立法會
Legislative Council

LC Paper No. CB(1)1059/20-21
(These minutes have been seen by the Administration)

Ref : CB1/BC/7/20

Bills Committee on Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021

Minutes of the second meeting on Tuesday, 4 May 2021, at 9:00 am in Conference Room 2B of the Legislative Council Complex

Members present	**:**	Hon Holden CHOW Ho-ding (Chairman) Hon WONG Ting-kwong, GBS, JP Hon Starry LEE Wai-king, SBS, JP Hon Wilson OR Chong-shing, MH
Public officers attending	**:**	Agenda item I Financial Services and the Treasury Bureau Mr Maurice LOO, JP Deputy Secretary for Financial Services and the Treasury (Treasury)2 Miss Helen CHUNG Principal Assistant Secretary for Financial Services and the Treasury (Treasury)(R1) Inland Revenue Department Mr LEUNG Kin-wa Deputy Commissioner (Operations) (Acting) Ms WONG Pui-ki Chief Assessor (Profits Tax)C (Acting)

Ms CHAN Ut-chan
Senior Assessor (Research)3

Department of Justice

Ms Rayne CHAI
Deputy Law Draftsman II (Acting)

Miss Selina LAU
Senior Government Counsel

Clerk in attendance : Mr Derek LO
Chief Council Secretary (1)5

Staff in attendance : Miss Rachel DAI
Assistant Legal Adviser 2

Mr Joey LO
Senior Council Secretary (1)8

Ms Michelle NIEN
Legislative Assistant (1)5

Ms Michelle LEE
Clerical Assistant (1)5

Action

I. Meeting with the Administration

(LC Paper No. CB(3)420/20-21 — The Bill

File Ref: TsyB R 183/700-6/12/0 (C) — Legislative Council Brief issued by the Financial Services and the Treasury Bureau

LC Paper No. LS57/20-21 — Legal Service Division Report

Action

LC Paper No. CB(1)804/20-21(01)	—	Marked-up copy of the Bill prepared by the Legal Service Division (Restricted to members only)
LC Paper No. CB(1)804/20-21(02)	—	Assistant Legal Adviser's letter dated 15 April 2021 to the Administration
LC Paper No. CB(1)819/20-21(01)	—	Letter from the Administration dated 19 April 2021 responding to the letter from Assistant Legal Adviser dated 15 April 2021
LC Paper No. CB(1)856/20-21(01)	—	Letter from Hon Holden CHOW Ho-ding dated 22 April 2021 to the Administration
LC Paper No. CB(1)856/20-21(02)	—	Administration's response to the letter dated 22 April 2021 from Hon Holden CHOW Ho-ding
LC Paper No. CB(1)856/20-21(03) *(tabled at the meeting and subsequently issued on 4 May 2021)*	—	Administration's consolidated response to submissions)

Discussion

The Bills Committee deliberated (Index of proceedings attached at the **Appendix**).

II. Any other business

Legislative timetable

2. The Chairman concluded that the Bills Committee had completed the scrutiny of the Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021 ("the Bill").

Action

3. The Bills Committee noted the Administration's intention to resume the Second Reading debate on the Bill at the Council meeting on 2 June 2021.

(*Post-meeting note*: Members were informed vide LC Paper No. CB(1)869/20-21 on 5 May 2021 that the Chairman would report the deliberations of the Bills Committee to the House Committee on 21 May 2021, and that the deadline for giving notice to move amendments to the Bill, if any, was 24 May 2021.)

4. There being no other business, the meeting ended at 10:25 am.

Council Business Division 1
Legislative Council Secretariat
2 July 2021

Appendix

Proceedings of the second meeting of the
Bills Committee on Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021
on Tuesday, 4 May 2021, at 9:00 am
in Conference Room 2B of the Legislative Council Complex

