

IN THE MATTER of the Mandatory Provident
Fund Schemes Ordinance (Cap 485)

And

IN THE MATTER of an Appeal by
HSBC Trustee (Hong Kong) Limited

Appellant: HSBC Trustee (Hong Kong) Limited

Respondent: Mandatory Provident Fund Schemes
Authority

Date of hearing: 31 October, 2000
Date of decision: 14 November, 2000

DECISION

Introduction

1. This is an appeal under section 35 of the Mandatory Provident Fund Schemes Ordinance (Cap 485) ("Ordinance") by HSBC Trustee (Hong Kong) Limited ("Trustee") against the refusal of the Mandatory Provident Fund Schemes Authority ("Authority") to issue an exemption certificate ("Exemption Certificate") under section 16 of the Mandatory Provident Fund Schemes (Exemption) Regulation ("Regulation") in respect of the Wang Tak Engineering & Shipbuilding Co. Ltd. Defined Contribution Scheme ("Scheme").

The exemption

- 2.1 On 3 April 2000, the Trustee, as trustee of the Scheme, applied to the Authority for the issue of an exemption certificate in respect of the Scheme.
- 2.2 On 29 July, 2000, the Authority gave a notice in writing of its refusal to issue the exemption certificate to the Trustee. The reasons given for the refusal were:-
 - (a) the Scheme was not a relevant ORSO registered scheme as its application for registration was received after 15 January, 1996; and
 - (b) the Scheme was not a continuity of another relevant ORSO registered scheme as there were no assets transferred from the former scheme.

The Appellant's grounds of appeal

3. The grounds of appeal (as stated in the Appellant's letters dated 29 September 2000 and 27 October 2000 and the letter from Wang Tak Engineering & Shipbuilding Co Ltd ("Employer") dated 27 October 2000 in each case addressed to the Mandatory Provident Fund Schemes Appeal Board ("Appeal Board")) are summarised as follows:-
 - (a) The Scheme was converted from Wang Tak Engineering & Shipbuilding Co. Ltd. Defined Benefit Scheme ("Former Scheme") which was established in 1989 and which had registered on 10 April 1995. The Scheme was a continuity of the Former Scheme and was deemed to be a relevant ORSO registered scheme eligible for applying for MPF exemption.
 - (b) Save for the inadvertent and inexplicable time to register the Scheme under the Occupational Retirement Schemes Ordinance ("ORSO") by 15 January 1996, the Scheme would otherwise meet all the requirements of the Regulation. A cheque for HK\$1,200 dated 15 January 1996 was issued for ORSO registration which was unrepresented. The Employer did everything possible to comply with the formalities of registration before 15 January 1996 and the Scheme should be treated as a relevant ORSO registered Scheme.

The Appellant's arguments

4. At the hearing, the Appellant stated:-
 - (a) In relation to section 16 of the Regulation:-
 - (1) The Scheme was prepared for registration in December 1995. For some unknown reason, a registration was not made on or before 15 January 1996.
 - (2) To all intents and purposes, the Scheme did meet all of the relevant criteria that were substantive of a relevant scheme.
 - (3) The Scheme was registered late and a penalty was paid and the Scheme was treated in exactly the same way as a scheme registered on or before 15 January 1996.
 - (4) It was not known at the time of the consequences of the late registration. The cut-off date of 15 January 1996 was selected at a later date when the MPF legislation was finalised in 1998.

- (5) The Employer considered it to be unfair that MPF exemption was not granted simply because application for registration of the Scheme was not made before 15 January 1996.
 - (6) The Appellant asked, insofar as the Appeal Board has the power to do so, that the Scheme be treated as if it were a relevant ORSO scheme.
- (b) In relation to section 14 of the Regulation:-
- (1) The Authority may treat an ORSO registered scheme which was not a relevant ORSO registered scheme as a relevant ORSO registered scheme if, but only if, four factors were satisfied. The Scheme satisfied all factors except that none of the assets of the Scheme were transferred.
 - (2) The Respondent submitted that the Former Scheme was not a relevant ORSO registered scheme because it was established by an insurance policy and not a trust. In this regard, the Appellant submitted that at the time the Former Scheme was set up, no distinction was made between schemes established by an insurance policy and those established by a trust and both were entitled to be registered. The distinction was imposed later when the MPF legislation was brought into force in 1998. The Employer considered that it was unfair as they were not aware, at the time of establishing the Former Scheme, that establishing it by an insurance policy and not a trust would later prejudice them in seeking exemption for MPF.
 - (3) The Appellant asked, insofar as the Appeal Board were not able to treat the Scheme as a relevant ORSO registered scheme under section 16, that the Board, insofar as it was within its power, do so under section 14.
5. At the hearing, the Employer submitted, through written submission made immediately before the hearing:-
- (a) The Government had only announced in 1998 that the ORSO scheme must be registered before 15 January 1996 to qualify for MPF exemption.
 - (b) The Employer had commenced amendment to its scheme in August 1995 and applied for registration of the succeeding scheme before the deadline enclosing a cheque dated 15 January. When it came to the attention of the Employer's Accounts Department that the 15 January cheque had not been presented, the Employer issued a replacement cheque on 22 March.
6. The Appellant, in response to questions raised by the Board, further stated at the hearing that:-

