

**For discussion
on 14 January 2011**

FCR(2010-11)52

ITEM FOR FINANCE COMMITTEE

**HEAD 151 – GOVERNMENT SECRETARIAT :
SECURITY BUREAU**

Subhead 700 – General non-recurrent

New Item “Sharing of confiscated drug trafficking proceeds with the United States Government – LAW Kin Man Case”

Members are invited to approve the creation of a new non-recurrent commitment of \$11,912,000 for paying the United States Government part of the assets which the Hong Kong Government confiscated from a convicted drug trafficker and his associates between 1991 and 2008.

PROBLEM

We need to transfer from the General Revenue a sum of \$11,912,000 for paying the United States Government (USG) its share of the assets we confiscated from a drug trafficker between 1991 and 2008 in Hong Kong, in addition to the balance of \$61,560,000 which will be transferred from a deposit account held by the High Court.

PROPOSAL

2. The Secretary for Security (S for S) proposes the creation of a non-recurrent commitment of \$11,912,000 for payment to the USG.

/JUSTIFICATION

JUSTIFICATION

3. A drug trafficker, LAW Kin Man (Law) was arrested in Hong Kong in December 1989 for trafficking heroin to the United States (US), and was surrendered to the US in December 1992 pursuant to judicial proceeding. He subsequently pleaded guilty in the US to drug trafficking. Investigation into Law's financial history revealed that he had received more than \$400,000,000 between 1982 and 1989, and the money could not be traced to any apparent legitimate source. Most assets under Law's control in Hong Kong were in the names of his relatives or associates or nominees, or in fictitious names.

USG's Request for the Sharing of Confiscated Assets

4. The USG made a formal request in June 1992 to share the drug proceeds of Law confiscated in Hong Kong pursuant to the Hong Kong and US Agreement Concerning the Confiscation and Forfeiture of the Proceeds and Instrumentalities of Drug Trafficking (Agreement). The Agreement, operational between 18 January 1991 and 30 June 1997, was a bilateral agreement between the two jurisdictions for combating drug trafficking and provided for co-operation in the restraint and confiscation or forfeiture of drug trafficking proceeds and instrumentalities^{Note}.

5. The Hong Kong Government (HKG) considered the USG's request in April 1993 and decided, among other things, that the confiscated proceeds should be shared with the USG on a 50:50 basis, provided that 20% of the confiscated proceeds should first be withheld by the HKG to cover our costs. In other words, the overall sharing ratio between the HKG and the USG is 60:40. As a reciprocal arrangement, the HKG would share in the assets confiscated by the USG on the same basis (i.e. 50:50 after deduction of 20% to cover the USG's costs). The Legislative Council was informed of the arrangement in May 1993 (Enclosure 1).

Encl. 1

Realisation of Confiscated Assets

6. The Law case involved an enormous range and number of assets (including money in over 300 accounts, company shares and real estates), a large number of parties, and protracted litigation over the years. The asset realisation process had therefore taken considerable time. The process was finally completed in 2008 with the assets confiscated by the HKG totalling \$185,706,000 (after deduction of receivers' fees, legal fees and disbursements). The USG advised that the assets forfeited in the US amounted to a sum of \$2,025,000.

/FINANCIAL

^{Note} In view of the expiry of the Agreement, the Hong Kong/US Agreement on Mutual Legal Assistance in Criminal Matters was signed on 15 April 1997 (entered into force on 21 January 2000) to provide for comprehensive mutual legal assistance in criminal matters, including assistance in the restraint and confiscation of proceeds of crime.

FINANCIAL IMPLICATIONS

7. In accordance with the agreed sharing arrangements outlined in paragraph 5 above, the USG's share of assets confiscated in Hong Kong amounted to \$74,282,000, while Hong Kong's share of assets forfeited in the US amounted to \$810,000. After netting off our share in the USG's forfeited proceeds, the USG should receive from the HKG a net payment of \$73,472,000.

