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

Background brief

Purpose

This paper provides background information on the Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021 ("the Bill"), and summarizes the views and concerns expressed by members when the Panel on Financial Affairs ("FA Panel") was consulted on the legislative proposals concerned.

Background

Court-free amalgamation of companies

2. Before the Companies Ordinance (Cap. 622) ("CO") came into operation on 3 March 2014, amalgamation of companies¹ could only be effected through the court-sanctioned statutory procedure under the old Companies Ordinance (Cap. 32) or by way of specific private merger ordinances.

3. Since 3 March 2014, Division 3 of Part 13 of CO has provided for a set of court-free amalgamation procedures for wholly-owned intra-group companies incorporated in Hong Kong and limited by shares to amalgamate and continue as one company ("qualifying amalgamation"). 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

¹ Amalgamation is a legal process by which the undertaking, property and liabilities of two or more companies merge and are brought under one of the original companies or a newly formed company and their shareholders become the shareholders of the new or amalgamated company.

amalgamated company.² At present, the Inland Revenue Department ("IRD") makes assessments on qualifying amalgamation cases in accordance with an assessment practice published on IRD's website. In order to provide clarity and certainty, the Administration considers it necessary to introduce legislative amendments to codify the practice into the Inland Revenue Ordinance (Cap. 112) ("IRO").

Transfer or succession of specified assets without sale

4. Currently, except for limited circumstances,³ there is no provision under IRO to deal with the transfer of assets without sale, such as in the case of a qualifying amalgamation. In the absence of specific provisions, the capital expenditures which have been allowed deductions or allowance cannot be clawed back in assessing profits tax. The Administration considers it necessary to amend IRO to provide for tax treatment in circumstances when a taxpayer succeeds to "specified assets".⁴

Furnishing of tax returns

5. At present, most profits tax returns are not submitted electronically as the existing information technology infrastructure of IRD cannot support the electronic processing of voluminous accounting and financial data given its very limited data uploading capacity.

6. On 2 July 2020, the Finance Committee ("FC") approved a new commitment of about \$742 million for the enhancement and relocation of information technology systems and facilities of IRD for the new Inland Revenue Tower in the Kai Tak Development Area. Among others, a Business Tax Portal will be developed to facilitate electronic submission of tax returns ("e-filing") by businesses including accounting and financial data. The first phase which enhances the existing eTax Portal to enable more businesses to

² The company whose shares are not cancelled upon amalgamation is the amalgamated company whereas the company whose shares are cancelled upon amalgamation is the amalgamating company.

³ There are provisions dealing with cessation of business without sale of environment-friendly vehicle (section 16J(5B)) and machinery or plant (section 38(4) and section 39D(4)) under the Inland Revenue Ordinance (Cap. 112). Under these provisions, the Commissioner of Inland Revenue is empowered to use the open market value of the asset as the deemed proceeds of sale.

⁴ Specified assets include machinery or plant or rights generated from R&D activities; patent rights or rights to know-how; specified intellectual property rights; prescribed fixed assets; environmental protection facilities; commercial buildings and structures; industrial buildings and structures; and machineries or plants.

voluntarily e-file profits tax returns including financial statements will be launched in around 2023, whilst the second phase which develops a new Business Tax Portal is expected to complete by 2025. The Administration will introduce amendments to IRO to enhance the statutory framework for the filing of tax returns electronically so as to provide legislative backing to IRD's plan of implementing e-filing.

Foreign tax deduction under specified circumstances

7. Currently, under section 16(1)(c) of IRO, in ascertaining the profits in respect of which a person is chargeable to tax in Hong Kong, limited relief is provided by way of deduction for foreign tax paid to address double taxation arising from charging profits tax on certain specified interest, gains and profits. However, since the enactment of the Inland Revenue (Amendment) (No. 6) Ordinance 2018 ("the 2018 Amendment Ordinance"), such deduction does not apply to foreign tax paid in a territory with a double taxation agreement in force with Hong Kong ("DTA territory").

8. According to the Administration, stakeholders have raised concerns about the change as a consequence of the 2018 Amendment Ordinance. There were concerns about the negative impact on the Hong Kong branches of foreign corporations, in particular the foreign banks operating in Hong Kong through branches, when they are dealing with DTA territories. Since no tax relief is available to such branches of foreign corporations in Hong Kong, their income would be subject to tax in both Hong Kong and the DTA territories if relief is also not available to such branches in their jurisdiction of residence. Besides, stakeholders have raised concerns that the current scope of deduction for foreign tax paid in respect of specified interest, gains and profits is too narrow, and proposed to expand the scope to cover foreign tax paid in respect of other income such as royalty.

9. Having considered stakeholders' views, the Administration will introduce amendments to IRO with the purposes to: (a) extend the existing deduction available for foreign tax paid in respect of specified interest, gains and profits by Hong Kong resident persons and non-Hong Kong resident persons in non-DTA territories to non-Hong Kong resident persons who paid such tax in DTA territories; (b) restrict the deduction of foreign tax paid by a non-Hong Kong resident person (in either DTA territory or non-DTA territory) to the extent of the portion of foreign tax paid for which the person would not be entitled to utilize for claiming any relief (whether by deduction or otherwise) in his jurisdiction of residence; and (c) extend the existing deduction available for foreign tax paid in respect of specified interest, gains and profits to cover foreign tax paid in respect of certain income if the tax is charged on gross

amount (e.g. withholding tax on royalty) subject to the same set of limitations and restrictions in (a) and (b) above.

The Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021

10. The Bill was gazetted on 19 March 2021 and received its First Reading at the Legislative Council meeting of 24 March 2021. The Bill seeks to amend IRO to:

- (a) provide for tax treatment in relation to the amalgamation of companies under the court-free procedures as provided for under Division 3 of Part 13 of CO;
- (b) provide for tax treatment for transfer or succession of certain capital assets;
- (c) enhance the mechanism for furnishing tax returns required under IRO; and
- (d) enhance the current provisions for deduction of foreign tax paid in respect of certain income, profits or gains.

11. Part 2 of the Bill contains provisions relating to qualifying amalgamations. The provisions provide for the tax treatment in relation to qualifying amalgamations (clause 3) and the special tax treatment for calculating profit tax payable by the amalgamating companies and amalgamated companies (clause 4). Part 3 of the Bill contains provisions relating to specified assets. The provisions set out the tax treatment in relation to the transfer or succession of specified assets. Part 4 of the Bill sets out amendments relating to furnishing of returns. The major provisions set out the legal framework for enhancing the mechanism for furnishing returns, including allowing mixed filing (clause 7), empowering the Commissioner of Inland Revenue to require any class of description of persons to furnish a return in the form of an electronic record and allowing taxpayers to appoint service providers to file tax returns on their behalf (clause 8). Part 5 of the Bill contains provisions relating to deduction of foreign tax. Details of the major provisions of the Bill are set out in paragraph 21 of the LegCo Brief (File Ref: TsyB R 183/700-6/12/0 (C)), and paragraphs 5 to 17 of the Legal Service Division Report on the Bill (LC Paper No. LS57/20-21).

12. The Bill, if passed, would come into operation on the day on which the enacted Ordinance is published in the Gazette. Amendments in relation to foreign tax deduction will take effect from the 2021-2022 year of assessment.

Major views and concerns expressed by Members

13. The Administration briefed the FA Panel on the legislative proposals concerning court-free amalgamation of companies, transfer or succession of specified assets without sale, and filing of tax returns at the meeting on 4 January 2021. The major views and concerns expressed by members at the meeting are summarized in the ensuing paragraphs.

Expected benefits of the legislative proposals

14. Members sought details on the benefits of the Bill, including the types of economic activities the Administration planned to promote through the Bill. Moreover, they stressed the need for the Administration to make reference to other jurisdictions' practices in providing favourable tax treatment to companies in those jurisdictions when introducing special tax treatment to companies in Hong Kong.

15. The Administration responded that the legislative proposals on the tax treatment for court-free amalgamation of companies and transfer or succession of specified assets without sale were technical amendments to IRO. While it would be difficult to quantify the economic benefits of the proposals, the amendments would provide certainty for companies on the tax treatment concerned, and hence would facilitate the conduct of businesses. Moreover, the legislative proposals on e-filing could lower the compliance costs of companies.

Anti-avoidance

16. Noting that the special tax treatment to be applicable to court-free qualifying amalgamations covered the set-off of unutilized pre-amalgamation losses of the amalgamating company against the assessable profits of the amalgamated company, members expressed concern about possible abuse of the proposed tax treatment by companies through shell companies, and enquired how the Administration would tackle the problem.

17. The Administration pointed out that the application of the tax treatment concerned would be subject to a number of restrictions and conditions including the same trade test (i.e. qualifying losses could only be used to set off against the assessable profits of the amalgamated company derived from the same trade, profession or business it succeeded from the amalgamating company). Companies failing to meet such restrictions and conditions would not be able to enjoy the tax treatment concerned. There would also be anti-avoidance provisions to prevent abuse.

Filing of tax returns by electronic means

18. Members stressed the need for the Administration to address existing problems of the eTax Portal (e.g. the inability of the Portal to accept financial statements) while advocating the use of e-filing. There were also enquiries about the scale of those companies which had submitted tax returns through the existing eTax Portal, and measures taken or planned by the Administration for encouraging companies to use the eTax Portal.

19. The Administration advised that at present most companies using the existing eTax Portal were small companies. Relatively few large companies used the eTax Portal as the system currently could not accept the financial documents submitted by such companies due to its limited uploading capacity. FC had approved a new commitment of about \$742 million for the enhancement and relocation of IT systems and facilities of the Inland Revenue Department for the new Inland Revenue Tower in the Kai Tak Development Area, including the development of a new Business Tax Portal. It was envisaged that more large companies would submit tax returns by electronic means when the new Business Tax Portal, which would enable the Department to receive voluminous accounting and financial data electronically, was scheduled to be launched in around 2023.

Latest development

20. At the House Committee meeting on 26 March 2021, Members agreed to form a Bills Committee to scrutinize the Bill.

Relevant papers

21. A list of relevant papers is in **Appendix**.

List of relevant papers

Date	Event	Paper
4 January 2021	Meeting of the FA Panel	Administration's paper (LC Paper No. CB(1)417/20-21(06))
24 March 2021	The Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021	The Bill Legislative Council Brief (File Ref: TsyB R 183/700-6/12/0 (C)) Legal Service Division Report (LC Paper No. LS57/20-21)