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on 11 October 2019**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 4 October 2019**

Tabling in LegCo : Council meeting of 16 October 2019

Amendment to be made by : Council meeting of 13 November 2019 (or that of 4 December 2019 if extended by resolution)

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Kingdom of Cambodia) Order (L.N. 117)

Specification of Arrangements (The Mainland of China) (Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income) (Fifth Protocol) Order (L.N. 118)

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. L.N. 117 and L.N. 118 are both made by CE in Council under section 49(1A) of Cap. 112.

L.N. 117

2. L.N. 117 gives effect to the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Kingdom of Cambodia ("Cambodia") for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("Cambodia Agreement") signed on 26 June 2019 together with its Protocol.

3. According to paragraph 4 of the Legislative Council ("LegCo") Brief (File Ref: TsyB R2 183/800-1-1/17/0 (C) and TsyB R2 183/800-1-1/65/0 (C)) issued by the Financial Services and the Treasury Bureau on 2 October 2019, 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 paid on income derived therefrom, comprehensive avoidance of double taxation agreements ("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. 117 declares that the arrangements in Articles 1 to 29 of the Cambodia Agreement and paragraphs 1 and 2 of the Protocol to the Cambodia Agreement ("Protocol to the Agreement") 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 Cambodia, and that it is expedient that those arrangements should have effect.

5. The provisions in the Cambodia Agreement set out the allocation of taxing rights between Hong Kong and Cambodia and the relief on tax rates on different types of income. The Cambodia 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 Cambodia Agreement are consistent with those under the sample EoI Article, it is noted that a specific provision is included in the Protocol to the Agreement. The specific provision provides that the Cambodian competent authority may disclose information in accordance with its confidentiality provisions and the EoI Article to the Legislature of Cambodia (National Assembly and Senate) and government bodies of Cambodia with a supervisory function over tax administration and enforcement. According to paragraph 15(c) of the LegCo Brief, the specific provision is included at the request of the Cambodian side. Members may refer to the summary of main provisions at Annex E to 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 the arrangements that requires disclosure of information concerning tax of Cambodia, have effect in relation to any tax of Cambodia that is the subject of that provision.

L.N. 118

7. On 21 August 2006, the Mainland of China and the Hong Kong Special Administrative Region ("the Parties") entered into an arrangement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income ("the Mainland Arrangement") together with a protocol to the Mainland Arrangement ("the First Protocol"). By the Specification of Arrangements (The Mainland of China) (Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income) Order (Cap. 112AY) made in October 2006, the arrangements in Articles 1 to 27 of the Mainland Arrangement and paragraphs 1 to 3 of the First Protocol are specified as double taxation relief arrangements under section 49 of Cap. 112.

8. Subsequent to the making of the Mainland Arrangement on 21 August 2006, the Parties have further signed the Second Protocol, the Third Protocol and the Fourth Protocol to the Mainland Arrangement on 30 January 2008, 27 May 2010 and 1 April 2015 respectively which are implemented in Hong Kong by three pieces of subsidiary legislation under Cap. 112. On 19 July 2019, the Parties signed the Fifth Protocol to the Mainland Arrangement.

9. L.N. 118 declares that the arrangements in the Fifth Protocol have been made, and that it is expedient that those arrangements should have effect. The effects of the declarations 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 the arrangements that requires disclosure of information concerning tax of the Mainland of China, have effect in relation to any tax of the Mainland of China that is the subject of that provision.

10. The Fifth Protocol incorporates into the Mainland Arrangement and its previous four protocols measures to prevent treaty abuse and artificial avoidance of permanent establishment status, which form part of the Base and Profit Shifting package promulgated by OECD in October 2015, to ensure that the Mainland Arrangement follows the latest international standard. The major provisions of the Fifth Protocol include, among others:

- (a) modifying the rule in Article 4 of the Mainland Arrangement for determining residence in case of dual residence of a person other than an individual (Article 2);
- (b) amending Article 5 of the Mainland Arrangement which sets out the conditions under which an enterprise of one side is deemed to have a permanent establishment in the other side in respect of any activities which a person other than an independent agent undertakes for the enterprise (Article 3); and
- (c) repealing the anti-abuse rule in Article 4 of the Fourth Protocol and adding a new Article 24A to the Mainland Arrangement to provide that a benefit under the Mainland Arrangement shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Mainland Arrangement (Article 6).

11. In addition, the Fifth Protocol adds a new Article 18A (Teachers and Researchers) to the Mainland Arrangement ("Teachers Article"). Under the Teachers Article, where an eligible individual is employed by a recognized educational or scientific research institution in one side and is present in the other side for the primary purpose of teaching or research at a recognized educational or scientific research institution of that other side, the remuneration derived by the individual in respect of such teaching or research to the extent it is paid by or on behalf of the individual's employer shall not be taxed in that other side for a period not exceeding three years, provided that such remuneration is subject to tax in the side where the individual is employed and (in relation to remuneration for research) the research is undertaken in the public interest (Article 5).

12. It is noted that no changes have been made by the Fifth Protocol to the EoI provisions in the Mainland Arrangement.

Consultation

13. According to paragraph 23 of the LegCo Brief, the business and professional sectors have all along supported the Administration's policy to conclude more CDTAs with the trading and investment partners of Hong Kong. The heads of universities have also urged the Administration to conclude a Teachers Article with the Mainland.

