Hong Kong Institute of
Certified Public Accountants
香港會計師公會

By email (bc_101_25@legco.gov.hk)

20 February 2025

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Hon CHAN Chun-ying, BBS, JP
Chairman,
Bills Committee on Inland Revenue (Amendment)
(Minimum Tax for Multinational Enterprise Groups) Bill 2024,
Legislative Council Secretariat,
Legislative Council Complex,
1 Legislative Council Road,
Central, Hong Kong

Dear Mr. Chan,

Re. Inland Revenue (Amendment) (Minimum Tax for Multinational Enterprise Groups) Bill 2024

The Hong Kong Institute of Certified Public Accountants ("the Institute") is supportive of the Government's efforts to implement the international taxation rules proposed by the Organisation for Economic Co-operation and Development ("OECD"), and supported by over 140 jurisdictions (i.e., members of the Inclusive Framework ("IF"), including mainland China), to tackle base erosion and profit shifting risks arising from the digitalisation of the economy. From the point of view of Hong Kong's standing as a major international financial centre, we believe it is important to adopt international standards on tax transparency and to tackle cross-border tax evasion, while protecting revenues and safeguarding our own taxing rights.

The Institute's Taxation Faculty Executive Committee, supported by its International Tax Task Force ("TFEC"), has reviewed the Bill, which introduces the OECD's Global Anti-Base Erosion ("GloBE") Rules into the Hong Kong tax system, aimed at helping to ensure that in-scope multinational enterprise ("MNE") groups pay a minimum tax of 15% in respect of the profits that they derive from every jurisdiction in which they operate. We are writing now to provide our comments on certain aspects of the Bill, which we believe could have an impact on Hong Kong's competitiveness.

Among other things, we have identified several administrative provisions that could create a penalty regime that is unlikely to perceived as business friendly, and which could create long-term uncertainty for MNE groups and be detrimental to Hong Kong's efforts to attract more investment. Further details on our concerns are outlined below for your consideration.

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Onerous penalty provisions and additional assessment timeline

Penalty framework inconsistent with OECD/G20 Inclusive Framework on BEPS transitional guidance principles

The Bill will introduce penalties under the proposed sections 80O(3) and 80O(5) for failures in fulfilling certain tax filing and notification obligations, with potential fines including a level 3 fine and an additional fine of 300% of any undercharged top-up tax. These penalties align with current provisions under the Inland Revenue Ordinance (Cap. 112) ("IRO"). However, the OECD/IF suggests a more lenient approach to penalties on a transitional basis where MNE groups have made reasonable efforts to comply with the new rules. The Bill does not specify how the Inland Revenue Department ("IRD") will align with this OECD/IF guidance. We recommend that the legislation be clarified, or that the IRD issue its intended penalty enforcement practices as soon as practicable, and in a manner that is consistent with the OECD/IF's relaxed transitional methodology for penalties.

Liability of directors and officers for offences under section 80Q

The proposed penalties will also apply to a director or other officer concerned in the management of the corporation, or any person purporting to act as such director or officer. So, for example, a company that earns hundreds of millions of dollars of profits on an annual basis could inadvertently under-report taxes by several million dollars, which could lead to millions of dollars of penalties. While, prima facie, the penalties on individuals apply where the offence was committed with the consent or connivance of that person, it may not be entirely clear what the position would be where a director or officer consented to an act that resulted in inadvertent underreporting. If such penalties were to be imposed upon an individual, it is very likely they would either be unable to pay the penalties, potentially, leading to bankruptcy or, at the very least, that the penalties would impose a very significant financial burden. The threat of such substantial personal liability could dissuade directors and officers from participating in Hong Kong-based companies. This may prompt MNEs to relocate their leadership to minimise ties to Hong Kong.

Liability of service providers for offences under section 80P

In addition, a range of offences are proposed in relation to service providers ("SPs"), including under the proposed subsection (4), which states:

A person who is a service provider commits an offence if—

(a) the person, without reasonable excuse and in purported compliance with section 3(1) of Schedule 62, files on behalf of a Part 4AA entity, or causes or allows the entity to file, a top-up tax return not in accordance with the information provided, or instructions given, by the entity to the service provider; and

(b) the top-up tax return is misleading, false or inaccurate in a material particular, whether or not because any information is omitted from the top-up tax return.

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While there are some similar provisions in the IRO under section 80K, which were introduced around four years ago, we had significant concerns about those provisions which we relayed to the Bills Committee at the time. We pointed out:

"[T]he proposed section 80K(4) creates an offence where 'the service provider furnishes the return for or on behalf of the taxpayer but not in accordance with the information provided, or the instructions given, by the taxpayers and the return so furnished is incorrect in a material particular...' This too would appear to create an offence for a possible breach of a contractual duty owed by the SP to the taxpayer, for which the normal remedy would be a civil claim. It seems unreasonable to prescribe a statutory offence for a situation where, for example, an SP may have made an inadvertent mistake which may not amount even to negligence."

