ANALYSIS

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Payment for Government Services by Consumers: Some Legal Considerations

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As a result of financial pressure, many Hong Kong Government departments have in recent years made an administrative decision to levy charges for some of their services. In so doing, the time-honoured constitutional principle that there is no power to levy charges in the absence of clear legislative authority may well have been overlooked. The author warns that in the absence of express or implied statutory power, such levies will be ultra vires.

Introduction

In an attempt to reduce public expenditure, the Hong Kong Government has in the last few years been advocating the policy of payment for Government services by consumers. Thus, various Government departments began levying charges for some of their services.[1] This article does not intend to discuss the merits of this policy. What it argues is that if the legal dimensions of this policy are not properly appreciated, some of these charges may well be ultra vires.

Power to levy charges

It is a well-established principle of English common law that an authority can impose charges only if the right to do so has been given specifically by statute or by necessary implication. In other words, no public body can charge or raise money from the public without the permission of Parliament. This principle, grounded on the long historical struggle of the legislature to secure for itself the sole power to levy money upon the subject, and traceable to the Magna Carta and the Bill of Rights 1688, was emphatically affirmed by the Court of Appeal and the House of Lords in the leading case of *Attorney General v Wilts United Dairies Ltd*:

> In these circumstances, if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament

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1 For example, the Fire Services Department has levied charges for non-emergency services: see South China Morning Post, 14 April 2000 and 6 May 2000.

has authorised the particular charge. The intention of the legislature is to be inferred from the language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute; but in view of the historic struggle of the legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, *the circumstances would be remarkable indeed which would induce the court to believe that the legislature had sacrificed all the well known checks and precautions, and, not in express words, but merely by implication, had entrusted a minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department.* (Italics supplied)[2]

In that case, the food controller had, under the Defence of the Realm Acts and Regulations, imposed as a condition for the grant of a licence to purchase milk in certain areas a charge of two pences per gallon payable to him by the purchaser. The House of Lords held the charge void. Lord Buckmaster, with whom all their Lordships concurred, said:

Neither of those enactments enabled the food controller to levy any sum of money on any of His Majesty's subjects. Drastic powers were given to him in regard to the regulation and control of the food supply, but they did not include the power to levy money, *which he must receive as part of the national funds*. However the character of the transaction might be defined, in the end it remained that people were called upon to pay money to the controller for the exercise of certain privileges. That imposition could only be properly described as a tax, which could not be levied except by direct statutory means. (Italics supplied)[3]

Scrutton LJ of the Court of Appeal in the same case made a similar observation:

It is inconceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the executive, but in my view *the clearest words should be required* before the courts hold that such an unusual delegation has taken place. As Wilde CJ said in *Gosling v Veley* (1850) 12 QB 328, 407: 'The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll,

2 (1921) 37 TLR 884 (CA), at 884, per Atkin LJ; approved by the House of Lords in (1922) 38 TLR 781 (HL).
3 Ibid, at 782.

except under clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it.'(emphasis added)[4]

Similarly, in *Congreve v Home Office*,[5] the Court of Appeal held unlawful a demand of £6 by the Home Secretary as the price for refraining from revoking a valid and subsisting television licence. As Lord Denning put it, '[t]here is yet another reason for holding that the demands for £6 to be unlawful. They were made contrary to the Bill of Rights. They were an attempt to levy money for the use of the Crown without the authority of Parliament: and that is quite enough to damn them.'[6]

This time-honoured principle in *Attorney General v Wilts United Dairies Ltd* has been widely followed in different jurisdictions.[7] It was recently affirmed by the House of Lords in *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council*.[8] The House of Lords, however, was not prepared to say that, in the absence of express statutory power, there can never be a case in which the power to charge can arise by necessary implication, though such circumstances must be rare. Surprisingly, the principle has not

4 (1921) 37 TLR 884 at 885.

5 [1976] QB 629.

