

立法會
Legislative Council

LC Paper No. CB(1)960/15-16
(These minutes have been seen
by the Administration)

Ref : CB1/BC/7/15/2

Bills Committee on Inland Revenue (Amendment) Bill 2016

Minutes of fourth meeting
held on Monday, 11 April 2016, at 4:30 pm
in Conference Room 2 of the Legislative Council Complex

Members present : Hon Andrew LEUNG Kwan-yuen, GBS, JP (Chairman)
Hon James TO Kun-sun
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon CHAN Hak-kan, JP
Hon NG Leung-sing, SBS, JP
Hon Kenneth LEUNG
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP

Members absent : Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon Charles Peter MOK, JP
Hon Christopher CHEUNG Wah-fung, SBS, JP

Public Officers : **For item II**
attending

Financial Services and the Treasury Bureau

Ms Mable CHAN, JP
Deputy Secretary (Treasury)2

Mr Gary POON
Principal Assistant Secretary (Treasury)(Revenue)

Miss Crystal YIP
Assistant Secretary (Treasury)(Revenue)1

Inland Revenue Department

Mr Brian CHIU, JP
Deputy Commissioner (Technical)

Ms Peggy LEUNG
Senior Assessor (Tax Treaty)2

Department of Justice

Mr Alan CHONG
Senior Government Counsel

Ms Phyllis POON
Senior Government Counsel

Clerk in Attendance : Ms Angel SHEK
Chief Council Secretary (1)1

Staff in attendance : Ms Clara TAM
Assistant Legal Adviser 9

Ms Mandy LI
Council Secretary (1)1

Action

I. Confirmation of minutes

(LC Paper No. CB(1)770/15-16 — Minutes of the meeting held on
1 March 2016)

The minutes of the meeting held on 1 March 2016 were confirmed.

Action

II. Meeting with the Administration

Matters arising from previous meeting

(LC Paper No. CB(1)772/15-16(01) — List of follow-up actions arising from the meeting on 22 March 2016

LC Paper No. CB(1)772/15-16(02) — Administration's response to the issues raised at the meeting on 22 March 2016)

Clause-by-clause examination of the Bill

(LC Paper No. CB(1)518/15-16(01) — Marked-up copy of the Bill prepared by the Legal Service Division (Restricted to Members)

LC Paper No. CB(3)290/15-16 — The Bill

File Ref: TsyB R 183/700-6/7/0 (C) — Legislative Council Brief

LC Paper No. LS28/15-16 — Legal Service Division Report

LC Paper No. CB(1)518/15-16(03) — Background brief prepared by the Legislative Council Secretariat)

Discussion

2. The Bills Committee deliberated (index of proceedings attached at the **Annex**).

Admin Follow-up actions to be taken by the Administration

Offence relating to the signing of self-certification that was misleading, false or incorrect

3. According to paragraph 3(b) of the Administration's paper (LC Paper No. CB(1)772/15-16(02)), the Inland Revenue Department ("IRD") might contact an account holder and examine the information in the self-certification provided by that person to a reporting financial institution ("FI") for

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the purpose of automatic exchange of financial account information in tax matters, so as to establish whether the information in the self-certification was correct or not. The Administration was requested to clarify whether the account holder concerned might exercise the right of silence when being requested to make a defence in respect of the self-certification made, and if so, whether IRD would caution the account holder about his/her entitlement to this right.

Issue of search warrant

4. The new section 51B(1AAAB) of the Inland Revenue Ordinance (Cap. 112) ("IRO") provided for the powers which the Commissioner of Inland Revenue or authorized officer might exercise with a search warrant obtained from a magistrate under the new section 51B(1AAA), including entering and having free access to a place where the Commissioner or authorized officer suspected there to be any articles or data of a reporting FI or its service provider (if any), or of any other person, that might afford evidence material in assessing, among others, the liability of a person for tax of a reportable jurisdiction (subsection (1AAAB)(a)(ii)). In this connection, the Administration was requested to clarify why the liability of a person for tax of a reportable jurisdiction was not among the matters stipulated in the new section 51B(1AAA) which the Commissioner or authorized officer must satisfy the magistrate for the purpose of obtaining the search warrant.

