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

By Email (bc_07_15@legco.gov.hk) & By Hand

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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

Thank you for inviting the views of the Hong Kong Institute of Certified Public Accountants ("the Institute") on the Inland Revenue (Amendment) Bill 2016. The Institute's Taxation Faculty has considered the bill.

The Institute understands that the Hong Kong Government ("Government") has committed to implement the Automatic Exchange of Information ("AEOI") standard developed by Organisation for Economic Cooperation and Development ("OECD"), with the first exchanges expected to take place by the end of 2018.

We consider that the primary purpose for implementation of AEOI (being the identification of tax evaders with financial assets and income in other jurisdictions, which they are not declaring for tax) is not especially relevant for Hong Kong. This is because Hong Kong applies a territorial basis of taxation and also excludes capital gains from tax. Therefore, income and capital gains arising from foreign accounts are unlikely to be subject to Hong Kong tax. This is in contrast with jurisdictions such as the United States and the United Kingdom that generally tax worldwide income of residents and which will benefit from the identification of tax residents' financial assets abroad through increased tax revenues.

Nevertheless, in principle, we are supportive of the objective of implementing the international standard on exchange of information for tax purposes as Hong Kong cannot afford to be perceived as being non-cooperative and opposing transparency in this regard. At the same time, there needs to be a reasonable balance between the rights and obligations of revenue authorities and taxpayers, including the right of revenue authorities to obtain relevant information about their tax residents' offshore financial accountants and safeguards for taxpayers to ensure that information on them is not misused or that inaccurate information about them is not widely circulated and used as the basis for tax audits or further enquiries.

Against this background, we have the following observations on the bill:

Notification

Paragraph 16 of the Legislative Council Brief refers to the safeguards on taxpayers' rights and suggests that the existing safeguards for EOI under comprehensive

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avoidance of double taxation agreements ("CDTAs") or tax information exchange agreements ("TIEAs") will be equally applicable under the AEOI mode, as AEOI will be implemented through CDTAs and TIEAs. However, the safeguards referred to at Annex C of the brief are only the high level, generic safeguards applicable to treaties. For EOI on request, other more specific safeguards apply, in particular those under the Inland Revenue (Disclosure of Information) Rules (Cap. 112BI), which include a requirement for the Commissioner of Inland Revenue, subject to certain exceptions, to notify the taxpayer, who is the subject of the request, of that request and to afford the opportunity to the taxpayer to correct any inaccurate information.

Whilst we note that the Government indicates in the brief that financial institutions ("FIs") have been reminded to comply with the provisions of the Personal Data (Privacy) Ordinance (Cap. 486), such as informing account holders of the use of the information collected and that account holders are entitled to request access and correction of their personal data, we do not believe that this is sufficiently specific for the purposes of this proposed legislation.

We appreciate that AEOI gives rise to different practical considerations from EOI on request and that advance notification is more straightforward with individual information requests from overseas revenue authorities than with AEOI. Nevertheless, in our submission on the AEOI consultation in 2015, we proposed that, if practicable, FIs should be required to send a copy of the information to be reported to both the Inland Revenue Department ("IRD") and the relevant account holders at the same time. If it is not feasible for each relevant account holder to be provided with a copy of the information that an FI plans to furnish on them in advance, it should be required for the FI to provide a statement of the information reported on them to account holders as soon as practicable after reporting to the IRD. There should be appropriate mechanisms to allow for inaccurate or incomplete information, whether in the hands of an FI or the IRD, to be corrected and for supplementary transmissions of corrected information to be made to foreign jurisdictions. 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 after the information was received by the IRD.

In addition, 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

Under the proposed section 50C of the Inland Revenue Ordinance ("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 on relevant account holders' accounts and should be sufficient to enable Hong Kong to meet the international standard on AEOI. We do 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".

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 can be addressed by amendment of the legislation. We do not think it advisable to include a "catch all" provision that would allow the Board of Inland Revenue to determine what information the IRD can require FIs to furnish on account holders.

Sections 50H

The proposed section 50H allows a service provider to be engaged to carry out for or on behalf of an FI obligations of the FI under the proposed legislation, to set up, maintain and apply procedures to identify relevant information and to make returns to the IRD, etc. Section 50H(2) makes it clear that, where a service provider has been engaged, the FI is not relieved of its obligations under the relevant provisions. However, under sections 80B – 80D, in addition to offences for FIs and employees of FIs, the bill seeks to impose offences on service providers. It seems somewhat questionable to have reporting FIs retain their obligation in relation to due diligence and furnishing returns where a service provider has been engaged and, at the same time, to impose offences on the service provider (section 80D). This appears to dilute the concept of responsibility under the bill and to create future uncertainty. We would compare this with, for example, the situation under the Anti-Money Laundering Ordinance (Cap. 615), where FIs may continue to rely on customer due diligence performed by certain intermediaries, but the FIs retain sole responsibility for knowing relevant information about their customers if they choose to so rely. We would suggest that bringing service providers into the enforcement regime would complicate the legislation and extend its reach to parties beyond those required for Hong Kong to fulfil its international commitments.

Section 50K

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 doubt 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 by-passing 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. 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 with treaty partners may be used domestically.

Section 61C

We should like to seek clarification as to the purpose of the anti-avoidance provision in the proposed section 61C and why this is considered necessary. We also have doubts about terminology adopted, i.e., the reference to "the main purpose or one of the main purposes", which differs from the existing general anti-avoidance provision in section 61A of the IRO, which refers to the "sole or dominant purpose", of entering into a transaction. We believe that introducing another similar but, in our view, less clear term in an anti-avoidance provision in the IRO is likely to cause confusion.

Section 80C

In our submission on the AEOI consultation in 2015, we expressed some concern about imposing penalties on employees of FIs and recommended that the proposed offence of causing or permitting an FI to fail to comply with relevant requirements, or to make incorrect returns, without reasonable excuse, be dropped. We are pleased to note that a rather general offence of this kind is not being proposed in the bill and that the proposed offence applicable to individuals working for FIs is limited to cases of causing or allowing an FI to provide any information that is misleading, false or inaccurate in a material particular with intent to defraud. On the other hand, we find some of the descriptions used to define the persons to whom the offence may be applied, to be less than entirely self-explanatory, which is of concern, given the seriousness of the offences and the penalties.

In particular, we are not clear and would like to seek further clarification as to who would be caught within the following descriptions: a person (other than an employee, as employees are covered under subsection (1)(a) and other than a service provider, covered in the first arm of subsection (1)(b)), who, under subsection (1)(b), "is engaged to work for a reporting financial institution" or who, under subsection (1)(c), "is concerned in the management of a reporting financial institution".

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,

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PMT/EC/vc