

Revenue (Abolition of Estate Duty) Bill 2005

Response to questions raised by the Legislative Council Assistant Legal Advisor

The coordinated response of the Administration to the questions raised by the Assistant Legal Advisor in her letter of 25 May 2005 is set out in the ensuing paragraphs.

General Observations

1. With the abolition of estate duty, which plays an important role in providing effective checks against tax evasion, whether the Administration have other policies to assist the IRD in uncovering cases of evading tax?

While disclosure in an estate duty affidavit of substantial assets inconsistent with tax returns of the deceased person during his/her life may sometimes provide hints for an investigation into possible liability to taxes under the Inland Revenue Ordinance (IRO), the existence of such assets is not a direct proof of understatement in the tax returns.

In recent years, IRD has introduced some new methods to identify potential cases of tax evasion for early investigation. Among these is the use of a sophisticated computerized case selection system to analyze the data input from annual tax returns. IRD's reliance on estate duty affidavits as a source of information to identify tax evasion cases has considerably reduced over the years and the estate duty affidavit only constitutes a minor and indirect source of information.

Besides, after the abolition of estate duty, IRD will continue to receive monthly reports on local deaths from the Immigration Department. IRD will also receive information on applications for grant and resealing of grant from the Probate Registry (under the proposed sections 24A and 49AA of the Probate and Administration Ordinance, Cap 10). Upon receipt of such information, IRD will review the relevant tax files of the deceased person to ensure that all outstanding assessments are issued in a timely manner, and to open a back duty investigation if understatement of income/profits is suspected. Under the proposed amendment of section 54 of the IRO, the IRD will have three years from the end of the year of assessment in which a person died to issue assessments on him.

2. Whether there are any offences (and penalties) for intermeddling the estate of persons who die on or after the commencement of the Bill, if enacted? If not, what is the legal basis for transferring the powers of the Commissioner of Inland Revenue to the Secretary for Home Affairs?

For the purpose of estate duty revenue protection under the existing regime, penalties are imposed on persons dealing with or taking possession of any estate of a deceased person before estate duty clearance (sections 23 and 24 of the EDO). As a result, the assets of a deceased person are frozen on his death until estate duty clearance is issued. To facilitate duty collection and to assist the family of the deceased during the period when the assets are frozen, CIR is empowered under to EDO to inspect any document or article, and specifically to authorize representatives to inspect the contents of a deceased person's bank safe deposit box, and to authorize the release of funds from an estate for burial of the deceased or maintenance of the former dependants of the deceased.

With the abolition of estate duty, there would no longer be any need for any offences (and penalties) for intermeddling the estate of a person who dies on or after the commencement of the Bill. That said, in order to ensure that the deceased persons' families or dependants would not be adversely affected by the falling away of CIR's powers under the EDO, the Administration proposes to empower the Secretary for Home Affairs (SHA) to discharge the functions mentioned in the above paragraph and delegate these to CIR administratively for a period, expected to be one year. This will ensure that the facility afforded to the public remains essentially unchanged for a period of time upon the abolition of estate duty. The Administration will explore the possibility of having some of the functions related to the residual powers being performed by the private sector.

Clause 2 Application

3. Would estate duty be chargeable if a person dies at exactly 00:00 hours, Hong Kong time, on the date on which the Bill is published in the Gazette as an ordinance?

In the event that it is proved that a person dies exactly at 00:00 hours on the date on which the ordinance comes into operation, his estate will not be subject to estate duty. At that very moment, the ordinance is in place.

Clause 6 Liability of executor of deceased taxpayer

4. Justification for imposing the three years' period for raising assessment and the position if no application for grant of probate or letters of administration are made within the 3-year period

Under the existing section 54, the expiry date for raising assessment of tax on an executor of a deceased person in respect of all periods prior to the date of death of the deceased person is one year after the date of death or one year after the date of filing an estate duty affidavit, whichever is the later. Section 60 of the IRO further limits the time for raising tax assessment for any year of assessment to within 6 years for normal cases, and 10 years for wilful evasion cases, after the end of the year of assessment concerned.

After the abolition of Estate Duty, the intended executors or administrators are no longer required to file any affidavit for estate duty purposes. As such, there is a need to modify the existing method of calculating the time limit for raising tax assessments for periods prior to the death of the deceased person.

We have looked at the practice in the United Kingdom and Singapore. In Singapore, any assessment or additional assessment on the income of a deceased person arising before his death shall be made on the executor not later than the end of the third year of assessment following that in which the individual died (see extract of the Income Tax Act section 58(2) in Appendix 1). In the UK, similar assessments cannot be made beyond the end of the period of three years beginning with the 31st January next following the year of assessment in which the deceased died (see extract of Tax Management Act 1970, section 40(1) in Appendix 2).

