

**Subcommittee on the Six Orders Made under Section 49(1A) of the  
Inland Revenue Ordinance and Gazetted on 2 October 2015**

**Follow up to the meeting on 27 October 2015**

This paper sets out the Government's consolidated responses to the issues raised by Members at the meeting held on 27 October 2015.

**(a) Competence of the Faroes and Greenland to enter into TIEAs**

2. For the TIEA between the Faroes and Hong Kong, it was concluded by the Government of the Faroes with the HKSAR Government on behalf of the Kingdom of Denmark "pursuant to the Act on the Conclusion of Agreements under International Law by the Government of the Faroes". For the TIEA between Greenland and Hong Kong, it was concluded by the Government of Greenland with the HKSAR Government on behalf of the Kingdom of Denmark "pursuant to the Act on Greenland Self Government". These are set out in the preamble to the respective TIEAs<sup>1</sup>.

3. It is also worth noting that the TIEA between the Kingdom of Denmark and Hong Kong was actually discussed and concluded simultaneously with the above two TIEAs. The Government of the Kingdom of Denmark is well aware of the latter. Indeed, a clear marker has been included in the TIEA with the Kingdom of Denmark under the definition of the term "Denmark" that "the term does not comprise the Faroe Islands and Greenland", so that the TIEA with the Kingdom of Denmark will not overlap with the TIEAs with the Faroes and Greenland in terms of territorial coverage among the three concerned.

4. As noted by the Global Forum on Transparency and Exchange of Information for Tax Purposes ("Global Forum") in its Peer Reviews on Denmark in 2013, for tax purposes, the Faroes and Greenland are regarded as separate jurisdictions<sup>2</sup>. As a matter of fact, the Faroes and

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<sup>1</sup> [http://www.ird.gov.hk/eng/pdf/Agreement\\_Faroes\\_HongKong.pdf](http://www.ird.gov.hk/eng/pdf/Agreement_Faroes_HongKong.pdf)

[http://www.ird.gov.hk/eng/pdf/Agreement\\_Greenland\\_HongKong.pdf](http://www.ird.gov.hk/eng/pdf/Agreement_Greenland_HongKong.pdf)

<sup>2</sup> <http://www.eoi-tax.org/jurisdictions/DK#latest> (paragraph 22 on page 14)

Greenland have each signed over 40 TIEAs with other tax jurisdictions, including Hong Kong, so far.

**(b) Confidentiality of information exchanged under TIEAs with the Faroes and Greenland?**

5. Same as the TIEAs signed with the other four Nordic jurisdictions, the TIEAs with the Faroes and with Greenland contain an article (i.e. Article 7) which seeks to provide adequate protection for the confidentiality of the information exchanged under the TIEA concerned. The article is reproduced below:

*“Any information received by a Contracting Party under this Agreement shall be treated as confidential in the same manner as information obtained under the internal laws of that Party and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. **The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.**” (Emphasis added)*

6. For information provided by Hong Kong to the Faroes or Greenland under the relevant TIEAs, the first highlighted part of Article 7 has made it clear that such information may be disclosed only to the prescribed scope of persons or authorities in the jurisdiction of the Contracting Party (which means the Faroes or Greenland, as the case may be). The second highlighted part of Article 7 has also made it clear that such information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of Hong Kong, i.e. the Inland Revenue

Department (“IRD”).

7. Article 7 should have provided sufficient safeguard against disclosure by the Faroes or Greenland, as the case may be, to another jurisdiction outside their respective jurisdictions, in the absence of IRD’s express written consent. In any event, Hong Kong, as a Contracting Party, is entitled to terminate the TIEA concerned under the relevant article, should any non-compliance come to light.

**(c) Bermuda’s court judgment**

8. Article 84 of the Basic Law provides that the courts of the HKSAR may refer to the precedents of other common law jurisdictions. As such, for the judgment of the Court of Appeal of Bermuda (which is also a common law jurisdiction) in *The Minister of Finance v Bunge Limited* [2013] CA(BDA) 4 CIV , we cannot rule out the possibility of its being cited for reference in the judicial proceedings in Hong Kong. That said, as a matter of general legal principle, the judgment of the Court of Appeal of Bermuda would have no binding effect under Hong Kong law.

9. In any event, in the case of Hong Kong, we would like to point out that, under the statutory regime as set out in section 5 of the Inland Revenue (Disclosure of Information) Rules (Cap. 112 sub. leg. BI), IRD must give prior notification to the subject person before sending out the information to the requesting party, except under special circumstances, e.g., when all the known address of the person are inadequate for giving notification. The person will have the right to review the information and request amendments if the information is factually incorrect. These notification and review mechanisms are not commonly found in other jurisdictions (including Bermuda), and offer additional and comprehensive safeguards to taxpayers in Hong Kong. OECD has made it clear that any such notification procedures should not be applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting party.

**(d) Any trend for making "Tax Examinations Abroad" mandatory?**

10. As explained at the meeting on 27 October 2015, as a matter of policy, we will not accede to any requests for tax examinations abroad, i.e. representatives of one Contracting Party will not be permitted to conduct tax examinations in the territory of another Contracting Party. As one of safeguard measures adopted by Hong Kong, the relevant article in the OECD Model Text has not been incorporated into our TIEAs. This is allowed by the OECD Model Text, which has made it clear that the decision of whether to allow such examinations lies exclusively in the hands of the requested party.

11. In the above regard, the provisions on tax examinations abroad are not considered mandatory under the standard of the Peer Review Group of the Global Forum. So far, we are not aware of any development at the international level which seeks to turn acceptance of tax examinations abroad into a mandatory requirement.

Financial Services and the Treasury Bureau  
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