立法會

Legislative Council

LC Paper No. LS83/02-03

Paper for the Manpower Panel

Population Policy and Importation of Foreign Domestic Helpers

At the House Committee Meeting held on 7 March 2003, Hon Margaret NG requested Legal Adviser to provide a written opinion on whether it was in order, as proposed by the Administration, for a monthly levy of $400 to be imposed under the Employees Retraining Ordinance (Cap. 423) (ERO) for the employment of foreign domestic helpers (FDHs).

Is the Employees Retraining Levy a tax?

2. The question of whether the Employees Retraining Levy (ER Levy) is a tax or not calls for an examination of the policy intent of ERO, the functions of the Employees Retraining Board (ER Board), the composition and purpose of the Employees Retraining Fund (ER Fund) and the Government's role in the operation of the ER Board and management of the ER Fund. If it may be concluded from the examination that the ER Board is a public body operating under ERO for a public purpose, and that the payment of ER Levy required by ERO is for the benefit of the public or a section of the public, it should provide sufficient grounds to justify an affirmative answer to the question.[1]

3. The ERO was passed in 1992 to establish the ER Board and to establish the ER Fund. The long title of ERO provides for, inter alia, the imposition of a levy (the ER Levy) payable by employers who employ imported employees, the collection of the levy by the Director of Immigration (Director) from those employers in respect of those employees and the remittance of the levy to the ER Board for the purposes of the ER Fund.

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[1] *A-G of New South Wales v. Collector of Customs of New South Wales* (1908) 5 CLR 818 at 848; *Transport Authority v. Adelaide* (1980) 24 SASR 481; Paul Lordon, Q.C., *Crown Law*, pp. 496-498 (1991); *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited* [1933] AC 168 and *Mootoo v. A-G of Trinidad and Tobago* [1979] 1WLR 1334

4. In moving the Employees Retraining Bill on 24 June 1992, the then Secretary for Education and Manpower made reference to the need to provide retraining courses designed to assist those workers who were displaced as a result of the economic restructuring process to find alternative employment. (Paper provided to the Panel on Manpower for its meeting on 12 March 2003 vide LC Paper No. CB(2) 1438/02-02(02) refers.)

5. According to the LegCo Brief issued on the Employees Retraining Bill, there was already in place the 1992 General Labour Importation Scheme before the introduction of the Bill. The Administration explained that under that scheme, employers of imported workers were charged a levy as a contractual fee by Government in consideration of the grant of a quota to an employer for importing workers. The Government's intention in making the levy statutory was to ensure that the levy collected could be channelled directly to the statutory fund specified for retraining rather than to the general revenue.

6. Under section 14(3) of ERO, the Chief Executive in Council (CE in Council) may, from time to time, approve a labour importation scheme under the terms of which a levy shall be payable by employers in accordance with Part IV of the ERO. Section 14 (1) requires an employer to pay the ER Levy to the Director in respect of imported employees to be employed by him. The amount of the ER Levy is specified in Schedule 3 to ERO which may be amended by the CE in Council pursuant to section 31 of ERO. That amount is currently specified as $400, the same amount when ERO was enacted in 1992. Although not expressed as a condition precedent for the Director's granting of visa to a person intending to enter Hong Kong to take up employment with an employer who has made application for the employment of such person, the payment of the ER Levy is a statutory requirement if an employer intended to employ a person from outside Hong Kong under an approved labour importation scheme.

7. The ER levy, once collected, has to be remitted to the ER Board in accordance with section 16 of ERO after deducting from it fees charged by the Financial Secretary for any service provided to the ER Board by the Government. The ER Board will then pay the ER Levy received into the ER Fund established under section 6(1) of ERO and from which the ER Board is empowered under section 7 of ERO to pay from the ER Fund expenditure for providing training or retraining courses and retraining allowance to trainees eligible for the allowance.

