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**Paper for the House Committee Meeting
on 30 October 2020**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 23 October 2020**

Tabling in LegCo : Council meeting of 28 October 2020

Amendment to be made by : Council meeting of 25 November 2020 (or that of 16 December 2020 if extended by resolution)

Inland Revenue (Double Taxation Relief with respect to Taxes on Income and Capital and Prevention of Tax Evasion and Avoidance) (Republic of Serbia) Order (L.N. 210)

Inland Revenue (Double Taxation Relief with respect to Taxes on Income and Capital and Prevention of Tax Evasion and Avoidance) (Georgia) Order (L.N. 211)

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. 210 and L.N. 211 are made by CE in Council under section 49(1A) of Cap. 112 to give effect to the following two Comprehensive Avoidance of Double Taxation Agreements ("CDTAs") ("the two Agreements" collectively) respectively:

- (a) the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China ("HKSAR") and the Government of the Republic of Serbia ("Serbia") for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Tax Evasion and Avoidance done in August 2020 ("HK/Serbia Agreement"), together with its Protocol; and
- (b) the Agreement between HKSAR and Georgia for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Tax Evasion and Avoidance done in September and October 2020 at Georgia and Hong Kong respectively ("HK/Georgia Agreement"), together with its Protocol.

3. According to paragraph 4 of the Legislative Council ("LegCo") Brief (File Ref: TsyB R2 183/800-1-1/117/0 (C) and TsyB R2 183/800-1-1/100/0 (C)) issued by the Financial Services and the Treasury Bureau ("FSTB") on 21 October 2020, 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 jurisdiction outside Hong Kong 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, CDTAs will enhance the certainty in respect of the elimination of double taxation. Besides, the tax relief available 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. 210 and L.N. 211 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 Serbia/Georgia, and that it is expedient that those arrangements should have effect:

- (a) arrangements in Articles 1 to 30 of the HK/Serbia Agreement and paragraphs 1 to 3 of the Protocol thereto; and
- (b) arrangements in Articles 1 to 29 of the HK/Georgia Agreement and paragraphs 1 and 2 of the Protocol thereto.

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

6. According to paragraph 11 of the LegCo Brief, every CDTA entered into by Hong Kong contains an Exchange of Information ("EoI") Article to facilitate exchange of tax information for meeting the requirements of the Organisation for Economic Co-operation and Development ("OECD"). In that regard, certain safeguard measures have been built into a sample EoI Article 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 two Agreements mainly include those under the sample EoI Article (e.g. requested information must be foreseeably relevant for carrying out the provisions of the two Agreements or to the administration or enforcement of the internal laws of Hong Kong or Serbia/Georgia, and information received thereunder shall be treated as secret and shall not be disclosed to any third jurisdiction for any purpose), the Legal Service Division ("LSD") notes that the scope of disclosure and use of information under the two Agreements are different from the sample EoI Article in the following aspects:

- (a) information may be disclosed to oversight bodies of the tax authorities concerned; and

- (b) information obtained may be used for non-tax related purposes when such information is allowed to be used for such purposes under the laws of both Hong Kong and Serbia/Georgia and the competent authority of the supplying party authorizes such use.

7. As explained in paragraph 12(c) and footnote 6 of the LegCo Brief, in relation to the disclosure of information to the oversight bodies of the tax authorities concerned, the two Agreements follow the formulation of the Convention on Mutual Administrative Assistance in Tax Matters ("Convention"), which was promulgated by OECD and entered into force in respect of Hong Kong in September 2018. Serbia and Georgia have advised that their relevant oversight bodies are the Ministry of Finance and the State Audit Office respectively. Upon LSD's enquiry as to why the relevant oversight bodies are not explicitly stated in L.N. 210 and L.N. 211, and whether Serbia and Georgia would be required to seek the written agreement from Hong Kong before adding other authorities as their oversight bodies in the future, the Administration has responded that:

- (a) the EoI Articles of L.N. 210 and L.N. 211 follow the relevant provisions of the Convention and the OECD Model Tax Convention on Income and on Capital ("MTC"), under which oversight bodies are not listed separately; and
- (b) the Convention and MTC do not require the contracting jurisdictions to seek agreement from other jurisdictions on the list of authorities that can be regarded as oversight bodies.

8. In relation to the use of information for non-tax related purposes, the Administration explained in paragraph 12(f), and footnotes 7 and 8, of the LegCo Brief that:

- (a) 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, organized and serious crimes and terrorist acts under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), the Organized and Serious Crimes Ordinance (Cap. 455) and the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) respectively. Hence, under Article 26(2) of the HK/Serbia Agreement, Serbia may only use the tax information exchanged for the said limited non-tax related purposes if Serbia also has similar laws permitting the use of tax information for the same purposes, and if the Commissioner of Inland Revenue of Hong Kong (or his authorized representative) authorizes such use. Serbia cannot use the tax information exchanged for other purposes even if permitted under Serbian laws because to do so would go beyond the permitted use under the laws of Hong Kong; and

(b) while Article 25(2) of the HK/Georgia Agreement does not expressly provide for the use of tax information exchanged for certain non-tax related purposes, this is allowed under the Convention, which is in force in both Hong Kong and Georgia. If Hong Kong or Georgia makes a request for tax information under the Convention and subsequently seeks to use such information for non-tax purposes, the restrictions under the Convention shall apply. This means that such non-tax purposes must be allowed under the laws of both Hong Kong and Georgia and the competent authority of the supplying side authorizes such use. The safeguards will operate in the same manner as outlined in paragraph 8(a) above.

9. The effect of the declarations referred to in paragraph 4 above is that:

- (a) the arrangements in the two Agreements 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 Serbia and Georgia, have effect in relation to any tax of Serbia and Georgia that is the subject of that provision.

10. According to paragraph 20 of the LegCo Brief, the business and professional sectors have all along supported FSTB's policy to conclude more CDTAs with the trading and investment partners of Hong Kong.

11. As advised by the Clerk to the Panel on Financial Affairs, the Panel has not been consulted on L.N. 210 and L.N. 211.

12. L.N. 210 and L.N. 211 come into operation on 18 December 2020.

Concluding observations

13. Subject to Members' views on the matters stated in paragraphs 7 and 8 above, no difficulties have been identified in relation to the legal and drafting aspects of the above items of subsidiary legislation.

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