

立法會
Legislative Council

Paper for the Panel on Financial Affairs
Legal Adviser's view on the interpretation of Section 6(a) of
the Exchange Fund Ordinance (Cap. 66)

Purpose of Paper

This paper sets out Legal Adviser's view on the interpretation of section 6(a) of the Exchange Fund Ordinance (Cap. 66).

Background

2. In his letter dated 12 April 2001 to the Chairman of the Panel on Financial Affairs, the Financial Secretary (FS) stated that using the Exchange Fund to purchase permanent office accommodation for Hong Kong Monetary Authority is lawful and within his powers under section 6(a) of the Exchange Fund Ordinance (Cap. 66). He had sought specific legal advice and was advised that the accommodation of staff and their equipment was clearly a "staff cost" in the context.

Analysis

3. Section 6(a) of Exchange Fund Ordinance (Cap. 66) reads as follows :

"There shall be charged to the Fund -

- (a) the emoluments payable to, and other staff costs relating to, the persons employed in connection with the purposes of the Fund, including the investment thereof, and also including any appropriate share of such emoluments or staff costs in respect of the services of public officers so employed as part of their duties:

Provided that the number of appointments and the emoluments of such staff have been approved by the Financial Secretary;"

4. Section 6(a), in its current form, was enacted in 1983 by the Exchange Fund (Amendment) Ordinance 1983. It is, on the face of it, an accounting provision. It requires certain expenditure specified in it to be charged to the Exchange Fund which is a fund comprising public money established by the Exchange Fund Ordinance (Cap. 66). It also authorizes FS by implication to do the necessary acts to effect payments which have to be made under the provision.

5. The word "emoluments" bears a relatively clear meaning. As regards the term "staff costs", it could cover any expenditure which has some relation with the performance of function by staff. For example, as suggested by the General Counsel to the Hong Kong Monetary Authority in his letter of 19 April, 2001, "expenditure that is staff-related" is "staff costs" if the expenditure is not emoluments. "The cost of accommodating staff" is one of the examples the General Counsel used to illustrate his point. On the other hand, the term could be given a more restrictive meaning by confining the costs to expenditure which is payable because of a condition in a staff's contract of employment or is reasonably incidental to such condition.

6. In order to ascertain what "staff costs" should mean or the principle which should be applied in interpreting this term, an understanding of the constitutional framework on the control of public expenditure and the government policy behind the creation of the Monetary Authority is important so that the term could be interpreted in context.

7. Under Article 73(3) of the Basic Law, it is one of the powers and functions of the Legislative Council "to approve taxation and public expenditure". The power is without qualification. All public expenditure will, as a matter of constitutional requirement, have to be approved by the Legislative Council. However, it should be accepted that if an enactment should empower a designated person to incur public expenditure, that enactment would not contravene the Basic Law if the Legislative Council retains the ultimate control of the public expenditure in question.

8. Under Article 113 of the Basic Law, the "Exchange Fund of the Hong Kong Special Administrative Region shall be managed and controlled by the government of the Region, primarily for regulating the exchange value of the Hong Kong dollar". The main purpose of this article is to make clear that the management and control of Exchange Fund lies with the government of the Hong Kong Special Administrative Region. It also makes clear that the purpose of the Exchange Fund is primarily for regulating the exchange value of the Hong Kong dollar.

9. Although Article 113 of the Basic Law appears to rule out the Legislative Council's intervention in the management and control of the Exchange Fund, it does not contradict Article 73(3) because use of the Fund for the purpose specified in the Basic Law is not public expenditure. Legislative Council's role in relation to the management and control of the Exchange Fund is governed by Article 64 of the Basic Law. Under Article 64, it would be quite legitimate for the Legislative Council to ask the government questions on the management and control of the Exchange Fund as one of the means to hold the government accountable.

10. Section 4 of Public Finance Ordinance (Cap. 2) provides that "no expenditure shall be charged on the general revenue except as provided by or under this Ordinance or any other enactment". Section 5(1) of the same Ordinance further provides that the FS "shall cause to be prepared in each financial year estimates of the revenue and expenditure of the Government for the next following financial year, and shall cause such estimates to be laid before the Legislative Council". Under section 6 of the same Ordinance, the estimates of expenditure have to be included in an Appropriation Bill. The estimates of expenditure so included are deemed to be approved by the Legislative Council upon the enactment of the relevant Appropriation Ordinance. In order to provide a mechanism for the Legislative Council to approve proposals to incur public expenditure which are made subsequent to the enactment of the Appropriation Ordinance, section 8 of the same Ordinance empowers the Finance Committee of the Legislative Council to approve changes to the approved estimates of expenditure upon the proposal of the FS.