Following a response from the Government, we made a second submission, an extract of which is in the Appendix, highlighting that, among other things, the statutory responsibility to file returns remains with the taxpayer not the SP.

In line with our past submissions on a similar point, therefore, we would ask that either the proposed section 80P(4) be removed from the Bill altogether or, at least, that the threshold for these offences should be no lower than for the offences applicable to other kinds of SPs under the IRO (e.g., under section 80D and 80H), which require mens rea, i.e., wilful or reckless behaviour to be established. We see no reason why, for example, an SP engaged to file a top-up tax return on behalf of an MNE entity under the proposed section 80P(4) should be subject to more onerous liabilities than an SP engaged to file on behalf of a reporting entity, in relation to country-by-country reporting, under section 80H of the IRO.

Unlimited timeframe for assessors to conduct additional assessments

The proposed legislation modifies the application of section 60(1) of the IRO in respect of the GloBE and Hong Kong Minimum Top-up Tax regimes. However, the modifications effectively remove the six-year limitation and are drafted in such a manner that an assessor could theoretically raise a new assessment at any time in the future, provided they become aware of new information upon which an assessment can be based. This effective removal of the statute of limitations could lead to prolonged uncertainty for MNE groups, which could face assessments potentially decades into the future.

Under the circumstances, we propose reinstating a clear time limit, such as six years post-fiscal-year-end as appropriate, with a possible extension to 10 years if an international information request is filed during the initial six-year period. This approach should provide greater certainty to MNE groups while also providing an

additional four years for the IRD to raise assessments, where, e.g., they are waiting for information from the tax authorities of other jurisdictions.

If it is decided to retain an indefinite timeframe for assessors raise a new assessment at any time, then consideration should be given to affording taxpayers a similar right to request correction of tax assessments for top-up tax purposes, beyond the current six-year period under section 70A of the IRO.

<u>Concerns regarding the introduction of a general anti-avoidance rule ("GAAR")</u>

Hong Kong is aligning itself with international tax standards by adopting the GloBE and HKMTT regimes; however, it must be cautious not to impose excessive taxes beyond the GloBE Rules' requirements. The proposed section 26AH would introduce a GAAR that is not part of the GloBE Rules and which has not been adopted by Hong Kong's close competitors.

Australia and Singapore have chosen not to incorporate GAARs in their respective implementations of the GloBE Rules, allowing them to meet international commitments without subjecting them to the uncertainty associated with a GAAR.

The proposed section 26A focuses on the "main purpose or one of the main purposes" of a company, suggesting a lower threshold for application than the existing GAAR in section 61A of the IRO. This creates concerns among MNE groups about a less business-friendly tax environment, making investments in Hong Kong more challenging. As a result, MNE groups may be inclined to choose jurisdictions that offer more certainty. We recommend the removal of section 26AH and suggest that Hong Kong only introduce rules that are clearly aligned with the published OECD/IF GloBE Rules.

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If, notwithstanding the above, it is decided to retain the proposed section 26A, we would recommend the amendments below.

Firstly, we suggest limiting the rule's application exclusively to arrangements that the OECD lists in the GloBE Rules, or commentary to the Rules, as facilitating tax avoidance or abuse. Since these transactions have yet to be published by the OECD, this would require updating section 26AH once the OECD releases its list of potentially abusive arrangements. Specifically referring to this list would ensure that the text of the law reflects the identified transactions accurately and does not go beyond what is necessary to implement the GloBE Rules.

Secondly, we recommend removing the wording "or one of the main purposes". This change would require entities to determine if the primary objective of an arrangement is to avoid tax obligations, aligning with the existing language in section 61A of the IRO, which refers to a "sole or dominant purpose."

Lastly, we suggest clarifying that the rule should apply on a prospective basis and should not overlap with other targeted anti-avoidance provisions of the GloBE Rules, such as Article 3.2.7.

Amendments to Schedules 60, 61, 62 and 63

Under the proposed section 26AG(1)(b), the Secretary for Financial Services and the Treasury may, by notice published in the Gazette, amend Schedules 60, 61, 62 and 63. Given that these Schedules cover the most substantial parts of the Bill, we would suggest that it be made explicit that any changes to these Schedules constitute subsidiary legislation, which would need to be laid before the Legislative Council.

Companies (Amendment) (No. 2) Bill 2024

It will be important to ensure proper coordination between the Bill and the Companies (Amendment) (No. 2) Bill 2024 ("Companies Bill"), which provides for companies to redomicile in Hong Kong and which is also being considered by the Legislative Council. Assuming both bills are passed, will, for example, an MNE group company that has redomiciled Hong Kong, and which is not normally managed or controlled in Hong Kong, be treated as a tax resident in Hong Kong, on the basis of its being regarded as a company incorporated in Hong Kong from the date of issue of the certificate of re-domiciliation (under the proposed new section 2(5A) in the Companies Bill), even before it has been deregistered in its place of incorporation, which might not be until 120 days later, or possibly longer, if an extension is granted?