Statistics for 2002-03 and 2003-04 in Hong Kong show that about 83% of the estate affidavits were filed within two years after the death of the deceased person. Leaving time for issuing tax returns and making enquiries on the executors, we consider it appropriate to set the time limit for raising tax assessments at three years after the year of death, which is in line with that of Singapore and similar to that of the UK.

Section 54 of the IRO provides that an executor will be chargeable with the tax liability of the deceased person in respect of the income earned before his death. "Executor" is widely defined in section 2 of the IRO to mean "any executor,

administrator, or other person administering the estate of a deceased person, and includes a trustee acting under a trust created by the last will of the author of the trust." Tax assessments for periods before death of the deceased can be raised on a person who comes within the definition of executor even though probate has not been granted.

Clause 7 and 8 Related amendments to Probate and Administration Ordinance

5. Information to be provided by the Registrar to CIR under sections 24A and 49AA of the PAO

IRD intends to request the Probate Registrar to provide the following information under the proposed sections 24A and 49AA of the PAO –

- (i) a monthly report in electronic format of all applications for grant and resealing of grant received in the preceding month, showing the particulars (name, identity card number and the latest address) of the deceased person and the person making the application, the date of death of the deceased person, as well as the date of application; and
- (ii) a monthly report in electronic format of all grants issued or resealed in the preceding month showing the particulars of the deceased person and the executor/administrator.

Clause 9 Part VA added

6. In the new section 60B(1)(b) of PAO, why is the release of money for meeting the funeral expenses or maintenance of dependents restricted to a bank account maintained in the sole name of the deceased person? Is it necessary to ascertain whether it is a trust account? Is this requirement consistent with the exercise of existing power of CIR under section 24(4) of EDO?

Currently, the Commissioner of Inland Revenue (CIR) is empowered under section 24(4) of the Estate Duty Ordinance (Cap. 111) (EDO) to authorize the release of part of the estate or income to cover funeral expenses of a deceased person and maintenance of his/her former dependants. The existing provision does not restrict the release of money only from bank accounts in the sole name of the deceased. However, in the case of a joint account, the surviving joint holder may continue to

withdraw funds after the death of the other holder and thus the power under the new section 60B(1)(b) does not need to cover joint bank accounts.

As regards trust accounts, the current practice is not to approve any release of money if there is any information suggesting that the bank account concerned is held by the deceased in trust for another person. And, IRD rarely receives requests for release of money from bank accounts held by other persons in trust for the deceased. As it would take considerable time to verify the existence of a trust relationship, and the time for obtaining a grant of representation would likely be much shortened following the abolition of estate duty, the Administration considers it unnecessary to extend the authorization to trust accounts.

7. What are the criteria that SHA would consider when specifying the amount of money in the certificate under the new section 60B(3)? Would he take into account section 13 of EDO which makes an allowance for reasonable funeral expenses incurred in Hong Kong not exceeding \$50,000 in the case of persons dying on or after the commencement of the Estate Duty (Amendment) Ordinance 1994?

The power to authorize release of money from the estate for funeral expenses and maintenance is mainly to relieve hardship cases. Nearly all applications at present concern members of the public who face immediate financial difficulties upon losing a bread-winner.

Take into account the prevailing fees for a funeral package, and in order to avoid any excessive release of funds prior to the grant of representation by the court, there is at present an administrative limit of \$20,000 for release of funds from the estate for funeral expenses. SHA would follow the existing arrangements and adopt similar limits in authorizing release of funds for funeral expenses.

8. In the new section 60C(3)(b), what is the purpose of ascertaining whether any document or article specified in the certificate for inspection is contained in the safe deposit box? Under section 13(8) of EDO, the Commissioner may authorize any person to inspect any property and to report to him the value thereof for the purpose of that Ordinance.

It is not uncommon for a person to keep his/her will, if there is one, in the safe deposit box. At present, if a will is discovered in the safe deposit box in the course of taking

inventory, and the applicant present at the inspection of the safe deposit box is the executor of the will, he would be allowed to remove the will to facilitate the application for grant of representation. The main purpose of the new section 60C is to retain the existing practice and to avoid unnecessary complication in the applications for grant of representation.

In some cases, it is necessary to remove documents other than a will from the safe deposit box, such as marriage certificate, birth certificate and documents belonging to persons other than the deceased, either to support the application for grant of representation or other purposes.

9. Is it the current practice for a bank to take a copy of the will or instrument before allowing a person to take possession of it as proposed in the new section 60C(4)?

