Bills Committee on Inland Revenue (Amendment) Bill 2016
Follow-up to the issues raised by Hon James To

Regarding the concerns raised by Hon James To in his letter of 10 May 2016 on the Inland Revenue (Amendment) Bill 2016 ("the Bill"), the Government's response is as follows –

(1) For the offence under the new section 80(2E) in the Bill, the same section has provided for the **two indispensable elements** constituting the offence involved, namely that the account holder in making a self-certification makes a statement that is misleading, false or incorrect in a material particular, **and** that the account holder knows, or is reckless as to whether, the statement is misleading, false or incorrect in a material particular. Accordingly, the Inland Revenue Department ("IRD"), when taking forward any prosecution action, has to prove that –

(a) the statement concerned is misleading, false or incorrect in a material particular; and

(b) the person concerned in making the statement knows that the relevant statement is misleading, false or incorrect, or is reckless as to whether the statement is misleading, false or incorrect.

The relevant provision has set a relatively high prosecution threshold for IRD, i.e. **IRD must prove not only the *actus reus* but also the *mens rea* of the person concerned.** Hence, IRD **cannot rely only on the self-certification which contains misleading, false or incorrect statement to establish that the account holder commits an offence**. The second element (*mens rea*) involves the state of mind of the person concerned. To meet the criteria for initiating prosecution, the Administration must conduct investigation in the first place and ascertain if there is sufficient evidence to prove the *mens rea* of "knowingly" or "recklessly". In the course of investigation, the account holder can defend his or her position when making explanation to IRD, and has the right to keep silent.

(2) When IRD raises questions with the account holder during investigation, IRD does not need to rely on the provisions specified in section 80 of the Inland Revenue Ordinance ("IRO"). IRD will follow the "Rules and Directions for the Questioning of Suspects and the Taking of Statements".

If IRD has reasonable cause to suspect that the account holder has committed an offence, IRD will caution him or her and remind the person concerned of the right to keep silent. The person concerned **will not** be regarded as breaching section 80 of IRO if he or she keeps silent when being questioned about the self-certification ("the person concerned" mentioned in paragraph 2(d) in the LC Paper No. CB(1)871/15-16(02) refers to the relevant account holder).

(3) At present, financial institutions ("FIs") collect information from account holders having regard to the statutory requirements and their own operational needs. According to the Bill, for automatic exchange of financial account information in tax matters, FIs have to collect information of their relevant account holders in accordance with the due diligence procedures as set out in Schedule 17D, and they only have to furnish information as required under section 50F to IRD. If FIs find in the course of due diligence that the information provided by an account holder is incorrect or unreliable (for example, the self-certification provided cannot pass the reasonableness test), the FIs should request the account holders to provide explanation or re-submit the relevant information. Account holders do not need to provide any information to the Government direct. Hence, there is no question of the FIs requesting IRD to exercise its statutory powers to request account holders to provide information.

(4) The wording of "misleading", "false" and "incorrect" is adopted in certain provisions under section 80 of IRO (about penalties for failure to make returns, making incorrect returns, etc.). They include section 80(1AB) which adopts the wording of "false or misleading" and section 80(2) and section 80(2D) which adopt the wording of "incorrect". The new section 80(2E) in the Bill is a penalty provision for account holders regarding the self-certifications provided by them. The use of the wording of "misleading", "false" and "incorrect" in the provision is generally in line with that adopted in section 80 of IRO.

(5) & (6) For cases involving the provision of "misleading" information, there are no such cases under IRO in recent years. For instance, if certain important information in a material particular is missing in a statement, and such omission makes others wrongly believe that what is provided in the statement is the whole truth about the fact, this may constitute a misleading statement.

It is upon the requests of Members at the meeting of 26 April 2016 that we provided successful cases of convictions for the offence of providing "false or misleading" statement in a material particular under the Securities and Futures Ordinance ("SFO") in the LC Paper No. CB(1)871/15-16(02). According to the relevant provisions of SFO (i.e. sections 383 and 384), it is an offence if any person in making application or providing information to the Securities and Futures Commission ("SFC") that the statement is false or misleading in a material particular, and he knows that, or is reckless as to whether, the statement is false or misleading in a material particular.

Regarding the case concerning SFO quoted in Annex B in the LC Paper No. 871/15-16(02) (i.e. Case 2), according to the published information of SFC, the defendant was convicted of providing false or misleading information to SFC in two licensing applications.

Financial Services and the Treasury Bureau
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