Should you wish to discuss any aspect of this submission, please do not hesitate to contact Peter Tisman at peter@hkicpa.org.hk or Jonathan Culver, convenor of TFEC's International Task Force, at joculver@deloitte.com.hk.

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Yours sincerely,

Peter Tisman
Director
Advocacy & Practice Development

PMT/JC/SC/pk

c.c. Hon Edmund WONG Chun-sek (Deputy Chairman, Bills Committee)

Extract of submission on the Inland Revenue (Amendment) (Miscellaneous Provisions) Bill 2021

We are responding to the Financial Services and the Treasury Bureau ("FSTB")'s consolidated response to the Bills Committee, summarising the views of stakeholders on the above Bill and providing FSTB's clarifications ("the Response"), a copy of which was sent to the Hong Kong Institute of CPAs by FSTB.

Having read the Response, we continue to have concerns on some issues, particularly in relation to Part 4 of the Bill, which introduces amendments relating to furnishing of tax returns. Our concerns are outlined below.

- Under (C)2., the Response states:

  "*a service provider under the proposed section 51AAD(8) is engaged by the taxpayer to perform a statutory act, i.e. to furnish the tax return for or on behalf of the taxpayer. If the service provider so engaged, without reasonable excuse, fails to do so, or does not do so in accordance with the information provided or instructions given by the taxpayer and the return so furnished is incorrect in a material particular, it is reasonable to impose penalty on the service provider to protect the interest of the taxpayer.*"

  However, the obligation to furnish a return remains with the taxpayer, as the proposed section 51AAD(5) makes clear:

  "*To avoid doubt, despite the engagement of a service provider under subsection (1), the taxpayer is not relieved from the taxpayer's obligation under section 51(1).*"

  The proposed section 51AAD(1) seems only to provide for a taxpayer to engage a service provider ("SP") if the taxpayer chooses to do so, in a case specified by the Commissioner:

  "*A taxpayer may, in a case specified by the Commissioner, engage a service provider to furnish a return under section 51(1) for or on behalf of the taxpayer.*"

  Prima facie, this does not create a statutory obligation or requirement on the SP to furnish a return. The response refers instead to a "statutory act" but, other than an act referred to in the law, we are not aware of the significance of this term. If there is no statutory obligation on the SP to furnish a return, the nature of the proposed offence under the proposed section 51AAD(8) remains unclear. The SP may not have fulfilled the terms of his/ her engagement or the contract between him/ herself and the taxpayer, but that would seem to be a matter more appropriately dealt with by the civil law, in the event of a dispute, rather than a matter for the criminal law. The Response suggests that it is reasonable to impose a penalty to protect the interest of the taxpayer, but section 80(2) of the Inland Revenue Ordinance (Cap. 112) ("IRO") already protects the interest of a taxpayer who fails to furnish a tax return under section 51(1) and has a reasonable excuse for not doing so.

- Under (C)3., the Response draws comparisons with other kinds of SPs under the IRO, including those engaged by financial Institutions who may assist the financial Institutions with, among other things, furnishing a return providing information on

foreign account holders. However, even though these SPs are likely to be more sophisticated than many ordinary tax representatives who carry out regular tax compliance work, the offences applicable to them under section 80D of the IRO are more circumscribed than those in the present Bill, as can be seen below:

"(4) A person who is a service provider engaged to carry out a reporting financial institution's obligations under section 50B(1) or (2) or 50C(1) commits an offence if the person—

(a) ***causes or allows the institution to provide, or in purported compliance with the requirement on the institution to furnish a return under section 50C(1), provides any information in the return that is misleading, false or inaccurate in a material particular, and—***

(i) ***knows the information is misleading, false or inaccurate in a material particular;***

(ii) ***is reckless as to whether the information is misleading, false or inaccurate in a material particular; or***

(iii) ***has no reasonable ground to believe that the information is true or accurate; or***

(b) ***after a return has been furnished to the Commissioner in purported compliance with section 50C(1)—***

(i) discovers misleading, false or inaccurate information in the return; and

(ii) ***without reasonable excuse, fails to notify the Commissioner of the discovery within a reasonable time.***

…….

(7) A person who is a service provider engaged to carry out a reporting financial institution's obligations under section 50B(1) or (2) or 50C(1) commits an offence ***if the person, with intent to defraud, causes or allows the institution to provide any information that is misleading, false or inaccurate in a material particular in a return furnished under section 50C(1)****."*

[Emphasis added]

- The above offences applicable to SPs under section 80D of the IRO generally require wilful or, at least, reckless behaviour to be established, on the part of the SP. The same is true of the offences applicable to another kind of SPs, under section 80H of the IRO, who assist multinational corporations to file country-by-county reports and related documents in accordance with the transfer pricing provisions of the IRO.

- Yet for SPs under the present Bill, who will often be small and medium-sized practices performing regular tax compliance work, the proposed offences are much more extensive and require no mens rea to be established. On the face of it, this is disproportionate. As we pointed out in our submission of 29 April 2021, it seems unreasonable to prescribe a statutory offence for a situation where, for example, an SP may have made an inadvertent mistake which may not even meet the test of negligence.