

立法會
Legislative Council

LC Paper No. LS37/13-14

Paper for the Subcommittee on Rating (Exemption) Order 2014

Purpose

At the meeting of the Subcommittee on Rating (Exemption) Order 2014 (the Subcommittee) of 13 March 2014, members of the Subcommittee discussed possible amendments to the Rating (Exemption) Order 2014 (L.N. 26 of 2014) (the Order) in the context of Rule 31(1) of the Rules of Procedure (RoP).

2. To assist the Subcommittee's deliberations, the Legal Service Division was requested to provide information on the following issues:

- (a) the genesis of Rule 31(1) of RoP and whether that rule is inconsistent with Article 74 of the Basic Law (BL74); and
- (b) whether a Member's proposed amendment to the Order that would not affect the amount of rates to be forgone (i.e. \$6,135 million) as proposed by the Administration would have any charging effect for the purposes of Rule 31(1).

Genesis of Rule 31(1) of RoP

3. Rule 31(1) of RoP provides for restriction on motions and amendments to subsidiary legislation. Rule 31(1) provides that –

"A motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by -

- (a) the Chief Executive (CE); or
- (b) a designated public officer ; or
- (c) a Member, if [CE] consents in writing to the proposal."

4. It is noted that Rule 31(1) is in terms substantially the same as Rule 57(6) of RoP except that Rule 57(6) applies to amendments proposed to be moved to bills¹. The charging effect restriction provided in Rule 31(1) and Rule 57(6) of RoP was adapted from the relevant Standing Orders of the pre-1997 Legislative Council (LegCo). It was a procedural device provided to protect the Government's financial initiative, reflecting the constitutional arrangement that it is the Government which demands and the legislature which provides. This arrangement is reflected in Articles 64 and 73 of the Basic Law².

5. Rule 57(6) of RoP has been considered by the Court of First Instance in *Leung Kwok Hung v. The President of the Legislative Council of the Hong Kong Special Administrative Region and the Secretary for Justice* (HCAL 87/2006) [2007] 1 HKLRD 387 where Rule 57(6) was challenged on the ground that it was inconsistent with the Basic Law. In his judgment, Hartmann J (as he then was) outlined the history of the rule which reflected "the principle of English constitutional law that there could be no charge on public funds unless it was at the initiative of the Crown". Hartmann J came to the view that insofar as Rule 57(6) diminishes the ability of Hong Kong's legislators, it is a long-standing diminishment inherited by our colonial legislature from Parliament and is one founded on the separation of powers, the particular constitutional principle being that no charge on public funds can be incurred except on the initiative of the executive and the administration³.

Whether Rule 31(1) is inconsistent with BL74

6. BL74 provides, among others, that "Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council". There was discussion on whether "bills" should include Committee Stage amendments (CSAs) to bills in *Leung Kwok Hung* but the Court did not find it necessary to determine the exact nature and extent of BL74 in determining the constitutionality of Rule 57(6) of RoP.

¹ Under Rule 57(6) of RoP, an amendment to a bill which has the object or effect of disposing of or charging any part of the revenue or other public moneys of Hong Kong may only be proposed by a Member, if CE consents in writing to the proposal.

² Article 64 of the Basic Law provides, among others, that the Government of the Hong Kong Special Administrative Region (HKSAR) shall obtain approval from LegCo for taxation and public expenditure. Article 73(3) stipulates that LegCo of HKSAR shall exercise the power and function of approving taxation and public expenditure.

³ Paragraphs 84 and 87 of the Judgment: [2007] 1 HKLRD 387 at 405

7. In the present case, since the Order is an item of subsidiary legislation and amendment is to be proposed in the form of a motion, the question to consider is whether "bills" in BL74 includes subsidiary legislation and/or motions. While BL74 merely refers to "bills", other provisions of the Basic Law refer to "bills", "motions" and "subsidiary legislation" separately. For example:

- (a) Article 48(3) and (10) refers to CE's powers "to sign bills passed" by LegCo, and "to approve the introduction of motions regarding revenues or expenditure" to LegCo;
- (b) Article 62(5) refers to the HKSAR Government's power and function of drafting and introducing "bills, motions and subordinate legislation"; and
- (c) Section II of Annex II deals with the procedures for voting on "bills and motions" in LegCo and refers to the passage of "motions, bills or amendments to government bills" introduced by individual members of LegCo.

