

立法會
Legislative Council

LC Paper No. LS 60/01-02

**Paper for the House Committee Meeting
of the Legislative Council
on 1 March 2002**

**Legal Service Division Further Report on
Dutiable Commodities (Amendment) Bill 2002**

Members may recall that the main purpose of this Bill is to implement an open bond system (OBS) in all bonded warehouses in Hong Kong. Opportunity is also taken to make some other changes to existing provisions not related to OBS.

2. At the House Committee meeting on 1 February 2002, we reported that we were seeking clarification from the Administration on certain legal and drafting aspects of the Bill (see **Annex**). Members agreed to defer the decision on whether to set up a bills committee on the Bill pending the Administration's reply to the queries.

3. The main legal issue that we have raised is on Clause 6(b) which is a provision not related to OBS. It amends Schedule 3 on compounding of offences. Under the existing section 34A(1), if a person enters Hong Kong at an entry point and fails to declare to the Customs the quantity of dutiable goods carried by him, he commits an offence. The maximum fine that the court can impose is a fine at level 1, i.e. at \$2,000. Under section 47A and Schedule 3, the Commissioner of Customs and Excise is empowered to compound this offence by imposing a fixed fine of \$2,000. Clause 6(b) of this Bill proposes to add, again by way of the compounding of offence, a further penalty of 5 times the duty payable on the goods where dutiable goods are seized in connection with the offence.

4. It appears that the Commissioner may be empowered to impose even a larger fine than the court. We have sought clarification from the Administration on the existing practices when compounding an offence and how this additional penalty will interface with another existing offence under section 17. Under section 17 and Schedule 3, if a person carries dutiable goods at an entry point to Hong Kong without making a declaration and if the duty value of the goods does not exceed \$10,000 as assessed by the Commissioner, he commits an offence. The Commissioner can compound this offence by imposing a fine of 5 times the duty payable on the dutiable goods concerned.

5. Another drafting issue that we have raised relates to new regulation 98A, which states that a warehouse-keeper shall keep every relevant document for 2 years and a document that is issued, prepared or received in the course of business of a warehouse shall be regarded as issued, prepared or received by the warehouse-keeper. We have raised queries with the Administration that such drafting might have the effect of displacing the prosecution's burden of proof.

6. As at 28 February 2002, we have not yet received the Administration's reply. Members may wish to consider whether there are policy or other matters which merits the setting up of a Bills Committee at this stage or wish to defer until another further report can be issued.

Encls.

Prepared by
HO Ying-chu, Anita
Assistant Legal Adviser
Legislative Council Secretariat
28 February 2002

FIN No. 104/5/27
LS/B/14/01-02
2869 9209
2877 5029

Secretary for the Treasury
(Attention: Miss Erica Ng, PAS(Tsy)R)
Finance Bureau
4/F Main Wing
Central Government Offices
Central
Hong Kong

6 February 2002

BY FAX
Fax No. : 2530 5921
Total no. of page(s) : (3)

Dear Miss Ng,

Dutiable Commodities (Amendment) Bill 2002

I am scrutinizing the above Bill with a view to advising Members on its legal and drafting aspects. I would be grateful if you could comment on or clarify the following -

Clause 1 - Commencement

2. If this Bill is passed, when will this Ordinance come into operation? Will there be different commencement dates for different provisions so as to implement this open bond system (OBS) in two phases? Will there be sufficient time for both the bonded warehouse owners and the Administration to prepare for and get acquainted with this OBS?

Clause 3

3. On the new section 8A(1)(e), what kind of "any other relevant matter" will the Commissioner take into account in determining an application for the grant or a renewal of a licence? Would it be relevant to (a) to (d) above or just any other relevant matter?

Clause 4

4. Why is section 10 repealed?

Clause 6(b) - compounding of offences

5. It is noted that under the existing section 17(1), a person who imports, exports or possesses dutiable goods not in accordance with the Ordinance commits an offence. He can be prosecuted and upon conviction, the court may impose a maximum fine of \$1,000,000 and imprisonment of 2 years.

6. According to section 47A and reading in conjunction with Schedule 3, the Commissioner is empowered to compound this offence if -

- (i) the dutiable goods are carried by a person at an entry point to Hong Kong;
- (ii) the person fails to declare or makes a false or incomplete declaration; and
- (iii) the duty value of the goods does not exceed \$10,000 as assessed by the Commissioner.

7. If all these conditions are met, the Commissioner is empowered to compound such offence and can impose a fine 5 times the duty payable on the dutiable goods concerned. If the person pays the fine, the Commissioner shall release the dutiable goods seized in connection with the offence. No more proceedings shall be taken against the person or goods. The full duty is taken to have been paid.

8. Then, pursuant to the existing section 34A(1), if a person enters Hong Kong at an entry point and fails to declare to the Customs the quantity of dutiable goods carried by him, he commits an offence. The offence seems to focus on the act of failing to declare the dutiable goods. If the case goes to court, the maximum fine is \$2,000. The court can always impose a lesser sum. However, under Schedule 3, the Commissioner is empowered to "compound this offence" by imposing a fixed fine of \$2,000.

9. In this Bill, Clause 6(b) proposes to amend Schedule 3 by adding "and, where dutiable goods are seized in connection with the offence, 5 times the duty payable on the goods concerned" to Column 4 against section 34A.

10. So, for example, if a person imports into Hong Kong 10 packets of dutiable cigarettes without making a declaration, and the Commissioner decides to compound this offence, what penalty is the Commissioner imposing? Is the Commissioner imposing a penalty of 5 times the duty payable on the cigarettes (i.e. \$804) against the person under section 17(1), or a penalty of a level 1 fine (i.e. \$2,000) under section 34A, or a total of \$2,804 under both sections 17(1) and 34A? If the Commissioner is imposing the penalty of \$2,804 against the person under both sections, and reading in conjunction with the proposed amendment in this Bill, is the Commissioner going to impose a further penalty of \$804, thus making a total of \$3,608 for bringing 10 packets of dutiable cigarettes into Hong Kong?

11. Further, by making this amendment in Clause 6(b), it seems that the Commissioner is empowered to impose even a larger fine than the court. Apart from imposing a fixed fine of \$2,000, he can impose a fine 5 times the duty payable on the goods concerned while the court can only impose a maximum fine of \$2,000. Is this the policy intent of "compounding this offence"?

Clause 20 - new regulation 98A

12. Under the new regulation 98A(1)(b)(i), it is stated that "a warehouse-keeper shall keep every relevant document that he prepares, including one that is prepared for the purpose of issuing but not issued". What kind of documents are the warehouse-keeper required to be kept if they are not actually issued? Does it include drafts of a document? It is noted that no such inclusion of documents is found in other provisions of this Ordinance.

13. The new regulation 98A(3) provides that "a document that is issued, prepared or received (as the case may be) in the course of the business of a warehouse shall be regarded as issued, prepared or received (as the case may be) by the warehouse-keeper." This presumption clause is not found in other regulations such as regulations 22A, 44, 48, 61 and 98. Since the offence provision would require evidence of the warehouse-keeper's knowledge of the issuance, preparation or receipt of a document in order to convict him, what would be the justification for enacting this presumption provision which would have the effect of displacing the prosecution's burden to prove that the warehouse-keeper has issued, prepared or received the document?

14. I would appreciate it if you could let me have your reply in both English and Chinese as soon as possible.

Yours sincerely,

(Anita HO)
Assistant Legal Adviser

c.c. Department of Justice (Attn: Mr W L Cheung, SGC)
LA