

立法會
Legislative Council

LC Paper No. LS37/12-13

**Paper for the House Committee Meeting
on 12 April 2013**

**Legal Service Division Report on
Education (Amendment) Bill 2013**

I. SUMMARY

1. The Bill

The Bill seeks to amend the Education Ordinance (Cap. 279) (EO) to provide that –

(a) the statutory protection of any benefits in the provident fund under section 85 of EO covers the bankruptcy of a Grant Schools Provident Fund (GSPF) or Subsidized Schools Provident Fund (SSPF) member if his bankruptcy is adjudicated on or after the date when the proposed amendments come into operation; and

(b) in relation to a bankruptcy adjudicated on or after the date when the proposed rule 14(2A) comes into operation, in working out the period of 3 years from the date on which a GSPF or SSPF contributor's account is closed, any time when the contributor is an undischarged bankrupt must be disregarded. At present, if no lawful claim for the provident fund benefits is made within the 3 years, the amount standing to the credit of the account is to be transferred to the credit of a reserve fund.

2. Public Consultation

According to the Administration, the respective Boards of Control of GSPF and SSPF were consulted in November and October 2012, and both supported the proposal.

3. Consultation with LegCo Panel

The Panel on Education was consulted on 11 December 2012. Members in general supported the proposed amendments.

4. Conclusion

Members may consider whether there is any issue which they wish to study in detail.

II. REPORT

The date of First Reading of the Bill is 27 March 2013. Members may refer to the LegCo Brief (File Ref.: L/M(1) to EDB(SA)/F&A/65/24/1 (pt. 5)) issued by the Education Bureau (EDB) on 20 March 2013 for further information.

Object of the Bill

2. The Bill seeks to amend the Education Ordinance (Cap. 279) (EO) to provide that –

- (a) if a Grant Schools Provident Fund (GSPF) or Subsidized Schools Provident Fund (SSPF) member is an undischarged bankrupt of a bankruptcy adjudicated on or after the date when the proposed amendments come into operation, the member's 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 3 years from the date on which a GSPF or SSPF contributor's account is closed under rule 14(2) of the GSPF Rules (Cap. 279 sub. leg. C) and the SSPF Rules (Cap. 279 sub. leg. D), any time when the contributor is an undischarged bankrupt must be disregarded.

Background

Relevant Provisions

EO

3. Section 85(3) of the EO provides that "...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."

GSPF Rules and SSPF Rules

4. Similar to the mandatory provident fund registered schemes, the GSPF and SSPF are statutory provident funds aimed at assisting teachers in grant/subsidized schools to accumulate retirement savings. Under the respective

Rules, a teacher employed in a grant/subsidized school shall contribute to a GSPF or SSPF at the rate of 5% of his basic salary, in addition to a Government donation. Whenever a contributor ceases to be employed as a teacher in a grant/subsidized school for any of the specified reasons¹, his account shall be closed and the amount standing to the credit of his account at the date of cessation of employment, including Government donations and all dividends that have been declared up to and including that date, shall be paid to him or his personal representative.

Bankruptcy Ordinance (Cap. 6) (BO)

5. Section 43(1) of the BO provides that a bankrupt's estate comprises, among others, all property² belonging to or vested in the bankrupt at the commencement of the bankruptcy. This section is however subject to the provisions of any enactment under which any property is to be excluded from a bankrupt's estate.³

6. Under sections 12(1) and 58(1) of the BO, on the making of a bankruptcy order, the property of the bankrupt shall vest in the Official Receiver, who shall thereby become the provisional trustee of the property of the bankrupt. Section 58(2) provides that the property of the bankrupt shall forthwith pass to and vest in the trustee appointed.

