

立法會
Legislative Council

LC Paper No. CB(1)961/15-16
(These minutes have been seen
by the Administration)

Ref : CB1/BC/7/15/2

Bills Committee on Inland Revenue (Amendment) Bill 2016

Minutes of fifth meeting
held on Tuesday, 26 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 CHAN Hak-kan, JP
Hon Charles Peter MOK, JP
Hon Kenneth LEUNG
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP

Members absent : Hon WONG Ting-kwong, SBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon NG Leung-sing, SBS, 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)818/15-16 — Minutes of the meeting held on
22 March 2016)

The minutes of the meeting held on 22 March 2016 were confirmed.

Action

II. Meeting with the Administration

Matters arising from previous meeting

(LC Paper No. CB(1)830/15-16(01) — List of follow-up actions arising from the meeting on 11 April 2016

LC Paper No. CB(1)830/15-16(02) — Administration's response to the issues raised at the meeting on 11 April 2016

LC Paper No. CB(1)830/15-16(03) — Assistant Legal Adviser's letter dated 22 April 2016 to the Administration

LC Paper No. CB(1)849/15-16(01) — Administration's reply to Assistant Legal Adviser's letter dated 22 April 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**) and completed clause-by-clause examination of the Inland Revenue (Amendment) Bill 2016 ("the Bill").

Action

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 of the Administration's paper (LC Paper No. CB(1)830/15-16(02)), even if an account holder, in making a self-certification to a reporting financial institution ("FI") for the purpose of automatic exchange of financial account information in tax matters ("AEOI"), was suspected to have provided misleading, false or incorrect information in a material particular, the Administration would not and could not rely on the self-certification provided by the account holder to establish that the person concerned committed an offence. The Administration must conduct investigation in the first place so as to confirm if there was sufficient evidence to prove that the person concerned provided such information knowingly or recklessly before taking prosecution actions. In this connection, the Administration was requested to:

- (a) provide a list of information required to be provided by an account holder when making self-certification to a reporting FI, together with a sample self-certification form; and information required to be furnished by the FI (or its service provider) to the Inland Revenue Department ("IRD") for AEOI;
- (b) provide information on past cases of successful prosecution for similar and comparable offences against a person providing information that was "misleading" or "incorrect" under the Inland Revenue Ordinance (Cap. 112) ("IRO") or other local legislation;
- (c) address a member's concern that IRD might exercise its information gathering powers under the existing provisions of IRO to request an account holder, who was suspected of making false self-certification, to provide certain information in respect of the self-certification made and that person would not be able to exercise his/her right to keep silent under such circumstances; and
- (d) consider adding a provision in the proposed amended section 80 of IRO or other provisions as appropriate to stipulate explicitly that the Administration would not and could not rely on the self-certification provided by an account holder to establish that the person concerned committed an offence under the new section 80(2E) relating to the signing of self-certification that was misleading, false or incorrect.

Action

Offences of service provider

4. The Administration was requested to:
- (a) provide information on the relevant provisions, if any, in overseas legislation which provided for offences of service provider engaged by FI to carry out the FI's obligations under AEOI, similar to those proposed in the new section 80D of IRO; and
 - (b) re-consider whether the offence provisions in respect of service providers under the Bill could be removed in the light that:
 - (i) no offence provisions were in place under the existing section 80 for similar contexts (e.g. reporting of tax liabilities to IRD by an agent engaged by a taxpayer); and
 - (ii) the contractual arrangement between the reporting FI and the service provider would normally include provisions governing the service provider's liabilities in the event of its failure to carry out the reporting FI's obligations under the Bill.

(Post-meeting note: The Administration's response was issued vide LC Paper No. CB(1)871/15-16(02) on 3 May 2016.)

III. Any other business

Legislative timetable

5. As agreed at the meeting, the Administration would provide supplementary information on the above issues, which would be circulated to members when ready. Subject to any views members and the Legal Adviser to the Bills Committee might have on the Administration's supplementary information and any Committee Stage amendments proposed by members for consideration by the Bills Committee, the Chairman would decide whether a further meeting was necessary.

6. Members agreed that if no further meeting would be held, the Bills Committee would complete scrutiny of the Bill. Members noted that the Administration would advise the Bills Committee on the proposed date for resumption of the Second Reading debate on the Bill in due course. The Chairman would report the deliberations of the Bills Committee to the House Committee in accordance with the legislative timetable.

Action

(Post-meeting note: At the request of Mr James TO, a further meeting of the Bills Committee was scheduled for Tuesday, 17 May 2016, at 11:00 am. Members were informed of the above arrangement vide LC Paper No. CB(1)904/15-16 issued on 10 May 2016.)