8. Out of the proceeds confiscated in Hong Kong, the High Court is currently holding \$61,560,000 in a deposit account created to hold the confiscated funds, with the rest of the proceeds having been credited to the General Revenue in accordance with the pre-1995 statutory regime on the disposal of confiscated proceeds, as detailed in paragraph 11 below. While the Secretary for Justice will give a direction to the Registrar of the High Court pursuant to section 13(8) of Schedule 2 to the Drug Trafficking (Recovery of Proceeds) Ordinance (DTROPO) to transfer the balance in the deposit account to the USG, it is necessary to transfer the remaining amount of \$11,912,000 out of the General Revenue for making payment to the USG. Detailed calculations are at Enclosure 2.

Encl. 2

PUBLIC CONSULTATION

9. An information paper on the proposal was issued to the Legislative Council Panel on Security for its meeting of 7 December 2010. Members raised no objection to its submission to the Finance Committee (FC) for funding approval.

BACKGROUND

10. We have all along been cooperating with foreign jurisdictions for the suppression of drug trafficking and combating of money laundering at the international level. The prime goal of mutual legal assistance is to combat transnational crime. Any financial gain arising from assets confiscated from drug traffickers is nothing more than an additional benefit. The sharing of confiscated proceeds with foreign jurisdictions concerned is a reasonable arrangement to encourage international cooperation in combating drug trafficking and money laundering.

/11.

11. Prior to 1995, the DTROPO provided for the confiscated proceeds being paid into the General Revenue. In order not to inflate both the General Revenue and public expenditure, and to simplify the administrative procedures, the DTROPO was amended in 1995 to provide that proceeds obtained on realisation of confiscated assets should be held in a deposit account by the Registrar of the High Court for at least five years, or after the sharing process is completed, before being transferred to the General Revenue. This allows time for a request to share the assets to be made by a foreign jurisdiction, and for a decision to be made on such a request.

12. A Committee on Asset Sharing (Committee), chaired by the S for S or his representative, was established in 1994 to decide on requests made by overseas jurisdictions pursuant to the DTROPO for sharing of drug proceeds valued above \$10,000,000 on a case-by-case basis having regard to the circumstances surrounding each case and the extent of assistance given by the requesting jurisdictions. While the Law case was decided before the Committee was established, its 50:50 sharing basis after 20% deduction for administration costs was adopted by all cases endorsed by the Committee.

13. The Committee has considered six cases so far. To date, Hong Kong has paid confiscated proceeds worth \$44,500,000 and \$5,600,000 to the USG and the Australian Government respectively in relation to these cases, and has received \$29,600,000 from the USG. FC last approved a non-recurrent commitment of a similar nature of \$16,900,000 for payment to the USG in a CHAN Ching Wai case in March 1998.

Security Bureau
January 2011

LEGISLATIVE COUNCIL BRIEF

**Drug Trafficking (Recovery of Proceeds)
Ordinance (Chapter 405)**

**PROPOSALS ON THE SHARING OF ASSETS
CONFISCATED FROM DRUG TRAFFICKERS**

INTRODUCTION

At the meeting of the Executive Council on 27 April 1993, the Council ADVISED and the Governor ORDERED that the following policy and other proposals should be implemented -

- (a) the request from the United States Government, for a share of the assets confiscated by the Hong Kong Government in the LAW Kin-man case be accepted on the basis of a 50:50 share of the net confiscated assets (i.e. a 40:60 share of the gross assets confiscated in Hong Kong) less 40% of the gross assets confiscated in the United States in their LAW Kin-man case;
- (b) subject to the court ruling upholding the confiscation of LAW Kin-man's assets in Hong Kong, a submission should be made to the Finance Committee of the Legislative Council to appropriate the amount to be given to the United States Government;
- (c) a Committee on Asset Sharing should be established to decide on requests for asset sharing in other cases involving assets valued above HK\$10 million. Requests for a share of assets where the total is HK\$10 million or less should not be entertained; and
- (d) the Drug Trafficking (Recovery of Proceeds) Ordinance should be amended to provide that in future cases, assets confiscated under bilateral drug agreements should be held in a Deposit Account for a period of five years, or until they are shared, whichever is the shorter, before being transferred to the General Revenue.

