

L.N. 118 of 2019

**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**

(Made by the Chief Executive in Council under section 49(1A) of the
Inland Revenue Ordinance (Cap. 112))

1. Commencement

This Order comes into operation on 6 December 2019.

2. Interpretation

In this Order—

Fifth Protocol (《第五議定書》) means The Fifth Protocol to the Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (a translation of “《內地和香港特別行政區關於對所得避免雙重徵稅和防止偷漏稅的安排》第五議定書”), done in duplicate at Beijing on 19 July 2019 in the Chinese language.

3. Declaration under section 49(1A)

(1) For the purposes of section 49(1A) of the Ordinance, it is declared—

- (a) that the arrangements in the Fifth Protocol have been made; and

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- (b) that it is expedient that those arrangements should have effect.
 - (2) The Chinese text of the Fifth Protocol is reproduced in the Chinese text of the Schedule. An English translation of the Fifth Protocol is set out in the English text of the Schedule.
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Schedule

[s. 3]

The Fifth Protocol to the Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

(English Translation)

The Mainland of China and the Hong Kong Special Administrative Region have agreed to amend the “Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income” (hereafter the “Arrangement”), done at Hong Kong on 21 August 2006, and the related protocols as follows:

Article 1

To repeal the Preamble to the Arrangement and substitute:

“The Mainland of China and the Hong Kong Special Administrative Region, desiring to further develop their economic relationship and to enhance their co-operation in tax matters, intending to eliminate double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining tax reliefs provided in this

Arrangement for the indirect benefit of residents of third tax jurisdictions), have agreed as follows:”

Article 2

To repeal paragraph 3 of Article 4 of the Arrangement and substitute:

“3. Where by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Sides, the competent authorities of both Sides shall endeavour to determine by mutual agreement the Side of which such person shall be deemed to be a resident for the purposes of this Arrangement, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Arrangement, except to the extent and in such manner as may be agreed upon by the competent authorities of both Sides.”

Article 3

1. To repeal paragraphs 5 and 6 of Article 5 of the Arrangement and substitute:

“5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in One Side on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are:

- (1) in the name of the enterprise; or
- (2) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or
- (3) for the provision of services by that enterprise,

that enterprise shall be deemed to have a permanent establishment in that One Side in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make the fixed place of business a permanent establishment under the provisions of that paragraph.

6. Paragraph 5 shall not apply where the person carries on business in One Side as an independent agent and acts in that One Side on behalf of an enterprise of the Other Side in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which that person is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.”

2. To add paragraph 8 to Article 5 of the Arrangement:

“8. For the purposes of this Article, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50% of the beneficial interest in the other (or, in the case of a company, more than 50% of the voting rights and value of the

company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50% of the beneficial interest (or, in the case of a company, more than 50% of the voting rights and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.”

Article 4

To repeal paragraph 4 of Article 13 of the Arrangement, paragraph 2 of the Protocol to the Arrangement and Article 4 of the Second Protocol to the Arrangement, and substitute the following for paragraph 4 of Article 13 of the Arrangement:

“4. Gains derived by a resident of One Side from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the Other Side if, at any time during the three years preceding the alienation, these shares or comparable interests derived more than 50% of their value directly or indirectly from immovable property, as defined in Article 6, situated in that Other Side.”

Article 5

1. To repeal paragraph 1 of Article 14 of the Arrangement and substitute:

“1. Subject to the provisions of Articles 15, 17, 18, 18A, 19 and 20, salaries, wages and other similar remuneration derived by a resident of One Side in respect of an employment shall be taxable only in that One Side unless the employment is exercised in the Other Side. If the employment is exercised in the Other Side, such remuneration as is derived therefrom may be taxed in that Other Side.”

2. To add to the Arrangement:

“Article 18A

Teachers and Researchers

1. Where an individual is employed by a university, college, school in One Side or by an educational institution or scientific research institution recognized by the Government of One Side and is, or was immediately before visiting the Other Side, a resident of that One Side and is present in that Other Side for the primary purpose of teaching or research at a university, college, school in that Other Side or at an educational institution or scientific research institution recognized by the Government 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 employer of that One Side, shall not be taxed in that Other Side for a period of three years, provided that such remuneration is subject to tax in that One Side.

2. The period of “three years” provided in paragraph 1 of this Article shall begin on the date of the individual’s first arrival in the Other Side for the above purpose or the date from which the provisions begin to apply under paragraph 2 of Article 7 of this Protocol, whichever is the later.

3. Paragraph 1 of this Article shall not apply to income derived from research if such research is undertaken not in the public interest but primarily for the private benefit of a specific person or persons.”

Article 6

To repeal Article 4 of the Fourth Protocol to the Arrangement and add to the Arrangement:

“Article 24A

Entitlement to Benefits under the Arrangement

Notwithstanding the other provisions of this Arrangement, a benefit under this 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 this Arrangement.”

Article 7

1. This Protocol shall, upon the written notifications by both Sides of the completion of their respective required approval procedures, enter into force on the date of the later of these notifications.

2. The provisions of this Protocol shall apply:

- (1) in the Mainland of China, to income derived in the taxable years beginning on or after 1 January in the calendar year next following the year in which this Protocol enters into force;

- (2) in the Hong Kong Special Administrative Region, to income derived in the years of assessment beginning on or after 1 April in the calendar year next following the year in which this Protocol enters into force.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto, have signed this Protocol.

DONE in duplicate at Beijing on the 19th day of July 2019 in the Chinese language.

[SIGNED]

Wendy LEUNG
Clerk to the Executive Council

COUNCIL CHAMBER

17 September 2019

Explanatory Note

The Mainland of China and the Hong Kong Special Administrative Region (*both Sides*) entered into an arrangement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (*Arrangement*) together with a protocol to the Arrangement on 21 August 2006. Both Sides entered into the Second Protocol, the Third Protocol and the Fourth Protocol to the Arrangement on 30 January 2008, 27 May 2010 and 1 April 2015 respectively. On 19 July 2019, both Sides further entered into the Fifth Protocol to the Arrangement (*Fifth Protocol*).

2. This Order specifies the arrangements in the Fifth Protocol (*arrangements*) as arrangements under section 49(1A) of the Inland Revenue Ordinance (Cap. 112), and declares that it is expedient that those arrangements should have effect. The Fifth Protocol was done in the Chinese language and is reproduced in the Chinese text of the Schedule to this Order. An English translation of the Fifth Protocol is set out in the English text of the Schedule to this Order.
3. The effects of the declaration are—
 - (a) that the arrangements have effect in relation to tax under the Inland Revenue Ordinance (Cap. 112) despite anything in any enactment; and
 - (b) that 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.