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Secretary for Financial Services
(Attention: Miss Patricia SO, AS(RSI))
Financial Services Bureau
18/F Tower I, Admiralty Centre
18 Harcourt Road
Hong Kong

13 June 2002

BY FAX

Fax No. : 2294 0460
Total no. of page : (3)

Dear Miss So,

Mandatory Provident Fund Schemes (Amendment) Bill 2002

At the Bills Committee meeting on 12 June 2002, the Administration explained the intended effect to be achieved by section 43B(3) proposed in clause 11 of the Bill. On the instructions of the Chairman of the Bills Committee, I write to set out my comments and seek further clarification on matters relating to the proposed section:

- (a) According to the Administration, the proposed daily penalty will not be imposed on the first conviction but may be imposed for each day on which the offence is continued after the date of the previous conviction. However, as proposed section 43B(3) already provides for a higher maximum penalty for a subsequent conviction, the court, in imposing sentence for the subsequent conviction, is likely to impose a heavier sentence, having regard to the fact that the defendant has a previous conviction and that despite previously convicted, the defendant has committed the offence again. Hence, the failure to rectify the situation after the previous conviction would have already been reflected and dealt with by the imposition of a heavier sentence for the subsequent conviction. The proposal to impose a further daily fine after the date of the previous conviction

could therefore amount to imposing a double penalty on the defendant.

- (b) In any case, if the offence is a continuing offence which takes place continuously over a period of time, the prosecution, in drafting the charge, can allege the offence as having committed between two specified dates (*Chiltern DC v Hodgetts* [1983] 1 All ER 1057, HL). This would mean that if, after the first conviction, there is evidence to show that an employer fails to comply with the requirement imposed by section 7(1A), the defendant can be charged with committing the offence between the date after the date of the first conviction and the date when the information is laid or the requirement complied with, whichever is the earlier. In such circumstances, the court, when convicting the defendant, would impose a penalty for the whole period during which the offence was committed. If this is a subsequent conviction, the heavier maximum penalty proposed in section 43B(3)(b) would apply. Accordingly, a defendant may be regarded as receiving a double penalty if, in addition to the higher penalty imposed under section 43B(3)(b) for the subsequent conviction, he is ordered to pay a further daily fine after the date of the previous conviction.
- (c) If the Administration's intention is to create a further offence for non-compliance with section 7(1A), it appears that proposed section 43B(3) would need to be amended. You may consider adding a provision to section 43B to the effect that if, after an employer has been convicted of the offence of failing to comply with a requirement imposed on the employer by section 7(1A), he does not take all practicable steps to secure compliance with the section, he shall be guilty of a further offence and is liable to a daily penalty of \$500 for each day on which the offence is continued after the conviction. If a further offence is provided, the question of possible double penalty would not arise as in such a case a fresh charge would be laid for the further offence, the penalty for which would be made dependent on the number of days on which the further offence takes place.
- (d) If, instead of creating a further offence as described in paragraph (c) above, the Administration's intention is to give the court the power to impose a further daily fine for a continuing offence, will the Administration consider deleting "after conviction therefor" and placing the paragraph relating to daily fine under paragraph (b) of proposed section 43B(3) rather than under section 43B(3)? The effect of this is that apart from imposing a penalty on an employer for

a subsequent conviction of an offence, the court may impose a further daily fine for each day the offence is continued since the date of the offence. In most of the existing Ordinances where continuing offences are provided, there is no reference to "after conviction therefor". It is noted that in the Amusement Rides (Safety) Ordinance (Cap. 449), the Personal Data (Privacy) Ordinance (Cap. 486) and the Human Reproductive Technology Ordinance (Cap. 561), the daily penalty provision is similar to proposed section 43B(3) in this Bill. Without going into the merits of the provision in the 3 Ordinances concerned, it should however be noted that unlike this Bill, there is no separate provision in those Ordinances providing for a higher maximum penalty for a subsequent conviction.

- (e) According to the Administration, it is only when an employer is convicted of the same offence in respect of the same employee on a subsequent occasion that the employer is liable to a daily penalty. If this is the Administration's intention, it would appear that proposed section 43B(3) would need to be amended. Proposed section 43B(3), as presently drafted, refers to "offence" generally and the offence in question is failure of an employer to comply with a requirement imposed by section 7(1A). It seems from the way proposed section 7(1A) is drafted that the offence can be committed in respect of any relevant employee.

In proposed section 43B(4), if the Administration intends to displace the time limit for prosecution stipulated in section 26 of the Magistrates Ordinance (Cap. 227), should "Notwithstanding section 26 of the Magistrates Ordinance (Cap. 227)" be added at the beginning of proposed section 43B(4)? This will bring the drafting of this section in line with similar provisions in the existing Ordinances. Examples of this provision are section 31A of the Prevention of Bribery Ordinance (Cap. 201), section 10 of the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570) and section 389 of the Securities and Futures Ordinance (Cap. 571).

I would appreciate it if you would let me have your reply in both languages by 17 June 2002.

Yours sincerely,

(Connie Fung)

Assistant Legal Adviser

c.c. DoJ (Attn: Mr. Geoffrey FOX, SALD)
LA