Time Marker	Speaker	Subject(s)	Action Required
Agenda item I — Meeting with the Administration			
000435 – 000655	Chairman	Opening remarks	
000656 – 001146	Chairman Administration	Briefing by the Administration on its consolidated response to the submissions received (LC Paper No. CB(1)870/20-21(03))	
001147 – 001555	Chairman Ms Starry LEE Administration	Ms Starry LEE pointed out the concerns of some stakeholders that the post-entry condition and the same trade test under the proposed special tax treatment for qualifying amalgamation, which were modeled on Singapore's relevant legislation, appeared unduly restrictive and even stricter than the corresponding legislation in Singapore. The Administration advised that – (a) the relevant legislation in Singapore had requirements which were similar to the post-entry condition and the same trade test; (b) in contrast with Singapore, the overall corporate tax rate of Hong Kong was lower and Hong Kong's tax regime did not provide for group loss relief; and (c) it was necessary to introduce the relevant conditions into the Inland Revenue Ordinance ("IRO") (Cap. 112) for prevention of tax abuse. Ms Starry LEE enquired whether the restaurant ("Business A") in the example given in the submission from Deloitte Advisory (Hong Kong) Limited (LC Paper No. CB(1)838/20-21(01)) could pass the same trade test.	

Time Marker	Speaker	Subject(s)	Action Required
		The Administration advised that – (a) it was unlikely that Business A would pass the same trade test; and (b) in the absence of the same trade condition, an amalgamated company might avoid tax simply through making use of the loss of the amalgamating company by closing the business of the latter after amalgamation.	
001556 – 003310	Chairman Mr WONG Ting-kwong Ms Starry LEE Administration	Mr WONG Ting-kwong sought clarification on whether the same trade condition would allow the transfer of losses between group companies through amalgamation involving the change of mode of operation but without involving acquisition. The Administration advised that – (a) under Hong Kong's tax regime, every subsidiary company under the same group was treated as a separate entity, and the transfer of losses between group companies was not allowed; and (b) the change in mode of operation after amalgamation might lead to the failure of the same trade test. Mr WONG Ting-kwong expressed views that – (a) the same trade test was too restrictive and the Administration should reconsider whether it should be applied to group companies having the same shareholders; (b) group companies with good commercial reasons and genuine business need to amalgamate should be allowed to pass the same trade test; and (c) however, to prevent tax avoidance, stricter treatment might be considered for those group companies operating on	

Time Marker	Speaker	Subject(s)	Action Required
		a franchise basis and each having a different composition of shareholders. The Chairman said that the stakeholders had expressed strong views on the same trade condition and the financial resources condition in their submissions. Ms Starry LEE said that – (a) the Administration should make it clear that while the legislative intent of provisions was to ensure that avoidance of tax was not the main purpose of the qualifying amalgamation, the application of the test would not be overly restrictive as to affect normal business activities; and (b) in making assessment on such cases, the Inland Revenue Department ("IRD") should look at the overall amalgamation arrangement. The Administration advised that in assessing whether the same trade test was satisfied, the Administration would look at all relevant facts and circumstances of each individual case, such as the reasons and circumstances for the amalgamation, what results the amalgamation was intended to achieve, etc.	
003311 – 003516	Chairman Ms Starry LEE Administration	Ms Starry LEE reiterated the stakeholders' concerns that the post-entry and financial resources conditions for the set-off of pre-amalgamation loss were too restrictive; and that the corresponding legislation in Singapore did not contain such restrictions. The Administration advised that – (a) the post-entry condition was modeled on Singapore's corresponding legislation. It aimed to prevent an entity from acquiring an unrelated or a non-wholly-owned loss company and making use of the tax losses	

Time Marker	Speaker	Subject(s)	Action Required
		accumulated in that loss company before the acquisition, in an attempt to reduce the tax liabilities of the group through amalgamation; and (b) the financial resources condition aimed to minimize the risk of achieving group tax loss relief through amalgamation. It had been included in IRD's interim administrative assessment practice since 2015 and had been operating smoothly without any operational problems.	
003517 – 004259	Chairman Administration	The Chairman said that in determining whether obtaining tax benefit was the main purpose of the amalgamation, the Administration should not simply look at the amount of tax benefit resulted from the amalgamation, but should also consider the non-tax and commercial reasons of the amalgamation. The Chairman noted the concern of some stakeholders that the financial resources condition was too restrictive and might unduly affect amalgamation based on business consideration. He sought clarifications on whether a subsidiary company could pass the financial resources test if – (a) it raised funds from independent third parties based on its own credit rating status to acquire another business; and (b) it used a loan borrowed from its parent to acquire another business. The Administration advised that – (a) under the existing practice, a subsidiary company could pass the financial resources test if it was able to raise funds from independent third parties having regard to its own credit rating status;	

