Revenue (Abolition of Estate Duty) Bill 2005

Matters Arising from the Bills Committee Meeting on 6 September 2005

Purpose

This paper sets out the Administration's response to Members' comments at the Bills Committee meeting held on 6 September 2005.

Exemption for Small Estates – Property held in trust by the deceased

2. The proposed section 60I of the Probate and Administration Ordinance (Cap. 10) (PAO) provides exemption for the personal representative of an estate of a value not exceeding $50,000 and wholly made up of money only, e.g. bank deposits, from intermeddling when dealing with the estate so declared. The said section was modelled on section 14A(1) of the Estate Duty Ordinance (Cap. 111) (EDO), which exempts the executor of an estate of a value not exceeding $400,000 from section 14(6) of the EDO, i.e. the requirement to file an account of the particulars and value of the estate with the Commissioner of Inland Revenue (CIR) and be accountable for the estate duty involved.

3. Section 14A(1) of the EDO provides that –

"If the Commissioner is satisfied –

(a) that an executor has, to the best of his knowledge and belief, disclosed in such manner as the Commissioner may determine –
    (i) all of the property belonging to a deceased; and
    (ii) all of the property held by the deceased as trustee for another person;
(b) that the principal value of the property belonging to the deceased should not exceed $400,000; and
(c) that no estate duty is payable on the death of the deceased,

the Commissioner may, subject to any conditions which he may specify, exempt the executor from section 14(6)."

The personal representative is required to disclose all property held in trust, regardless of the size of the estate, for revenue protection purpose. Nonetheless, as property held in trust does not form part of the estate of the deceased and is not subject to estate duty, such property is excluded from the $400,000-threshold.

4. At the Bills Committee meeting on 6 September 2005, Members requested the Administration to consider whether and how any property held in trust should be covered in the new section 60I, i.e. the provision for exemption from intermeddling in relation to small estates. Pursuant to the proposed section 60I, a personal representative of small estate may deal with it without having to apply for a formal grant though the personal representative would need to apply for a Confirmation Notice from the Secretary for Home Affairs (SHA). The provision intends to facilitate the handling of small estates in view of the monetary value of the estate involved. Since the handling of property held in trust could be complicated, we consider that the proposed section 60I should not be made available to the personal representative of a deceased who held property as a trustee for another person. This would pre-empt personal representatives from bypassing the formality of applying for a grant and attempting to intermeddle with property held in trust by relying on the confirmation notice. The proposed section 60I of the revised 14th Draft Committee Stage Amendments (CSAs) have taken care of this aspect.

Confirmation Notice – Cancellation mechanism

5. At the Bills Committee meeting on 6 September 2005, Members asked how the mechanism of cancelling a confirmation notice under the new section 60I(4) would work. While the proposed section 60I(4) empowers SHA to cancel the confirmation notice, in practice he may not need to make use of this power in every case.

(a) If the value of the whole estate is found to exceed $50,000 after SHA has issued a confirmation notice, in order to lawfully deal with the assets not disclosed to SHA in the affidavit, the personal representative would have to apply for summary administration, grant

of representation or sealing of a foreign grant with the court under sections 15, 24 or 49 of the PAO. SHA may not need to cancel the notice.

(b) If, after SHA has issued a confirmation notice, more property belonging to the deceased are found, but the value of the whole estate does not exceed $50,000, in order to lawfully deal with the assets not disclosed to SHA in the affidavit, the personal representative would have to seek SHA's cancellation of the original notice and apply for a new confirmation notice with the return of the original notice to SHA.

The confirmation notice would include details of the money involved. The personal representative and other parties should know clearly what property they could deal with without incurring the liability for intermeddling.

6. Members also asked whether SHA would notify those third parties who acted on the basis of the confirmation notice when the latter was in force of the cancellation of the notice. Such notification may not be necessary. The proposed section 60I(4) provides that where a confirmation notice is in force, the relevant intermeddling provisions shall not apply. There is no retrospective effect in the cancellation of a confirmation notice. If the notice is effective at the time of the relevant transaction, third parties and the personal representative who acted on the basis of it should remain not liable for intermeddling in respect of that particular transaction.

