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

By Fax (3529 2837) & By Hand

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Our Ref.: C/TXG, M105917

The Hon. Andrew LEUNG Kwan-yuen, GBS, JP
Chairman,
Bills Committee on Inland Revenue (Amendment) Bill 2016,
Legislative Council Complex,
1 Legislative Council Road,
Central, Hong Kong

Dear Mr. Leung,

Inland Revenue (Amendment) Bill 2016

We are writing to follow up on the Hong Kong Institute of CPAs' earlier submission, dated 29 February, on the Inland Revenue (Amendment) Bill 2016. We have considered the Administration's responses to the views submitted and expressed by deputations at the Bills Committee meeting held on 1 March 2016 (in Bills Committee paper CB(1)697/15-16(02)).

Taxpayer safeguards

In our earlier submission, we noted the lack of specific safeguards for taxpayers under the Bill and contrasted this with the hard-won safeguards under the Inland Revenue (Disclosure of Information) Rules (Cap. 112BI), in relation to exchange of information on request. These include a requirement for the Commissioner of Inland Revenue, subject to certain exceptions, to notify a taxpayer who is the subject of an information request of that request and to afford an opportunity to the taxpayer to correct any inaccurate information that would otherwise be passed to the requesting tax authority. There is also an appeal mechanism in the law.

We observe that the lack of procedural rights and safeguards in the Bill, akin to those in the above Rules, was also noted in a letter from the Assistant Legal Adviser ("ALA") of the Legislative Council Legal Services Division to the Administration, dated 26 January 2016. On this point, the Administration's response to the ALA, in its letter of 1 February, was essentially the same as that subsequently given to the deputations which raised similar concerns, namely: (i) that if a disclosure and review process were in place for automatic exchange of financial account information in tax matters ("AEOI") it would unduly delay effective EOI; (ii) that no similar disclosure and review process for AEOI has been introduced by the competent authorities of other jurisdictions and (iii) that, essentially, there is no need because, according to the existing relevant legislation to protect privacy, account holders can request access to and correction of their personal data held by financial institutions ("FIs"). Furthermore, the Administration has reminded FIs "to amend the Personal Information Collection Statement to ensure that customers are duly informed of the purpose and use of the personal data for AEOI arrangement" and "to take all practical steps to ensure that the

37th Floor, Wu Chung House,
213 Queen's Road East, Wanchai, Hong Kong
香港灣仔皇后大道東213號胡忠大廈37樓
Tel電話: (852) 2287 7228
Fax傳真: (852) 2865 6776
(852) 2865 6603
Website網址: www.hkicpa.org.hk
Email電郵: hkicpa@hkicpa.org.hk

personal data is accurate, and account holders will be allowed to review and correct their personal and financial data".

With due respect to the Administration, this response seems to miss the point. We acknowledged in our earlier submission that AEOI gives rise to different practical considerations than EOI on request and we proposed that, if it is not feasible for account holders to be provided in advance with a copy of the information that an FI plans to furnish on them, it should be required for the FI to provide account holders with a copy of the information that has been reported on them as soon as practicable after it has been submitted to the Inland Revenue Department ("IRD"). There should also be appropriate mechanisms to allow for inaccurate or incomplete information, whether in the hands of an FI or the IRD and whether before or after it has been sent to the relevant overseas tax authority, to be corrected. If this takes place after it has been sent overseas, there should be provision for a supplementary transmission of corrected information to be made to the overseas jurisdiction concerned.

It follows that account holders should have the right to obtain a copy of their information contained in the IRD records for this purpose and should be able to request the IRD to correct any errors that may have occurred. The rights under the Personal Data (Privacy) Ordinance (Cap. 486), to which the Administration refers, would not address these concerns. Clearly it is of no great help to taxpayers to be informed in advance by an FI of the purpose for which data may be used, i.e., that it will be sent to the IRD, to be transferred to an overseas tax authority of a jurisdiction where the account holder is resident; in effect, this merely gives authority to an FI to hand over the information. Allowing the account holder to review personal data in the hands of an FI at some time before it is sent may also not be sufficient, as there is a risk that any errors that occur may occur during the transmission of the data. This is all the more likely given that the proposed section 50H of the Inland Revenue Ordinance ("IRO") introduced by the Bill allows an FI to engage a service provider to carry out its obligations under the proposed legislation, i.e., to set up, maintain and apply procedures to identify relevant information and to make returns to the IRD.

In addition, it should be noted that, under various circumstances, section 58(1)(c) of the Personal Data (Privacy) Ordinance exempts personal data held for the purposes of the assessment or collection of any tax or duty from Data Protection Principle 6, relating to a data subject's access to personal data (see Schedule 1 of Cap. 486) and from section 18(1)(b), on the right of an individual to be supplied with a copy of data of which the individual is the data subject.

