

**Subcommittee on
Two Orders Made under Section 49(1A) of the
Inland Revenue Ordinance and Gazetted on 14 September 2018**

**List of follow-up actions arising from the discussion
at the meeting on 19 October 2018**

Government's Responses

At the meeting of the Subcommittee held on 19 October 2018, the Administration was requested to provide supplementary information in respect of the exchange of information (“EoI”) arrangement under the two Comprehensive Avoidance of Double Taxation Agreements (“CDTAs”) signed with India and Finland as well as the interface with the Mutual Legal Assistance (“MLA”) arrangement under the agreements on MLA in criminal matters (“MLA Agreements”). This note sets out the responses of the Administration.

EoI arrangement under CDTAs

2. The EoI arrangement under the CDTAs has been an integral part of the CDTAs signed by Hong Kong. The use of exchanged information for non-tax related purposes was previously an optional provision in the EoI Article in the Model Tax Convention on Income and on Capital (“Model Tax Convention”) promulgated by the Organisation for Economic Co-operation and Development (“OECD”). It has become an integral provision in the 2012 version of the EoI Article in the Model Tax Convention. The international community, including our potential CDTA partners, would expect such provision to be incorporated into new CDTAs in line with the prevailing international requirement.

3. The CDTAs with India and Finland are the first two CDTAs signed by Hong Kong which allow the use of exchanged information for limited non-tax related purposes. Hong Kong has not received any requests for the use of exchanged information for non-tax related purposes before.

4. **The EoI arrangement under the CDTAs and the MLA arrangement under the MLA Agreements are two separate regimes independent of each other.** MLA in criminal matters is a form of international legal cooperation allowing governments to render assistance to each other in the investigation and prosecution of criminal offences as well as the restraint and confiscation of proceeds of crimes. MLA requests to Hong Kong are handled by the Department of Justice (“DoJ”) in accordance with the

relevant provisions of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (“MLAO”)¹. While Hong Kong has signed MLA Agreements with India and Finland, the MLA Agreements concerned do not prevent Hong Kong from providing assistance pursuant to other agreements, arrangements or practices, including CDTAs².

Handling EoI requests under CDTAs

5. **An EoI must be conducted for tax purposes in accordance with the provision of a relevant CDTA.** The requesting party must first demonstrate that the information requested is foreseeably relevant to the application of the provisions of the CDTA or the administration or enforcement of the domestic laws of the contracting parties concerning taxes imposed on the parties. The competent authorities (i.e. the Commissioner of Inland Revenue (“CIR”) or his authorised representative where Hong Kong is concerned) **will not entertain any request for information based on purely non-tax related grounds.**

6. Upon receipt of an EoI request, the Inland Revenue Department (“IRD”) will examine, with reference to the particulars provided by the requesting party, whether the information requested is “foreseeably relevant” according to the provisions of the relevant CDTA as well as the Inland Revenue (Disclosure of Information) Rules (Cap. 112BI) (“Disclosure Rules”). The particulars that a CDTA partner has to provide in its EoI request are set out in the Schedule to the Disclosure Rules (see **Annex**). They include, among others, the purpose of the disclosure request, the identity of the person who is the subject of the request, a statement about the relevance of the information to the purpose of the disclosure request, a statement that the disclosure request complies with the relevant agreement, etc. If the conditions are not fulfilled, the IRD will not approve the EoI request.

¹ A request for assistance should be made by an appropriate authority of a place outside Hong Kong to the Secretary for Justice (“SJ”). A request should contain the necessary information stipulated in section 8 of the MLAO and meet the requirements for the type of assistance sought as stipulated in the MLAO. Upon satisfying that the requirements of the MLAO are met and that the various grounds of refusal set out in the MLAO do not apply, the SJ may authorise the taking of steps to obtain evidence or provide assistance, including the making of applications in court, if necessary.

² Please refer to Article III of the MLA Agreement with India under the Mutual Legal Assistance in Criminal Matters (India) Order (Cap. 525AD) and Article 3 of the MLA Agreement with Finland under the Mutual Legal Assistance in Criminal Matters (Finland) Order (Cap. 525Y).