14. As advised by the Clerk to Panel on Financial Affairs, the Panel has not been consulted on L.N. 117 and L.N. 118.

15. L.N. 117 and L.N. 118 come into operation on 6 December 2019.

Prohibition on Face Covering Regulation

(L.N. 119)

16. Section 2(1) of the Emergency Regulations Ordinance (Cap. 241) provides that on any occasion which the CE in Council may consider to be an occasion of emergency or public danger, CE in Council may make any regulations whatsoever which he may consider desirable in the public interest.

17. L.N. 119 is made by CE in Council under section 2 of Cap. 241 to:

- (a) prohibit the use of any facial covering (i.e. a mask or any other article of any kind (including paint) that covers all or part of a person's face) by a person that is likely to prevent identification while the person is at an unlawful assembly¹ (whether or not the assembly is a riot); an unauthorized assembly²; a public meeting (of 50 persons or more) or public procession (of 30 persons or more) in respect of which the Commissioner of Police is notified and does not prohibit the holding of the meeting or object to the procession under section 7(1) or 13(1) of the Public Order Ordinance (Cap. 245);
- (b) provide that a person who contravenes paragraph (a) commits an offence and is liable on conviction to a fine at level 4 (i.e. \$25,000) and to imprisonment for one year;

¹ Under section 18(1) of the Public Order Ordinance (Cap. 245), an unlawful assembly refers to the situation when three or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace.

² Under section 17A(2) of Cap. 245, a public meeting or procession is an unauthorized assembly if:

- (a) the public meeting or procession is one which the Commissioner of Police has to be notified before taking place, but the Commissioner of Police is either not notified or, if notified, prohibits or objects to it;
- (b) three or more persons taking part in or forming part of a public gathering refuse or wilfully neglect to obey an order given to control and direct the conduct of all public gatherings, which is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others; or
- (c) three or more persons taking part in or forming part of a public meeting, public procession or public gathering, or other meeting, procession or gathering of persons refuse or wilfully neglect to obey an order given to prevent, stop, disperse or vary the place or route of any public gathering if it is likely to cause or lead to a breach of the peace.

- (c) provide for a defence of lawful authority or reasonable excuse for the offence, including that the person (i) was engaged in a profession or employment and was using the facial covering for the physical safety of the person while performing an act or activity connected with the profession or employment; (ii) was using the facial covering for religious reasons; or (iii) was using the facial covering for a pre-existing medical or health reason;
- (d) empower a police officer, who reasonably believes that a person using a facial covering in a public place is likely to prevent identification, to stop the person and require the person to remove the facial covering to enable the officer to verify the identity of that person ("the requirement"), and to remove the facial covering if the person fails to comply with the requirement;
- (e) provide that a person who fails to comply with the requirement in paragraph (d) commits an offence and is liable on conviction to a fine at level 3 (i.e. \$10,000) and to imprisonment for six months; and
- (f) provide for an extension of the prosecution time limit for an offence under paragraph (b) or (e) to 12 months beginning on the date on which the offence is committed.

18. According to paragraph 5 of the LegCo Brief issued by the Security Bureau in October 2019 (File Ref.: SBCR 3/3285/57), the Administration is invoking Cap. 241 on the public danger ground, not the emergency ground. According to paragraph 3 of the LegCo Brief, the Administration is of the view that the prohibition on facial covering in public assemblies would be essential in public interest in restoring public peace, and is rationally connected to protecting public order and public safety.

19. L.N. 119 came into operation on 5 October 2019. By virtue of section 2(3) of Cap. 241, L.N. 119 shall continue in force until repealed by order of CE in Council. According to paragraph 10 of the LegCo Brief, since L.N. 119 is meant to deal with the situation of public danger at the time, approval would be sought from CE in Council to repeal L.N. 119 when the prevailing public danger drops to a level which no longer justifies L.N. 119.

20. In view of the provision in section 2(3) of Cap. 241, a question has arisen as to whether L.N. 119 may only be repealed by CE in Council. It is noted that this would be one of the issues to be considered by the Court of First Instance ("CFI") in the impending judicial review proceedings on the legality

and constitutionality of L.N. 119.³ Subject to CFI's decision on the issue, the judgment in *R v To Lam Sin* (1952) 36 HKLR 1 would be relevant. In that case, the Full Court decided, among others, that although the delegation of the powers to make regulations under section 2 of Cap. 241 may be wide, LegCo retains a very firm and close control over regulations so made by virtue of the then Interpretation Ordinance (Cap. 1) in that such regulations had to be tabled at the first meeting of LegCo after their publication in the Gazette and LegCo may repeal or amend any of them.⁴ Under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), subsidiary legislation tabled in LegCo may be amended (including repealed) by resolution of LegCo in any manner whatsoever consistent with the power to make such subsidiary legislation.

21. According to paragraph 17 of the LegCo Brief, the Administration considers that given the exigency of the situation, public consultation is not feasible.

22. As advised by the Clerk to the Panel on Security, the Panel has not been consulted on L.N. 119.

Concluding observations

23. The Legal Service Division is scrutinizing the legal and drafting aspects of L.N. 117 to L.N. 119. A further report will be provided if necessary.

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LS/S/37/18-19 & LS/S/38/18-19

³ HCAL 2945/2019.

⁴ See *R v To Lam Sin* (1952) 36 HKLR 1, at page 14. The case was considered by the Court of First Instance in HCAL 2945/2019 when considering an application for the grant of interim relief to suspend the operation of L.N. 119 pending the hearing of the application for leave to apply for judicial review. As stated in paragraph 16 of the Reasons for Decision dated 8 October 2019 in HCAL 2945/2019, the court was given to understand that, if during the negative vetting procedure, LegCo resolves to repeal or amend L.N. 119, such resolution will be given effect.