- (a) There was a letter in the file from the Employer to the Trustee dated 7 December 1995 returning all documentation necessary to make the application for registration except for a cheque to support the application. No explanation was found as to why the cheque was not received by the Trustee and why an application for registration was not submitted to the then Occupational Retirement Scheme Office.
- (b) Other than the application dated 22 March 1996 submitted to the Occupational Retirement Scheme Office, no other application was submitted.

The Respondent's arguments

7. In the statement dated 26 October 2000 submitted to the Appeal Board, the Respondent stated:-

- (a) Section 16 of the Regulation permitted an exemption certificate to be granted only in respect of a relevant ORSO registered scheme which term was defined in section 2 of the Regulation. The Scheme complied with all the criteria in the definition except criteria (e) because the application for its registration was received by the Registrar of Occupational Retirement Schemes on 3 April 1996 and not on or before 15 January 1996. For that reason the Scheme was not a relevant ORSO registered scheme and the Authority has no power to issue an exemption certificate.
- (b) Notwithstanding that the Authority had no power to exercise its powers under section 14 as no application in writing had been made, the Authority proceeded to consider whether the Scheme might be treated as a relevant ORSO registered scheme pursuant to section 14 of the Regulation. The Authority determined that an application under section 14 would not be successful as the Former Scheme was not a "relevant ORSO registered scheme" because it was not governed by a trust. All of the assets of the Former Scheme were paid out as benefits, none of the assets of the Former Scheme were transferred to the Scheme. Having regard to the matters listed in section 14(2) of the ORSO, it seemed unlikely that the Authority would grant a section 14 application, if it could do so.

8. At the hearing, Ms Helen Lee, Deputy General Counsel of the Authority, further stated on behalf of the Respondent:-

- (a) The policy intention of the Ordinance was to grant exemptions to ORSO schemes well established before the beginning of MPF.
- (b) The date of 15 January 1996 was not a date arrived at arbitrarily, it was an important date from a policy angle and it was arrived at after consultation with industry, with businesses and after debates in Legco. More than 5,000 schemes were not eligible for exemption purposes because of this

cut-off date. From an operational point of view, the Authority needed a cut-off date and that date was chosen.

- (c) In considering the application under section 14 of the Regulation, the section required but there were no asset transfers from the Former Scheme.
- (d) In addition, section 2(10) of the Occupational Retirement Schemes Ordinance stated that where an occupational retirement scheme referred to in section 2(8) is terminated and the benefits payable to each member of the scheme have been paid out to such member, for the purposes of regulation, such a scheme shall cease to qualify as a relevant ORSO registered scheme under section 12 regulation. In this case, after the scheme was terminated on 31 August 1995, all the benefits were paid out to the members. Because of this pay out of benefits, the Scheme no longer qualified as a relevant ORSO registered scheme. Therefore, if an application were made for exemption under 14, that application would fail.
- (e) In response to a question raised by the Board, the Registrar confirmed that the first time that the date 15 January 1996 was made known to the general public in the exemption regulation was upon the approval by Legco on 1 April 1998 of the regulation made by the Chief Executive on 10 March 1998. However, there had been wide consultation with the business and with industry prior to passing of that legislation.

