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CB(1) 1002/08-09(01)

10 March 2009

Ms. Kitty Cheng
Assistant Legal Adviser
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central
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[Fax: 2877 5029]

Dear Ms. Cheng,

**Product Eco-responsibility (Plastic Shopping Bags) Regulation
("the Regulation")**

Thank you for your letters of 25 and 27 February 2009. Our responses to your questions are set out below please.

Sections 4, 7 and 9

Determination of application for registration, deregistration, exemption and variation of exemption

2. The burden of proof and standard of proof are applied in legal proceedings to deal with a disputed fact. At the stage of an applicant submitting information under the specified form for the Director's consideration, the burden of proof and standard of proof will not come into play yet.

3. If an application is rejected, the Director must give the applicant written notice of the reason. If the applicant disagrees with the Director and makes an appeal, then the Appeal Board will determine how to establish or refute a disputed factual issue.

4. For the sake of providing greater certainty to applicants, the Regulation requires that the Director must approve an application unless there is a ground for rejection as listed in the Regulation. That means in the absence of a ground for rejection, the doctrine of legitimate expectation relating to the exercise of a discretion is irrelevant because the Director will then be under a duty to approve the application.

5. The Director will process an application based on the information submitted by the applicant and any other information that the Director may obtain through investigation or other means. The Director will not reject an application arbitrarily because the reason for rejection must be provided to the applicant by written notice and the decision is subject to appeal to the Appeal Board.

6. In addition to the requirements under sections 3, 6 and 8 of the Regulation, there can be other factors affecting the processing of an application. For example, if an applicant has completed the correct specified form and submitted the required supporting documents, but the copy of the business registration certificate submitted is so blurred that the particulars of the retail outlet concerned are illegible, the Environmental Protection Department (EPD) will contact the applicant to ask for a clearer copy. But if the applicant fails to respond despite repeated requests, the Director may consider the application as not properly made because the relevant document provided is not clear enough to enable the EPD to process the application further.

7. In processing an application, the Director will take into account the declaration made by an applicant in the specified form, the supporting documents submitted by the applicant and any other information obtained through the EPD's own investigation.

8. In order to keep the application procedure simple to facilitate compliance by the trade, the Director does not propose to seek a separate power to require the applicant to provide additional information apart from that requested under the specified form. But as mentioned above, if the information and supporting documents provided under the specified form are incomplete or unclear, the Director will request the applicant to supply the missing details, clearer copies or further clarification.

9. Sections 4(4), 7(4) and 9(7) of the Regulation provide that if an application is rejected, the Director must give the applicant notice in writing of the decision and include in the notice a statement setting out the reasons for the decision. An aggrieved party may also make an appeal to the Appeal Board established under the Product Eco-responsibility Ordinance (the Ordinance). The Administration considers that the safeguard of procedural fairness provided in the Ordinance and Regulation is proper and in line with that adopted in other recently enacted legislation (e.g. the Hazardous Chemicals Control Ordinance (Cap. 595) and the Energy Efficiency (Labelling of Products) Ordinance (Cap. 598)). But in order to reassure the trade that the Director will not reject any application arbitrarily, we are prepared to accept your suggestion that provisions be added to expressly give an applicant the opportunity to respond to any alleged ground of rejection before the Director decides to reject an application. If Members of the Subcommittee agree, we will propose amendments to the Regulation for this purpose.

Section 9

Determination of application for exemption or variation of exemption

10. Similarly, in order to reassure the trade that the Director will not impose any conditions under section 9(5)(a)(iii) of the Regulation arbitrarily in relation to an exemption granted to a retail outlet, we are prepared to accept your suggestion that a registered retailer be given the prior opportunity to make representations as to why a proposed condition under that section should not be imposed. If Members of the Subcommittee agree, we will propose amendments to the Regulation for this purpose.