6 At 652. The Bill of Rights 1688 formed part of Hong Kong law under the Supreme Court Ordinance 1846 (No 2) and 1873 (No 12). Peter Wesley-Smith argued that the Bill's repeal by s 3 of the Application of English Laws Ordinance did not revive the suspending power: see Peter Wesley-Smith, 'Note on Re the Hong Kong Hunters' Association Ltd' (1981) 11 *Hong Kong Law Journal* 80. The non-reception of the Application of English Laws Ordinance as laws of the HKSAR does not change this position because the Basic Law only preserves the law previously in force in Hong Kong, which is defined as the law as it existed on 30 June 1997: see *HKSAR v Ma Wai Kwan David* [1997] 2 HKC 315.

7 See, for example, *R v Powys County Council, ex parte Hambidge* [1998] 1 FLR 643; CP 342/98 [1999] NZAR 233; *Re Commonwealth Bank of Australia and Commission for Act Revenue* (1988) 48 ALR 710; *O'Neill v Minister for Agriculture and Food, Ireland and the Attorney General* [1997] 2 ILRM 435; *Creative Purpose Sdn Bhd v Integrated Trans Corp Sdn Bhd* (1997) 2 MLJ 429; *Whangarei District Council v Northland Regional Council* [1995] NZRMA 455; *The State of Victoria v The Master Builders' Association of Victoria* [1995] 2 VR 121; *Cheticamp Fisheries Co-operative Ltd v Canada* (1994) 118 DLR (4th) 428; *Ackerman v Nova Scotia (Attorney-General)* (1988) 55 DLR (4th) 46; *Cunningham v Milk Marketing Board for Northern Ireland* [1988] NI 469; *City Brick & Terra Cotta Co Ltd v Belfast Corporation* [1958] NI 44.

8 [1992] 2 AC 48, at 71. See below. *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council* has been followed in a number of subsequent cases: see, for example, *Stirrat Park Hogg v Dumbarton District Council* [1996] SLT 1113, where the Outer House of the Court of Session held that mere silence in the statute could not give rise to an implied power to levy a charge; *Wards Construction (Medway) Ltd v Kent County Council*, Chancery Division, 7 July 1997 (unreported), where the court affirmed that the only possible origin of any necessary implication must be the statute under which the charge is sought to be made, and that it does not matter whether the function is a 'duty', 'service' or some other activity (but see below for a qualification of this statement). See also *R v Police Authority, ex parte Century Motors (Farnworth) Ltd*, The Times, 31 May 1996, CO/1151/95 (Crown Office List). See also de Smith, Woolf & Jowell's, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999), para 5-070 and the cases cited therein.

been invoked in Hong Kong, though it has been supported by academic writings.[9]

The English common law position applies equally to Hong Kong. Under Article 18 of the Basic Law, the law previously in force in Hong Kong, including the common law, shall continue to apply after the resumption of sovereignty over Hong Kong by the People's Republic of China on 1 July 1997. Article 84 further provides that the courts of the Hong Kong Special Administrative Region may, in adjudicating cases, refer to precedents of other common law jurisdictions.

Express power to levy charges

In some Hong Kong ordinances there is an express power to levy charges for public services.[10] In such case the question is one of statutory construction, namely whether the power to levy charges is wide enough to cover the specific services for which a government department proposes to levy charges. In the absence of a direct provision providing for a power to levy charges, it is possible to derive a power to levy charges indirectly from other statutory provisions.

The first type of indirect provision is the power to make subordinate legislation. For example, section 22 of the Customs and Excise Service Ordinance provides that the Chief Executive in Council may by regulation provide for, inter alia, 'such other matters as may be necessary or expedient for rendering the Customs and Excise Service efficient in the discharge of its duties' and 'generally, for carrying into effect the provision of this Ordinance'. Section 29(1A) of the Interpretation and General Clauses Ordinance (Cap 1) provides that where an Ordinance confers a power on a person to make subordinate legislation, the subordinate legislation may impose a fee or charge for anything in it or the Ordinance. Accordingly, the Chief Executive in Council may by regulation impose a fee or charge for anything that is necessary or expedient for rendering the Customs and Excise Service efficient in the discharge of its duties. However, the power to levy charges can only arise when there is subordinate legislation to this effect. Therefore, if a government department wishes to levy fees for its services in such circumstances, it must first introduce appropriate subordinate legislation.

