

Bills Committee on Inland Revenue (Amendment) Bill 2016
Follow-up to the meeting on 22 March 2016

Purpose

At the meeting on 22 March 2016, Members raised views on the Inland Revenue (Amendment) Bill 2016 (“the Bill”) regarding the offence relating to self-certification, the application for search warrant, and the reference to “commodity”. This paper sets out the Government’s response.

Self-certification

2. At the meeting, a Member suggested that, before establishing an offence relating to the signing of a self-certification that is misleading, false or incorrect, and taking enforcement actions, the Inland Revenue Department ("IRD") should seek confirmation from the relevant account holder on the self-certification made. If the account holder provides incorrect information when making confirmation with IRD, IRD should then take enforcement actions.

3. We understand the concerns raised by the Member. In the light of the Member’s suggestion, the Financial Services and Treasury Bureau, IRD and Department of Justice have carefully examined and studied the suggestion. Our detailed response is as follows –

- (a) Even if an account holder, in making a self-certification, provides misleading, false or incorrect information in a material particular the Administration **will not and cannot rely only on the self-certification provided by account holder to establish that the person concerned commits an offence**. According to the new section 80(2E) to be introduced by the Bill, the account holder would commit an offence only if it has been proved that he **knows, or is reckless** as to whether, the statement is misleading, false or incorrect in a material particular. It would be a **very high prosecution threshold** to prove *mens rea* of “knowingly” or “recklessly”. The Administration has to conduct investigation in the first place before being in a position

to establish whether there are sufficient grounds to take prosecution actions.

- (b) In actual operation, if IRD receives information showing that an account holder may have provided a misleading, false or incorrect self-certification, IRD will contact the relevant reporting financial institutions (“FIs”) to ascertain if the FIs have carried out the due diligence procedures required to identify whether the account holder is a resident for tax purposes of a reportable jurisdiction (including the procedures of collecting self-certification from the account holder and ascertaining the reasonableness of such self-certification). If IRD finds that the reporting FIs have complied with the required procedures, **IRD will contact the relevant account holder and examine the information in the self-certification provided by that person, including requesting the person to provide information on his tax residence, so as to establish whether the information in the self-certification is correct or not in the first place.** During the process, the person concerned can provide further information and explanation to IRD to assist in the investigation. The above arrangement seeks to establish (as required by the offence provision) whether the account holder knows or is reckless as to whether the statement is incorrect, and can provide an opportunity for the account holder to make his defence to IRD. Under such circumstances, we consider that the arrangement under the present proposed provisions has already provided proper safeguards for the account holder, and there is no need to introduce further provisions to require confirmation by an account holder with IRD on the self-confirmation made.
- (c) In fact, if the Bill provides that an account holder can confirm with IRD again on the self-certification made, and that no offence would be committed so long as he can provide correct information when making conformation with IRD, it will render the proposed sanctions futile, and will also affect the effective implementation of the whole AEOI regime. According to our study on the overseas legislations for AEOI, no other tax

jurisdiction has provided statutory provisions which allow an account holder to confirm with the tax authority the self-certification provided to FIs.

Search warrant

4. According to section 51B of the existing Inland Revenue Ordinance (“IRO”), the Commissioner of the Inland Revenue or his authorized officer may apply to the magistrate for a search warrant under the following conditions -

- (a) there are reasonable grounds for suspecting that a person has made an incorrect return or supplied false information having the effect of understating his income or profits chargeable to tax and has done so without reasonable excuse and not through an innocent oversight or omission; or
- (b) a person has failed to comply with an order of a court made under section 80(1) or (2A) directing him to comply with the requirements to furnish a return.

The relevant provisions **also apply to the taxes of tax jurisdictions with which Hong Kong has signed CDTAs or TIEAs.**

5. In order to enable effective implementation of AEOI, we propose to add new provisions, based on the above existing provisions, into section 51B (i.e. sub-sections (1AAA) to (1AAAE)), so as to allow IRD to apply for search warrants regarding the returns furnished by reporting FIs or service providers for the AEOI purpose. Same as IRD’s current practice in applying search warrants from the magistrate, IRD will only apply to the magistrate for the search warrants regarding the relevant reporting FI or service provider under the following two circumstances –

- (a) the reporting FI or service provider has failed to comply with an order of a court made directing the FI or service provider to comply with a requirement under section 50C(1) (i.e. the requirement for furnishing returns); or

- (b) there are reasonable grounds for suspecting that a reporting FI or service provider has failed to comply with section 50B(1) or (2) or 50C(1) (i.e. the requirements for due diligence and furnishing returns) and has done so without reasonable excuse and not through an innocent oversight or omission.

The proposed provisions have clearly provided the circumstances under which IRD may apply to the magistrate for the search warrant. Moreover, IRD will make such application only if necessary. No adverse view was received on this during the consultation process.

The term “commodity” under the definition of “financial assets”

6. A Member asked if the term “commodity” may be misunderstood to cover all commodities (such as basic necessities), and whether it could be amended to “commodity future” with reference to the term used in the definition of “investment entity”. In this regard, the inclusion of a reference to “commodity” in the definition of “financial assets” follows the definition of the same term under the Common Reporting Standard. The reference to “commodity” under the definition of “financial assets” is mainly for defining the scope of financial assets in determining the aggregate value or balance by end of reporting period. As regards the reference to "commodity futures" under the definition of "investment entity", it is for the purpose of determining the scope of investment entity by having regard to whether or not an entity conducts a business in the trading of, amongst others, "commodity futures".

7. In order to facilitate the trade’s operation, we will, in drawing up guidelines in future, provide further information on the scope of the items generally involved under the definition of “financial assets” (including “commodity”).

Financial Services and the Treasury Bureau
April 2016