

Letterhead of FINANCIAL SECRETARY'S OFFICE
Government of the Hong Kong Special Administrative Region

CB(1) 1829/00-01

Tel: (852) 2810 2022
Fax: (852) 2840 0569
Email:aafs@fb.gov.hk

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Mrs Florence Lam
Clerk to Panel
Legislative Council
(Fax: 2869 6794)

Dear Mrs Lam,

LegCo Panel on Financial Affairs
Permanent Accommodation for the HKMA

Further to our letter of 18 May 2001, we have now received the views of the Department of Justice on the legality of charging the expenditure for the purchase of permanent office accommodation for the Hong Kong Monetary Authority (HKMA) to the Exchange Fund. The proposed purchase raises two legal issues: the first in relation to certain provisions of the Basic Law and the second in relation to the interpretation of the Exchange Fund Ordinance (EFO). The views of the Department of Justice on these two issues are summarised as follows:

The Basic Law Issue

- (a) The SARG is entrusted under BL 113 with the power and function to manage and control the Exchange Fund, established by section 3 of the EFO, "primarily for regulating the exchange value of the Hong Kong dollar".
- (b) This power and function is regulated by the EFO, which was enacted in 1935 by the Hong Kong legislature, and is under BL 8, BL 18 and BL 160 maintained as part of the laws of the HKSAR, except for any part that contravenes the Basic Law. There has been no suggestion that the EFO is inconsistent with the Basic Law.
- (c) In managing and controlling the Exchange Fund, the SARG is, in accordance with BL 64, bound by the terms of the EFO and accountable to LegCo. BL 64 provides, as one of the incidents of this duty of accountability, that the SAR "shall obtain approval from the [Legislative] Council for taxation and public expenditure". This corresponds to LegCo's power and function under BL 73(3), to "approve taxation and public expenditure". The issue is whether this duty to obtain approval for public expenditure is applicable in the context of the Exchange Fund under BL 113.

- (d) Prior to the Reunification, there was a clear distinction between the control of the Exchange Fund and that of the general revenue. The Fund since its inception in 1935 was subject to the control of the Government and, in some cases before 1995, the approval of the UK Secretary of State, in accordance with the terms of the EFO. The charge on the general revenue was subject to the approval of LegCo under the Public Finance Ordinance or other statutory enactment. It is therefore unlikely, given the theme of continuity of the Basic Law as identified by the Court of Appeal in *HKSAR v David Ma* [1997] HKLRD 761, that the constitutional relationship between the Government and the legislature as regards the government's management and control of the Exchange Fund under the EFO is intended to be changed under the Basic Law. Following from this, it is unlikely that the duty to obtain approval for public expenditure is applicable in the context of the Exchange Fund under BL 113, so long as the relevant expenditure falls within the terms of BL 113 and the EFO.
- (e) In any event, the EFO has authorised the SARG to incur certain expenditure under the Exchange Fund (e.g. primarily for purposes affecting the exchange value of the currency of Hong Kong and for other purposes incidental thereto). The EFO may thus be seen as an implementation and statutory regulation of SARG's constitutional power and function under BL 113, or alternatively, where approval under BL 73(3) is required, the necessary approval.
- (f) In view of the above constitutional background, the EFO should be interpreted in such a way as to give full effect to the intention of the legislature in enacting the EFO, by applying the relevant common law rules of statutory interpretation (including, where appropriate, taking into account the legislative history etc of the EFO). It is not appropriate to adopt an unduly restrictive approach to the interpretation of the relevant provisions of the EFO.

The EFO issue

- (g) The uses to which the Exchange Fund may be put are set out in section 3(1) and (1A). Those uses include "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".
- (h) Section 6 was added to the original Ordinance (the Currency Ordinance) in 1936 to put beyond doubt that certain expenditure in the operation of the Fund might properly be charged to the Fund.

- (i) Section 6 now provides for specific expenditure in relation to staff to be charged to the Fund; but also provides that other expenditure shall be charged to the Fund if it is approved by the Chief Executive (of the HKSAR) as being necessary for the due performance of the duties laid upon the Financial Secretary (and the Advisory Committee) in connection with the operation of the Fund. This power of approval has been delegated to the Financial Secretary for many years.
- (j) While the duties laid upon the Financial Secretary are primarily those set out in section 3(1) and (1A), under section 5A(1) the Financial Secretary shall appoint the Monetary Authority (MA) to assist him in the performance of his duties. Under section 5A(4) the MA and persons appointed to assist him shall be regarded for all purposes as employed in connection with the purposes of the fund.
- (k) The MA clearly requires accommodation to enable him and his staff to undertake their functions and duties under the Ordinance. The Financial Secretary, who is vested with the delegated authority to approve expenditure under section 6(b) of the EFO, has been satisfied that the expenditure on the accommodation is necessary and approved it.
- (l) While there is some doubt as to whether the cost of providing accommodation can properly be regarded as a "staff cost" which may be charged to the Fund under section 6(a), it is unnecessary to resolve this question in the light of the preceding considerations.

Yours sincerely,

(Howard Lee)
Administrative Assistant to
Financial Secretary

cc SFS
CE/MA