Offences relating to reporting financial institutions

5. In connection with the offences relating to reporting FIs under the new section 80B of IRO, the Administration was requested to explain how a reporting FI might be regarded as having provided, in a knowing or reckless manner, information that was "misleading, false or inaccurate", with reference to past cases of successful prosecution for similar offences in IRO or other local legislation.

Offences of service provider

6. Regarding engagement of service provider under the new section 50H of IRO to carry out a reporting FI's obligations under the new section 50B(1), 50B(2) or 50C(1), and related offences under the new section 80D(1) to (3) whereby a service provider committed an offence if the service provider, without reasonable excuse, failed to fulfill any of the aforesaid obligations, the Administration was requested to:

- (a) elaborate on engagement of service providers by reporting FIs and the services involved, with reference to similar practices in the financial services industry;

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- (b) clarify whether and how a service provider would be solely or jointly liable if it was engaged by a reporting FI to carry out part, and not all, of the FI's obligations in the new section 50B(1), 50B(2) or 50C(1), in particular if more than one service provider was engaged by the FI to carry out the obligations;
- (c) explain whether and how the provisions in respect of the obligations and offences of service providers would be applicable to, and sufficient to catch, service providers incorporated or operating overseas and engaged by reporting FIs in Hong Kong; and
- (d) explain the intended meaning of "without reasonable excuse" in the context of the new section 80D and address members' concerns that the proposed offences appeared to be strict offences and unfair to the service providers (who might act according to the reporting FIs' instructions only), and in particular, consider whether the service providers should be held liable only if they failed to meet those requirements knowingly or recklessly.

Drafting issues

7. The Administration was requested to provide justifications as to the use of different expressions (i.e. "incorrect" and "inaccurate") in similar context in the new sections 80(2E), 80B and 80C of IRO and whether the drafting in the above sections might be aligned to achieve consistency.

(Post-meeting note: The Administration's response was issued vide LC Paper No. CB(1)830/15-16(02) on 22 April 2016.)

III. Any other business

Date of next meeting

8. The Chairman reminded members that the next meeting of the Bills Committee was scheduled for Tuesday, 26 April 2016, at 4:30 pm.

9. There being no other business, the meeting ended at 6:20 pm.

Bills Committee on Inland Revenue (Amendment) Bill 2016

**Proceedings of the fourth meeting
on Monday, 11 April 2016, at 4:30 pm
in Conference Room 2 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
Agenda Item I — Confirmation of minutes			
000145 – 000210	Chairman	The minutes of the meeting held on 1 March 2016 were confirmed. [LC Paper No. CB(1)770/15-16]	
Agenda Item II - Meeting with the Administration			
000211 – 000236	Chairman	Opening remarks	
000237 – 001425	Chairman Administration Mr James TO	<p>Briefing by the Administration on its response to the issues raised at the meeting on 22 March 2016 [LC Paper No. CB(1)772/15-16(02)]</p> <p>Mr TO reiterated his suggestion that the Inland Revenue Department ("IRD") should seek confirmation from the relevant account holder on the self-certification made before taking enforcement actions.</p> <p>The Administration explained the course of actions to be taken by IRD if an account holder was suspected to have made a false self-certification, as set out in paragraph 3 of the Administration's paper (LC Paper No. CB(1)772/15-16(02)), and pointed out that:</p> <p>(a) reporting financial institutions ("FIs") would be required to inform the account holders the purpose of obtaining the self-certification. The self-certification form would include reminder or warning to caution an account holder about his/her liabilities in relation to the self-certification; and</p> <p>(b) the account holder would commit an offence only if it was proved that he/she knew, or was reckless as to whether, the statement was misleading, false or incorrect in a material particular. It would be a very high prosecution threshold to prove mens rea of "knowingly" or "recklessly".</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>At the request of Mr TO, the Administration would provide information on whether an account holder might exercise the right to remain silent when being requested by IRD to make a defence in respect of the self-certification made to a reporting FI for the purpose of automatic exchange of financial account information in tax matters ("AEOI"), and if so, whether IRD would caution the account holder about his/her entitlement to this right.</p>	<p>The Administration to take action as paragraph 3 of the minutes</p>
<p>001426 – 001818</p>	<p>Chairman Mr Kenneth LEUNG Administration</p>	<p>Mr LEUNG enquired about:</p> <p>(a) the penalties imposed on a reporting FI which provided inaccurate information in a return furnished to IRD for AEOI purposes, and where the inaccuracy was attributable to the FI; and</p> <p>(b) whether the Administration would facilitate compliance by verifying the internal systems of reporting FIs or assisting the FIs to rectify relevant problems upon request.</p> <p>The Administration responded that:</p> <p>(a) if a reporting FI provided to IRD for AEOI purposes information that was misleading, false or inaccurate in a material particular, the FI would be subject to a fine at level 3 (i.e. same as the penalty imposable on an account holder for signing a self-certification that was misleading, false or incorrect). Heavier penalties might be imposed on the reporting FI if the offence was committed with an intent to defraud; and</p> <p>(b) the new section 51BA of the Inland Revenue Ordinance (Cap. 112) ("IRO") provided for IRD's power to access the business premises of a reporting FI or its service provider to inspect the FI's compliance system and process, and require the FI to rectify its system or process for any non-compliance. IRD would render assistance, as far as practicable, to FIs to facilitate compliance.</p>	
<p>001819 – 002025</p>	<p>Chairman Mr SIN Chung-kai Administration</p>	<p>In reply to Mr SIN, the Administration advised that, as set out in paragraph 8(a) of the Administration's paper (LC Paper No. CB(1)611/15-16(02)), there were similar offence</p>	

