

LS/B/21/02-03

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By Fax (2801 6314) and By Post

6 October 2003

Dear Miss Lau,

Construction Industry Levy (Miscellaneous Amendments) Bill 2003

I am looking at the legal and drafting aspect of the Construction Industry Levy (Miscellaneous Amendments) Bill 2003 and would be grateful if you could clarify the following matters:-

1. Adaptation of laws

Part 3 of the Bill (clauses 37 and 38 and Schedules 1 and 2) seeks to adapt certain provisions of the Industrial Training (Construction Industry) Ordinance (Cap. 317) and the Pneumoconiosis (Compensation) Ordinance (Cap. 360) with the view to bringing them into conformity with the Basic Law and with Hong Kong's status as a Special Administrative Region of the People's Republic of China. The adaptation exercise essentially replaces:-

- (a) the reference to "Governor" by "Chief Executive";
- (b) the reference to "Governor in Council" by "Chief Executive in Council";
and
- (c) the reference to "立法局" in the Chinese text by "立法會".

However, the reference to "the Crown" in various sections of Cap. 317 and Cap. 360 are not sought to be adapted in the Bill. Please explain the reason for not doing so. Please also advise whether the Administration has a timetable for adapting the reference to "the Crown" in these legislation.

2. Interpretation of "employer" (clause 3)

Under clause 3, "employer" means "a person for whom construction operations are carried out by a contractor, whether under a contract or otherwise". Please clarify:-

- (i) whether the term "employer" used in the Bill refers to the person who *engages* another person (or party) to carry out construction operations; and
- (ii) whether the relationship between these persons is, in fact and in law, of employment under the Employment Ordinance (Cap. 57).

3. Interpretation of "contract of employment" (clause 3)

Under clause 3, "contract of employment" has the meaning assigned to it in section 2(1) of the Employment Ordinance. The relevant parts of section 2(1) of the Employment Ordinance provide as follows:-

" 'contract of employment' means any agreement, whether in writing or oral, express or implied, whereby one person agrees to employ another and that other agrees to serve his employer as an employee and also a contract of apprenticeship; ...

'employer' means any person who has entered into a contract of employment to employ any other person as an employee and the duly authorized agent, manager or factor of such first mentioned person".

Please explain, in the light of the above definition, the application of the terms "employer" and "contract of employment" in the various provisions of the Bill.

4. Application of the Bill to various parties involved (clause 3)

The proposed section 2(2)(a) (clause 3) of the Bill provides that, for the purposes of the Bill, where a person carries out any construction operations for any other person under a contract of employment, the construction operations shall be regarded as carried out-

- (i) by that other person (that is, the employer), or
- (ii) by the first-mentioned person (that is, the employee), where the first-mentioned person (that is, the employee) is a contractor by virtue of the definition of "contractor" under the Bill.

Please explain why a contract of employment and thus an employer-employee relationship under the Employment Ordinance is relevant in determining whether a particular contractor should be regarded as the party carrying out the construction operations.

5. Clause 4 - Value of construction operations

The proposed section 2A(1)(b) (clause 4) provides that for the purposes of this Bill, "value", in relation to construction operations where the construction operations are not carried out under a construction contract, means the reasonable consideration to be expected on the open market in respect of the carrying out of such operations.

The above provision presumably adopts the open market price for carrying out the construction operations. Construction operations which are not carried out under a construction contract may be carried out over a time span of months or even years. For greater certainty, do you think a timing for the valuation of the open market price of such construction works should be clearly set out in the Bill?

6. Clause 5 - Exemption in respect of certain construction operations in domestic premises

The proposed section 3A(1) (clause 5) provides that the Bill does not apply to construction operations which are carried out for a person who occupies or owns any domestic premises and the sole or principal purpose of which is to decorate, alter, repair, maintain or renovate the premises or any part thereof. However, where a person occupies or owns more than one domestic premises in the same building and at the same time such construction operations are carried out in respect of more than one of those premises or parts of more than one of those premises, and the aggregate of the respective values of the construction operations so carried out exceeds the specified amount (i.e. \$1,000,000), the provisions of the Bill applies (proposed section 3A(2)).

Do the above provisions apply in the case of sole as well as joint owners of domestic premises?

There is a situation where, for example, a person who owns (or jointly owns with his wife) one flat as the matrimonial home and who also owns (or jointly owns with his parents) another flat in the same building as his parents' residence. Would the Bill apply if this person chooses to renovate both flats at the same time at a total price exceeding \$1,000,000?

7. Clause 6 - Powers of the Construction Industry Training Authority

The Bill seeks to empower the Construction Industry Training Authority to engage the services of other bodies to provide training courses for the construction industry and to assess the standards of skills of any person in the industry (proposed section 6(1)(f)).

Do you think whether it is desirable to define "bodies" under the provision (for example, limited companies, statutory corporations, etc)?

Could I have your reply to the above questions in bilingual form on or before 15 October 2003? Thank you.

Yours sincerely,

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