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Report of the Bills Committee on Education (Amendment) Bill 2013

Purpose

This paper reports on the deliberations of the Bills Committee on Education (Amendment) Bill 2013 ("the Bill").

Background

The Grant Schools Provident Fund and the Subsidized Schools Provident Fund

2. The Grant Schools Provident Fund ("GSPF") and the Subsidized Schools Provident Fund ("SSPF") are statutory provident fund schemes established to provide, subject to the provisions of the Grant Schools Provident Fund Rules (Cap. 279 sub. leg. C) ("GSPF Rules") and the Subsidized Schools Provident Fund Rules (Cap. 279 sub. leg. D) ("SSPF Rules"), for payments to teachers upon the cessation of their employment as teachers in grant/subsidized schools or direct subsidy scheme schools, or to their estates in case of death. Similar to Mandatory Provident Fund ("MPF") schemes, GSPF and SSPF operate as a kind of retirement savings schemes where the contributions by the employees are matched by the Government/schools, such that the contributors will receive a lump sum payment when they cease to be employed as teachers. GSPF and SSPF are exempted from the provisions of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO")¹.

¹ See section 4(1) of MPFSO and items no. 4 and 5 in Part 1 of its Schedule 1.

The Court case

3. In 2008, in a bankruptcy case concerning a subsidized school teacher (Re. Ng Shiu Fan [2008] 4 HKLRD 813), the Court of First Instance held that section 85(3) of the Education Ordinance (Cap. 279) ("EO")² did not prevent the benefits under SSPF from being vested in the trustee-in-bankruptcy by virtue of section 58(1) of the Bankruptcy Ordinance (Cap.6) ("BO")³. The judge further recommended that serious consideration be given to amending the relevant legislation to extend the protection to retirement benefits generally in the event of bankruptcy. On appeal, the case was heard in the Court of Appeal in 2009 ([2009] 4 HKLRD 774) and it was held that the bankrupt is only entitled to the proportion of the benefits attributable to his service and contribution after his discharge from bankruptcy. On 13 April 2010, the Court of Appeal granted leave to the applicant to appeal against the judgment of the Court of Appeal. The bankrupt's two applications for legal aid were refused on 16 August 2010 and 11 January 2011 respectively. Towards the end of August 2012, the Official Receiver's Office informed the Education Bureau ("EDB") that the Director of Legal Aid had granted legal aid to the bankrupt. According to the Administration, the present status of the court case is unclear as further appeal in Mr Ng's case is still possible⁴.

4. Noting that the retirement benefits of teachers in government schools under the Pensions Ordinance (Cap. 89) or Pension Benefits Ordinance (Cap. 99) and that of the majority of the workforce under MPFSO are under protection in the event of bankruptcy, EDB has reviewed the relevant arrangements under GSPF and SSPF and considers that legislative amendments are necessary to effect similar protection to the benefits of GSPF and SSPF members in the event of bankruptcy.

The Bill

5. The Bill seeks to amend EO and its subsidiary legislation to provide that –

- (a) if a GSPF or SSPF member is an undischarged bankrupt of a bankruptcy adjudicated on or after the date when the proposed

² Section 85(3) of EO stipulates that "Subject to any rules made under subsection (1), no contribution or donation to or dividend or interest on a dividend from a provident fund shall be assignable or transferable or liable to be attached, sequestered or levied upon, for or in respect of any debt or claim whatsoever."

³ Section 58(1) of BO stipulates that "On the making of a bankruptcy order, the property of the bankrupt shall vest in the Official Receiver."

⁴ See LegCo Brief on the Bill (File Ref.: L/M(1) to EDB(SA)/F&A/65/24/1 (pt.5)) issued by EDB on 20 March 2013.

amendments come into operation, his right or entitlement to any benefits in the Fund are excluded from his property upon bankruptcy; and

- (b) in relation to a bankruptcy adjudicated on or after the date when the proposed amendments come into operation, in working out the period of three years from the date on which a GSPF or SSPF contributor's account is closed under rule 14(2) of GSPF Rules and SSPF Rules, any time when the contributor is an undischarged bankrupt must be disregarded.

The Bills Committee

6. At the House Committee meeting on 12 April 2013, Members agreed to form a bills committee to scrutinize the Bill. The membership list of the Bills Committee is at **Appendix I**. Under the chairmanship of Hon Cyd HO, the Bills Committee has held two meetings and received views from deputations at one of the meetings. The two deputations which have submitted views to the Bills Committee are listed in **Appendix II**.

Deliberations of the Bills Committee

7. The Bills Committee supports the Bill and its early implementation. The issues of concern raised by members in the course of deliberation are summarized in the ensuing paragraphs.