7. There being no other business, the meeting ended at 5:44 pm.

Council Business Division 1
Legislative Council Secretariat
24 May 2016

Bills Committee on Inland Revenue (Amendment) Bill 2016

**Proceedings of the fifth meeting
on Tuesday, 26 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			
000104 – 000133	Chairman	The minutes of the meeting held on 22 March 2016 were confirmed. [LC Paper No. CB(1)818/15-16]	
Agenda Item II — Meeting with the Administration			
000134 – 000157	Chairman	Opening remarks	
000158 – 003309	Chairman Administration Mr James TO	<p>Briefing by the Administration on its response to the issues raised at the meeting on 11 April 2016 [LC Paper No. CB(1)830/15-16(02)]</p> <p>In relation to the offence under the new section 80(2E) of the Inland Revenue Ordinance (Cap. 112) ("IRO") relating to the signing of self-certification that was misleading, false or incorrect, Mr TO expressed the following views and suggestions:</p> <p>(a) it would be difficult to determine whether an account holder, in making a self-certification to a reporting financial institution ("FI") for the purpose of automatic exchange of financial account information in tax matters ("AEOI"), provided information that was "misleading" or "incorrect";</p> <p>(b) where there was reasonable doubt, the Inland Revenue Department ("IRD") should seek confirmation from an account holder on a self-certification made by the person before taking enforcement actions;</p> <p>(c) IRD might, before commencing criminal proceedings, exercise its information gathering powers under the existing provisions of IRO to request an account holder, who was suspected of making false self-certification, to provide certain information in respect of the self-certification made and that person would then be unable to exercise his/her right to silence under such circumstances; and</p>	The Administration to take action as paragraph 3(c) of the minutes

Time marker	Speaker	Subject(s)	Action required
		<p>(d) IRD should consider adding a provision in the Bill to stipulate explicitly that the Administration could not rely on the self-certification provided by an account holder to establish that the person concerned committed an offence under the new section 80(2E).</p> <p>Mr TO indicated that he might propose Committee Stage amendments ("CSAs") to the Bill or object to the resumption of the Second Reading debate on the Bill if the Administration would not take on board his suggestions in (b) or (d) above.</p> <p>The Administration advised that:</p> <p>(a) the threshold to establish a case involving the provision of "misleading" information was very high. There were successful prosecution cases concerning providing "false" or "incorrect" statement in a material particular under IRO and cases concerning providing "misleading" statement in a material particular under the Securities and Future Ordinance (Cap. 571);</p> <p>(b) IRD would follow the procedures set out in paragraphs 3 to 4 of the Administration's paper (LC Paper No. CB(1)830/15-16(02)) if an account holder was suspected to have provided in a self-certification misleading, false or incorrect information in a material particular;</p> <p>(c) the Judges' Rules would be followed when IRD raised questions with the account holder during investigation. If IRD had reasonable cause to suspect that the account holder had committed an offence, IRD would caution the account holder and remind him/her of the right to keep silent; and</p> <p>(d) the Administration would not and could not rely on the self-certification provided by an account holder to establish that the person committed an offence under the new section 80(2E). IRD had to conduct investigation and prove that the person provided misleading, false or incorrect information knowingly or in a reckless manner before considering taking any prosecution action.</p> <p>In reply to the Chairman, the Administration pointed out that the scope of information required to be provided by account holders to reporting FIs under</p>	<p>The Administration to take action as paragraph 3(d) of the minutes</p>

Time marker	Speaker	Subject(s)	Action required
		<p>the AEOI arrangement was limited.</p> <p>At the requests of Mr TO and the Chairman, the Administration agreed to:</p> <p>(a) provide information on past cases of successful prosecution for similar and comparable offences against a person providing information that was "misleading" or "incorrect" under IRO or other local legislation; and</p> <p>(b) provide a list of information required to be provided by an account holder when making self-certification to a reporting FI, together with a sample self-certification form; and information required to be furnished by the FI (or its service provider) to IRD for AEOI.</p>	<p>The Administration to take action as paragraph 3(a) and (b) of the minutes</p>
003310 – 003857	Chairman Mr SIN Chung-kai Administration	<p>Mr SIN considered that the Administration should take into account reasonableness and proportionality when considering the application of the offence provision in relation to the signing of self-certification that was misleading, false or incorrect. He also queried how the Administration could prove whether an account holder had provided "misleading" or "incorrect" information in a material particular when making a self-certification.</p> <p>The Administration pointed out that as the information required to be provided by an account holder in a self-certification was his/her personal particulars, only the account holder (instead of the FIs) was in a position to provide the information. The offence provision in question had struck a balance between providing sufficient deterrence to ensure effective implementation of AEOI in Hong Kong while not imposing disproportionately heavy sanctions on individuals. Investigation would have to be conducted before it could be established whether an account holder had provided misleading, false or incorrect information in the self-certification.</p>	
003858 – 010217	Chairman Mr Kenneth LEUNG Administration	<p>Mr LEUNG expressed the following views and suggestions:</p> <p>(a) the Administration might consider adding a provision in the new section 80(2E) of IRO to raise the threshold for taking prosecution actions against a person for an offence related to the signing of self-certification that was misleading, false or incorrect;</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>(b) whether the offence provisions in respect of service providers could be removed in the light that no offences were in place for similar contexts (e.g. reporting of tax liabilities to IRD by agents engaged by taxpayers) under the existing section 80; and the contractual arrangement between a reporting FI and its service provider normally included provisions governing the service provider's liabilities in the event of its failure to carry out the reporting FI's obligations under the Bill;</p> <p>(c) the proposed offences of service providers might render it difficult for reporting FIs to procure services in relation to AEOI; and</p> <p>(d) how an excuse provided by a service provider would be taken as "reasonable excuse" for the purpose of the new section 80D on offences of service providers.</p> <p>Mr LEUNG indicated that he might propose CSAs to the Bill if the Administration could not address his views and suggestion in (b) above.</p> <p>The Administration advised that:</p> <p>(a) AEOI was different from the reporting of tax liabilities to IRD under IRO. While a taxpayer might engage an agent as his or her tax consultant under IRO, the agent could not sign on the tax return on behalf of the taxpayer or furnish the tax return on behalf of the taxpayer to IRD;</p> <p>(b) 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' obligations as clearly specified in the new section 50B(1), 50B(2) or 50C(1) of IRO;</p> <p>(c) having regard to the feedback collected in the consultation that penalty provisions for different parties should be clearly set out in the law, the Bill had stipulated clear penalty provisions regarding all relevant parties (i.e. reporting FIs, FIs' employees and service providers);</p> <p>(d) if a service provider failed to comply with its</p>	<p>The Administration to take action as paragraph 4(b) of the minutes</p>