Time marker	Speaker	Subject(s)	Action required
		provisions in other local legislation (e.g. the Companies Ordinance (Cap. 622)) in respect of provision of information to another person (not Government) that was misleading.	
002026 – 002750	Chairman Administration Assistant Legal Adviser 9 ("ALA9") Mr Kenneth LEUNG	<p>Briefing by the Administration on the remaining parts of its response to the issues raised at the meeting on 22 March 2016 [LC Paper No. CB(1)772/15-16(02)]</p> <p>In reply to Mr LEUNG, the Administration advised that IRD could at present apply to a magistrate for a search warrant for matters relating to exchange of information ("EOI") upon request. However, IRD had not applied for such a search warrant so far.</p> <p>At the request of ALA, the Administration undertook to clarify why the liability of a person for tax of a reportable jurisdiction was not among the matters stipulated in the new section 51B(1AAA) of IRO which the Commissioner of Inland Revenue or authorized officer must satisfy a magistrate for the purpose of obtaining the search warrant under the AEOI regime.</p>	The Administration to take action as paragraph 4 of the minutes
<p>Clause-by-clause examination of the Bill [The Bill (LC Paper No. CB(3)290/15-16)] [Marked-up copy of the Bill prepared by the Legal Service Division (LC Paper No. CB(1)518/15-16(01))]</p>			
002751 – 002937	Chairman Administration	<p><u>Clause 8 — Section 61C added</u></p> <p><i>61C. Avoidance arrangement of no effect</i></p> <p><u>Clause 9 — Section 80 amended (penalties for failure to make returns, making incorrect returns, etc.)</u></p> <p>Members raised no queries.</p>	
002938 – 012623	Chairman Administration Mr Kenneth LEUNG Mr James TO ALA9 Mr NG Leung-sing Mr SIN Chung-kai	<p><u>Clause 10 — Sections 80B to 80F added</u></p> <p><i>80B. Penalties for offences relating to reporting financial institutions</i></p> <p><i>80C. Offences of persons employed by reporting financial institutions, etc.</i></p> <p><i>80D. Offences of service provider</i></p>	