Introduction of the Bill

8. Following the judgment of the Court of First Instance in the case Re. Ng Shiu Fan, the Administration had taken steps to amend MPFSO to put beyond doubt that the right or entitlement of a scheme member to any accrued benefits in a registered MPF Scheme derived from mandatory contributions would be excluded from the member's property for the purposes of BO. Hence, the accrued benefits would not vest in a trustee-in-bankruptcy in case of bankruptcy of the MPF scheme member. As the relevant amendments to MPFSO had come into operation as early as 13 May 2011⁵, members of the Bills Committee and the deputations consider that the Administration should have introduced the amendments to EO and its subsidiary legislation on protection of provident fund benefits expeditiously so that teachers in grant/subsidized schools could enjoy similar protection as their counterparts in government schools and the majority

⁵ See the Mandatory Provident Fund Schemes (Amendment) Ordinance 2011.

of the workforce in Hong Kong much earlier.

9. As explained by the Administration, it has monitored closely the development of the court case Re. Ng Shiu Fan, and has taken into consideration the possible appeal to the Court of Final Appeal as well as the subsequent impact on the legislative amendments. Having regard to the long lapse of the leave to appeal, the Administration took steps to expedite the legislative exercise by commencing the drafting work notwithstanding the possibility of further appeal.

Retrospective effect (if any) of the Bill

10. On whether the Bill, if enacted, would have any retrospective effect, the Administration has advised that as a matter of principle, newly enacted legislation will not normally take retrospective effect. Upon enactment by the Legislative Council, the Bill will take effect on the date of gazettal. Pursuant to the Bill, where a teacher-contributor of GSPF/SSPF is adjudicated bankrupt on a date after the legislative amendments have come into operation, his GSPF/SSPF benefits will not be vested in the trustee-in-bankruptcy in case of bankruptcy. However, if the bankruptcy order was issued on a date before the commencement of the Bill as enacted, the existing law will continue to apply.

GSPF/SSPF members to benefit from the Bill

11. The Bills Committee has noted from the Administration that there were three bankruptcy cases each year involving GSPF/SSPF members in 2009, 2010 and 2011; and two such cases in 2013 (up to May 2013). Some members are deeply concerned about the predicament of those GSPF/SSPF members whose provident fund benefits were vested in the trustee-in-bankruptcy, and consider that had the Administration taken steps to introduce the Bill earlier, these members would have been able to enjoy more equitable protection over their provident fund benefits. They urge the Administration to actively consider providing assistance to these persons on an administrative or ex-gratia basis.

12. The Administration has advised that in line with existing policy, the GSPF/SSPF benefits of bankrupt teacher-contributors should be dealt with in accordance with the prevailing law and scheme requirements in order to safeguard the interests of both the bankrupt and the creditor(s). Whilst the Administration is not in a position to devise special arrangements regarding the GSPF/SSPF benefits of teacher-contributors vested in trustees-in-bankruptcy, it has indicated that if these persons encounter difficulties in their daily living, they may seek appropriate assistance from the Government, similar to other needy members of the public.

13. Regarding the practices adopted in bankruptcy cases, the Administration has clarified that before the Court of Appeal judgment in Re. Ng Shiu Fan, when the GSPF/SSPF benefits were payable to the teacher-contributor, EDB would release the benefits of a bankrupt (or former bankrupt) teacher to the trustee-in-bankruptcy as required by the trustee-in-bankruptcy. After the aforesaid Court of Appeal judgment in 2009, the practice has been changed such that the payment of benefits attributable to post-discharge services are paid to the contributors who have since been discharged from bankruptcy and the pre-discharge benefits are paid to the trustee-in-bankruptcy. The proposed arrangements under the Bill will only be adopted after passage of the Bill.

14. As the relevant dates of the court decisions, the bankruptcy order, the payment of provident fund benefits and the commencement of the legislative amendments are critical in deciding how the GSPF/SSPF benefits of the teacher-contributor are to be dealt with in case of bankruptcy, there is a suggestion that the information should preferably be presented to the Bills Committee in the form of a chart to facilitate understanding of various scenarios. The Administration notes the suggestion for future reference.

Direct Subsidy Scheme schools

15. Noting that the proposed amendments are applicable mainly to teacher-contributors employed by grant schools and subsidized schools, some members have enquired on the relevant arrangements, if any, for Direct Subsidy Scheme ("DSS") schools.