8. Apart from the ER Levy collected under ERO, the ER Fund also receives money provided by the Government for the purposes of the ER Fund under section 6(3)(e) of ERO. According to Head 177 of the Draft 2003-04 Estimates of Expenditure, the ER Board

receives recurrent funding from the Government to allow it to have a stable source of funding to provide retraining to eligible persons, enabling them to acquire new or enhanced vocational skills and adjust to changes in the employment market. This funding arrangement is subject to a Memorandum of Administrative Arrangements signed with the ER Board. For the years 2001–02 and 2002-03, the funding was $400 million and $396 million respectively. The proposed funding for 2003-2004 is $378 million. Under section 27 of ERO, the CE has the authority to give directions to the ER Board which may include a direction to transfer assets of the ER Fund which the ER Board no longer requires for the purposes of the ER Fund to the general revenue.

9. Under section 4 of ERO, the functions of the ER Board are, among other things, to consider the provision, administration and availability of retraining courses intended or designed for the benefit of eligible employees in adjusting to changes in the employment market by acquiring new or enhanced vocational skills; to identify particular occupations or classes of occupation that have high vacancy rates and in respect of which eligible employees may secure employment or re-employment by attending retraining courses as trainees to acquire new or enhanced vocational skills; to liaise with training bodies, other related organizations and Government departments with respect to the design, administration and availability of retraining courses; to pay retraining allowances to trainees; to engage the services of training bodies for the purpose of providing or conducting retraining courses; and to appoint, by notice in the Gazette, a training provider to provide training or retraining.

10. The above may be grounds for arguing that the ER Levy is a tax because the ER Board is a public body operating under ERO for a public purpose, and that the payment of the ER Levy as required by ERO is for the benefit of a class of person in the society generally. However, it may, on the other hand, be argued that the nature of the ER Levy is fundamentally a contractual fee charged in consideration of the quota allocated by the Secretary for Education and Manpower. The making of the ER Levy statutory was not intended to change that fundamental nature but to achieve the policy objective of designating the ER Levy for funding retraining programme for eligible employees.

11. At the meeting of the LegCo Panel on Manpower held on 12 March 2003, the Administration advised that, from the legal point of view, the ER Levy income brought by importation labour scheme under ERO was not for the purpose of general revenue but for the purposes specified under ERO, and therefore did not fall within the head of taxation in its normal sense for the purposes of Legislative Council procedures. That advice appeared to address the question from the perspective of Legislative Council procedures only. Members may wish to ask the Administration to provide its views from other legal perspectives as well.

Is the ER Levy a tax which requires the approval of the Legislative Council?

12. Assuming that it is correct to regard the ER Levy as a tax, the next question is whether the approval of a new importation of labour scheme with the consequence that an employer intending to employ a worker from outside Hong Kong has to pay the ER Levy in accordance with ERO requires the approval of the Legislative Council in accordance with Article 73 of the Basic Law.[2] If the ER Levy is not a tax, the question does not arise.

13. As a matter of general principle, it is permissible for a legislature to delegate by way of legislation its powers and functions to a subordinate agency. However if such delegation amounts to the legislature effacing itself or results in the legislature losing effective control over the subordinate agency, doubts may be raised on the constitutionality of such delegation.[3]

14. If section 14(3) of ERO and other provisions of ERO read as a whole are considered a delegation of the power to approve taxation, the issue is whether Legislative Council has deprived itself of the opportunity to exercise that power to approve an imposition of the ER Levy in relation to an importation of labour scheme approved under section 14(3).

15. According to section 31 of ERO, the level of the ER Levy specified in Schedule 3 of ERO may be amended by the CE in Council by notice in the Gazette. The notice is subsidiary legislation and is subject to the power of the Legislative Council to amend in accordance with section 34 of the Interpretation of General Clauses Ordinance (Cap. 1). In so far as the CE in Council's power to adjust the level of the ER Level is concerned, the Legislative Council retains an effective control over it.