11. Section 3(1) of the Exchange Fund Ordinance (Cap. 66) establishes the Exchange Fund. It also provides that the Exchange Fund "shall be under the control of the Financial Secretary and shall be used primarily for such purposes as the Financial Secretary thinks fit affecting, either directly or indirectly the exchange value of the currency of Hong Kong and for other purposes incidental thereto. The control of the Financial Secretary shall be exercised in consultation with an Exchange Fund Advisory Committee of which the Financial Secretary shall be ex officio chairman and of which the other members shall be appointed by the Chief Executive". By virtue of section 3(1A) and (1B) of the same Ordinance, the Fund may also be used for the secondary purpose of maintaining the stability and the integrity of the monetary and financial systems of Hong Kong with a view to maintaining Hong Kong as an international financial centre.

12. In 1992, section 5A of the Exchange Fund Ordinance (Cap. 66) was enacted to require the FS to appoint a person as the Monetary Authority on such terms and conditions as he thinks fit. The person appointed has the functions as provided in section 5A(2). They are: to assist the FS in the performance of his functions under the Exchange Fund Ordinance; perform such functions as the FS may direct; and perform functions imposed on or assigned to the Monetary Authority by any other Ordinance. Under section 5A(3), the FS may appoint, on such terms and conditions as he thinks fit, persons to assist the Monetary Authority in the performance of the functions of the Monetary Authority specified in section 5A(2). A person appointed to assist the Monetary Authority is deemed to be employed in connection with the purposes of the Exchange Fund.

13. The institutional structure provided in the Exchange Fund Ordinance for the FS to discharge his functions under section 3 of the same Ordinance does not include a department of the government. What the FS is provided with are a person holding the title of Monetary Authority, persons whom FS could appoint to assist the Monetary Authority and an advisory committee entitled Exchange Fund Advisory Committee with which the FS is required to consult when performing his functions under section 3. However, the then Secretary for Monetary Affairs, when speaking at the Second Reading debate of the Exchange Fund (Amendment) Bill 1992, stated that "in practice the term "Monetary Authority" was to be regarded as an organization" and it would "remain an integral part of the Government". He also stated that it was the government's intention that "the staff and operating costs of the Authority would be charged directly to the Exchange Fund instead of to the general revenue, thus taking the Authority outside the resource allocation constraints applicable to other parts of government".

14. The government policy reflected in section 6(a) of the Exchange Fund Ordinance is to allow the Hong Kong Monetary Authority, when operating as a government department, the resources to employ staff on terms different from those of the Civil Service in order to attract and retain high calibre staff with the right experience and expertise. It is necessary for the implementation of that policy that the FS is given the authority to appoint persons from outside the Civil Service and their emoluments and other staff costs relating to them are to be paid from the Exchange Fund.

15. It seems clear from paragraphs 12, 13 and 14 above that the government remains financially responsible for the operation of the Hong Kong Monetary Authority in the same way as it is responsible for other government departments. Under normal circumstances, this responsibility is translated into a responsibility to provide funds from the General Revenue for all the recurrent and non-recurrent expenditure for the operation of the department. But, in the case of the Hong Kong Monetary Authority "staff and operating costs" are to come from the Exchange Fund. The antithesis of this is that expenditure other than for covering these costs would have to come from the General Revenue. Although it would seem more convenient if all the public expenditure relating to the operation of the Hong Kong Monetary Authority could be charged to the Exchange Fund, there is no clear provision in the Exchange Fund Ordinance allowing this to be so either expressly or by implication. Furthermore, to seek to include within the meaning of "staff costs" the purchase of a multi-billion dollar permanent office accommodation raises the issue of whether such an interpretation is in contravention of the Basic Law since it effectively nullifies the Legislative Council's constitutional function of approving public expenditure under Article 73 (3).

16. In Legal Adviser's view, against the constitutional requirement that public expenditure has to be approved by the Legislative Council under the Basic Law and the fact that the use of the Exchange Fund to purchase office accommodation for a government department is no doubt public expenditure, the reliance on section 6(a) to justify charging that expenditure to the Exchange Fund would need very strong and compelling arguments. To simply argue that "staff costs" means staff-related costs and therefore covers the cost of accommodating staff may not be conclusive. Members are advised that it would be a matter for them to hold the public officers concerned accountable for their decisions until they are satisfied that it is a proper application of the law to justify the expenditure from the Exchange Fund. In addition, it is suggested that in view of the fact that it has been some years since section 6(a) of the Exchange Fund Ordinance (Cap. 66) was enacted it may be time to consider reviewing the provision to see if it still meets contemporary needs.

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