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(Fax: 2877 5029)

Dear Miss Cheng,

Construction Industry Levy (Miscellaneous Amendments) Bill 2003

I refer to your captioned letter dated 6.10.2003 seeking clarification on certain legal and drafting aspects of the captioned Bill (the Bill).

1. Adaptation of laws

The Bill seeks to, among other things, adapt the references to “Governor” to “Chief Executive”, “Governor in Council” to “Chief Executive in Council” and “立法局” to “立法會” under the corresponding provisions of the Industrial Training (Construction Industry) Ordinance (Cap. 317) and the Pneumoconiosis (Compensation) Ordinance (Cap. 360).

The adaptation of the references to “Governor”, “Governor in Council” and “立法局” is pure adaptation. The amendments are straightforward and should therefore be dealt with in the current exercise. As regards the adaptation of the references to the “Crown” under Cap 317 and Cap 360, it does not involve pure adaptation, but requires legislative amendments pending policy deliberations. It will be dealt with separately.

2. Interpretation of “employer” (Clause 3)

In Clause 3, the term “employer” is defined to mean ‘a person for whom construction operations are carried out by a contractor, whether under a contract or otherwise’. This definition includes a person who engages another person (or party)

to carry out construction operations. The expression "person for whom...are carried out..." is used in sections 4 and 9 of the Buildings Ordinance (Cap. 123) which are relevant to the definitions of "contractor" and "authorized person". The reason for adopting the quoted expression is to bring consistency among Caps. 123, 317 and 360 in this regard.

Under the provisions of the Bill, it is possible for a person to carry out construction operations for an "employer" (as defined in Clause 3 of the Bill) under a "contract of employment" (as defined in the Employment Ordinance (Cap. 57)). However, the definition of "employer" under the Bill does not automatically entail a relationship of employment under the Employment Ordinance between the parties concerned. In fact, the "contractor" (as defined in Clause 3 of the Bill) does not have to be an employee of the "employer" and, in most cases, he/she is not.

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

The term "employer" appearing in the Bill would have to be construed in accordance with the definition of "employer" to be added to section 2(1) of Cap. 317. In fact, the term has long been used in the construction industry in a way that has been reflected in the definition as provided in the Bill. For the purpose of Cap. 317, the term "employer" carries a different meaning to that under the Employment Ordinance, Cap. 57.

As pointed out in our response in item 2, the definitions of "employer" and "contractor" do not preclude the possibility that there exist a relationship of employment in the sense under the Employment Ordinance. For example, a construction company could order its staff, who are its employees under a contract of employment, to carry out the construction operations. Our policy intention is to exclude, under normal circumstances, employees from being regarded as "contractor" and thus being held liable to perform the duties of "contractor" (such as giving notices to CITA and paying levy) imposed under Cap. 317.

To this end, the term "contract of employment" is introduced in Clause 3 of the Bill (in section 2(1) of Cap. 317 as a new definition and in the definition of "construction contract") to make it clear that a "construction contract" does not include a contract of employment. Also, the term has been used in the new section 2(2) which seeks to clarify the identities of the "employer" and "contractor" involved under the special circumstances that a person carries out construction operations for another person under a contract of employment.

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

Under Cap. 317, the obligation to pay levy (as well as other obligations and duties) is imposed on the contractor. It is not our intention to render an ordinary employee (who is not a contractor under section 9 of Cap. 123) liable as a contractor under Cap. 317 merely because he is asked to carry out construction operations for

his employer in his course of employment. The new section 2(2)(a)(i) is to make sure that where such an ordinary employee is asked to carry out construction operations for his employer under a contract of employment, the liability to pay levy (as well as other obligations and duties imposed on a contractor) will be imposed on the employer instead of the employee.

On the other hand, if the employee concerned is a contractor under section 9 of Cap. 123, and is asked to carry out construction operations, the new section 2(2)(a)(ii) provides that he/she shall be regarded as the contractor for the purpose of Cap. 317.

5. Clause 4 – Value of construction operations

In the case where the construction operations are not carried out under a construction contract, CITA will identify the Authorised Persons (AP) registered under section 4 of Cap. 123 or appointed under section 34(3) of Cap. 317 and assess the levy due from the contractors according to the certified value issued by AP over the period when the construction operations are carried out.

In the event AP is unable to provide certified value in relation to the construction operations, CITA will apply the various construction costs indices¹ prevailing in the period when the construction operations are performed to arrive at an “open market value”. For example, if the construction operations were carried out in 2001, reference would be made to the relevant construction costs indices for the same period in determining the open market value in respect of the operations. Therefore, it is neither desirable nor necessary to specify a timing for the determination of the open market price.

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

The section applies to sole as well as joint ownership. In that case, the hypothetical situation described in paragraph 3 under point 6 of your letter will be subjected to the proposed section 3A(2).

However, we are prepared to further revise the section to reflect more clearly our policy intent that a person shall be regarded as a person who occupies or owns a domestic premises if he occupies or owns any part of the premises.

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

There is no legal ambiguity arising from the new section 6(1)(f). To allow for future flexibility, we do not consider that there is a need to define “bodies” here.

¹ The indices normally used are those published by Davis Langdon & Seah and Levett & Bailey. Indices on average unit rates of [BQ] items, construction costs in HK\$/M² Construction Floor Area and Tender price will be adopted for the determination of the open market value.

Yours sincerely,

(Miss Shirley LAU Sze-mun)
for Secretary for Education and Manpower