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**Paper for the House Committee Meeting
on 23 January 2009**

**Legal Service Division Report on
Proposed Resolution under section 29 of the Product
Eco-responsibility Ordinance (32 of 2008)**

The Secretary for the Environment has given notice to move a motion at the Legislative Council meeting of 4 February 2009. The motion seeks the Legislative Council to approve the Product Eco-responsibility (Plastic Shopping Bags) Regulation (the Regulation) made by the Secretary for the Environment (the Secretary) under section 29 of the Product Eco-responsibility Ordinance (32 of 2008) (the Ordinance) which was passed in July 2008.

Product Eco-responsibility Ordinance

2. The object of the Ordinance is to introduce measures to minimize the environmental impact of certain types of products. It was intended to be a piece of "framework legislation" by which the implementation of the measures were to be provided in subsidiary legislation. In the Ordinance, an environmental levy is imposed on one type of product, namely, plastic shopping bags (Part 3 of the Ordinance).

3. Under section 19 of the Ordinance, a prescribed retailer¹, or a person who proposes to be a prescribed retailer, may apply to the Director of Environmental Protection (the Director) for registration as a registered retailer in respect of a qualified retail outlet² (subsection (2)). A prescribed retailer shall ensure that no plastic shopping bag, or nothing that can be easily turned into a plastic shopping bag, is provided directly or indirectly to a customer from a qualified retail outlet of that retailer unless the outlet is a registered retail outlet (subsection (3)). A prescribed retailer who contravenes

¹ A person is a retailer prescribed for the purposes of section 19(1) of the Ordinance if he carries on a retail business at-

(a) 5 or more qualified retail outlets in Hong Kong; or
(b) at least one qualified retail outlet in Hong Kong that has a retail floor area of not less than 200 square metres.

² A retail outlet is a qualified retail outlet if the goods offered for sale in the outlet include all of the following categories of goods-

(a) any food or drink;
(b) any medicine or first-aid item; and
(c) any personal hygiene or beauty product.

subsection (3) commits an offence and is liable to a fine at level 6 (i.e. \$100,000) on the first conviction and to a fine of \$200,000 on each subsequent conviction (subsection (4)).

4. Section 29 of the Ordinance provides that the Secretary may, after consultation with the Advisory Council on the Environment and subject to the approval of the Legislative Council, make regulations with respect to the following matters –

- (a) application for registration and deregistration in respect of a retail outlet, and the determination of such an application;
- (b) application for the exemption of part of the area of a registered retail outlet, and the criteria in accordance with which the Director may determine such an application;
- (c) submission of returns and payment of levies by registered retailers;
- (d) records and documents to be kept by registered retailers;
- (e) such supplemental provisions as are necessary or expedient for giving full effect to the provisions of Part 3 of the Ordinance (plastic shopping bags); and
- (f) any matter ancillary or incidental to those specified in section 29.

The Regulation

5. According to the draft speech of the Secretary, the environmental levy on plastic shopping bags is introduced with a view to addressing the indiscriminate use of plastic bags (para. 3). The Regulation includes the following provisions –

- (a) **Registration of prescribed retailers (sections 3 to 7)**
A prescribed retailer, or a person who proposes to be a prescribed retailer, may apply for registration as a registered retailer in respect of a qualified retail outlet by making an application to the Director in writing and in a specified form. An application for exemption must be accompanied by a floor plan, indicating the area intended to be exempted.
- (b) **Application for exemption of part of the area of registered retail outlet (sections 8 to 11)**
A registered retailer may apply for exemption of part of a registered retail outlet by making an application to the Director in writing and in a specified form. An application for exemption must be accompanied by a floor plan, indicating the area intended to be exempted.

(c) **Submission of returns and payment of levies (sections 12 and 13)**

A registered retailer must submit a return in respect of each registered retail outlet of the retailer on a quarterly basis. The return must be submitted to the Director in a specified form within 30 days after the last day of the quarter. The information to be stated in the return for each quarter includes: (i) the number of plastic shopping bags delivered to the outlet during the quarter; (ii) the number of plastic shopping bags provided to the customers from the outlet during the quarter; and (iii) the total amount of levies payable for the relevant bags. A registered retailer must pay to the Government the relevant levies accordingly.

(d) **Record keeping (section 14)**

A registered retailer shall ensure that records, invoices, receipts, delivery notes or any other documents that contain sufficient details to enable the Director to readily verify the number of plastic shopping bags provided and the charge for those bags, as well as the procurement and delivery of plastic shopping bags should be kept.