Time Marker	Speaker	Subject(s)	Action Required
		(b) a loan borrowed from the parent company by a subsidiary company for the purpose of acquiring the business of the amalgamating company would not be treated as the financial resources of the subsidiary company for the purpose of the financial resources test; and (c) in day-to-day operation, financial support was provided by a parent company to the subsidiary company. Such inter-company transactions in the current account with the subsidiary would not be regarded as borrowing of money from the parent company by the subsidiary company for the purpose of the financial resources test.	
004148 – 004855	Chairman Administration	The Chairman reiterated the stakeholders' concern about the following – (a) for avoidance of doubt, there was a need to include an explicit provision to deem an amalgamating company as being dissolved without liquidation; and (b) otherwise, the amalgamating company would be treated as subsisting in the guise of the amalgamated company after the amalgamation, with outstanding legal responsibilities and tax liabilities. The Administration advised that – (a) apart from the proposed section 40AG which explicitly stated that for the purposes of IRO, an amalgamating company was treated as having ceased to carry on its business on the day immediately before the date of amalgamation, the proposed sections 40AJ, 40AK and 40AL clearly set out that the obligations, liabilities, rights, powers and privileges of the amalgamating companies were to be succeeded by the amalgamated company;	

Time Marker	Speaker	Subject(s)	Action Required
		(b) unless otherwise specified, the amalgamated company had to comply with those obligations which were not set out under the proposed sections 40AJ, 40AK and 40AL but stipulated in other parts of IRO; (c) in particular, the proposed section 40AJ stated that the amalgamated company had to comply with all obligations, and meet all liabilities, of each of the amalgamating companies under IRO, for the year of cessation of the amalgamating companies and all preceding years of assessment; and (d) whether a company was dissolved was largely irrelevant in the context of IRO.	
004856 – 005108	Chairman Administration	The Chairman enquired about the Administration's response to stakeholders' concern that tax treatment arising from a qualifying amalgamation where no election for special tax treatment was made should be specified. The Administration advised that – (a) as a usual practice, where no election for special tax treatment was made, other provisions in IRO would apply. The Administration considered it not necessary to specify the tax treatment where no election for special tax treatment was made; and (b) where an election for special treatment was made, those tax treatments which needed to be specified were set out in Schedule 17J.	
005109 – 005930	Chairman Administration	The Chairman noted the Administration's response to stakeholders' concern/suggestion and made the following points –	

Time Marker	Speaker	Subject(s)	Action Required
		(a) a merger of two companies under the merger law of a foreign country was not a "qualifying amalgamation" as defined in the Bill and as a result, the transfer or succession of assets between the Hong Kong branches of these two foreign companies pursuant to the merger would not qualify for the special tax treatments; (b) however, the provisions on deemed disposal and purchase of specified assets in a specified event under the proposed new Part 6D of IRO would apply to a foreign merger but not a qualifying amalgamation in Hong Kong; (c) there should not be any differences between the tax treatments of a qualifying amalgamation under the Companies Ordinance (Cap. 622) ("CO") in Hong Kong and a merger under the merger law of a foreign country if the latter is of substantially the same nature of the former; and (d) the special tax treatment under the proposed new Schedule 17J should apply to the merger of Hong Kong branches of two foreign companies under a foreign law, if an election for special tax treatment has been made under the proposed section 40AM(1). The Administration responded that – (a) a branch was considered part of an entity rather than a separate legal entity. The merger of foreign entities was governed by the laws of the foreign jurisdictions which might be different in different jurisdictions; (b) CO provided for a set of court-free amalgamation procedures for wholly-owned intra-group companies incorporated in Hong Kong and limited	

Time Marker	Speaker	Subject(s)	Action Required
		by shares to amalgamate and continue as one company; (c) such procedures could take the form of a vertical amalgamation between the holding company and one or more of its wholly-owned subsidiaries with the holding company as the amalgamated company, or a horizontal amalgamation between two or more of the wholly-owned subsidiaries of a company with one of them as the amalgamated company; and (d) as some mergers in foreign jurisdictions might involve companies which were not wholly-owned by the same group, it was inappropriate to cover the merger of Hong Kong branches of two foreign companies under the proposed legislation.	
005931 – 011330	Chairman Administration	The Chairman's enquiry and the Administration's response on the "reasonable excuse" of the taxpayer for failure to comply with any requirements in relation to filing of tax returns. The Chairman sought clarification on whether the definition of "specified tax" would cover the foreign taxes charged in the examples given in PricewaterhouseCoopers Limited's submission (LC Paper No. CB(1)838/20-21(04)). The Administration advised that – (a) subject to other conditions, foreign taxes on deemed profit should be deductible if they were charged based on turnover or gross income; (b) foreign tax paid on royalty income in example 1 should be deductible as it was charged as a percentage on the gross income; and	