Time marker	Speaker	Subject(s)	Action required
		<p>relevant obligations without reasonable excuse, or provides information that was misleading, false or inaccurate in a material particular in a return knowingly or in a reckless manner, the penalty was a fine at level 3 (i.e. \$10,000). The service provider providing misleading, false or inaccurate information in a material particular in a return might be subject to imprisonment only if it did so with intent to defraud; and</p> <p>(e) based on IRD's general experience with the administration of IRO, factors which went beyond control of individuals (e.g. a fire, a flood or an accident) might be accepted as a "reasonable excuse" for non-compliance, though much would be subject to the facts of the case involved.</p> <p>The Chairman opined that removal of the offence provisions in respect of service providers might give rise to difficulties in holding the service providers legally liable even if justified.</p> <p>The Administration stressed that the new section 50H of IRO stipulated that even if a service provider was engaged, the reporting FI would not be relieved from its due diligence and reporting obligations under the AEOI regime.</p> <p>At the request of Mr LEUNG, the Administration agreed to provide supplementary information on the relevant provisions, if any, in overseas legislation which provided for offences of service provider engaged by FI to carry out the FI's obligations under AEOI, similar to those proposed in the new section 80D of IRO.</p>	<p>The Administration to take action as paragraph 4(a) of the minutes</p>
<p>010218 – 011012</p>	<p>Chairman Administration Mr Kenneth LEUNG Assistant Legal Adviser 9 ("ALA9")</p>	<p>Briefing by the Administration on its reply to ALA's letter dated 22 April 2016 [LC Paper No. CB(1)849/15-16(01)]</p> <p>Regarding the list of non-reporting FIs specified in the new Schedule 17C to IRO, Mr LEUNG enquired about the differences in the thresholds for exempting broad participation retirement fund and narrow participation retirement fund from reporting under the AEOI regime.</p> <p>The Administration advised that both broad participation retirement fund and narrow participation retirement fund were provided in the Common</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>Reporting Standard ("CRS") as non-reporting FIs, and CRS had stipulated clearly the specific qualifying criteria. Schedule 17C incorporated such criteria in accordance with CRS. In general, a broad participation retirement fund was a non-reporting FI if it did not have a single beneficiary with a right to more than 5% of the fund's assets, while a narrow participation retirement fund was a non-reporting FI if it had less than 50 participants and the participants who were not residents for tax purposes for the jurisdiction in which the fund was established were not entitled to more than 20% of the fund's assets.</p> <p>ALA enquired about whether a reporting FI which opted, by indicating in its return to IRD, to apply different due diligence requirements for new accounts to pre-existing accounts could change the option made and if so, whether the FI had to notify IRD of the change.</p> <p>The Administration advised that after a reporting FI had selected the relevant option, in the AEOI return to IRD, to apply the due diligence requirements for new accounts to pre-existing accounts, the FI had to establish, maintain and apply the applicable due diligence procedures accordingly and could not adopt other procedures on their own.</p>	
<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>			
011013 – 011231	Chairman Administration	<p><u>Clause 11 — Schedules 17C, 17D and 17E added</u></p> <p><i>Schedule 17E Reportable Jurisdictions and Participating Jurisdictions</i></p> <p>Members raised no queries.</p> <p>The Bills Committee completed clause-by-clause examination of the Bill.</p>	
<p>Agenda Item III — Any other business</p>			
011232 – 011555	Chairman	Legislative timetable	