

立法會
Legislative Council

LC Paper No. LS92/17-18

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 14 September 2018**

Tabling in LegCo : Council meeting of 10 October 2018

Amendment to be made by : Council meeting of 7 November 2018 (or that of 28 November 2018 if extended by resolution)

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Republic of India) Order (L.N. 155)

Inland Revenue (Double Taxation Relief with respect to Taxes on Income and Prevention of Tax Evasion and Avoidance) (Republic of Finland) Order (L.N. 156)

Under section 49(1A) of the Inland Revenue Ordinance (Cap. 112), the Chief Executive ("CE") in Council may, by order, declare that the arrangements specified in the order have been made with the government of any territory outside Hong Kong for the purposes of affording relief from double taxation and/or exchanging information in relation to any tax imposed by the laws of Hong Kong or the territory concerned.

2. L.N. 155 and L.N. 156 are made by CE in Council under section 49(1A) of Cap. 112 to give effect to the following Comprehensive Avoidance of Double Taxation Agreements ("CDTAs") respectively:

- (a) the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China ("HKSARG") and the Government of the Republic of India ("India") for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("India Agreement") signed on 19 March 2018 together with its Protocol; and

- (b) the Agreement between HKSARG and the Government of the Republic of Finland ("Finland") for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance ("Finland Agreement") signed on 24 May 2018 together with its Protocol.

3. According to paragraph 3 of the Legislative Council ("LegCo") Brief (File Ref: TsyB R2 183/800-1-1/29/0 (C) and TsyB R2 183/800-1-1/37/0 (C)) issued by the Financial Services and the Treasury Bureau on 12 September 2018, while 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 residents' income derived from Hong Kong. Although many jurisdictions provide their residents with unilateral tax relief for the Hong Kong tax they paid on income derived therefrom, CDTAs will enhance the certainty in respect of the elimination of double taxation. Besides, the tax relief provided under CDTAs may exceed the level provided unilaterally by the jurisdictions concerned.

4. For the purposes of section 49(1A) of Cap. 112, L.N. 155 and L.N. 156 declare respectively that the following arrangements have been made for the purposes of affording relief from double taxation and exchanging information in relation to any tax imposed by the laws of Hong Kong or the territories concerned, and that it is expedient that those arrangements should have effect:

- (a) arrangements in Articles 1 to 30 of the India Agreement and Paragraphs 1 to 6 of the Protocol to the India Agreement; and
- (b) arrangements in Articles 1 to 29 of the Finland Agreement and Paragraphs 1 to 3 of the Protocol to the Finland Agreement.

5. The provisions in the above Agreements set out the allocation of taxing rights between Hong Kong and the respective jurisdictions and the relief on tax rates on different types of income. Members may refer to the summaries at Annexes D and E of the LegCo Brief for further details.

6. The effects of the declarations referred to in paragraph 4 above are as follows:

- (a) the arrangements have effect in relation to tax under Cap. 112 despite anything in any enactment; and
- (b) the arrangements, for the purposes of any provision of those

arrangements that require disclosure of information concerning tax of India and Finland, have effect in relation to any tax of the respective jurisdictions that is the subject of that provision.

7. Each Agreement contains an article on exchange of information which is based on the Organisation for Economic Cooperation and Development ("OECD") 2004 version of the Exchange of Information ("EoI") Article. A sample EoI Article was presented to the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009 vide LC Paper No. CB(1)466/09-10(02). While the EoI arrangements under the India Agreement and Finland Agreement are consistent with those under the sample EoI Article in certain aspects (such as requested information must be foreseeably relevant and information received under the CDTA shall be treated as secret), we note that the scope of disclosure and use of information under the two Agreements¹ are different from the sample EoI Article in the following aspects:

- (a) information obtained under these agreements may be used for non-tax related purposes if certain conditions are satisfied;²
- (b) information may be disclosed to certain bodies specified in the India Agreement ("specified bodies");³ and
- (c) there is a duty to disclose information which pre-dates the day on which the India Agreement has effect ("pre-date information") under the said agreement.⁴

8. We have sought clarifications from the Administration on the reasons for the above differences with the sample EoI Article. The Administration's explanation is summarized below:

- (a) It is the Administration's policy that the use of information exchanged for non-tax related purposes should only be allowed when such use is allowed under the laws of both contracting parties and the tax authority of the supplying party authorizes such use. As envisaged by OECD, the sharing of tax information exchanged is only meant for certain high priority matters such as those for combating money laundering, corruption and terrorist financing.