Time marker	Speaker	Subject(s)	Action required
		<p>In reply to Mr LEUNG, the Administration explained that:</p> <ul style="list-style-type: none">(a) the new sections 80B, 80C and 80D of IRO provided for offences against different parties of a reporting FI (e.g. its directors, employees and service providers). Which party/parties would be held responsible (or jointly responsible), and which offence provision(s) would be applicable, would be subject to investigation and decided by the court having regard to the actual circumstances; and(b) a person employed by a reporting FI would only be held liable if he or she, with intent to defraud, caused or allowed the FI to provide misleading, false or inaccurate information in a material particular in a return furnished to IRD for AEOI. <p>Discussion on:</p> <ul style="list-style-type: none">(a) whether an account holder would be required to provide information on his/her past tax residences; and(b) whether IRD would exchange with the tax authority of a reportable jurisdiction information on accounts the holders of which were previous (not current) tax residents of that reportable jurisdiction, or changes in the tax residences of the account holders. <p>The Administration advised that:</p> <ul style="list-style-type: none">(a) reporting FIs would be required to collect and report to IRD information on reportable accounts for the reporting year only, and IRD would exchange the information only with the reportable jurisdiction concerned (i.e. the jurisdiction to which the account holder was a tax resident for the reporting year);(b) if the tax authority of a reportable jurisdiction requested information on an account holder who was no longer a tax resident of that jurisdiction, the request could be made and considered separately under the existing regime of EOI upon request in the context of a comprehensive avoidance of double taxation agreement or tax information exchange agreement; and	

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		<p>(c) use of information exchanged under AEOI for criminal proceedings (i.e. non-tax related purposes) would not be allowed unless authorized by IRD having regard to, among other factors, the requirements of relevant local legislation (e.g. the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) ("AMLO")).</p> <p>Regarding the proposed offences of service providers under the new section 80D(1) to (3) of IRO (i.e. a service provider of a reporting FI would commit an offence if the person, without reasonable excuse, failed to fulfill the FI's obligations under the new section 50B(1), 50B(2) or 50C(1)), Mr LEUNG and Mr TO considered that:</p> <p>(a) the proposed offences appeared to be strict offences and unfair to the service providers as they might act according to the reporting FIs' instructions only;</p> <p>(b) failure of a service provider to fulfill the reporting FI's obligations should be a matter of the contractual arrangement between the FI and its service provider, and hence should be subject to civil liabilities only; and</p> <p>(c) the proposed offences of service providers might render it difficult for reporting FIs to procure services to carry out the FIs' obligations under the AEOI regime.</p> <p>Mr SIN queried whether the proposed offences on service providers would in effect allow reporting FIs to shift their obligations and liabilities to the service providers. He was also worried that the diligence compliance requirements for identifying reportable accounts might give rise to undue compliance burden on the reporting FIs as well as difficulties of members of the public in opening bank accounts.</p> <p>Mr NG cautioned that whether certain information provided by reporting FIs or account holders was "misleading", "false" or "inaccurate" (or "incorrect") should be considered carefully and independently having regard to the actual circumstances. In his view, provision of inaccurate information might not necessarily involve a criminal intent.</p>	