Court Case

7. In a bankruptcy case concerning a subsidized school teacher (Re. Ng Shiu Fan [2008] HKLRD 813), the Court of First Instance considered the effect of section 85(3) of the EO and that the entitlement of a former subsidized school teacher, a discharged bankrupt, to his contribution to SSPF under the EO formed part of his estate and vested in the Official Receiver and trustee under the BO when he was adjudged bankrupt. It further considered that section 85(3) did not prevent the "Benefits"⁴ under the SSPF from vesting in the trustee-in-bankruptcy by virtue of section 58(1) of the BO. The judge recommended that serious consideration be given to amending the law to extend the protection to retirement benefits generally in the event of bankruptcy⁵. On appeal, the Court of Appeal ([2009] 4 HKLRD 774) held that the bankrupt is only entitled to the proportion of the "Benefits" attributable to his service and contribution after his discharge from bankruptcy. In April 2010, the Court of Appeal granted leave to the applicant to

¹ In the present case, the specified reason is voluntary retirement after 10 years' continuous contributory service.

² Under section 2 of the BO, "property" is defined to include money, goods, things in action, land and every description of property, whether real or personal and whether situate in Hong Kong or elsewhere, also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident of property as above defined.

³ See section 43(6) of the BO.

⁴ The amount so payable or in other words the entitlement of Ng Shiu Fan under the SSPF Rules was referred to in the Court of Appeal Judgment as the "Benefits" (see paragraphs 2 and 5 of the said Judgment).

⁵ See paragraph 84 of the Judgment.

appeal to the Court of Final Appeal. According to the Administration, the present status of the court case is unclear⁶.

Current bankruptcy practice

8. Before the Court of Appeal judgment in Re. Ng Shiu Fan, the EDB had released GSPF and SSPF benefits of a bankrupt (or former bankrupt) teacher to the trustee-in-bankruptcy as required by the trustee-in-bankruptcy when the benefits were payable to the teacher-contributor. Since the said Court of Appeal judgment, 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.

Provisions of the Bill

9. The Bill proposes to add new section 85(4) and (5) to the EO so that if a GSPF or SSPF member is an undischarged bankrupt of a bankruptcy adjudicated on or after the date when the proposed section 85(4) comes into operation, the member's right or entitlement to any benefits in the GSPF and SSPF is excluded from his property for the purposes of the BO. This will bring protection to the benefits of GSPF and SSPF contributors in the event of bankruptcy as in the case of teachers in government schools under the Pensions Ordinance (Cap. 89) (PO) or Pensions Benefits Ordinance (Cap. 99) (PBO) in line with the majority of the workforce under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO).

10. Under the respective rules 14(2) of the GSPF Rules and the SSPF Rules, if no lawful claim for the provident fund benefits is made within 3 years after the date on which a contributor's account is closed, the amount standing to the credit of the account is to be transferred to the credit of the reserve fund. The Bill adds new rule 14(2A) and (2B) to each of those Rules so that in relation to a bankruptcy adjudicated on or after the date when the proposed rule 14(2A) comes into operation, in working out the period of 3 years for the respective rules 14(2) of the GSPF Rules and the SSPF Rules, any time when the contributor is an undischarged bankrupt must be disregarded.

11. On enquiry, the EDB has explained that the protection afforded to teachers in grant or subsidized schools as proposed in the Bill would not be greater than that afforded to mandatory provident fund contributors under the MPFSO. Copies of the two replies from the EDB are attached for members' reference. No other legal or drafting issues have been identified.

⁶ According to the LegCo Brief, Ng Shiu Fan's two applications for legal aid were refused in August 2010 and January 2011 respectively. Towards the end of August 2012, the Official Receiver's Office informed the Education Bureau that Ng was granted legal aid to appeal against the judgment of the Court of Appeal. As at the date of the LegCo Brief, appeal in Ng's case is still possible.

Public Consultation

12. According to the Administration, the respective Boards of Control of GSPF and SSPF were consulted in November and October 2012, and both supported the proposal.

Consultation with LegCo Panel

13. The Clerk to the Panel on Education has advised that in principle, Panel members supported the proposed amendments to prevent the benefits of contributors to the GSPF and the SSPF from being vested in a trustee-in-bankruptcy in case of bankruptcy, similar to the protection currently provided under the PO, the PBO and the MPFSO. At members' request, the Administration had provided additional information relating to the payment of provident fund benefits.