BACKGROUND AND ARGUMENT

Bilateral Cooperation in the Suppression of Drug Trafficking

2. Hong Kong has concluded eleven bilateral agreements and arrangements with other jurisdictions concerning mutual assistance in the investigation, confiscation and recovery of drug proceeds. The bilateral agreements stipulate that confiscated assets should accrue to the Party in whose territory the assets are located. The agreements also provide for the possibility of sharing such assets. Hong Kong has cooperated with the USA on nine drug cases which have resulted in drug assets amounting to about HK\$300 million being frozen or confiscated in Hong Kong. In the HK-US bilateral agreement, there is a clause stipulating that either Party may transfer the confiscated assets or the proceeds of their sale to the other Party, to the extent permitted by their respective laws upon such terms as may be agreed.

3. The US Government has made a formal request for a 50% share of the assets confiscated by the Hong Kong Government in a particular drug case, involving a drug trafficker known as LAW Kin-man. This is the only request received to date. The US authorities have sought to justify their request by referring to the considerable investigative and litigative resources they have devoted to the case. They have also claimed that their efforts have provided the Hong Kong Government with sufficient grounds to seek the restraint orders against the drug trafficker's assets in Hong Kong.

The Policy on Asset Sharing

4. The main purpose of our bilateral agreements is to provide mutual assistance to suppress drug trafficking and to combat money laundering; financial gain is nothing more than an additional benefit. However, in recognition of the importance of international cooperation in combatting the drug problem, it is appropriate to consider requests to share confiscated assets on a case-by-case basis.

Why Hong Kong Should Share Assets with the USA

5. There are several reasons why Hong Kong should favourably consider the request -

- (a) forfeiture procedures brought by the US Attorney's Office in New York led to the confiscation and realization of the drug trafficker's assets in Hong Kong;

- (b) the Americans are likely to attach higher priority to breaking drug rings involving countries which are willing to share confiscated assets with them; and
- (c) other countries have agreed to share confiscated assets with the USA in similar circumstances.

Ratio of Sharing for the Case in Question

6. We consider that the request of the US authorities for a 50% share should be accepted, provided that all costs incurred by Hong Kong are deducted first. This is to ensure that our costs are recovered and that we retain the larger share, in recognition of the principle that the Party in control of confiscated assets is responsible for their disposal. Our costs are, at this stage, estimated at around 20% of the assets confiscated in this particular case. For simplicity, we propose to deduct 20% from the confiscated assets to cover costs, and share the net assets on an equal basis with the USA. In other words, and subject to the qualification in the next paragraph, the US Government is to be given a 40% share of the gross confiscated assets.

Other Aspects of Asset Sharing

7. As Hong Kong has also contributed significantly to the identification and confiscation of the drug trafficker's assets in the United States, we propose to take account of these in determining the amount of proceeds to be transferred to the US Government. It would be reasonable and equitable for the Hong Kong Government to receive a share in these proceeds on the same basis as the US Government receives a share in the proceeds confiscated in Hong Kong. Accordingly, we propose to pay over 40% of the gross confiscated assets held by us less 40% of the gross confiscated assets held by them.

MECHANISM FOR ASSET SHARING

Appropriation of Funds for Sharing with the USA

8. As the monies realized from the assets confiscated in this case have been credited to the General Revenue, the transfer of an appropriate share to the US authorities will require the approval of the Finance Committee of the Legislative Council. In this regard, the Attorney General's Chambers have advised that any sharing should be conditional upon the confiscation and realization of these monies continuing to remain free from legal challenge. Although the appellate time-limits for the confiscated

assets have expired, a recently-mounted application to set aside two of the three original US court orders is before the Hong Kong courts, although a hearing date has yet to be fixed.