8. When BL74 is construed in the context of other provisions of the Basic Law as set out above, we consider that BL74 only applies to bills but not subsidiary legislation or motions (including motions to amend subsidiary legislation). If BL74 is intended to cover subsidiary legislation or motions in addition to bills, this should have been stipulated expressly in BL74 in the same way as other provisions of the Basic Law. On this basis, no issue of inconsistency with BL74 should arise in considering whether an amendment to the Order may be proposed under Rule 31(1) of RoP.

9. Under Article 73(1) of the Basic Law (BL73(1)), LegCo has the power "to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures". The phrase "in accordance with ... legal procedures" in the context of BL73(1) has been interpreted to mean that LegCo must act not only in accordance with the Basic Law but also in accordance with the rules of procedure which the Council has the power to set for itself in order to govern the manner in which it enacts, amends or repeals laws⁴. As far as amendment to subsidiary legislation is concerned, the relevant governing rule under RoP is Rule 31(1). Applying *Leung Kwok Hung* which held that Rule 57(6) of RoP is not rendered inconsistent with the Basic Law by the application of BL74 when it is read in the context of other relevant provisions of the Basic

⁴ Paragraph 7 of Hartmann J's Judgment in *Leung Kwok Hung*: [2007] 1 HKLRD 387 at 391

Law⁵, it is likely that the courts would come to the same conclusion in relation to Rule 31(1) which is basically identical to Rule 57(6).

Principles relevant to consideration of whether an amendment has charging effect

10. The admissibility of a Member's proposed amendment to the Order is ultimately a matter for the President of LegCo (PLC) to decide. One may note that the contents of Rule 31(1) and Rule 57(6) of RoP are basically identical. In fact, the former and present PLC both have applied the relevant principles adopted in the consideration of whether a proposed CSA to a bill would have charging effect under Rule 57(6) of RoP to the consideration of whether a proposed resolution to amend subsidiary legislation would have charging effect under Rule 31(1) of RoP⁶.

11. In discussing the meaning and effect of Rules 31(1) and 57(6) of RoP in relation to Members' proposed amendments to vary the Government's revenue proposals, PLC has previously held that:

- (a) the "charging effect" restriction provided in Rules 31(1) and 57(6) applies to revenue which may be collected under statutory authority⁷;
- (b) proposed amendments would have charging effect if revenue to be collected under the proposed amendments would be less than what is being collected under existing law which would be affected by the amendments⁸; and
- (c) an amendment would have charging effect if it imposes a new and distinct function on the Administration, the performance of which would require the spending of an amount of public money that is not nominal or negligible⁹.

⁵ Paragraphs 69 to 72 of the Judgment: [2007] 1 HKLRD 387 at 402

⁶ For example, the former PLC's ruling on the proposed resolution to amend the Sewage Services (Trade Effluent Surcharge) (Amendment) Regulation 2008 proposed by Hon Audrey EU Yuet-mee and the PLC's ruling on the proposed resolution to amend the Minimum Wage Ordinance (Commencement) (No. 2) Notice 2010 proposed by Hon LEE Cheuk-yan.

⁷ See, for example, the President's ruling on Hon LAU Chin-shek's proposed resolution to amend the Public Revenue Protection (Revenue) Order 2001 (27 March 2001).

⁸ PLC's ruling on CSAs to Revenue (No. 2) Bill 2003 proposed by Hon SIN Chung-kai (23 June 2003).

⁹ See, for example, PLC's ruling on Hon Albert CHAN's proposed resolution to amend the Rating (Exemption) Order 2012 (26 March 2012).

