THE LAW SOCIETY OF HONG KONG 香港律師會

Submissions by the Law Society's Probate Committee and Revenue Law Committee on the Revenue (Abolition of Estate Duty) Bill 2005

1. Introduction

1.1 The Law Society's Probate Committee and Revenue Law Committee (collectively "the Committees") have both considered the Revenue (Abolition of Estate Duty) Bill 2005. The major concern is on the way the Bill has been drafted, namely, that it seeks to implement the proposal to abolish estate duty by simply stating that estate duty will be chargeable on the estates of deceased persons who died on or after 1 January 1916 *"and before commencement of the Bill"*.

1.2 Apart from transferring certain powers that the Commissioner of Inland Revenue has ("CIR") under the Estate Duty Ordinance ("EDO") to the Secretary for Home Affairs ("SHA") under the proposed new Sections 60B and 60C of the Probate and Administration Ordinance ("PAO"), the existing safeguards afforded by the EDO to the beneficiaries and other interested parties against intermeddling with the estate will no longer apply. This will render administration of estate more easily susceptible to abuse.

1.3 The Bill, in not *"repealing"* the EDO but allowing it to remain on the statute book, will only have the effect of *"suspending"* its operation from the commencement of the Bill. This means that estate duty could be easily re-introduced at a later stage with unfortunate consequences.

2. Suspension of the EDO

2.1 The effect of the Bill is not the repeal of the EDO; indeed the EDO will still remain on the statute book. It also fails to repeal the EDO from the date the prospective change was announced.

2.2 It is accepted that there has to be a transitional mechanism to cater for the chargeability to estate duty on the estates of those persons who died before the commencement of the Bill. However, the practical effect of the Bill is not to abolish estate duty but simply to suspend it; estate duty can be imposed if another bill is passed stating that estate duty will apply to the estates of those persons who die after a certain date and at a certain rate chargeable on certain thresholds.

2.3 The possibility that Estate Duty could be so easily re-introduced probably has not come to the attention of the business community; the Bill as currently framed does not clearly implement the policy of the administration which is to abolish the duty. Indeed, a future administration could well reintroduce the legislation (including the complex and antiquated controlled company provisions) which would possibly be obsolete and bear no relevance to the then circumstances. Absence of clarity of purpose and intent of the administration is unlikely to achieve its goal of making Hong Kong a financial management centre. Initial indications from overseas persons have indicated that given the terms of the Bill, they do not believe that it goes far enough in attracting them to invest in or bring monies to Hong Kong; this centers on an apparent lack of certainty as to the implementation of Government policy.

2.4 ***In order to achieve certainty, (which also goes to the heart of the territory's future as a financial services centre), the Bill should be drafted to state that***:-

(a) the estate duty is abolished with effect from March 16, 2005; but
(b) for transitional purposes the EDO will continue to apply to the estates of those persons who die before the date of abolition.

3. Existing Safeguards under the EDO

3.1 Whilst the main objective of the EDO is undoubtedly to facilitate the Government's collection of the duty, the estate duty scheme has, over the years, operated side by side with the probate application process to provide an additional layer of protection to beneficiaries and parties interested in a deceased's estate.

3.2 The current arrangements under the EDO are:

(a) No grant of probate or letters or administration can be issued until estate duty clearance has been obtained (S.15)
(b) A personal representative ("PR") and other accountable persons such as the recipients of gifts, trustees and surviving joint tenants are statutorily obliged either to exhibit *"on oath"* an account with the Estate Duty Office ("ED Office") providing a full inventory of all the properties in respect of which estate duty is payable (S.14) or where small estates are involved, to complete a statement of assets in lieu of affidavits (S. 14A).

(c) To comply with the obligations in (b), the PR and other accountable person will need to identify, list and value all the properties of the deceased. This includes the obligation to provide bank statements and account for any gifts made by the deceased for the past 3 years. These steps will not only enable the PR to determine whether any estate duty is payable and if so, the applicable rate of estate duty so as to compute the duty but also at the same time help to identify assets which should form part of the estate but may otherwise not be apparent to the beneficiaries. Examples of these otherwise hidden assets of the estate include transactions which the recipient might have claimed to be a gift by the deceased to him when in actual fact are assets of the estate held by the recipient as trustee for the deceased; bank accounts previously held in the deceased's sole name but to which an additional name has been added as a joint account holder shortly before the deceased's death, etc.

(d) The CIR is empowered to make enquiries concerning the contents of any account submitted to him and require the deponent of an affidavit to attend in person to provide explanation.