9. Therefore, Finance Committee approval for the transfer of the appropriate amount of money to the US Government will only be sought after the court ruling on the application is delivered and provided it upholds the confiscation of the assets in Hong Kong.

Future Cases

10. Asset confiscation is invariably a time-consuming process, and a considerable administrative effort is involved in processing the court orders and in other confiscation procedures. A major contribution, in terms of legal, accounting and law enforcement agents' staff time, is required on the part of the requested Party in each confiscation. It is therefore appropriate for a threshold value to be set, and for any request from an overseas jurisdiction for asset-sharing involving confiscated assets below the threshold value to be declined.

11. It is proposed to set the threshold at HK\$10 million and to have requests for asset-sharing in cases where confiscated assets amount to more than this amount examined on a case-by-case basis by a Committee on Asset Sharing chaired by the Secretary for Security, or his representative, and attended by the Attorney General, the Commissioner for Narcotics, the Secretary for the Treasury, the Commissioner of Police, the Commissioner of Customs & Excise, and the Commissioner of the Independent Commission Against Corruption, or their representatives.

12. In the light of operational experience so far, it does not appear that there is yet a case where there are grounds for Hong Kong to initiate a request for asset sharing. Should such a case arise, the matter will be considered by the Committee on Asset Sharing.

LEGISLATIVE AMENDMENTS

13. Under s.13(7) of the Drug Trafficking (Recovery of Proceeds) Ordinance, the balance of the proceeds of confiscation, after the settlement of specific payments stipulated in the section, shall be deposited in the General Revenue. The effect of this requirement, if some of the assets are subsequently to be shared, is to -

- (a) unduly inflate both general revenue and public expenditure; and

- (b) lengthen the administrative procedures involved in processing requests for asset-sharing.

14. We therefore propose that, in future cases, confiscated assets will be placed in a Deposit Account for a period of five years, or until they are shared, whichever is the earlier. The confiscated assets, or our share remaining, will then be transferred to the General Revenue. Our share of assets confiscated in and received from other jurisdictions will be transferred directly to the General Revenue. The necessary amendments to the Drug Trafficking (Recovery of Proceeds) Ordinance will be included in an amendment bill which is expected to be submitted in early 1994.

FINANCIAL AND STAFFING IMPLICATIONS

15. The proposed sharing of confiscated assets in the LAW Kin-man case will involve appropriation of funds from General Revenue. This will require the approval of the Finance Committee because all the assets confiscated have already been transferred to General Revenue. However, in future cases, if the legislation is amended as proposed, only Hong Kong's share of the confiscated assets will accrue to the General Revenue Account. The proposals have no staffing implications.

CONSULTATION

16. The Action Committee Against Narcotics has been consulted. It supports the proposals, which will enhance international cooperation in the fight against drugs.

PUBLICITY

17. A press release will be issued on the day the subject is discussed by the Finance Committee.

Narcotics Division
Government Secretariat
7 May 1993

**Sharing of Confiscated Drug Trafficking Proceeds
with the United States Government
- LAW Kin Man Case**

Amount to be transferred from General Revenue

	<u>\$'000</u>	<u>\$'000</u> (USG's share)	<u>\$'000</u> (HKG's share)
(i) <i>Hong Kong confiscated proceeds</i>	185,706		
(a) HKG's share (60%)			111,424
(b) USG's share (40%)		74,282	
(ii) <i>US confiscated proceeds</i>	2,025		
(c) HKG's share (40%)			810
(d) USG's share (60%)		1,215	
(iii) HKG's total share [(a) + (c)]			112,234
(iv) USG's total share [(b) + (d)]		75,497	
(v) Net payment to USG [(b) – (c)]	73,472		
(vi) Amount to be paid from Deposit Account	-	61,560	
(vii) Amount to be paid from General Revenue subject to the approval of the Finance Committee [(v) – (vi)]	<u>11,912</u>		