Summary Administration

7. Section 15 of the PAO empowers the Official Administrator (OA) to, without any legal formality, get in and administer the estate of a deceased where the whole of the estate does not, in the OA's opinion, exceed $150,000 in value. There is no specific rule or subsidiary legislation in the PAO which sets out how the OA should exercise his power.

8. Members were concerned that the formerly proposed sections 15A and 15B[1] may mislead members of the public into believing that the OA would administer estates of deceased persons that involve non-monetary assets and/or property held in trust.

9. The purpose of the formerly proposed section 15B is to set out what assets and liabilities have to be disclosed in the schedule required under the proposed section 15A. In other words, the applicant is required to **disclose** all information relating to the estate of the deceased, including property held in trust, if any. On receipt of an application, the OA may determine whether or not to exercise his power under section 15 to get in and administer the estate in question. It is important that the applicant discloses all relevant information so that the OA can exercise his discretion.

10. The established practice for the OA to exercise his power under section 15 in relation to estates consisting of cash only should remain unaltered following the abolition of estate duty. If the OA needs to get in and administer estates involving non-monetary assets, then regardless of the value, section 16 of the PAO applies. Pursuant to section 16(1), the OA should apply for grant under section 24, and should follow the procedure in section 24A in future. If a person living on the street dies leaving no next of kin, depending on the nature and value of his assets, either section 15 or 16 applies.

11. To avoid any possible misunderstanding that the OA would necessarily entertain applications under section 15A of the PAO in relation to estates consisting of assets other than cash, we have amended section 15A(1) and deleted section 15B in the revised 14th draft CSAs to make it clear that the property held in trust by the deceased should be disclosed in an application under section 15A for the purpose of facilitating the OA's consideration.

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[1] Section 15B of the PAO in the 12th draft CSAs reads as follows –

"**15B. Application of section 15A**

Section 15A applies to assets and liabilities of the deceased (including assets and liabilities of the deceased in the capacity of a trustee or the manager of a *Tso* or *Tong*) in the form of real property or personal property situated in Hong Kong."

Consultation with relevant parties

12. We have consulted the Hong Kong Association of Banks (HKAB), the Law Society of Hong Kong (Law Society) and the Hong Kong Bar Association (Bar Association) on the revised proposal regarding the inspection of a safe deposit box jointly rented by the deceased with other person(s) (presented to the Bills Committee vide LC Paper No. CB(2)2507/04-05(02)) and discussed at the meeting on 6 September 2005 as well as the 12th draft CSAs. We have also sent for their comments the revised 14th Draft CSAs when available on 20 September.

13. The main concern of HKAB is that the proposal to bring the new Ordinance into operation about one month[2] following the passage of the Bill in LegCo would mean "insufficient time for banks to review and amend their procedures and documentation, as well as to notify affected customers". HKAB commented that banks would require a minimum lead time of 3 months. The Administration considers the proposal reasonable, and Clause 1A of the Draft CSAs has been amended in this regard (see Clause 1A of the revised 14th Draft CSAs).

14. The Law Society has agreed with the Administration's proposal regarding the arrangements for safe deposit box jointly rented by a deceased person and other(s) and where the lease agreement in question contained a "survivorship" clause.

15. The Bar Association has yet to respond to us at the time of issue of this paper.

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[2] Under Clause 1A of the 12th draft CSAs, the new Ordinance shall come into operation on the expiry of the period of 21 days commencing on the date on which the Ordinance is published in the Gazette. Normally the Ordinance will be published in the Gazette on the second Friday following the passage of the Bill. The new Ordinance would therefore come into operation on the expiry of 30 days commencing on the date on which the Bill is passed.

16. Comments on the revised 14th Draft CSAs from the three organizations are awaited.

Home Affairs Bureau
23 September 2005