(e) A *"schedule of the property"* relating to the free estate of the deceased and of those properties held by the deceased in trust or a certificate of exemption with a verified photostat copy of the *"statement of assets"* is required to be annexed to the Grant of probate or letters of administration (S. 23)

3.3 The EDO makes it a criminal offence for intermeddling with the estate of a deceased person. Under Section 24, anyone attempting to deal with the estate of the deceased without the authority of the ED Office or until such time as they have filed the necessary accounts will be liable for intermeddling. In addition, anyone dealing with any estate of the deceased which is not set out in the schedule of property or statement of assets as annexed to the grant of probate or letters of administration will be liable to a penalty (S.23). Not only will the offence attract a criminal sanction at level 3 of HK$10,000, but there can also be a further penalty equal to 3 times the amount of estate duty, which can have a deterrent effect on the intermeddlers.

3.4 It should be noted that the schedule of property (including the trust assets)/statement of assets presently required to be annexed to a Grant under Section 23 of the EDO fulfill other important functions apart from ensuring the payment of the duty:

(a) the documents will make it obvious to the beneficiaries and all interested parties what assets are comprised in the deceased's estate. This will assist them to guard against any attempt to intermeddle with the estate.

(b) the documents provide information on the total value of the estate. This will enable both the PR and the Probate Registry to determine, in intestacy or partial intestacy situations, the beneficial entitlements under the Intestates' Estates Ordinance and therefore also whether a person is entitled to apply for the grant. Determination of beneficiary entitlement will also sometimes be necessary to consider whether a person is legally entitled to apply for a grant or whether an additional PR will be required (e.g. where minor interests are involved).

(c) the documents in providing particulars of landed property will enable the Land Registry to verify that the deceased had real interest in the property for the purpose of registration rather than someone bearing the same name as the registered owner.

3.5 It is true that apart from those obligations imposed by the EDO, a PR is subject to other statutory duties under the PAO to collect and get in the estate and administer it according to the law. Under Section 56 of the PAO, the PR is also required, if lawfully required so to do by the Court, exhibit by affidavit filed in the Court a true and perfect inventory and account of the movable and immovable property of the deceased.

3.6 However, the obligation to provide an inventory under section 56 is not mandatory and it is unclear whether the Court will make this a general requirement for every application. Moreover, unlike Section 14 of the EDO, Section 56 of the PAO imposes no accounting obligations on recipients of properties, trustees or surviving joint account holders. Without any accounting obligations imposed, it will in many instances be very difficult for beneficiaries to discover that such assets actually exist and whether they are held in trust for the deceased. This is especially true with bank accounts as banks are unlikely to be prepared to provide statements to joint accounts to PR without the surviving account holder's consent.

3.7 The lack of mandatory obligations for the PR and of any accounting obligations on other accountable persons as mentioned under section 14 of the EDO to provide a full inventory of the estate will facilitate intermeddling and misappropriation of estate assets. Beneficiaries will be at the mercy of the PR, who will be able to deal with and dispose of any part the estate by mere production of the Grant without the beneficiaries even knowing that such properties have existed and formed part of the estate. They will also not be able to discover assets belonging to the deceased which had been converted by parties claiming them to be gifts to them by the deceased. This could result in a surge of claims on intermeddling and misappropriation of estate and the position would be highly unsatisfactory.

3.8 ***The Committees understand that it is the Government's policy to abolish estate duty and to implement such policy as soon as possible. However, a prudent approach should be adopted in the legislative process to ensure the interests of the beneficiaries will continue to be well safeguarded. Whilst there may no longer be any revenue protection reason for the requirement, the obligation of the PR and other accountable persons such as a recipient of "gift" from the deceased, surviving joint owners and any other trustees holding assets on behalf of the deceased to prepare a full inventory and account of properties comprised in a deceased's estate should be made mandatory. Furthermore, there should be clear provisions that assets not disclosed in the inventory list cannot be dealt with by the PR. This is essential not only for the protection of interested parties to avoid misappropriation of assets, but for various practical purposes to ensure proper administration of the estate: e.g. to enable the PR and the Probate Registry to identify the appropriate beneficiaries entitled to the estate; to facilitate the registration process by the Land Registry, etc. and to avoid unnecessary family disputes on the administration and distribution of the estate.***

4. COURT FEES

4.1 The Committees note the proposal to only charge the standard filing fees of HK$265.00 for application for probate or letters of administration or application for resealing of the same. There will be no court fee for extracting the Grant, which is calculated at the net value of the free estate.