12. For example, in 2001, Hon Albert HO and Dr Hon YEUNG Sum proposed moving CSAs to the Inland Revenue (Amendment) Bill 2001, seeking to increase the maximum amount of home loan interest deduction from \$150,000, as proposed in that Bill, to \$180,000. While the original proposal in the Bill would result in a reduction of revenue by \$520 million a year, the Members' proposed CSAs would lead to a further loss of \$210 million per year by way of revenue forgone. As such, it was held that the proposed CSAs had charging effect under Rule 57(6)¹⁰.

13. Further, in 2012, Hon Albert CHAN's proposed resolution to limit the number of tenements in respect of which any one person could be exempted from payment of rates was held to have charging effect within the meaning of Rule 31(1) because the implementation of the proposed amendments would create a new and distinct function for the Rating and Valuation Department (RVD) to cross-check its records of payers of rates of all tenements which would entail an additional expenditure of \$48 million that was not nominal or negligible¹¹.

Member's proposed amendment to the Order

14. Based on the rulings referred to above, it may be argued that a Member's proposed amendment to the Order would not have "charging effect" for the purpose of Rule 31(1) if the amendment does not have the object or effect of:

- (a) reducing the amount of rates that may be collected under existing statutory authority; or
- (b) imposing a new and distinct function on the Administration, the performance of which would require the spending of an amount of public money that is not nominal or negligible.

15. What then is the "existing statutory authority" in this case? Under section 22 of the Rating Ordinance (Cap. 116), rates shall be payable quarterly in advance to the Commissioner of Rating and Valuation (CRV) in the first month of each quarter. CRV's statutory authority to collect rates is, however, subject to the power of CE in Council under section 36(2) of Cap. 116 to make an order to declare any class of tenements, or parts thereof, or any part of Hong

¹⁰ See the ruling on CSAs to Inland Revenue (Amendment) Bill 2001 proposed by Hon Albert HO Chun-yun and Dr Hon YEUNG Sum (19 November 2001).

¹¹ See footnote 9.

Kong to be exempted from the payment of rates wholly or in part. Two such orders have been made and published in the Gazette since March 2013:

- (a) Rating (Exemption) Order 2013 (L.N. 26 of 2013) (the 2013 Order) exempting all tenements from the payment of rates for the period 1 April 2013 to 31 March 2014, subject to a maximum exemption amount of \$1,500 per quarter; and
- (b) the Order exempting all tenements from the payment of rates for the period 1 April 2014 to 30 September 2014, subject to a maximum exemption amount of \$1,500 per quarter.

16. The 2013 Order will be spent after midnight on 31 March 2014. As from 1 April 2014 when the Order comes into operation, CRV's statutory authority to collect rates under section 22 of Cap. 116 will be subject to the exemptions under the Order unless and until a resolution to amend or repeal the Order is passed by LegCo and published in the Gazette under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1). In the absence of such a resolution, CRV's "existing statutory authority" to collect rates for the 2014-15 year is subject to the exemptions under the Order which are estimated to result in total revenue forgone of \$6,135 million.

Administration's response to Members' suggestions

17. The Administration considers that the rates concession proposal as announced in the Budget is more preferable and that:

- (a) if the rates concession measure under the Order is extended to four quarters with the ceiling set at \$600 to \$750 per quarter, this will result in further revenue forgone ranging from \$764 million to \$2,116 million;
- (b) on the basis of maintaining the Government's financial commitment at \$6.1 billion, if the rates concession arrangement were to be extended to four quarters, the ceiling would have to be further adjusted downwards to a level below \$600 per quarter; and
- (c) if the rates concession measure is to be extended to four quarters, RVD will need to incur additional administrative expenses of about \$410,000 for re-printing the pamphlets to be attached to the rates demand notes to explain the new rates concession arrangement.

Conclusion

18. Subject to the Administration's views and our consideration of the Member's proposed amendment when it is available, it is arguable that an amendment to the Order would have no "charging effect" under Rule 31(1) of RoP if the amendment would not:

- (a) result in any additional loss of rates beyond the \$6,135 million already envisaged to be forgone under the Order; or
- (b) impose a new and distinct function on the Administration, the performance of which would require the spending of an amount of public money that is not nominal or negligible.

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21 March 2014