move the proposed motion.)*

4. There being no other business, the meeting ended at 9:38 am.

**Proceedings of the Subcommittee on the Two Orders Made under Sections 49 and 49(1A) of the Inland Revenue Ordinance and Gazetted on 17 October 2014  
Second meeting on Tuesday, 11 November 2014, at 8:30 am  
in Conference Room 3 of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000428 – 000556	Chairman	Introductory remarks	
000557 – 001036	Chairman Administration	<p>The Administration's briefing on the two Orders as follows:</p> <p>(a) The Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of Korea) Order (L.N. 119 of 2014) was made to implement the Comprehensive Avoidance of Double Taxation Agreement ("CDTA") which was made between the Government of the Hong Kong Special Administrative Region ("HKSAR Government") and the Government of the Republic of Korea ("Korean Government") and signed on 8 July 2014 ("the Korean Agreement").</p> <p>(b) The Korean Agreement set out the allocation of taxing rights between Hong Kong and Korea and the relief on tax rates on different types of passive income, including interest, royalties and dividends. The Korean Agreement contained an Exchange of Information ("EoI") Article which had adopted all the safeguards to protect taxpayers' privacy and confidentiality of any information exchanged as detailed in paragraph 10 of the Legislative Council Brief (Tsy B R 183/800-1-1/19/0(C)).</p> <p>(c) The Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Socialist Republic of Vietnam) (Amendment) Order 2014 (L.N. 120 of 2014) was made to implement the Second Protocol ("the Vietnamese Second Protocol") (signed on 13 January 2014) to the CDTA between the HKSAR Government and the Government of the Socialist Republic of Vietnam ("the Vietnamese Agreement").</p>	

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		<p>(d) The Vietnamese Second Protocol modified the Vietnamese Agreement by removing the domestic tax interest requirement in the EoI Article, thus enabling the EoI arrangement to be compliant with the Organization for Economic Cooperation and Development ("OECD") standard on tax transparency.</p> <p>(e) The Vietnamese Second Protocol had adopted the same safeguards in its EoI Article as those in the Korean Agreement for protecting taxpayers' privacy and confidentiality of information exchanged. Details of the safeguards were set out in paragraph 5 of the relevant Legislative Council Brief (Tsy B R 183/800-1-1/32/0(C)).</p>	
001037 – 002005	Mr Kenneth LEUNG Mr Andrew LEUNG Administration	<p>In response to Mr Kenneth LEUNG's enquiries about the difference between the respective EoI Articles in the two Agreements and that promulgated by OECD, the Administration advised that the EoI Article in the CDTAs that the HKSAR Government signed so far was generally based on the 2004 version of OECD EoI Article. The EoI provisions in the Korean Agreement (Article 24) and the Vietnamese Second Protocol (Article 1) were identical adopting the same privacy and confidentiality protection safeguards.</p> <p>On Mr Kenneth LEUNG's further enquiries on Article 24 of the Korean Agreement which stipulated that "... <i>The exchange of information is not restricted by Article 1.</i>", the Administration advised as follows:</p> <p>(a) The provision in Article 24 was based on the 2004 version of OECD EoI Article with modifications to address Hong Kong's needs. The EoI Article of OECD model text originally stated that information exchanged should not be restricted by Articles 1 and 2, but the HKSAR Government had removed the reference to "Article 2" from the EoI Article in the Korean Agreement, thus confining the scope of information exchanged to tax types covered by the CDTA. While the reference to "Article 1" was retained in the EoI Article and information exchanged could also cover information in respect of non-residents of the Contracting Parties, any</p>	

