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By Fax No. 2868 5279

18 November 1999

Finance Bureau
(Attn: Miss Esther Leung
Principal Assistant Secretary (Tsy)R)
5/F, Main and East Wings
Central Government Offices
11 Ice House Street Central
Hong Kong

Dear Miss Leung,

Dutiable Commodities (Amendment) Bill 1999

I am scrutinizing the above Bill with a view to advising Members. I should be grateful if you would comment on or clarify the following -

Clause 2

After amendment, the new section 6(1)(i) will read as follows:

"The Chief Executive in Council may by regulation prescribe or provide for dispensing with or relaxing any of the provisions of this Ordinance or duties imposed under this Ordinance relating to goods to which this Ordinance applies and empowering the Commissioner to impose conditions in respect of the dispensation or relaxation".

This proposed section will give a general power to the Chief Executive in Council to make regulations for exempting any person from complying with or paying any duties under this Ordinance. There is no express restriction on the scope of exemption. Nor is there requirement for the Chief Executive in Council to justify the exemption.

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In my view, this kind of enabling provision should only be provided if there is clear justification in policy terms. To cite a passage from *Constitutional and Administrative Law* by *Stanley de Smith and Rodney Brazier* (which I annex herewith for your easy reference) -

> "Parliament (in our case, the Legislative Council) should not delegate to Ministers power to make regulations on matters of general principle unless it lays down in the enabling Act standards delimiting the boundaries of the delegate's discretion …. In countries with written constitutions, a blanket delegation of legislative power to the executive may be held to be unconstitutional".
>
> "The power to impose or vary taxation is, in general, too important to be delegated by Parliament".

The Administration has suggested in paragraph 20(a) of the LegCo Brief that the proposed amendment, if enacted, would "not change the power of the Legislative Council to scrutinize any changes to the scope of exemption in future through negative vetting". Whilst the Administration's statement is accurate to the extent that it relates to future changes, I think that Members should be advised in clearer terms that the proposed amendment would replace the existing requirement for exemption by primary legislation under section 6(1)(i). Under the proposed mechanism, the Legislative Council would only know of the exercise of this exemption power when the regulation is published in the Gazette which can take immediate effect. Should the Legislative Council wish to amend the regulation, the Council will have to pass a resolution to amend the regulation. Such resolution is rarely to have retrospective effect.

Further, in section 4(2)(b) of the Ordinance, the Legislative Council may by resolution (i.e. by positive vetting) amend Schedule 1 and in particular to abolish, vary or waive or remit any duty imposed therein. If Clause 2 is enacted, there would appear to be inconsistency between section 4(2)(b) and the proposed new section 6(1)(i) in that the Chief Executive in Council may by regulation (negative vetting by the Legislative Council) dispense with or relax any duties imposed under this Ordinance.

Clause 7

The proposed section 64A(2)(a) states "if the person who manufactures the liquor is in possession, anywhere in Hong Kong, of alcoholic liquor …". For the sake of consistency, would it be better to use one term instead of two terms for the same thing? What kind of "liquor" or "alcoholic liquor" is now exempted from licensing ? Can a person manufacture spirit at home?

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With regard to the Chinese term of "alcoholic liquor", it is "飲用酒類" in this Ordinance but "酒類" in section 52 of the Public Health and Municipal Services Ordinance (Cap. 132) which includes Chinese wine and spirit whilst in Regulation 18 of the Dangerous Goods (General) Regulations (Cap. 295 sub. leg.), it is translated as "含酒精酒類". Should the same Chinese term be used?

Clause 9

In the proposed Regulation 12(1)(ea)(ii), will the "quantity of the alcoholic liquor and tobacco" be specified in a Legal Notice in the Gazette as subsidiary legislation governed by section 34 of Cap.1? Please state so expressly.

I would appreciate it if you would let me have your reply in both English and Chinese as soon as possible.

Yours sincerely,

(Anita Ho)
Assistant Legal Adviser

Encl.

c.c. D of J (Attn: Miss Betty Cheung, SGC)
LA

傳真號碼 Fax No. : 2530 5921
電話號碼 Tel. No. : 2810 2370
本函檔號 Our Ref. : FINCR 6/3231/89
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22 March 2000

Ms Anita Ho
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central, Hong Kong
[fax: 2877 5029]

Dear Ms Ho,

Dutiable Commodities (Amendment) Bill 1999

Thank you for your letter of 18 November 1999 in which you have raised a number of questions on certain clauses in the above Bill. It has taken quite some time to reply since we need to research into the background and legal principles pertaining to such provisions. A consolidated reply is in the ensuing paragraphs.

Clause 2

The proposed amendment to section 6(1)(i) of the Dutiable Commodities Ordinance (DCO) is meant to remove from the DCO specific categories of goods which only need to be set out in the Dutiable Commodities Regulations. This will also in effect provide a general regulation-making power to the Chief Executive in Council in respect of exempting any specific categories of goods from duties.

