

**Bills Committee on Interest on Arrears of Maintenance Bill 2001
Matters Arising from the Meeting of 2 December 2002**

A. Surcharge Ceiling

At the meeting of 2 December 2002, Members considered that the surcharge ceiling should be set at 100% of the amount of maintenance arrears.

2. In considering an appropriate surcharge ceiling, we need to pay due regard to the legal policy principle that it is necessary and desirable to maintain consistency in the level of surcharge for similar “offences”.

3. Section 32 of the Public Finance Ordinance (“PFO”) (Cap. 2) provides for a surcharge of 100%, same as the level proposed by Members. However, the “surcharge” under PFO is a recovery of the amount of loss suffered by the Government as a result of wrongdoings by public officers. It is not an added-on, as in the case of the proposed surcharge in a maintenance arrears case.

4. There are also other instances in the laws where a high percentage of surcharge is provided –

<i>Ordinance</i>	<i>Surcharge</i>
Industrial Training (Construction Industry) Ordinance (Cap. 317), section 26	If a contractor fails, without reasonable excuse, to give notice (for receiving a payment), the Construction Industry Training Authority may impose a surcharge not exceeding twice the amount of the levy (0.4% of the value of the construction works which exceeds \$1,000,000).
Industry Training (Clothing Industry) Ordinance (Cap. 318), section 25	An exporter has to lodge with the Commissioner of Customs and Excise a declaration on the particulars of a shipment of clothing items and pay the clothing industry training levy, which is 30 cents for every \$1,000 of the F.O.B. value of the items. Where the Commissioner has reason to believe that an exporter has understated the

	F.O.B. value or failed to lodge a declaration, he may impose a surcharge not exceeding 20 times the difference, provided that the surcharge does not exceed \$10,000.
Pneumoconiosis (Compensation) (Assessment of Levy) Regulations (Cap. 360A), rule 6	If a contractor fails, without reasonable excuse, to give notice (for receiving a payment), the Pneumoconiosis Compensation Fund Board may impose a surcharge not exceeding twice the amount of the levy (0.25% of the value of the construction works which exceeds \$1,000,000).
Employees Compensation Assistance Ordinance (Cap. 365), section 36A	An employer who employs an employee without a policy of insurance in force is liable to pay a surcharge to the Employees Compensation Assistance Fund Board. The surcharge is 3 times the levy payable under the Employees' Compensation Insurance Levies Ordinance (Cap. 411), which is 2%-6.3% on the premium payable, depending on date the insured pays a premium in respect of an insurance policy. The amount of surcharge will be multiplied by a factor of 2 for a second contravention.

However, such instances cannot serve as comparable benchmark in that the sum or levy in question basically represents a small percentage of the amount on which the levy is based. The actual amount of money involved is comparatively small. They are also different in nature.

5. The surcharge payable in respect of tax and Government rent are designed for late payment, as in the case of maintenance arrears. Under section 71 of the Inland Revenue Ordinance (Cap. 112) and section 15 of the Government Rent (Assessment and Collection) Ordinance (Cap. 515), late payment of tax and Government rent are respectively subject to 5% of the amount in default and the percentage will be raised to 10% if the default is over 6 months. In both cases, the payer is still liable for the amount of unpaid tax or Government rent. Likewise, the maintenance payer will have to pay the maintenance arrears and the surcharge, the latter if ordered by the court.

6. Our proposed surcharge ceiling of 30% is comparatively higher. However, this may be justified on the grounds that the surcharge is not

automatic, that it is meant to be a deterrent against the maintenance payer's blameworthy conduct of defaulting repeatedly without reasonable excuse. On the other hand, we need also to take into account that the payee would have already been compensated for his/her loss in interest on the maintenance arrears by the automatic interest at judgment rate.

B. The Court be Empowered to Impose Surcharge in Maintenance Payer's Absence

7. Members considered that the court should be empowered to impose a surcharge on maintenance arrears even though the maintenance payer failed to appear before the court, so long as the summons had been served on the payer. Members agreed with our proposal that the maintenance payer "should be given the opportunity to defend himself/herself". However, Members considered that default judgment should be provided for in case of deliberate evasion of service.

Blameworthy conduct and standard of proof

8. The blameworthy conduct of the maintenance payer, i.e. he/she has defaulted repeatedly without reasonable excuse, is a fact to be established by the court before imposing a surcharge. Accrued maintenance arrears can amount to tens of thousands of dollars. As the surcharge scheme is designed to cover all maintenance arrears cases, the imposition of a surcharge by the court may inflict a serious detriment on some maintenance payers. From general legal policy perspective, where a court judgment inflicts a serious detriment on an individual on the establishment of certain facts, even though the case is not a criminal cause or matter, the criminal standard of proof will be required to establish those facts. The facts will not be taken to be proved merely on a balance of probabilities.

9. If the court is empowered to impose a surcharge on a maintenance payer in his/her absence, there may be cases where the criminal standard of proof is not satisfied. It is only appropriate that a maintenance payer be afforded a chance to present his/her points to the court. Otherwise, there is no way for the court to find that there is no

reasonable excuse for the payer's failure to comply with the maintenance order.

Application for Surcharge

Writ Proceedings and Default Judgment

10. Orders 10 to 13 of the Rules of the High Court (Cap. 4 sub. leg. A) and Rules of the District Court (Cap. 336 sub. leg. H) set out the writ proceedings. Under these provisions, default judgment may be entered against a defendant when –

- (a) the defendant has acknowledged service on him of the writ; or
- (b) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant; or
- (c) the plaintiff produces the writ indorsed by the defendant's solicitor with a statement that he accepts service of the writ on the defendant's behalf,

and when the defendant fails to file a defence or apply for extension of time for doing so.

11. Writ proceedings deal with civil matters and an application for surcharge on maintenance arrears is civil in nature. As the existing legislation does not prohibit a maintenance payee from using the writ proceedings to apply for a surcharge on arrears, in theory the proceedings could be used for the purpose of attaining default judgement. However, the plaintiff (maintenance payee in our case) would still have to rely on enforcement proceedings when the defendant refuses to abide by the judgment.

Enforcement Proceedings

12. In practice, the payee would most likely seek for a surcharge in the course of action to enforce the maintenance order under which arrears have accrued, instead of pursuing the writ proceedings and following up with enforcement proceedings if the payer refuses to pay the surcharge. However, providing for default judgment in enforcement proceedings may have Bill of Rights implications, Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383) in particular. In the circumstances, we do not consider it appropriate to provide for such in the bill.

13. Members may wish to note that under rule 87 of the Matrimonial Causes Rules (Cap. 179 sub. leg. A), the court may, on an application made ex parte by the judgment creditor, direct a judgment summons (“JS”) to be issued to the judgment debtor to appear in the court and be examined on oath as to his/her means. Under rule 87(5)(c), the court in the adjourned JS hearing (when the judgment debtor fails to show up in the first hearing) can make an order of commitment against the judgment debtor –

- (a) when he/she fails to attend the adjourned hearing; or
- (b) he/she attends but fails to show cause why an order of commitment should not be made against him/her.

These rules enable the court to bring a judgment debtor to court through an order of commitment.

Home Affairs Bureau
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