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		<p>information exchanged should be foreseeably relevant to the provisions of the CDTA or to the administration and enforcement of the tax laws of the Contracting Parties. When making an EoI request on information relating to non-residents of both Contracting Parties, in line with prevailing international practices, the requesting party must provide relevant information to support and set out its request, including the purpose of the request, the tax type and period of information covered by the request, and a statement that the authority had exhausted all means available in its territory to obtain the information sought, etc. in order to demonstrate the foreseeable relevance of the EoI request.</p> <p>(b) For instance, the Korean Government might, upon meeting the above requirements to demonstrate that its EoI request was foreseeably relevant to the carrying out of the provisions of the CDTA or its administration or enforcement of its tax laws, make an EoI request to the HKSAR Government in respect of a United Kingdom-based company doing business through a permanent establishment in Hong Kong.</p> <p>(c) Other highly stringent safeguards were also provided in the Korean Agreement, for instance, Contracting Parties had no obligation to disclose information to a third jurisdiction, or supply information where the information would disclose any trade, business, industrial, commercial secrets, or which would be covered by legal privileges, etc.</p> <p>In response to Mr Andrew LEUNG's enquiry, the Administration advised that the EoI Articles in the Korean Agreement and the Vietnamese Second Protocol had incorporated the same privacy protection and confidentiality safeguards in the EoI as those in other CDTAs that Hong Kong had entered into with other jurisdictions.</p>	

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002006 – 002241	Chairman Administration	In response to the Chairman's enquiry on the major provisions of the Korean Agreement for eliminating double taxation, the Administration highlighted the methods as detailed in Article 21 of the Korean Agreement.	
002242 – 002422	Mr Andrew LEUNG Administration	<p>Mr Andrew LEUNG enquired about the consultation with parties before negotiations with the Korean authority on the Korean Agreement.</p> <p>The Administration pointed out that the Inland Revenue Department ("IRD") would gauge the views of the relevant stakeholders on CTDA negotiations with other jurisdictions through various means, including announcing the plan of negotiations with the jurisdictions concerned in IRD's website to invite views from the public and interested parties, and engaging professional and advisory bodies through the Joint Liaison Committee on Taxation which was a discussion platform comprising representatives from chambers of commerce, Hong Kong Institute of Certified Public Accountants and Taxation Institute of Hong Kong, etc.</p>	
002423 – 003122	Chairman Administration	<p>The Chairman enquired about the eligibility of unit trust funds operated in Hong Kong but constituted in Korea for tax relief under the Korean Agreement, and the procedures for applying the relief.</p> <p>The Administration advised as follows:</p> <p>(a) In accordance with the definitions of "person" given in paragraph 1(f) of Article 3 and "resident of a Contracting Party" in paragraph 1(a) of Article 4 of the Korean Agreement, "person" included an individual, a company, a trust, a partnership and any other body of persons; and an investment fund set up in the form of a trust and constituted outside Hong Kong with its central management and control in Hong Kong would be regarded as a Hong Kong tax resident and thus be entitled to the relevant tax relief.</p> <p>(b) In respect of application for tax relief, if a Hong Kong resident received dividends or interest income from Korea, he or she could request IRD to issue a certificate of resident status for such purposes.</p>	

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		<p>(c) In the case of tax relief for dividends, with the Korean Agreement, the Korean withholding tax (currently at 20%) will be capped at 10% if the beneficial owner was a company which held directly at least 25% of the capital of the company paying the dividends, and at 15% in all other cases. Article 26 of the Korean Agreement further provided that a resident of a Contracting Party shall not be entitled to the tax relief if the main purpose of any persons was to take advantage of the tax reliefs provided under the Korean Agreement.</p>	
003123 – 003558	Mr Kenneth LEUNG Administration Chairman	<p>In response to Mr Kenneth LEUNG's enquiries on the criteria for determining whether a body corporate was centrally managed and controlled in Hong Kong, the Administration advised that there was clear case law on the matter. In general, a company would be regarded as centrally managed and controlled in Hong Kong if its board of directors was stationed in Hong Kong and its important business decisions and management functions were made and carried out in Hong Kong.</p> <p>As regards Mr LEUNG's enquiry about whether transfer pricing adjustments could be found in the Korean Agreement, the Administration explained that Article 9 of the Korean Agreement provided for the adjustments for transfer pricing among associated enterprises by the Contracting Parties. In accordance with the Article, if two associated enterprises entered into a transaction not based on the market price, the Contracting Parties could make adjustments to the amount of the tax charged therein on those profits according to laws of their respective jurisdictions.</p>	
003559 – 004302	Chairman Administration	<p>In response to the Chairman's enquiry on the Vietnamese Agreement, the Administration re-iterated that the Vietnamese Second Protocol only introduced changes to the EoI arrangement to make it comply with the OECD standard on tax transparency. Other provisions in the Vietnamese Agreement remained unchanged. The Administration kept the CDTAs signed with other jurisdictions under constant review, and taking into account the operational experience and views of the relevant stakeholders, contracting parties would</p>	