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		(c) foreign tax paid on service fee income in example 2 should also be deductible as it was charged on the deemed profit which was based on a deemed profit rate of gross income. Ms Starry LEE requested and the Administration undertook to forward its consolidated response to the submissions received (LC Paper No. CB(1)870/20-21(03)) to each of the parties concerned.	
Clause-by-clause examination of the Bill [The Bill (LC Paper No. CB(3)420/20-21)] [Marked-up copy of the Bill prepared by the Legal Service Division (LC Paper No. CB(1)804/20-21(01))]			
011331 – 011845	Chairman Administration	**Part 4: Amendments relating to Furnishing of Returns** <u>Clause 9 – Section 51A amended (power to require statement of assets and liabilities, etc.)</u> The Chairman suggested that the proposed subsection (1A) of section 51A be amended to make it clear that "the mere act of" engaging a service provider under section 51AAD(1) did not in itself constitute a reasonable excuse. The Administration advised that the suggested amendment was not necessary as the phrase "in itself" in the proposed subsection already carried a similar meaning to "the mere act of", and the wording of the proposed subsection was modeled on similar provisions relating to Common Reporting Standard and country-by-country reporting. It was therefore not necessary to make the amendment as suggested by the Chairman. <u>Clause 10 – Section 51B amended (power to issue search warrant)</u> <u>Clause 11 – Section 80 amended (penalties for failure to make returns, making incorrect returns, etc.)</u> Members raised no questions.	

Time Marker	Speaker	Subject(s)	Action Required
011846 – 012053	Chairman Administration	<u>Clause 12 – Sections 80K to 80N added</u> *Section 80K* *Offences of service provider in relation to furnishing of returns under section 51(1)* The Chairman opined that in order to address the stakeholders' concern whether parties performing certain tasks in preparation for the furnishing of a return would be treated as service providers, the term "service provider" should be clearly defined in the Bill. The Administration responded that – (a) by making cross-reference to section 51(1) of IRO, the proposed section 51AAD(1) and (8) serves to define "service provider" to mean a person engaged to carry out a taxpayer's obligation to furnish returns under section 51(1) of IRO; (b) therefore, only the person who furnished the tax return on behalf of the taxpayer (i.e. the one signing the return), irrespective of the way in which a return was furnished (i.e. paper, electronic or mixed), would be treated as the service provider; (c) in other words, a person engaged by a taxpayer for undertaking only preparatory work such as preparing profits tax computations and other supporting documents, filling in the return form, etc. was not a service provider for the purpose of proposed section 51AAD(8), unless the person also furnished the tax return on behalf of the taxpayer; and (d) for avoidance of doubt, the Secretary for Financial Services and the Treasury would explain the definition of service provider clearly in his speech on the resumption of the Second Reading debate on the Bill.	

Time Marker	Speaker	Subject(s)	Action Required
012054 – 012223	Chairman Administration	*Section 80L* *Court may order service providers to do certain acts* *Section 80M* *Proceedings for offences relating to service providers* *Section 80N* *Commissioner may compound offences* Clause 13 – Section 82A amended (additional tax in certain cases) Members raised no questions.	
012224 – 012548	Chairman Administration	**Part 5: Amendments relating to Deduction of Foreign Tax** Clause 14 – Section 16 amended (ascertainment of chargeable profits) Clause 15 – Section 50AA amended (general provisions on relief from double taxation) Members raised no questions.	
012549 – 012800	Chairman Administration	**Part 6: Related Amendments** Clause 16 – Section 38 amended (balancing allowances and charges, machinery or plant) Clause 17 – Section 39D amended (balancing allowances and charges under the pooling system) Clause 18 – Section 80 amended (penalties for failure to make returns, making incorrect returns, etc.) Clause 19 – Section 82A amended (additional tax in certain cases) Clause 20 – Schedule 45 amended (deduction of R&D expenditures) Members raised no questions.	

Time Marker	Speaker	Subject(s)	Action Required
Agenda item II — Any other business			
012801 – 012930	Chairman Mr WONG Ting-kwong Administration	Meeting arrangements	

Council Business Division 1
Legislative Council Secretariat
2 July 2021