¹ See Article 26 of the India Agreement and Paragraph 5 of the Protocol to the Agreement, and Article 25 of the Finland Agreement and Paragraph 3 of the Protocol to the Agreement.

² See Article 26(2) of the India Agreement and Article 25(2) of the Finland Agreement.

³ Under Paragraph 5(b) of the Protocol to the India Agreement, these bodies are Parliamentary Committees, the Special Investigation Team constituted by Government and any other oversight bodies mutually agreed upon in writing.

⁴ See paragraph 5(c) of the Protocol to the India Agreement.

- (b) Under the laws of Hong Kong, tax information may only be used for limited non-tax related purposes (such as the recovery of proceeds from drug trafficking, organized and serious crimes and terrorist acts). It follows that in reality, information received under the India and Finland Agreements may only be used for the said limited non-tax related purposes if India and Finland also have similar laws permitting the use of tax information for the said non-tax related purposes.
- (c) On every occasion of intended use of tax information for such specified non-tax related purposes, the tax authority of the treaty partners concerned have to seek prior authorization from the Inland Revenue Department ("IRD"). IRD will only indicate consent to treaty partners for such use if such use of information is covered by the current exemption provided under section 58 of the Personal Data (Privacy) Ordinance (Cap. 486) in relation to crimes under the laws of a place outside Hong Kong with which Hong Kong has legal or law enforcement cooperation.
- (d) In relation to disclosure of tax information to oversight bodies of the persons or authorities concerned with the assessment or collection of, the enforcement or prosecution in respect of and the determination of appeals in relation to taxes, the Administration will not allow such disclosure unless there are legitimate reasons given by the treaty partners and, where applicable, such oversight bodies are positively listed in the relevant agreement or its protocol. The oversight bodies concerned are subject to the safeguards which are applicable to the tax authorities for the protection of taxpayers' privacy and confidentiality of the information exchanged. In the case of the India Agreement, the bodies specified therein were added pursuant to India's request so as to fulfil the requirements of its domestic law.
- (e) The provision on exchange of pre-date information was added to the India Agreement upon India's request and after taking into account that such information is foreseeably relevant for a taxable period or taxable event following the date on which the relevant CDTA comes into effect.

9. We have also sought information on other legal aspects of the above agreements, including the funding requirements for an activity to be considered as "substantially supported by public funds" under Article 18 of the India Agreement, an illustration on the operation of the exception as stated in

the anti-abuse provision expressly provided in Article 21 of the Finland Agreement, and the reason for not incorporating similar exceptions in the India Agreement.⁵ According to the Administration, public funds should account for more than half of the total funding support for activities to be considered as substantially supported by public funds under Article 18 of the India Agreement. In relation to the above exception in the Finland Agreement, the Administration has explained that the drafting approaches adopted by the Finland Agreement and the India Agreement to prevent fiscal evasion are different and considers it unnecessary to provide a similar exception in the India Agreement.

10. As advised by the Clerk to Panel on Financial Affairs, the Panel has not been consulted on L.N. 155 and L.N. 156.

11. L.N. 155 and L.N. 156 come into operation on 30 November 2018.

Concluding Remarks

12. Subject to Members' views on the matters mentioned in paragraphs 7 to 9 above, no difficulties have been identified in the legal and drafting aspects of L.N. 155 and L.N. 156.

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⁵ See, for example, Articles 10(6), 11(8), 12(7), 13(7) and 14(7) of the India Agreement.