Therefore, the right and ability of taxpayers under the existing law to be able to gain access to, review and correct information on them that has been passed to an overseas tax authority is far from clear cut. For this reason the Institute maintains that, the Bill should, at the very least, specifically provide for taxpayers, under normal circumstances, to be able to access information that that has been already passed by an FI to IRD and from the IRD to an overseas tax authority and to request that any errors be corrected, and that the overseas tax authority be notified of any material corrections. As it is envisaged that AEOI will take place once annually, this should be quite feasible. It would also provide a reasonable safeguard for taxpayers and, given that it would occur after the event, it need not delay the transmission of information, as suggested by the Administration.

In addition to the above, there should be reasonable means of dealing with any disputes between FIs and account holders regarding the accuracy of information sent or to be sent to the IRD.

Section 50C

In our previous submission, we noted that under the proposed section 50C of the IRO, a reporting FI is required to furnish a return in accordance with a notice given by an assessor. An assessor may give a notice requiring an FI to furnish a return containing the information indicated in subsection (3) (referred to in the bill as "required information") in relation to reportable accounts with respect to any reportable jurisdiction, maintained by the FI at any time during the relevant period. The required information under subsection (3)(a), is the detailed information specified in section 50F, supplemented by 50G. This is already quite detailed information about taxpayers' and it should be sufficient to enable Hong Kong to meet the international standard on AEOI. We did not see the need, therefore, to include the open-ended provision in subsection (3)(b), i.e., "any other information that the Board of Inland Revenue specifies".

The Administration's response to the above point is that the proposed new section 50C(3)(b) is required because, "apart from the information required by the [Common Reporting Standard], some other information is also required in the return for practical and operational need (such as information of the reporting FI (e.g., business registration number and address), the name of the service provider or authorised person engaged, the name of the person responsible for submitting the return and that person's declaration)". If this is the purpose of the provision, we believe that it would be preferable to give some clearer indication in the Bill of the type of additional information that may be required, rather than to include a very open-ended provision, which could, in principle, be made use of to change the nature or extent of the information that is required to be supplied by FIs about account holders.

As we indicated previously, if there are moves in future at the international level to extend the type of information that FIs are required to report on relevant account holders, or more generally, this should be the subject of further consultation and discussion in Hong Kong and should be addressed through amendments to the legislation. We do not think it advisable to include a "catch all" provision in the law that would apparently give the Board of Inland Revenue a very broad remit to determine what information the IRD may require FIs to furnish on account holders.

Section 50K

In our earlier submission we noted that the proposed section 50K appears to be extending the possible use of information beyond the scope of AEOI reporting and exchanges, to the use, more generally, in the administration and enforcement of the IRO. We have some reservations about this, firstly, because, when seen in the context of the proposed section 50C(3)(b), highlighted above, which could require an FI to provide any information about relevant accounts that the Board of Inland Revenue may specify, this could be seen as short-circuiting the existing procedures that the IRD has for obtaining information, and any procedural safeguards that may apply to these; secondly, because the IRD already has wide powers to obtain information from a broad range of persons under sections 51, 51A, 51B and 52, etc. of the IRO. As such, it may not be appropriate to make use of this proposed

legislation to extend the scope whereby information intended to be collected for the purposes of AEOI may be used domestically.

The Administration's response to the above point is: "At present, IRD may administer and enforce the relevant provisions of IRO having regard to the information furnished by the relevant persons in accordance with the IRO. For the sake of clarity, we propose to add section 50K to the Bill to avoid doubt".

This response does not address our concern. If, as the Administration suggests, the power already exists in the IRO, there is no need for the introduction of section 50K. If there is doubt as to whether this power currently exists, then we would reiterate our concern that legislation specifically for AEOI may not be an appropriate vehicle for extending the authority of the IRD to use the information gathered for domestic purposes. In our view, new or extended powers of information gathering for domestic purposes should not be introduced without, at the same time, also considering the associated procedural safeguards.

Section 80C

The Administration's response to our earlier request for clarification regarding some of the terminology in the proposed section 80C of the IRO appears not to have addressed the question. We were not clear and sought clarification as to who is intended to be covered by the reference, in section 80C(1)(b), to a person who "other than a service provider, is engaged to work for a reporting financial institution"? This is not aimed at employees, as employees are covered under subsection (1)(a). In addition, what is the intended scope of reference, in subsection (1)(c), to a person who “is concerned in the management of a reporting financial institution"? This is quite a broad and vague term and, again, this provision is apparently not aimed at persons who are employees of an FI because, as noted above, they are already covered .

Should you have any questions on our submission, I can be contacted at the Institute on 2287 7084 or by email at peter@hkicpa.org.hk .

Yours sincerely,

Peter Tisman
Director, Advocacy & Practice Development

PMT/vc