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		<p>discuss necessary amendments to the CDTAs. On the Vietnamese Agreement, the Administration was not aware of any views from the trade and business sectors as well as the Vietnamese Government for reviewing other provisions in the Vietnamese Agreement.</p> <p>In view of the enhanced business exchanges between Hong Kong and its trading and investment partners in recent years, the Chairman considered that the Administration should take more proactive actions in engaging views of the stakeholders in developing new CDTAs and reviewing existing CDTAs.</p>	
<b><u>Section-by-section examination of the two Orders</u></b>			
004303 – 004409	Chairman Assistant Legal Adviser 4 Administration	<p><b>Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Socialist Republic of Vietnam) (Amendment) Order 2014 (L.N. 120 of 2014)</b></p> <p><u>Section 1 – Commencement</u></p> <p><u>Section 2 – Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Socialist Republic of Vietnam) Order amended</u></p> <p>Members raised no questions.</p>	
004410 – 004624	Chairman Administration	<p><u>Section 3 – Section 2 amended (declaration under section 49)</u></p> <p>In response to the Chairman's enquiry on the proposed section 2(2)(b) which provided that "<i>that it is expedient that those arrangements should have effect</i>", the Administration explained that the wording was to comply with the relevant provision in section 49(1A) of the Inland Revenue Ordinance (Cap. 112).</p>	
004625 – 004709	Chairman Administration	<p><u>Section 4 – Section 3 amended (arrangements specified)</u></p> <p><u>Section 5 – Schedule heading amended</u></p> <p>Members raised no questions.</p>	

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004710 – 005414	Chairman Administration	<p><u>Section 6 – Schedule 2 added</u></p> <p>The Chairman sought elaboration on the provision contained in paragraph 3(c) of Article 1 under the proposed Schedule 2 which provided that a Contracting Party had no obligation to "...disclose ... information, the disclosure of which would be contrary to public policy".</p> <p>The Administration responded that IRD would be prudent in considering the matter and could take into account views of the relevant parties, including those from the data subject, before providing the requested information to the Contracting Parties. IRD would refuse an EoI request if it considered that the disclosure of the requested information would be contrary to public policy and explain the case to the Contracting Party. Any disputes would be dealt with according to the mutual agreement procedure provided under the Vietnamese Agreement. Paragraph 3(c) of Article 1 was a standard provision in the OECD model text and had been included in CDTAs concluded by Hong Kong with other jurisdictions.</p>	
005415 – 005505	Chairman Administration	<p><b>Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of Korea) Order (L.N. 119 of 2014)</b></p> <p><u>Section 1 – Commencement</u></p> <p><u>Section 2 – Declaration under section 49(1A)</u></p> <p>Members raised no questions.</p>	
005506 – 005609	Chairman Administration	<p><u>Section 3 – Arrangements specified</u></p> <p>In reply to the Chairman, the Administration advised that the Chinese, Korean and English versions of the Korean Agreement were equally authentic.</p>	
005610 – 010523	Chairman Administration	<p><u>Schedule – Part 1 – Articles 1 to 28 of the Korean Agreement</u></p> <p><i>Article 3 – General Definitions</i></p>	

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		<p>In response to the Chairman's enquiry on the Korean Government's taxing rights on territories where there were territorial disputes, the Administration advised that the territory of Korea should include areas so designated under the laws of the Republic of Korea in accordance with international law. Issues of determination of taxing rights arising from territories under disputes with other parties would need to be considered on a case-by-case basis.</p> <p><i>Article 4 – Resident</i></p> <p>In response to the Chairman's enquiry, the Administration advised that paragraph 2 which provided for the determination of the status of a resident of both Contracting Parties was a standard provision in CDTAs concluded by Hong Kong with other jurisdictions.</p>	
010524 – 010809	Chairman Administration	<p><u>Schedule – Part 2 – Paragraphs 1 to 7 of the Protocol to the Korean Agreement</u></p> <p>Members raised no questions.</p>	
010810 – 010915	Chairman Clerk	Legislative timetable	