Notification and review mechanism

7. In handling an approved EoI request, the IRD will notify the person who is the subject of the request in writing of (a) the nature of the information requested by a CDTA partner and (b) his right to request, within 14 days after the date of notification, a copy of the information that the IRD is prepared to disclose to the CDTA partner concerned (“Relevant Information”). Within 21 days after the IRD has provided a copy of the Relevant Information, the person may request the CIR to amend any part of the Relevant Information on the ground that certain information is factually incorrect or does not relate to him. The CIR may make full amendment, partial amendment or no amendment. If the person is dissatisfied with the CIR’s decision, he may, within 14 days after the CIR’s notice of decision, further invite the Financial Secretary to direct the CIR to make the amendments so requested. If the person is aggrieved by any of the administrative decisions, he may apply to the court for judicial review.

Use of exchanged information for non-tax related purposes

8. Information exchanged for tax purposes shall not be used for purposes other than those for which it has been exchanged. If the receiving party intends to use the exchanged information for non-tax related purposes, the OECD’s requirement stipulates that this should only be allowed where **such use is allowed under the laws of both contracting parties and the competent authority of the supplying party authorises such use**. As envisaged by the OECD, the sharing of exchanged tax information is only meant for certain high priority matters, such as those for combating money laundering, corruption or terrorism financing.

9. Under the laws of Hong Kong, tax information may only be used for limited non-tax related purposes, covering purposes relating to recovery of proceeds from drug trafficking, organised and serious crimes and terrorist acts under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), the Organised and Serious Crimes Ordinance (Cap. 455) and the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) respectively³. Hence, the competent authorities of the CDTA partners may only use the tax information exchanged under the CDTAs for the said limited non-tax related purposes if

³ Under these Ordinances, a person with relevant knowledge or suspicion must disclose that knowledge or suspicion or related information to an authorised officer (e.g. a police officer and a member of the Customs and Excise Service) who in turn may disclose the relevant information to the law enforcement authorities of any place outside Hong Kong for the purposes of combating drug trafficking or crime or preventing and suppressing terrorist financing.

they also have similar laws permitting the use of tax information for the same purposes. They cannot use the tax information exchanged for other purposes even if permitted under their laws because to do so will go beyond the permitted use under the laws of Hong Kong.

10. In addition, on every occasion where the requesting party would like to use the exchanged tax information for such specified non-tax related purposes, the competent authorities of the requesting party have to seek prior authorisation from the IRD, which will then consult relevant law enforcement agencies and the DoJ. The IRD will only give consent to the competent authorities of the CDTA partners if (a) the relevant government departments raise no objection to the disclosure and (b) such use of information is permitted 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.

11. If Hong Kong considers that the requesting party does not comply with its duties regarding the confidentiality of the information exchanged under the EoI Article, Hong Kong may suspend assistance under the EoI Article until such time as proper assurance is given by the requesting party that those duties will be honoured. In extreme cases, Hong Kong can terminate the relevant CDTA and bring the case to the OECD.

**Financial Services and the Treasury Bureau
Inland Revenue Department
October 2018**

**SCHEDULE to the Inland Revenue (Disclosure of Information) Rules
(Cap. 112BI)**

PARTICULARS TO BE CONTAINED IN DISCLOSURE REQUEST

1. The identity of the person or authority that makes the disclosure request (“competent authority”).
2. The purpose of the disclosure request and the tax type concerned.
3. The identity of the person who is the subject of the disclosure request.
4. A statement on the information requested, including –
 - (a) the nature of the information;
 - (b) the relevance of the information to the purpose of the disclosure request; and
 - (c) the form in which the competent authority wishes to receive the information from the Commissioner of Inland Revenue (“Commissioner”).
5. The ground for believing that the information requested is held by the Commissioner or is in the possession or control of a person in Hong Kong.
6. The name and address of any person believed to have possession or control of the information requested.
7. A statement that –
 - (a) the disclosure request complies with the laws and administrative practices of the requesting government’s territory;

(b) the competent authority is able to obtain the information under the laws of the requesting government's territory or in the normal course of the administrative practices of the requesting government's territory; and

(c) the disclosure request complies with the relevant arrangements.

8. A statement that the requesting government has pursued all means available in its territory to obtain the information, including getting the information directly from the person who is the subject of the disclosure request.

9. The tax period for which information is requested.

10. The period within which the competent authority wishes the disclosure request to be met.

11. If applicable, a statement –

(a) confirming that the competent authority is of the opinion that notification to the person who is the subject of the disclosure request is likely to undermine the chance of success of the investigation in relation to which the request is made; and

(b) giving reasons for the opinion.

12. If applicable, a statement –

(a) confirming that the competent authority is of the opinion that prior notification to the person who is the subject of the disclosure request is likely to frustrate the timely enforcement of the tax laws of the requesting government's territory; and

(b) giving reasons for the opinion.