4.2 ***However, as the proposals in paragraph 3.8 may probably lead to an increased role and workload of the Probate Registry, the Committees believe that the Court fees should be commensurate with the work ultimately required of the Probate Registry.***

5. Residual powers under the EDO

5.1 The Bill proposes to transfer certain powers currently vested in the CIR and will lapse with the abolition of estate duty to the Secretary for Home Affairs ("SHA"):

(a) the power to inspect any document or article (S. 14(8) of the EDO), which includes authorization of representatives to inspect the contents of a deceased person's safe deposit box in the bank.

(b) the power to authorize the release of funds from the estate for burial of the deceased or maintenance of the former dependants of the deceased (S. 24(4) of the EDO)

5.2 ***Safe Deposit Box***

5.2.1 The Committees are concerned that the proposed changes will reduce the present safeguards afforded to beneficiaries under the EDO.

5.2.2 At present, the ED Office has established an arrangement with the banks whereby the banks will freeze the safe deposit boxes kept by a deceased, and will only allow this to be opened in the presence of at least four persons: 2 officers of the Inland Revenue Department, the PR (with solicitor, if any) and the bank officer. The estate duty officer will make a record of the official inspection and take an inventory of the contents of the safe deposit box. Under the proposed Section 60C of the PAO, a certificate issued by the SHA will allow the holder to, subject to the conditions imposed in the certificate, inspect the safe deposit boxes to ascertain the existence of and take possession of a will or "any document or article" specified in the certificate.

5.2.3 Whereas the main objectives of opening the safe deposit boxes of a deceased should be to ascertain the existence of the will and to prepare an inventory of its contents, it has not been made an automatic requirement for an inventory list of its contents to be prepared when a safe deposit box is opened for inspection in the future. It is unclear if the SHA will impose this as a condition in every certificate. Moreover, what is or is not a will is a question of law and under the proposed new regime, there is a real risk of e.g. a home-made will in the form of a letter or other informal format being released or tampered with or mislaid before legal advice can be obtained.

5.2.4 It is equally unclear under what circumstances the SHA will issue a certificate to permit the holder to open the safe deposit box to ascertain the existence of and take possession of *"documents or article other than the Will"* and what conditions the SHA will impose as to safeguard the interests of the beneficiaries against intermeddling with the estate. Without clear legislative provisions, there is a danger that articles may be removed and not reported and accounted for and documents removed and destroyed.

5.2.5 Unlike the present practice, there will not be any requirement in the future for an independent representative from the Government to be present and witness the opening of the safe deposit box.

5.3 ***Release of funds for burial expenses and maintenance***

5.3.1 The proposed new Section 60B of the PAO empowers the SHA to issue a Certificate for Necessity of Release of Money to authorize release of money in a bank account of a deceased person for two purposes:

(a) to cover burial expenses; and

(b) for maintenance of any person who was *"dependent"* on the deceased person immediately before his death.

5.3.2 Under the proposed Section 60B(2)(b) of the PAO, an application for such a Certificate can be made by any person who appears to the Secretary to be *"a fit and proper person"* to be the holder of the certificate applied for.

5.3.3 Whilst the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481) empowers *"the court"* to make orders for the making out of the estate of a deceased person of provision for certain members of that person's family and dependants of that person, the power given to the SHA under the proposed Section 60B will require the SHA to make a preliminary decision on who could be regarded as the *"former dependents"* of the deceased person.

5.3.4 It is not clear how this power of the SHA under Section 60B should relate to the power of the court under Cap. 481. Nor has it been made clear as to what types of persons the SHA could consider to be *"fit and proper person"* to apply for a Certificate under that section or to be the *"former dependents"* of the deceased for which the money could be released.

5.3.5 The Committees understand that the power to provide for former dependants exists at present and is vested in the CIR under Section 24(4) of the EDO. However, the number of applications under section 24(4) is unknown. ***The Government should provide statistics on the number of instances where the power of the CIR under section 24(4) of the EDO has been invoked to justify the need for such power. Given the possible conflict with the judicial power under Cap. 481, there is also a need to define clearly in the legislation the types of person that the SHA could consider to be "fit and proper" to apply for a certificate and to be "former dependents" under the new Section 60B of the PAO.***

5.3.6 Whilst Section 60B of the PAO has not imposed any limit on the amount that the SHA could authorize for release from a deceased's bank account, it is submitted ***that the SHA should only be empowered to authorize the release of a "fair amount" for these purposes.***

5.3.7 It would seem that the SHA in exercising its power under the two sections should owe a duty of care to the beneficiaries and persons interested in the estate to ensure that the property of a deceased's estate will be properly released to the appropriate party. ***The legislation should specify clearly the liabilities in cases where there should be wrongful release of documents or assets from the estate under the proposed Section 60B and 60C of the PAO.***

The Probate Committee & Revenue Law Committee
The Law Society of Hong Kong
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