



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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30 November 2018

Ms YONG Pui Wan, Pecvin
Principal Assistant Secretary for
Financial Services and the Treasury (Treasury) (R1)
Financial Services and the Treasury Bureau
The Treasury Branch
24/F, West Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms YONG,

Inland Revenue (Amendment) (No. 7) Bill 2018

Thank you for your reply dated 29 November 2018. We have the following additional enquiries:

Interim administrative measures to accept tax returns prepared on a fair value basis

- (a) In *Nice Cheer Investment Ltd v. Commissioner of Inland Revenue* ("CIR") (2013) 16 HKCFAR 813, the Court of Final Appeal ("CFA") held that on a proper construction of the existing provisions of Part 4 of the Inland Revenue Ordinance (Cap. 112), "profits" connoted actual or realized (not potential or anticipated) profits so that unrealized revaluation gains were *not* assessable to tax. However, tax assessments on a fair value basis involving unrealized gains of financial instruments appear to have been made by CIR at the relevant taxpayers' election from 2013/14 to 2017/18. In view of CFA's decision, please clarify whether CIR's interim administrative measure in charging tax on unrealized gains was *ultra vires* the existing provisions of Part 4 of Cap. 112, and if not, why not.

- (b) In *Woolwich Equitable Building Society v. Inland Revenue Commissioners* ("IRC") [1993] A.C. 70, the House of Lords ("HL") held that money paid as tax pursuant to an *ultra vires* demand by a public authority was recoverable as of right because there could be no taxation without parliamentary authority under article 4 of the Bill of Rights 1689. In *Deutsche Morgan Grenfell Group Plc v. IRC* [2007] 1 A.C. 558, HL further held that claimants may rely on mistake as a reason for restitution when seeking to recover money paid as tax which was not due. Please consider whether CIR's interim administrative measure in demanding or charging profits tax on unrealized profits or gains would be subject to:
- (i) judicial review; and/or
 - (ii) a restitutionary claim on the grounds that CIR's demand was *ultra vires* or a nullity, or that the taxpayer's tax payment was mistaken.
- (c) To address the above risks of legal challenge, please re-consider whether the Bill should include saving provisions to cover CIR's interim administrative measures which appear to be contrary to CFA's judgment.

Please reply to the above in both languages **as soon as practicable**.

Yours sincerely,



(Bonny LOO)
Assistant Legal Adviser

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