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		<p>ALA pointed out that:</p> <p>(a) service providers would commit the offences under the new section 80D(1) to (3) of IRO only if they failed to carry out the relevant reporting FIs' obligations without reasonable excuse, and hence the offences was not to be one of strict liabilities; and</p> <p>(b) as stipulated in the new section 50H, even if a service provider was engaged, the reporting FI was not relieved from its due diligence and reporting obligations in relation to AEOI.</p> <p>In response to members' enquiries above, the Administration further explained the provisions for engagement of service providers (new section 50H of IRO) to carry out on behalf of a reporting FI's obligations under the new sections 50B(1), 50B(2) and 50C(1) and related offences (new section 80D) under the Bill.</p> <p>The Administration pointed out that:</p> <p>(a) reporting FIs could leverage on similar experiences gained from implementation of AMLO and Foreign Account Tax Compliance Act (i.e. an Act passed by the United States ("US") Congress in 2010 requiring foreign FIs including those in Hong Kong to report financial information in respect of their US clients) to carry out the due diligence and reporting requirements under the AEOI regime;</p> <p>(b) engagement of service providers was a common practice among FIs, in particular those with global operations; and such practice was permissible under the AEOI standard set by the Organisation for Economic Co-operation and Development ("OECD"); and</p> <p>(c) since a service provider might be engaged by a reporting FI to take up the obligations specified in the Bill, and these obligations were crucial for Hong Kong to deliver its obligations for AEOI, it was essential to put in place relevant offence provisions in respect of service providers.</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration agreed to provide supplementary information on:</p> <ul style="list-style-type: none"> (a) engagement of service providers by reporting FIs and the services involved; (b) the intended meaning of "without reasonable excuse" in the context of the new section 80D; (c) whether and how a service provider would be solely or jointly liable if it was engaged by a reporting FI to carry out part, and not all, of the FI's obligations, in particular if more than one service provider was engaged by the FI to carry out the obligations; (d) whether the Administration would consider holding the service providers liable only if they failed to meet the relevant requirements knowingly or recklessly (i.e. the new section 80D(4)); (e) how a reporting FI might be regarded as having provided, in a knowing or reckless manner, information that was "misleading, false or inaccurate"; (f) justifications as to the use of different expressions (i.e. "incorrect" and "inaccurate") in similar context in the new sections 80(2E), 80B and 80C of IRO, and whether the drafting in the said sections might be aligned to achieve consistency; and (g) whether and how the provisions in respect of the obligations and offences of service providers would be applicable to, and sufficient to catch, service providers incorporated or operating overseas and engaged by reporting FIs in Hong Kong. 	<p>The Administration to take action as paragraphs 5 to 7 of the minutes</p>
<p>012624 – 012759</p>	<p>Chairman Administration Mr Kenneth LEUNG</p>	<p><i>80E. Offences of directors, etc. of corporations</i></p> <p><i>80F. Miscellaneous provisions for certain offences relating to reporting financial institutions, etc.</i></p> <p>Mr LEUNG enquired about why the period within which proceedings could be brought in respect of an offence under the new section 80B, 80C, 80D or 80E of IRO, other than indictable offence, was</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>within six years after the date on which the offence was committed.</p> <p>The Administration explained that the period in question was set with reference to the period specified in section 60 of IRO for IRD to make additional tax assessments to rectify non-assessment or under-assessment of any person, which was six years after expiration of the year of assessment, and 10 years where the non-assessment or under-assessment was due to fraud or willful evasion of the person. The shorter period of six years (instead of 10 years) was adopted in the current context, taking into account that the offence under section 80B, 80C, 80D or 80E was related to the tax residents of jurisdictions outside Hong Kong.</p>	
012800 – 013214	<p>Chairman Administration Mr Kenneth LEUNG Mr James TO</p>	<p><u>Clause 11 — Schedules 17C, 17D and 17E added</u></p> <p><i>Schedule 17C Non-reporting Financial Institutions and Excluded Accounts</i></p> <p>Mr LEUNG enquired about the rationale for setting the threshold at not exceeding \$7,800 for a dormant account to be an excluded as a reportable account in relation to AEOI.</p> <p>The Administration explained that the threshold in question was set in accordance with the Common Reporting Standard ("CRS") promulgated by OECD, and converted to Hong Kong currency. To be eligible for exclusion, the dormant account also had to meet other conditions specified in item 7 of Part 3 of the new Schedule 17C to IRO.</p> <p>In reply to Mr TO, the Administration explained the conditions for term life insurance contracts to be regarded as an excluded account. In brief, a life insurance contract with a coverage period that would end before the insured individual attained age 90, and subject to meeting the specified conditions in respect of such contracts set out in item 3 of Part 3 of the new Schedule 17C to IRO, would be regarded as an excluded account.</p>	
013215 – 015108	<p>Chairman Administration Mr James TO</p>	<p><i>Schedule 17D Due Diligence Requirements</i></p> <p>In reply to Mr TO, the Administration explained:</p> <p>(a) the definition of low value account as set out in</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>the new Schedule 17D to IRO (the relevant threshold of \$7.8 million followed the relevant CRS requirement);</p> <p>(b) the proposed rules of "account aggregation" as provided in item 5 of Part 7 of Schedule 17D; and</p> <p>(c) the due diligence requirements for low value and high value pre-existing individual accounts in Part 3 of Schedule 17D.</p> <p>Mr TO enquired about the considerations for setting out the details of the due diligence requirements in the new Schedule 17D of IRO instead of prescribing the requirements by way of a subsidiary legislation.</p> <p>The Administration advised that it had made reference to similar legislative arrangements in other local legislation, such as the customer due diligence requirements under the anti-money laundering regime in AMLO.</p>	
Agenda Item III — Any other business			
015109 – 015139	Chairman	Date of next meeting	