16. As advised by the Administration, DSS schools, private schools and international schools are required to enroll their employees including teachers on registered MPF schemes or other recognized retirement schemes pursuant to relevant provisions under MPFSO, similar to the statutory obligation of most other employers in Hong Kong. Generally speaking, the contributions from employers and employees, the vested and accrued benefits of scheme members, the scheme assets and related arrangements are governed by relevant provisions under MPFSO. Nevertheless, some existing DSS schools are former grant or subsidized schools, the teachers of which were covered by GSPF or SSPF respectively. The relevant provisions in the GSPF Rules⁶ provide for the special arrangements for teachers of these DSS schools opting to remain as members of GSPF. For those SSPF contributors, after a maximum period of five years immediately after the subsidized school has become a DSS school⁷, they are to be covered by the MPF schemes provided by respective DSS schools.

⁶ Rules 7A and 7B of GSPF Rules are relevant.

⁷ Rule 7A of SSPF Rules is relevant.

The subsidy provided by the Government to DSS schools has also taken into account the funding required for the schools' donations to GSPF/SSPF. Members note that in the case of a DSS school which was formerly a grant or subsidized school, it is possible that some of its teachers are members of a MPF scheme while some are members of GSPF/SSPF.

Comparable provisions under MPFSO

17. The Bills Committee notes that the wording "if a provident fund member is an undischarged bankrupt" is used in proposed section 85(4) of the Bill as a condition for excluding the provident fund benefits from vesting with the trustee-in-bankruptcy, whereas the relevant wording in section 16(1A) of MPFSO is "if a scheme member is adjudicated bankrupt". Given that one of the stated objectives of the Bill is to effect similar protection under MPFSO to the benefits of GSPF and SSPF, question has been raised on the reasons for the different wordings used.

18. The Administration's explanation is that proposed section 85(4), as currently drafted, aims to express clearly the policy intent that protection is given to a provident fund member so long as the member is an undischarged bankrupt, regardless of whether the person is adjudicated bankrupt before or after becoming a member of GSPF/SSPF.

19. Referring to section 16(1A) of MPFSO, members note that the expression "any accrued benefits in a registered scheme" is used, and the term "accrued benefits" is defined under section 2(1) of the said Ordinance. However, the term "benefits accrued" is not defined under EO or the Bill. Moreover, it is noted that the protection under proposed section 85(4) of the Bill is extended to the benefits "accruing" and "to be accrued" to the provident fund member. Members have enquired on the reasons and implications, if any, of the different formulations.

20. In response, the Administration has advised that under the existing provisions of EO, the GSPF and SSPF Rules, the term "benefits" is used without being defined. In section 2 of BO, "property" is defined to include "...things in action...present or future, vested or contingent, arising out of or incident to property as above defined". Hence, the use of "accrued", "accruing" and "to be accrued" in proposed section 85(4) of the Bill seeks to reflect the scope of "benefits" in line with the relevant provision in BO. Furthermore, as the payment of provident fund benefits is subject to conditions stipulated under the GSPF and SSPF Rules, and the Government's donations (in the case of grant or subsidized schools) or the school's donations (in the case of DSS schools) may not be payable at all under certain circumstances, it is therefore arguable as to

the point in time such donations or benefits become accrued to a contributor. The Administration has also confirmed that as currently drafted, proposed section 85(4) of the Bill will not provide greater protection to GSPF/SSPF members than that available to MPF scheme members. According to the Administration, section 16(1A) of MPFSO and proposed section 85(4) of the Bill are not strictly comparable as the former is a provision to avoid doubt, while the latter has been introduced following the decisions of the courts.

Committee Stage amendments

21. No Committee Stage amendments to the Bill have been proposed by the Administration or the Bills Committee.

Recommendation

22. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 19 June 2013.

Consultation with the House Committee

23. The House Committee was consulted on 31 May 2013 and supported the recommendation of the Bills Committee in paragraph 22 above.

Council Business Division 4
Legislative Council Secretariat
4 June 2013

Bills Committee on Education (Amendment) Bill 2013

Membership list

Chairman	Hon Cyd HO Sau-lan
Members	Hon Tommy CHEUNG Yu-yan, SBS, JP Hon Starry LEE Wai-king, JP Hon MA Fung-kwok, SBS, JP Dr Hon Kenneth CHAN Ka-lok Hon CHAN Yuen-han, SBS, JP Dr Hon Helena WONG Pik-wan Hon IP Kin-yuen

(Total : 8 Members)

Clerk	Miss Polly YEUNG
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Legal Adviser	Miss Carrie WONG
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Date	22 April 2013
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Bills Committee on Education (Amendment) Bill 2013

Deputations that have submitted views to the Bills Committee

1. Young DAB
2. Hong Kong Professional Teachers' Union

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Legislative Council Secretariat
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