Currently, if the executor removes the will or codicil during the opening of the safe deposit box, CIR would take two copies of the document, one for the estate duty file of the deceased in IRD, and the other to be kept inside the box for record purpose. IRD noted that a few banks do take a copy of the will with the consent of the executor. There is no similar practice for removal of other kinds of documents from the box.

Given the importance of the will and codicil, the Administration proposes that the practice of making a copy of the will and placing it inside the box upon its removal be retained. This arrangement could be one of the conditions attached to the certificate for inspection.

10. Under the new sections 60B(1)(a) and 60C(1)(a), the application to the Secretary has to be made in a manner specified by him. Under the new section 60D, the certificate for release of money or the certificate for inspection shall be in a form specified by the Secretary. How would the Secretary specify the manner of application and the form of certificate?

Currently the Estate Duty Office provides application forms for releasing money from bank accounts for meeting funeral expenses and making appointments for the opening of safe deposit boxes. On approval of the application, the Estate Duty Office would issue "no-objection" letters to the applicant or the bank concerned. These forms and letters are administrative in nature.

In respect of the manner of application to be specified by SHA, the Administration intends to refer to the existing application forms used by CIR. The "no-objection" letters would be replaced by certificates for release of money and certificates for inspection, and the format of the latter two would also follow that of the former. Similarly, the new forms and certificates would be administrative in nature.

11. What kind of conditions would be attached to the certificate under the new section 60E(1)?

The conditions to be attached to the certificates would follow the existing ones specified by CIR in allowing the release of money from bank accounts and the opening of safe deposit boxes. Examples of the conditions include –

- (a) the bank concerned shall make direct payment by cashier's order to the funeral service supplier specified in the certificate;
- (b) the bank concerned shall make maintenance payments to the former dependant by monthly installments; and
- (c) the bank concerned shall allow only the executor to take possession of the will if discovered in the safe deposit box. If the applicant is not the executor specified in the will, the bank shall not allow the removal of the will from the box.

12. The new section 60G provides that Part VA shall cease to have effect on a date appointed by the Secretary by notice published in the Gazette. How long is the intended validity period and is the notice subsidiary legislation?

The new Part VA is intended to have effect so long as such authorization from the Government is required. For example, we understood that in Singapore and British Columbia in Canada, the process of opening safe deposit boxes does not require the involvement of the Government. We would consult relevant parties to see if similar arrangements could be adopted in Hong Kong, say, through contractual arrangements between bankers and their clients. The notice to be published by SHA in the Gazette under the new section 60G is subsidiary legislation.

Clause 11 Probate Jurisdiction

13. What are the justifications for repealing the fees for grants of probate or letters of administration or resealing of the same? Why is the repeal a consequential amendment?

At present, persons requesting probates or letters of administration have to pay a fee for filing the applications and a fee for granting the probates/letters of administration. The latter fee (Item 2 of Schedule 2 to High Court Fees Rules (Cap.4D)) is charged by reference to the net value of the estate as stated in the schedule of property, which is required for estate duty assessment and protection purposes. Upon abolition of estate duty, the schedule of property is no longer required. As such, the latter fee will become inoperative and needs to be repealed as a consequential amendment.

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(c) any owner of such moneys who objects to the share presumed under paragraph (b) shall give notice of his objection in writing to the person declared to be the agent under subsection (1) within 28 days of the receipt of the notice of the agent under paragraph (a) (i), or within such further period as the Comptroller in his discretion may allow, and furnish proof as to his share of the moneys;

(d) where an objection under paragraph (c) has been received, the person declared to be the agent shall —

(i) retain the amount of such moneys referred to in paragraph (a) (ii) until such time as the Comptroller by notice under paragraph (e) informs him of his decision on the objection; and

(ii) inform the Comptroller of the objection within 7 days of the receipt of the objection;

(e) the Comptroller shall consider the objection and shall by notice in writing inform the person declared to be the agent of his decision and the agent shall, notwithstanding any appeal under paragraph (f), pay over any tax due from the share of moneys decided by the Comptroller as the amount, not exceeding the amount presumed under paragraph (b) to be the share of the person by whom the tax is payable, held by him for or due by him to the person; and

(f) any owner of such moneys aggrieved by the decision of the Comptroller under paragraph (e) may appeal against the decision to the Board of Review and the provisions of Part XVIII shall apply, with the necessary modifications, to the appeal.

[32/95]

(6) Any person making any payment to the Comptroller under this section shall be deemed to have been acting under the authority of the person by whom any tax is payable and is hereby indemnified in respect of such payment.