Conclusion

14. Members may consider whether there is any issue which they wish to study in detail.

Encls.

Prepared by

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10 April 2013

LS/B/10/12-13



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9 April 2013

Miss Carrie WONG
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Legislative Council Secretariat
1 Legislative Council Road
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Hong Kong

Dear Miss WONG,

Education (Amendment) Bill 2013

Thank you for your letter dated 26 March 2013. Our response to your questions concerning the Education (Amendment) Bill 2013 is set out as follows:

“In this connection, please clarify the reasons for adopting a different conditions (i.e. if a provident fund member is an undischarged bankrupt) from that in MPFSO (i.e. if a scheme member is adjudicated bankrupt). It seems that an undischarged bankrupt may retain that status over a period of time but a scheme member is adjudicated bankrupt only at a specific point of time.”

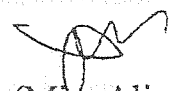
The wording “if a provident fund member is an undischarged bankrupt” in the proposed section 85(4) of the Education Ordinance (EO) is aimed to express clearly the policy intent that protection is given to a provident fund member so long as the member is an undischarged bankrupt, regardless of whether the person is adjudicated bankrupt before or after becoming a provident fund member. On the other hand, it is noted that section 16(1A) of the MPFSO is a provision to avoid doubt.

"It is noted that in the MPFSO, the expression "any accrued benefits in a registered scheme" is used and "accrued benefits" is defined. Please clarify -

- (a) why a definition is considered unnecessary for "benefits accrued";
- (b) why the protection in the proposed section 85(4) of the Education Ordinance (Cap. 279) is extended to benefits "accruing" and "to be accrued";
- (c) how the right or entitlement of a provident fund member to any benefits in the fund which has not yet accrued (i.e. "accruing" and "to be accrued") could be excluded from the property for the purposes of the Bankruptcy Ordinance (Cap. 6)."

In the existing provisions of the EO, the Grant Schools Provident Fund Rules and the Subsidized Schools Provident Fund Rules (GSPF and SSPF Rules), the term "benefits" is used without being defined. In section 2 of the Bankruptcy Ordinance (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" (emphasis added). As the payment of provident fund benefits is subject to conditions stipulated under the GSPF and SSPF Rules, and Government donations (in the case of grant or subsidized schools) or school's donations (in the case of direct subsidy scheme schools) may not be payable at all under certain situations, it is arguable as to which point in time such donations or benefits become accrued to a contributor.

Yours sincerely,



(Miss Alice YU)

for Secretary for Education



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10 April 2013

Miss Carrie WONG
Assistant Legal Advisor
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Dear Miss WONG,

Education (Amendment) Bill 2013

I refer to your letter dated 9 April 2013 in response to our reply on the same date. Our response to your further question concerning the Education (Amendment) Bill 2013 is set out as follows:

“Based on your reply as to why the protection is extended to benefits “accruing” and “to be accrued”, please clarify whether the protection afforded to teachers in grant or subsidized schools as proposed in the Bill could be greater than that afforded to MPF contributors under Cap. 485, because the protection afforded to the latter covers only “accrued” benefits, which as defined do not seem to include benefits “accruing” and “to be accrued”.

The protection intended to be afforded to teachers in grant or subsidized schools as proposed in the Bill is not greater than that given to MPF contributors under the MPFSO. The term “accrued benefits” was defined in the MPFSO before the addition of section 16(1A). Further, it should be noted that section 16(1A) of the MPFSO is a provision to avoid doubt. On the other hand, the Bill is proposed

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following the decisions in the courts. The proposed section 85(4) is aimed to express the protection clearly in view of the possible uncertainty as to when exactly the benefits can be said to have accrued to a contributor under the Grant Schools Provident Fund Rules and the Subsidized Schools Provident Fund Rules.

Yours sincerely,



(Miss Alice YU)
for Secretary for Education