Statutory Framework

9. The relevant statutory provisions are:

- (a) Section 16(1) of the Regulation which provides that
“The Authority may on an application in writing issue an exemption certificate to the relevant employer in respect of a relevant ORSO registered scheme if the Authority is satisfied that the application and the scheme comply with the requirements of or under this Regulation which are applicable to the application or scheme, as the case may be.”
- (b) Section 2 of the Regulation which defines “relevant ORSO registered scheme” as
“an ORSO registered scheme –
 - (a) which is governed by a trust;
 - (b) which provides benefits payable on termination of service, death, disability, retirement or winding up of the scheme;
 - (c) established before or on 15 October 1995; and
 - (d) in respect of which an application under section 7 or 15 of the relevant Ordinance was received by the Registrar within the meaning of that Ordinance not later than 15 January 1996.”

(c) Section 14 of the Regulation which provides that

“(1) The Authority may on an application in writing issue a certificate stating that an ORSO registered scheme (not being a relevant ORSO registered scheme) specified in the certificate shall be treated as a relevant ORSO registered scheme if, but only if –

- (a) the scheme is governed by a trust;
- (b) the scheme provides benefits payable on termination of service, death, disability, retirement or winding up; and
- (c) all or a class of –
 - (i) the members of the scheme; and
 - (ii) the assets of the scheme,have been transferred to the scheme from 1 or more relevant ORSO registered schemes.

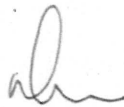
(2) Without prejudice to the generality of the Authority’s power under subsection (1) to issue (or not to issue) a certificate referred to in that subsection, the Authority shall, in exercising his power under that subsection in relation to an ORSO registered scheme, have regard to such of the following as are applicable –

- (a) whether the scheme is a new scheme established as a result of scheme restructuring or bona fide business transactions (including company amalgamation, restructuring and joint ventures);
- (b) if the scheme was established after the relevant date, whether the members of the original schemes were exempt from all or part of the provisions of the Ordinance by virtue of section 5 of the Ordinance;
- (c) whether the terms and conditions of the scheme are generally as favourable as the original schemes; and
- (d) whether a substantial portion of the members of the scheme comprise members of the original schemes.”

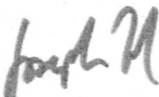
Decision

- 10.1 (a) Section 16 of the Regulation provides that the Authority may issue an exemption certificate in respect of a relevant ORSO registered scheme. A relevant ORSO registered scheme is defined as an ORSO registered scheme in respect of which, inter alia, an application for registration was received by the Registrar not later than 15 January 1996.
- (b) The application for registration of the Scheme was not received by the Registrar for registration on or before 15 January 1996. Accordingly, the Scheme was not a relevant ORSO registered scheme (unless the Scheme is treated as a relevant ORSO registered scheme under Section 14).

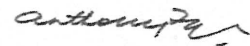
- (c) We were not directed to any statutory or other power whereunder either we or the Authority could treat the Scheme as a relevant ORSO registered scheme notwithstanding that it did not fall within the definition of such in Section 2 of the Regulation.
- 10.2 (a) Section 14 of the Regulation provided that the Authority may issue a certificate stating that an ORSO registered scheme (not being a relevant ORSO registered scheme) specified in the certificate shall be treated as a relevant ORSO registered scheme, if but only if, inter alia, all or a class of the assets of the scheme have been transferred to the scheme from one or more relevant ORSO registered schemes.
- (b) The Former Scheme did not qualify to be treated as a relevant ORSO registered scheme under Section 14 because it was not governed by a trust. In addition, no assets were transferred from the Former Scheme to the Scheme.
- (c) Again, we were not directed to any statutory or other power whereunder either we or the Authority could treat the Scheme as a scheme qualifying for treatment as a relevant ORSO registered scheme under Section 14 of the Regulation, notwithstanding that it did not fulfil the qualifying conditions laid down in Section 14 of the Regulation.
- 10.3 For the reasons set out in paragraphs 10.1 and 10.2, we have decided unanimously to uphold the decision of the Authority to refuse the application for issue of an exemption certificate under section 16 of the Regulation in respect of the Scheme and consequently to dismiss this appeal.



Mrs Angelina LEE WONG Pui Ling, J.P.
Deputy Chairman



Mr Joseph Fok, S.C.
Member



Mr Tyen Kan Hee, Anthony
Member

Representation:

For the Appellant: Ms Susan M Sayers, Legal Advisor, The Hongkong and Shanghai Banking Corporation Limited

Mr Szeto Wang, Director, Wang Tak Engineering & Shipbuilding Co. Ltd.

For the Respondent: Ms Helen Lee, Deputy General Counsel of Mandatory Provident Fund Scheme Authority