[11/94]

(7) In this section —

"joint account" means any account in the names of 2 or more persons but excludes any partnership account, trust account and any account where a minor is one of the joint account holders;

"tax" includes any penalty or any other money which a person is liable to pay to the Comptroller under this Act.

[11/94; 32/95]

Deceased persons

58. —(1) Where an individual dies, then as respects income arising before his death all rights and duties which would have attached to him, and any liability to be charged with or to pay tax to which he would have been subject under this Act if he had not died, shall pass to his executor, and the amount of any tax payable by the executor under this section shall be a debt due from and payable out of the estate of the deceased.

(2) Any assessment or additional assessment on any such income shall not be made later than the end of the third year of assessment following that in which the individual died.

(3) Where, by reason of the death of the individual, a trade, business, profession, vocation or employment ceases to be carried on or exercised by him or the income from any other source ceases, and section 35 applies, the executor of the individual shall be liable for the tax for which the individual would have been liable if he had not died but, except in the case of dividends, a cessation had taken place at the date of his death.

(4) In the case of an individual dying during the year preceding the year of assessment, if his executor distributes the estate before the commencement of the year of assessment, such executor shall pay any tax for that year of assessment at the rate or rates in force at the date of distribution of the estate, if the rate of tax for that year of

Assessment and Claims**TMA 1970 s 41A****39 Neglect: corporation tax****Commentary—A3.226.****Amendments—**This section repealed by FA 1989 s 149(2), (7) and Sch 17 Pt VIII without affecting the making of assessments for years of assessment before 1983–84 or for accounting periods ending before 1 April 1983.**40 Assessment on personal representatives**

(1) For the purpose of the charge of tax on the executors or administrators of a deceased person in respect of the income, or chargeable gains, which arose or accrued to him before his death, the time allowed by section 34, 35 or 36 above shall in no case extend beyond the end of [the period of three years beginning with the 31st January next following the year of assessment]⁵ in which the deceased died.

(2) ..², for the purpose of making good to the Crown any loss of tax attributable to the [fraudulent or negligent conduct]³ of a person who has died, an assessment on his personal representatives to tax for any year of assessment ending not earlier than six years before his death may be made at any time before the end of [the period of three years beginning with the 31st January next following the year of assessment]⁵ in which he died.

(3) In [this section]¹ “tax” means income tax or capital gains tax.

[(4) Any act or omission such as is mentioned in section 98B below on the part of a grouping (as defined in that section) or member of a grouping shall be deemed for the purposes of subsection (2) above to be the act or omission of each member of the grouping.]⁴

Commentary—A3.227, 1682.**Revenue Internal Guidance—**Enquiry Manual 7301 (the time limits under s 40 apply, in particular, to consequential amendments under s 30B(2) to the self-assessment of deceased partners in partnerships, but does not affect the time limit for amending the partnerships statement).**Simon's Tax Cases—**s 40(1), *Larter v Skone James* [1976] STC 220; *Honig v Sarsfield* [1986] STC 246.**Definitions—**“Chargeable gain”, TCGA 1992 s 15(2) by virtue of s 118(1); “year of assessment”, TA 1988 s 832(1).**Cross references—**See FA 1993 s 178(3) (Lloyd's underwriters: payment to a member in respect of his loss under a stop-loss insurance policy or out of High Level Stop Loss Fund: extension of time limit under this section for assessment or further assessment).

FA 1993 Sch 19 para 8 (acts or omissions of underwriting syndicate's managing agent treated as acts or omissions of each member for the purposes of this section).

Amendments—¹ Words in sub-s (3) substituted by FA 1985 s 93(7), Sch 25 Pt II para 5.² Words in sub-s (2) repealed by FA 1989 Sch 17 Pt VIII.³ Words in sub-s (2) substituted by FA 1989 s 149(4)(a)(ii), (7).⁴ Sub-s (4) inserted by FA 1990 Sch 11 paras 4(2), 5 with effect from 1 July 1989.⁵ Words in sub-ss (1), (2) substituted by FA 1994 ss 196, 199(1), (2)(a) and Sch 19 para 12 with effect from the year 1996–97.**41 Leave of General or Special Commissioners required for certain assessments****Commentary—A3.222, 223.****Amendments—**This section repealed by FA 1989 s 149(2), (7) and Sch 17 Pt VIII without affecting the making of assessments for years of assessment before 1983–84 or for accounting periods ending before 1 April 1983.*Corporation tax determinations***41A Determination procedure****Commentary—D2.720.****Amendments—**This section repealed by FA 1998 Sch 19 para 19, Sch 27 Part III(28) with effect in relation to accounting periods ending after 30 June 1999 (by virtue of Finance Act 1994, Section 199, (Appointed Day) Order, SI 1998/3173 art 2).