This amendment is not inconsistent with the principles laid down in *Constitutional and Administrative Law by Stanley de Smith and Rodney Brazier.* Under the heading "Where delegation is open to criticism", in item 5, the authors have qualified the sentence you quoted ("The power to impose or vary taxation is, in general, too important to be delegated by Parliament.") by-

> "But a flexible power to make regulations modifying, for example, rates of indirect taxation or customs duties may be a valuable ancillary instrument for the management of the economy."

We therefore consider that the regulation-making power under the proposed section 6(1)(i) does not fall within "the power to impose or vary taxation." Rather, it is "a flexible power to make regulations modifying customs duties".

The authors of *Constitutional and Administrative Law* object to delegation of power to make regulations on matters of general principles without delineating the boundaries of the delegate's discretion. However, the regulation making power under the proposed section 6(l)(i) does not concern "matters of general principle". Exemptions by nature are not general principles. That is the reason why a general regulation making power for prescribing exemptions is found in various Ordinances without specific criteria being set out for them. Specifically, similar power to make subsidiary legislation to exempt tax or rates are found in section 87 of the Inland Revenue Ordinance and section 36(2) of the Rating Ordinance.

Following the proposed amendment, LegCo can exercise its existing power of scrutiny over subsidiary legislation on all regulations made under the new section 6(1)(i). The same degree of scrutiny is accepted as sufficient for exemption orders under the Inland Revenue Ordinance and the Rating Ordinance. As you are aware, in specifying a commencement date for each Regulation, the Administration usually allows time for negative vetting by LegCo, except where an emergency requires that the Regulation comes into immediate effect. The Administration will also issue a LegCo Brief on the Regulation before it is gazetted. This will in effect give prior notice to LegCo about the Regulation. Apart from LegCo's scrutiny, subordinate legislation is subject to review under the general law. It cannot contradict the principal Ordinance, or be discriminatory or unreasonable (see for example, Hong Kong Administrative Law by Clark &McCoy (Second Edition) pp.407-418).

You also asked whether there would be any inconsistency between section 4(2)(b) of the Ordinance and section 6(l)(i) of DCO, if the amendments to the latter are enacted. We do not consider there is any such inconsistency. The scope of section 4(2)(b) is different from that of section 6(l)(i) and indeed much wider as it covers the power to increase, decrease, recast, vary and abolish any duty as well. This explains why a positive resolution is needed under the section. While section 4(2)(b) is wide enough to deal with exemption, it is not primarily

intended for handling duty exemption matters. Otherwise, a separate regulation-making power would not have been given to the Chief Executive in Council under section 6(1)(i) to specifically exempt prescribed categories of goods from duties imposed.

Clause 7

You proposed to standardise the use of the terms "alcoholic liquor" and "liquor" in the new section 64A(2)(a) and (b). We consider this not necessary. The reference to "the liquor" in (2)(a) and (b) refers to an antecedent i.e. the "alcoholic liquor" made under section 64A(1). This is supposed to avoid making repetitive reference without compromising clarity. For the same reason, we refer to "the person" in section 64A(2) instead of "a person aged 18 or over" and to "the premises" instead of "premises which are used by the person exclusively as his place of residence...". They refer to antecedents in section 64A(1).

You may note that there are also references to "alcoholic liquor" in section 64A(2)(a) and (b). These references refer not only to liquor manufactured by "the person" in 64A(1) but also any home-brewed liquor made by any other person. That is why "alcoholic liquor" instead of "liquor" is used. In other words, the effect of 64(A)(2)(a) is that the home-brewed liquor exemption will not apply if a person who manufactures the liquor is in possession of home-brewed liquor exceeding 50 litres even if the liquor is manufactured by another person.

You asked whether the same Chinese rendition of "alcoholic liquor" should be standardised in different Ordinances. You may wish to note that the rendition we are using in the amendment bill is same as the one being used in the DCO. We see no reason why we have to change it. Nor do we see the need to standardise all the terms in different Ordinances, given the varied objectives and ambits of these Ordinances.

You have specifically asked what kind of liquor is exempted from licensing and whether spirit can be manufactured at home. On the first question, basically all home-brewed liquor which is neither manufactured by way of distillation nor for sale is exempted from licensing and duty. Regarding your second question, spirit is normally manufactured by distillation. Since home brewing by distillation is not allowed under the proposed amendment bill for fire safety concern, it follows that manufacturing of spirit by distillation is not allowed. However, upon our further research, we have found that the making of certain types of wine (for example fortified wine) may involve the mixing of wine with spirit and such manufacturing process may not necessarily involve

distillation. We think such manufacturing of home-brewed liquor (involving spirit but not distillation) may likewise be exempted from the licence requirements and duty. To make this legislative intent clear, we will therefore move a Committee Stage Amendment to specify that home-brewed liquor which does not involve distillation is exempted from section 17(4) of the DCO.

You have also asked whether we could positively list out all liquor manufacturing methods that are allowed for home brewing purpose in the proposed section 64A(1). Since there are many different kinds of manufacturing methods such as fermentation, mixing, treatment, rectification, purification, refinement, or other kinds of processing, it is not practicable to list out all of these methods. Neither is it necessary to do so, given that our approach seeks to only exclude liquor manufactured by distillation from the definition of home-brewing for duty-exemption purpose.

