



**By email (bc\_07\_20@legco.gov.hk) and by hand**

12 May 2021

Our Ref.: C/TXG, M129985

Hon. Holden Chow Ho-ding  
Chairman, Bills Committee on Inland Revenue (Amendment)  
(Miscellaneous Provisions) Bill 2021  
Legislative Council Complex,  
1 Legislative Council Road,  
Central, Hong Kong

Dear Mr. Chow,

**Re. 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)1., the Response states, among other things:

*“By defining the role of service provider as ‘furnishing returns’, it is intended to refer only to the act of signing the return.”*

While this clarifies a point raised in our submission on the Bill of 29 April 2021 regarding the roles expected of an SP, it raises other questions. If the role of an SP is just to sign the return, then how is the proposed offence of an SP, without reasonable excuse, furnishing the return not in accordance with the information provided or instructions given by the taxpayer (and the return so furnished is incorrect in a material particular) to be construed? Does this relate only to information provided or instructions given by the taxpayer about signing the return?

- 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*

- (ii) **return; and**  
**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-country 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.
- The Bill also creates an offence under the proposed section 80K(3) in relation to obligations that are specifically imposed on an SP by the legislation:

*"The service provider commits an offence if the service provider, without reasonable excuse, fails to comply with a requirement under section 51AAD(3) or (4)."*

These provisions relate to obtaining a confirmation from the taxpayer stating that the information contained in the return is correct and complete to the best of the taxpayer's knowledge and belief, and retaining the confirmation for a period of not less than 7 years beginning on the date on which the return is furnished to the Commissioner. Given that these offences relate to specific obligations imposed on SPs by the Bill, they are clearer and more understandable. While one still might question whether criminal penalties are needed in this case, given that most SPs are likely to be professionals who are subject to their own professions' disciplinary regimes, our principal concerns relate to the other offence provisions, as explained above. **We would ask for these (i.e., the proposed sections 80K(2) and (4)) to be removed from the Bill altogether or, at the very least, the threshold for these offences should be no less than for the offences applicable to other kinds of SPs under section 80D and 80H of the IRO, which require mens rea, i.e., wilful or reckless behaviour, to be established.**



- Finally, we would repeat certain general points made in our earlier submission on the Bill, which have not been fully addressed in the Response:
  - ❖ The circumstances under which an SP could be engaged are not entirely clear. For example, there is uncertainty whether this statutory arrangement might be implemented to replace the existing system for filing paper returns, in which returns may be submitted by a tax representative. There would be a major concern if this were so because the existing system has worked smoothly for many years without, to our knowledge, any major issues arising.
  - ❖ In other jurisdictions that are further advanced than Hong Kong in terms of e-filing, some of which have been operating fairly extensive systems for a decade or more and are moving toward full digitalisation of their systems, tax agents are generally not made liable under the law for simple failures to submit tax returns for or on behalf of their clients.
  - ❖ The Bill is setting out a framework for e-filing, including roles and responsibilities, as well liabilities of different parties before there has been any detailed consultation on how the future system in Hong Kong will operate. A comprehensive system of e-filing which, under the legislation, could be made mandatory, represents a major operational change to the process of furnishing tax returns, which, we believe merits a broader public discussion. Given the proposed timetable for implementing e-filing, there should be sufficient time to introduce legislation once more detailed plans for system design and operation have been worked out. We would ask that consideration be given to deferring this part of the Bill for the time being.
  - ❖ We do not know the rationale for some of the proposals discussed above. However, if there were a concern on the part of the Administration is that, under an e-filing system, there may be greater scope for returns to be altered online before being submitted to the Inland Revenue Department, this could be addressed through the design architecture of the system rather than by trying to take action against SPs after the event. The system could, for example, be designed so that a taxpayer is required to e-sign on the return before the SP submits it and then, once a taxpayer has signed on the return, it cannot be amended without using a new e-return and/ or requiring the taxpayer to re-sign. We understand that this may be how the e-filing system operates in some jurisdictions.

Yours sincerely,

Peter Tisman  
Director, Advocacy & Practice Development

C.c. Secretary for Financial Services and the Treasury (Attn: Ms. Helen Chung)  
Commissioner of Inland Revenue (Attn: Mr Leung Kin-wa)

PMT/pk