6. Members may refer to the LegCo Brief issued by the LegCo Brief (ref: EP 381/11/03) issued by the Environmental Protection Department in December 2008 for background information about the Regulation.

Specified forms

7. Members may note that specified forms must be used in connection with applications for registration of prescribed retailers, deregistration of registered retailers or registered retail outlets, exemption of part of the area of registered retail outlets or variation of exemption. If such procedural requirement is not complied with, the applications are to be treated as not properly made and may be rejected by the Director.

8. The Legal Service Division has been informed by the Administration that the specified forms to be used for the above purposes under the Regulation will be specified administratively in consultation with the trade.

Exemption from payment of environmental levy

9. Under section 23(2) of the Ordinance, a registered retailer may apply to the Director for exemption of part of the area of a registered retail outlet of that retailer and the Director may approve or reject such application in accordance with the criteria prescribed by regulation. The following criteria for exemption are provided in section 9(3) of the Regulation –

- (a) the total floor area of the retail outlet in which only non-specified goods³ are displayed or offered for sale is more than 50% of the retail floor area of the retail outlet; and
- (b) each part of the area to be exempted is a cashier's counter that accepts payment for non-specified goods only.

10. The Legal Service Division has been advised by the Administration that the intended effect of section 9(3) is that if exemption is granted by the Director, the exempted area will only be the cashier's counter but not other parts of the area where non-specified goods are displayed or offered for sale, even if such area is more than 50% of the retail floor area of the retail outlet.

11. Section 9(5) of the Regulation provides that if an application is approved, the Director must exempt the part of the area of the registered retail outlet subject to the following conditions –

- (a) the retail outlet continues to meet all the criteria for exemption;
- (b) plastic shopping bags may be provided from an exempted area without payment of the levy only if they are provided to customers who make payment for non-specified goods in that area and the number of bags so provided is not more than necessary for carrying those goods; and
- (c) such other conditions as the Director may reasonably impose from time to time.

Practice guidelines

12. The Administration has observed the business arrangements within retail outlets where such retail outlets are operated by third parties. The Administration considers that the area occupied by a third party operator should not be regarded as the part of the retail outlet of a registered retailer only if –

- (a) the operator operates under a separate business registration at the location in question;
- (b) the operation occupies a clearly defined area;
- (c) the brand name of that third party is conspicuously displayed within that area;

³ Goods not belonging to any category of food or drink, medicine or first-aid item and personal hygiene or beauty product (section 2(1) of the Regulation and section 1 of Schedule 4 to the Ordinance).

- (d) the operation is managed by an employee of that third party; and
- (e) the third party operator provides its own plastic shopping bags that bear its own brand name or logo (para. 6 of LegCo Brief).

13. The above criteria will be set out in the Administration's own practice guidelines (para. 6 of LegCo Brief).

Consultation with LegCo Panel

14. The Panel on Environmental Affairs (EA Panel) was briefed on the implementation details of the environmental levy on plastic shopping bags contained in the Regulation on 24 November 2008.

15. While there was general support for the levy scheme which aimed at reducing the number of plastic shopping bags to be disposed of at landfills, some members expressed concerns about the possible abuse if plastic shopping bags only referred to those which had a hole, perforation, handle or string on or attached to them because registered retail outlets could easily get round the scheme by providing plastic shopping bags with no holes, perforations or handle. On the other hand, non-registered retail outlets might be able to make a profit by charging each plastic shopping bag provided to consumers who might not be aware of the non-application of the levy to such outlets. There were also concerns that the implementation were too cumbersome and might incur additional administrative costs. The Administration was urged to review the definition of plastic shopping bag and the exemptions to be granted. According to the Administration, any extension of the scheme to retailers other than those covered under the Regulation would be considered subject to a review of the first phase of the scheme.

16. Some members held the view that apart from retailers, the scheme should also apply to manufacturers. Besides, the Government should take the lead in avoiding the indiscriminate use of plastic shopping bags, such as those large plastic bags used in street cleaning. They were also disappointed that the Administration had previously turned down members' request of using the levy to set up a fund to taking forward environmental initiatives.

Conclusion

17. The Legal Service Division is considering the legal aspects of the Regulation, including the use of specified forms for various applications (para. 7 above), the criteria for exemption from payment of environmental levy (para. 10 above) and the issue of practice guidelines as criteria for compliance with the Ordinance (para. 6 of LegCo Brief), and will seek clarifications from the Administration in due course. In view of the fact that the specified forms and the practice guidelines will be in the form of administrative measures, the concerns raised by members of the EA Panel and

the important implications of the Regulation on the trade and the public, members may wish to consider setting up a subcommittee to examine the Regulation in detail.

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