Clause 9

We intend to publish the specification in a Legal Notice.

I hope you will find the above information useful.

Yours sincerely,

(Ms Esther Leung)
for Secretary for the Treasury

6 Changes in the constitutions of dependent territories, and constitutions adopted immediately before independence, are better embodied in Orders in Council than in Acts of Parliament. This is not because they are unimportant but because they are almost invariably the outcome of an intergovernmental negotiation, and if it were open to Parliament to delete or modify individual provisions of the constitution a delicate balance might be upset and the political consequences could then be very serious.

Where delegation is open to criticism

1 It is a primary function of Parliament to determine the guidelines of legislative policy.[18] Parliament should not, therefore, delegate to Ministers power to make regulations on matters of general principle unless it lays down in the enabling Act standards delimiting the boundaries of the delegate's discretion. Skeleton legislation is justifiable only in order to deal with a state of dire emergency (such as the Northern Ireland situation since 1972) or a quite exceptional situation, such as has been created by Britain's accession to the European Communities. In countries with written constitutions, a blanket delegation of legislative power to the Executive may be held to be unconstitutional.[19]

2 Grants of delegated power ought not to be so expressed that it becomes impossible in practice for the courts to review the limits of the powers exercised. Statutory formulae purporting to oust the jurisdiction of the courts by express language[20] are now uncommon. Less uncommon are statutory provisions endowing Ministers with powers which in their opinion are requisite or expedient for a broadly framed statutory purpose. When the validity of regulations made in pursuance of such powers is challenged, very strong grounds will have to be adduced before a court will be persuaded to intervene.[21] Moreover, Ministers, and their advisers endowed with so large a discretion may be unable to resist temptations to stretch

[18] See generally Griffith (1951) 14 *Mod. L. Rev.* 279, 425.

[19] See, for example, *Keal* v. *Dulles* 357 U.S. 116 (1958) (United States); *Re Delhi Laws Act* (1951) S.C.R. 747 (India), though see H. M. Seervai, *Constitutional Law of India* (2nd edn, 1975), pp. 874–86.

[20] See pp. 354–5.

[21] The point is well made by Lord Diplock *obiter* in *McEldowney* v. *Forde* [1971] A.C. 632 at 659–61, though see *Utah Construction and Engineering Co.* v. *Pataky* [1966] A.C. 629; *Customs and Excise Commissioners* v. *Cure and Deeley Ltd* [1962] 1 Q.B. 340. See also pp. 353–4.

their powers beyond reasonable limits. Such delegations may thus offend against proposition (1).

3 Criticism has been levelled against the so-called 'Henry VIII clause', under which Parliament delegates authority to make regulations amending Acts of Parliament.[22] This formulation is not widely used, and it is normally innocuous if the grant of power is confined to a limited period for the purpose of enabling draftsmen to make consequential adaptations to miscellaneous enactments that may have been overlooked when the principal Act was passed.[23]

4 Seldom if ever will a grant of power to make regulations imposing liabilities with retroactive effect be justified.[24]

5 The power to impose or vary taxation is, in general, too important to be delegated by Parliament. But a flexible power to make regulations modifying, for example, rates of indirect taxation or customs duties may be a valuable ancillary instrument for the management of the economy.[25]

6 In the interests of certainty, Parliament ought to identify the recipient of its delegated powers, and when delegating legislative authority it should not authorize sub-delegation of those powers to unnamed persons. In and immediately after the Second World War, when sub-delegation was expressly authorized by the Emergency Powers (Defence) Acts and their successors, instances of five-tier delegation arose.[26]

The European Communities Act 1972

Quite apart from Community regulations which are directly applicable of their own force (section 2(1)), further regulations have been and will have to be made in this country under powers delegated by the Act (section 2(2)) to give effect to Community directives and decisions and also to implement in fuller detail some Community regulations. Orders

[22] cf. Cmd 4060 (1932), pp. 36–8, 59–61, 65.

[23] See, for example, Kenya Independence Act 1963, s. 5(4). An unusual power to amend the parent Act itself was conferred by section 16(2) of the Race Relations Act 1968 (see now the Race Relations Act 1976, s. 71). And see the extraordinary device in the Remuneration, Charges and Grants Act 1975, s. 1 (which lapsed in 1978).

[24] Such legislation is likely to be held to be *ultra vires* unless retroactive operation has been expressly authorized by the enabling Act, cf. authorities cited in *The Aboukir* [1968] P. 656 at 659. See also *Master Ladies Tailors Organization* v. *Minister of Labour and National Service* [1950] 2 All E.R. 525 at 528. See, however, *Subally & N'Jie* v. *Att.-Gen.* [1965] 1 Q.B. 273.

[25] cf. Excise Duties (Surcharges or Rebates) Act 1979, s. 1.

[26] J. A. G. Griffith and H. Street, *Principles of Administrative Law* (5th edn, 1973), pp. 59–66.