

立法會***Legislative Council***LegCo Paper No. LS153/00-01**Paper for the Panel on Financial Affairs****Permanent Accommodation for the HKMA****Legal Adviser's comments on the Legal Views of the Department of Justice
as set out in the Letter of the Administrative Assistant to Financial Secretary**

The purpose of this paper is to provide for members' consideration Legal Adviser's comments on legal issues arising from the summary of the legal views of the Department of Justice as set out in the letter of the Administrative Assistant to Financial Secretary dated 19 July 2001 (the Letter).

General

2. Before members received the Letter, it had been the assertion of the then Financial Secretary (FS) and the Monetary Authority (MA) that the expenditure for the proposed purchase of permanent office accommodation for the Hong Kong Monetary Authority (HKMA), which is a government department, could lawfully be charged to the Exchange Fund under section 6(a) of the Exchange Fund Ordinance (Cap. 66) (EFO). (Section numbers referred to in this paper are those of the EFO unless otherwise stated.)

3. As regards that assertion, Legal Adviser has provided an analysis of the legal issues relating to the interpretation of "staff costs" in section 6(a) and has suggested that the interpretation proposed by the General Counsel of HKMA (GC) that "staff costs" covers expenditure for the purchase of permanent office accommodation for HKMA is untenable. (Please see Legal Adviser's paper submitted to members vide LegCo Paper No. CB(1) 1518/00-01.)

4. It appears from paragraph (1) of the Letter that the Department of Justice has some doubt as to whether the cost of providing accommodation can properly be regarded as a "staff cost" which may be charged to the Exchange Fund under section 6(a); a view which is consistent with that of Legal Adviser.

5. The assertion as described in paragraph 2 above seems to have been abandoned according to the information provided in the Letter. It is stated in paragraph (k) of the Letter that 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" (my underlining). Immediate legal issues raised by this new information include the proper scope and application of section 6(b) and whether the power to approve conferred on the CE by section 6(b) can be delegated to the FS.

Scope and Application of section 6(b)

6. Section 6(b) provides that there shall be charged to the Exchange Fund "any incidental expenditure which the Chief Executive (CE) may approve as 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". The expression, "Advisory Committee", is not defined in the EFO. It is, however, clear from the context of the EFO that "the Advisory Committee" should be the Exchange Fund Advisory Committee (EFAC) referred to in section 3(1).

7. Section 6(b) is an empowering provision. It confers on the CE the power to approve certain expenditure which is to be charged to the Exchange Fund on the conditions that the nature of the expenditure is incidental and that it is necessary for the due performance of duties laid upon the FS and the Advisory Committee in connection with the operation of the Fund. Although section 6(b) does not provide in more detailed and specific terms as to how this power to approve is to be exercised, the principle that such statutory power should be exercised in good faith and in accordance with the usual standards of reasonableness consistent with the scope and policy of the ordinance in question should apply.

8. On the question of the scope and policy of the EFO, an examination of the sort of expenditure which could lawfully be charged to the Exchange Fund under sections 3(1), 6(a) and 6(b) may be useful for understanding the statutory scheme enacted to regulate and authorize expenditure from the Exchange Fund.

9. Section 3(1) empowers the FS to control and use the Exchange Fund primarily for affecting the exchange value of the currency of Hong Kong and for other purposes incidental thereto. This power of control has to be exercised in consultation with the EFAC. Although expenditure from the Exchange Fund for these other purposes may reasonably be described as incidental expenditure in the context of section 3(1), the need for incurring the expenditure should flow from a specific decision made for achieving the primary purpose of the Exchange Fund. This should be distinguished from the "incidental expenditure" referred to in section 6(b) which is qualified by its own specific terms.

10. Section 6(a) empowers the FS to approve the number of appointments of staff and their emoluments. FS is not required to consult the EFAC for exercising this power of approval. Upon such approval being given, the emoluments and other related staff costs have to be charged to the Exchange Fund. Under section 5B, FS may delegate his powers to the MA and MA is also allowed to subdelegate.

11. Section 6(b) requires any incidental expenditure which the CE has approved as necessary for the due performance of the duties laid upon the FS and the EFAC in connection with the operation of the Exchange Fund to be charged to the Exchange Fund.

12. In relation to an item of expenditure not within the scope of section 3(1), but which the FS considers to be reasonably within the scope of section 6(b), he may make a proposal to the CE for his approval of that expenditure under section 6(b). However, even if the CE considers that the proposed expenditure is within his power to approve under section 6(b), he may still cause that to be proposed to the Legislative Council for approval in accordance with the Public Finance Ordinance (Cap. 2).

13. On the specific question of whether the expenditure for the purchase of permanent office accommodation of a gross floor area of about 340,000 square feet for HKMA for the purposes indicated in HKMA's paper entitled "Permanent accommodation for the HKMA" (LegCo Paper No. CB(1) 905/00-01 dated 28 March 2001) could be lawfully considered as within the scope of section 6(b), it would be a matter of judgement for the CE. He has to decide, by following the principle referred to in paragraph 7 above and taking into account all relevant considerations, whether the proposed expenditure could reasonably be categorized as "incidental" and "necessary" in the context of section 6(b). The CE would be accountable to the Legislative Council for such decision which is amenable to judicial review.

Can the CE lawfully delegate the power of approval to the FS

14. No express provision in the EFO allows the CE to delegate the power conferred upon him under section 6(b), but such delegation is permissible if section 63 of the Interpretation and General Clauses Ordinance (Cap. 1) is applicable and is not overridden by section 2(1) of Cap. 1. Section 63 of Cap. 1 provides that where any ordinance confers powers or imposes duties upon the CE, he may delegate any person by name or the person holding any office designated by him to exercise such powers or perform such duties on his behalf. Section 2(1) of Cap. 1 provides that "[s]ave where the contrary intention appears either from this Ordinance [i.e. Cap. 1] or from the context of any other Ordinance [e.g. the EFO], the provisions of this Ordinance [Cap. 1] shall apply".

15. The issue for consideration here is whether there appears from the context of the EFO a "contrary intention" within the meaning of section 2(1) of Cap. 1 which would override the effect of section 63 of Cap. 1 and put into doubt the lawfulness of a purported delegation made pursuant to section 63 of Cap. 1. On analysis, the following appear to constitute such "contrary intention".

16. When section 6(b) is read together with section 6(a), it is obvious that a separation of powers of approval has been intended. While under section 6(a) the FS is to approve the number of appointments and the rates of emoluments of staff, the CE is empowered under section 6(b) to approve the incidental and necessary expenditure. The intention is clearly that any approval under section 6(b) is to be given by the CE personally.

17. In the light of the analysis set out in paragraphs 8 to 12 above, it is clear that section 6(b) is intended to provide a statutory requirement of an independent review at a level senior to the FS of any proposed expenditure which may be charged to the Exchange Fund as incidental expenditure necessary for the due performance of the duties laid upon the FS and the Advisory Committee. That mechanism obviates the need to seek the approval of the Legislative Council for such incidental and necessary expenditure which the CE has approved. The purported delegation of the power to approve under section 6(b) by the CE to the FS would in effect dismantle the statutory requirement of an independent review at a level senior to the FS.

Prepared by

MA Yiu-tim, Jimmy

Legal Adviser

Legislative Council Secretariat

31 August 2001