16. As with the exercise of power under section 14(3) by the CE in Council, there is no legislative means provided by ERO to set that aside. The only means the Legislative Council may invalidate that is by way of primary legislation. To the extent that the Legislative Council is empowered to enact laws in accordance with the provisions of the Basic Law and legal procedures, it may be said that Legislative Council retains the ultimate control over the CE in Council. However, in the light of the conditions and restrictions imposed by Article 74 of the Basic Law on Members' right to introduce bills into the Legislative Council, whether that right could be considered as an effective means of control in the current context has not been considered by the court.

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[2] Article 73 of the Basic Law provides that the Legislative Council of the HKSAR shall exercise the powers and functions of, inter alia, approving taxation and public expenditure.

[3] *The Sze Yap S.S. Co. Ltd. v. The King* [1924] 14 HKCU 1; *Mootoo v. A-G of Trinidad and Tobago* [1979] 1WLR 1334; *Cobb & Co. Ltd. v. Kropp* [1967] A.C. 141

Powers Under Section 14 of ERO

17. Another question is whether the imposition of ER Levy on importation of FDH and the purported designation of the importation of the employment of FDHs as a labour importation scheme under ERO are within the powers conferred on the CE in Council by section 14(3) of ERO.

18. Section 14(3) empowers CE in Council to approve, from time to time, a labour importation scheme, for the purpose of section 14. The power conferred appears to be a broad discretionary power without restrictions. However, it is well established that such broad discretionary power should only be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.[4] In order to determine whether the CE in Council has satisfied these requirements requires a detailed examination of the facts and policy reasons considered by the CE in Council.

19. According to the LegCo Brief entitled "Review of the Policy on Foreign Domestic Helpers" (Ref: EDLB/LB/C/36/02) dated 26 February 2003, the main policy justification for the CE in Council's decision to designate the importation of FDHs as a labour importation scheme is to bring employers of FDHs on par with employers of other imported workers under the Supplementary Labour Scheme (SLS) (para. 2 of the LegCo Brief). This justification is further elaborated in paragraph 5 of the LegCo Brief along the following lines. First, because there is an insufficient supply of local people willing to work as full-time live-in domestic helpers, it justifies the continued importation of FDHs. Secondly, because the SLS and the importation of FDHs operate on the same principle, i.e. employers should be allowed to import employees to fill vacancies where there are insufficient suitable and available local candidates, there is a case to bring the admission of FDHs on par with the SLS. Thirdly, given that employers of FDHs are enjoying services offered by foreign workers, it is reasonable that they contribute towards the training and retraining of the local workforce and promotion of job opportunities for local employees.

20. At the meeting of the LegCo Panel on Manpower held on 12 March 2003, the Secretary for Economic Development and Labour remarked that FDHs and Local Domestic Helpers (LDHs) had different labour markets. He made reference to his personal experience that people had indicated to him that they might be willing to change to hiring LDHs if the latter had been trained to cook properly and do a good job in household chores. He also said that according to the manpower forecast that the Administration had done, the reasons for the need to provide training and retraining were because many low-skilled or semi-skilled middle-aged people had the need to find a job.

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[4] Sir William Wade, QC in Administrative Law (8th Edition, 2000) at page 357

21. It has been noted by Members that when ERO was enacted in 1992, the policy of allowing the admission of foreigners into Hong Kong to take up employment as domestic helper had been in place for some years without charging the employer the ER Levy and it was considered not appropriate to change that policy at that time. In 1995, it was stated by the then Secretary for Education and Manpower, when answering a question asked in the Legislative Council, that "[f]oreign domestic helpers come under a separate scheme which is different from the labour importation scheme. For this reason, our present approach is based on the policy that has been adopted for the past 20 years and that is, foreign domestic helpers are imported on the basis of the local demand, with no special charges levied or quota set for such employment. Therefore, we consider it inappropriate to levy charges on the employers. Of course, if we deem it is necessary to readjust the demand and supply, it is possible that we will use other methods to readjust the demand and supply of foreign domestic helpers. However, we will certainly give this matter individual consideration because this is a matter different from the labour importation scheme."

