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8 June 2005

Clerk to Bills Committee
(Attn: Mrs Sharon Tong)
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Mrs Tong,

**Bills Committee on
Revenue (Abolition of Estate Duty) Bill 2005 (“the Bill”)**

Follow-up to the Meeting on 7 June 2005

_____ We understand from the Financial Services and the Treasury Bureau (“FSTB”) that, at the Bills Committee meeting on 7 June 2005, one of the major issues of concern was whether, with the abolition of estate duty, there was a need to retain a schedule of property to be annexed to a grant of probate and letters of administration. The Bills Committee would like to know, among other things, whether the Administration had consulted the Judiciary on this issue and the Judiciary’s position.

Background

2. Before the publication of the Bill, the FSTB had consulted the Judiciary on a proposal to amend the Probate and Administration Ordinance (“PAO”) (Cap. 10) to confer on the court the power to demand the filing of a schedule of property, either a schedule in full as presently under the Estate

Duty Ordinance (“EDO”) (Cap. 111) or in another format. The Judiciary’s position in respect of this proposal is set out in paragraphs 3 - 5 below.

3. No such power should be conferred for the following reasons -
- (a) Such power is unnecessary for the processing of an application for grant of probate or letters of administration^{Note};
 - (b) Conferring such a discretionary power without any guidance in the statute as to the relevant considerations for its exercise is unsatisfactory;
 - (c) If the schedule of property is filed in applying for a grant and a grant is made, the public might be misled into believing that its contents have been vetted by the court.
 - (i) In principle, it is objectionable for the Probate Registry (“PR”) and the court to be engaged in any vetting of the schedule of property. This is not a proper part of the judicial function or the judicial process. It should be noted that the court may have to deal with disputes concerning the estate.
 - (ii) Further, the PR is practically unable to verify the schedule. This is unlike the Estate Duty Office which has the responsibility and the resources to do so.

4. The Judiciary has noted that, among the various jurisdictions without estate duty, some require the filing of an affidavit of assets and liabilities, which appears to be similar in nature to a schedule of property. Presumably this is required in applying for a grant. But other jurisdictions do not have such requirement. The Judiciary’s position is that Hong Kong should adopt the latter (that is, not requiring the filing of an affidavit or a schedule of property). The following considerations are relevant -

Note In processing applications for grant, the Judiciary only needs to know the aggregate value of the deceased’s assets in a very limited number of instances, viz. –

- (a) where summary administration is sought on the basis that the value of the estate is below \$150,000;
 - (b) where (i) the deceased died intestate; (ii) infants’ interests are involved; and (iii) only one administrator is sought to be appointed. (1 administrator can be appointed if the estate is less than \$500,000. Where the estate is more than \$500,000, 2 administrators will be required.)
2. The question of collection of the fees for the grants depending on the value of the estate does not arise, given the abolition of item 2 in schedule 2 to the High Court Fees Rules.

- (a) The purpose of the requirement for a schedule of property under the EDO is to facilitate and ensure the collection of estate duty. It should be noted that as estate duty is only charged on Hong Kong assets, only Hong Kong assets are set out in the schedule;
- (b) With the abolition of estate duty, this should not be required;
- (c) The schedule of property as accepted by the Estate Duty Office may in practice have been relied on by beneficiaries and interested parties to establish the link between the deceased and his assets. But –
 - (i) These have been incidental benefits which were not the purpose of the requirement provided for in the EDO;
 - (ii) With the abolition of estate duty and the requirement for a schedule of property under the EDO, the beneficiaries and interested parties would now have to resort to their legal rights and remedies. For example, the beneficiary would have to seek an account from the executor, if necessary, by instituting proceedings; and
 - (iii) Requiring the schedule of property to be filed with an application for a grant does not assist at all, since it would not have been vetted by an authority such as the Estate Duty Office. For the reasons explained above (see paragraph 3(c)), it is objectionable for the PR and the court to be engaged in any such vetting.

5. In summary, our position is that -

- (a) the court and the PR do not require the proposed power to demand a schedule of property, and should not be conferred such power; and
- (b) the practice in some overseas jurisdictions of not requiring the filing of an affidavit of the assets and liabilities of the deceased should be adopted in Hong Kong.

Recent Development

6. In response to the Bills Committee's concerns, the Home Affairs Bureau ("HAB") consulted the Judiciary on 6 June 2005 as to whether a schedule of property or a similar instrument, without having to be vetted/valued, should be filed with the court together with an application for a grant, and the personal representative's administration authority would be limited to what are listed in such schedule or similar instrument.

7. The Judiciary maintains the position in paragraphs 4 and 5(b) above for the reasons stated therein.

8. However, if, as a matter of policy, the Administration wishes to pursue the possibility referred to in paragraph 6 above of the filing of a schedule of property together with an application for a grant and the limitation of the personal representative's authority to what are listed in the schedule, then the full ramifications would have to be thoroughly considered and if necessary, certain matters would have to be addressed in relevant legislation. The matters which should be considered and addressed include those set out in the **Annex** to this letter.

9. I trust that the above clarifies the Judiciary's position on the matter.

Yours sincerely,

(Augustine L.S. Cheng)
for Judiciary Administrator

c.c. Secretary for Financial Services and the Treasury
(Attn: Miss Erica Ng)
Secretary for Home Affairs
(Attn: Mrs Nancy Hui)
Department of Justice
(Attn: Mrs Emme Waller)

1. Is it suggested that the grant should refer to or annex the schedule of property?
 2. It must be made clear that the schedule of property has not been vetted by the PR or any governmental authority.
 3. The form of the schedule of property would have to be prescribed.
 4. The matters which have to set out in the schedule have to be prescribed. In particular whether the schedule (i) would be limited to Hong Kong assets or (ii) would also cover overseas assets. If (ii), it would be a radical departure from what is now required for estate duty purposes and would raise far-reaching questions of disclosure of offshore assets.
 5. How could the schedule be revised or supplemented? Note that the personal representative may discover more assets in the course of administration.
 6. At present, the Hong Kong grant may be used for obtaining a grant of probate (or resealing of a grant) in jurisdictions outside Hong Kong where assets of the deceased may be situated. Assuming the schedule is limited to Hong Kong assets as at present, the suggested limitation of the personal representative's authority to what are listed in the schedule (that is Hong Kong assets) may adversely affect, if not destroy, the usefulness of the Hong Kong grant for obtaining a grant overseas. Note that at present, although the schedule is limited to Hong Kong assets, there is no limitation of the personal representative's authority to what is contained in the schedule. Even if the schedule of property were required as suggested, the suggested limitation of the personal representative's authority to what is contained therein may well be considered to be undesirable or inappropriate.
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