Section 12

Submission of quarterly return

11. Under section 23 of the Ordinance, a registered retailer shall charge a customer an amount of not less than the levy for each plastic shopping bag provided directly or indirectly to the customer from a registered retail outlet of that retailer. As previously explained to the Bills Committee during the examination of the Bill, it is necessary to include the reference to “indirectly” in

order to prevent retailers from circumventing the law by, for example, providing free plastic shopping bags to a third person who subsequently hands over the bags to customers.

12. Section 12(3) of the Regulation reflects and adheres to the requirement in section 23 of the Ordinance and provides that a quarterly return to be submitted by a registered retailer must contain the total number of plastic shopping bags provided directly or indirectly to customers from the retail outlet concerned and the total amount of levies payable for those bags. The purpose is to prevent the retailer from providing free plastic shopping bags to customers indirectly through a third person. In effect, as long as the retailer has charged for each plastic shopping bag according to the requirement in the Ordinance, it is not necessary for the retailer to ascertain whether the payer for the bag has subsequently passed it to another person.

Section 14

Record-keeping

13. Since section 14(a) of the Regulation refers to the keeping of records relating to each “retail transaction” and there must be a customer in each retail transaction, it is not necessary to repeat the reference to “directly or indirectly” in that section.

Section 16

Specified forms

14. As explained in our letter of 16 February, the Secretary for the Environment’s regulation-making power under section 29 of the Ordinance may not be delegated to other public officers. Sections 29(1)(e) and 29(1)(f) also provide that the Secretary may include supplementary provisions and ancillary or incidental matters in the regulation. Moreover, according to section 5 of the Ordinance, the regulation made under section 29 may provide for the performance by the Director or an authorized officer of a function under the regulation, and may authorize a matter to be determined, applied or administered by a specified person.

15. It is therefore appropriate for the Director, in the course of performing her functions in handling applications under the Regulation, to specify the forms to be used under the Regulation administratively. These forms are not intended to be prescribed within the Regulation. The specification of administrative forms under section 16 of the Regulation is compatible with the legislative intent of section 29 of the Ordinance. It is also in line with the current practice adopted in other legislation and has nothing to do with the exercise of subdelegated regulation-making power.

16. With respect to the first question in your letter of 27 February, while an application that is not made in the specified form is to be treated as not properly made under the Regulation, the Director in handling the application will have to go through the actual process of examining the information submitted by the applicant and considering whether the application is properly made. The Director has to take the same steps in processing applications for registration, deregistration and exemption.

17. With respect to the second question in your letter of 27 February, the proposed forms to be specified by the Director under the Regulation basically follow the requirements set out in the Ordinance and the Regulation and will not impose more stringent requirements on the applicants.

18. We understand that Members are mainly concerned about the declaration of third party operations contained in the application form. We would like to point out that the purpose of this declaration is not to impose additional requirements on the applicants. It is included in the form because the retail trade proposes to continue to allow third parties offering specified goods within qualified retail outlets to distribute free plastic shopping bags, which might cause confusion to customers and could undermine the regulatory scheme.

19. Based on the requirements of sections 19(3) and 23(1) of the Ordinance, the EPD takes the view that a third party may provide free plastic shopping bags from an area located within a qualified retail outlet only if the area occupied by the third party operation is clearly *not* part of that retail outlet. In order to demonstrate clearly that such an area does not form part of the retail outlet so that plastic shopping bags provided from that area will not be subject to the levy scheme, we consider it prudent for the third party to declare that its operation is carried on in that area under a separate business registration.

20. In view of Members' concern about the inclusion of the declaration of third party operations in the specified form, we now propose to deal with this issue by adding to the Regulation a second category of exemption criteria for third parties offering specified goods in registered retail outlets. If Members of the Subcommittee agree, we will propose amendments to the Regulation for this purpose.

21. We hope the above has addressed your questions. Please feel free to contact the undersigned if we could be of further assistance.

Yours sincerely,

A handwritten signature in dark ink, appearing to be 'Alfred Lee', written in a cursive style.

(Alfred Lee)
for Director of Environmental Protection

c.c.

Miss Shandy LIU SGC/D of J

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