22. It is clear from the above background information that there has been a change of government policy in relation to the policy of not charging the ER Levy from employers who employ FDHs. Whether Members should support this change of policy is, of course, a matter for them. However, in considering whether the exercise of power under section 14(3) of ERO could stand up to challenge in judicial review proceedings, it would be relevant to consider whether the stated justifications could stand up to scrutiny. The following three paragraphs provide an analysis of the issues for Members' reference.

23. First, the fact that there is an insufficient supply of local people willing to work as full-time live-in domestic helpers is considered by the Administration as a justification to continue the importation of FDHs. This does not appear to provide justification for imposing the ER Levy on the employers of FDHs bearing in mind that the insufficient supply of pool of local people for employment as domestic helpers is not because of their lack of vocational skills required of domestic helpers but their unwillingness to work as full-time live-in domestic helpers. Members may note that the Administration,when reporting to the Panel on Manpower the findings of that survey at the meeting of the Panel held on 2 November 2001, had described the domestic helper employment market as a "mismatch of demand and supply" on the basis of a fact-finding survey on the supply and demand of domestic helpers in Hong Kong conducted in 2000, which suggested that FDHs and LDHs were addressing the needs of different types of households. The Administration's proposed measures to address the problem were to attract potential employers to hire LDHs by improving the quality of service of LDHs, enhancing employment services for employers seeking LDHs, enhancing publicity of LDH service, and preserving the part-time market of LDHs. To impose the ER Levy on employers was not considered. (LC Paper No. CB(2)189/01-02(04) refers.)

24. Secondly, it is doubtful whether it is reasonable to regard the SLS and the importation of FDHs as operating on the same principle in that both types of employers are allowed to import employees to fill vacancies for the same reason that there are insufficient suitable and available local candidates for them to employ. Members may wish to ask the Administration to explain the grounds for this justification.

25. Thirdly, in relation to the justification that given that employers of FDHs are enjoying services offered by foreign workers, it is reasonable that they contribute towards the training and retraining of the local workforce and promotion of job opportunities for local employees, it should be noted that this ground has been available to the Administration since the inception of the policy to allow employers to employ domestic helpers from outside Hong Kong.

Conclusion

26. The above analysis is based on information at hand. Our preliminary view is that on the question of whether the ER Levy is taxation, it would depend on whether the requirement to pay the levy is fundamentally contractual. If it is not, it is likely that the ER Levy will be considered a tax. If the ER Levy is a tax, it should require the approval of the Legislative Council for its imposition and collection. However, since the ER Levy is being collected by authority of ERO, it may be argued that the necessary approval has been given. Nevertheless, because the triggering off of the imposition of the ER Levy is by means of the CE in Council's approval of a labour importation scheme given under section 14(3) of ERO, it would be a matter for judicial determination in an appropriate case as to whether conditions and restrictions imposed by Article 74 of the Basic Law on Members' right to introduce bills could be considered as having the effect of reducing the effectiveness of Legislative Council's control over the CE in Council by enacting legislation. If it could, there may be doubts on the constitutionality of ERO if the ER Levy is considered a tax. As regards whether the exercise of power to "designate" the employment of FDHs as a labour importation scheme was exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest, an analysis of the issues is given in paragraphs 22 to 25 above for Members' consideration. Subject to examination of further information the Administration has been asked to provide, Members may find that because of the uniqueness of the employment market of domestic helpers it is doubtful whether it was within the contemplation of ERO to have the employment of FDHs covered by it.

27. The Administration has been asked at the Panel on Manpower meeting held on 12 March 2003 to provide further information including the Department of Justice's advice on whether section 14 of ERO gives the power to the Administration to impose a levy on employers of FDHs without the need to legislate and other questions. Members will be assisted in their consideration of that advice and the above analysis will be reviewed in the light of that advice and information.

Prepared by

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