9 See Clark & McCoy, *Hong Kong Administrative Law* (Hong Kong, Singapore, Malaysia: Butterworths, 2nd ed, 1993), p 333. The learned authors referred to *Re Golden Wall Shirts Factory Ltd* [1981] HKLR 144 where the court effectively permitted the Government to 'extract "compensation" from a quota holder on the basis of a policy rather than a specific legal provision.' *Attorney General v Wilts United Dairies Ltd* was not cited to the court in that case. *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council* was followed in *Hong Kong and China Gas Co Ltd v Director of Lands* [1997] HKLRD 1291 on a different point.

10 See, for instance, sections 34(1), 124J and 124L of the Airport Authority Ordinance (Cap 384), section 124I of the Public Health and Municipal Services Ordinance (Cap 132), section 54 of the Securities and Futures Commission Ordinance (Cap 24), section 11 of the Dogs and Cats Ordinance (Cap 167), and section 59 of the Immigration Ordinance (Cap 115).

In some ordinances that establish a Government service, there is a standard provision which provides that the '*provision for the payment and maintenance* of the service shall be by charges on the general revenues of Hong Kong, to such amount and in such proportion as may from time to time by annual vote or otherwise be voted by the Legislative Council.'[11] It is submitted that such a provision does not prohibit the levying of charges. The effect of such provision is to provide for the sources of payment for the operation costs of the service. The section refers to the 'provision' for the 'payment' and 'maintenance' of the service. It does not restrict the power, if any, of the service to levy charges for its service. In any event, the charges are not levied for the purpose of 'payment' of the service, because section 96 of Interpretation and General Clauses Ordinance (Cap 1) provides that any fee or charge made payable by or under any Ordinance to the Government shall be paid into the general revenues. It is not an *express* prohibition on the power to levy charges, but on the other hand, it does not confer any power to levy charges either.[12] In other words, this provision is neutral, and the power to levy charges has to be found elsewhere.

A second possible source of power lies in section 40 of Cap 1, which provides that where any Ordinance confers upon any person a power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.[13] This is not an express power, and the question is whether a power to levy charges can be inferred by necessary implication. There is also the common law rule that a statutory body can at common law do anything that is reasonably incidental to the discharge of its functions. In *Attorney General v Great Eastern Railway* Co, Lord Selborne LC said:

> It appears to me to be important that the doctrine of ultra vires, as it was explained in [*Asbury Railway Carriage and Iron Co Ltd v Riche*], should be maintained. But I agree with James LJ that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.[14]

11 See, for example, section 6 of the Customs and Excise Service Ordinance (Cap 342), section 4 of Immigration Service Ordinance (Cap 331), section 12 of the Police Force Ordinance (Cap 232) and section 4 of the Hong Kong Auxiliary Force Ordinance (Cap 233).

12 This section is, however, relevant in the consideration of any implied power: see below.

13 For a broad interpretation of duties and powers, see *R v To Kwan Hang and Tsoi Yiu Cheong* (1994) 4 HKPLR 356 at 364-5.

14 (1880) 5 App Cas 473 at 478. See also *Asbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653; *Attorney General v Fulham Corporation* [1921] 1 Ch 440; *Attorney General v Manchester Corporation* [1906] 1 Ch 643; and *Attorney General v Smethwick Corporation* [1932] 1 Ch 562.

Necessary implication

In the absence of an express power to levy charges, the authority to levy a charge can only arise by necessary implication. The court will not accept an implied power simply because such power is reasonable. As stated authoritatively by the House of Lords in *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council*,[15] the test is more vigorous and goes far beyond the proposition that the levying of charges is reasonable. The proper question is whether it is reasonably and directly conducive or incidental to the discharge of the functions. In that case, the applicant developers challenged the legality of a decision by the respondent local planning authority to levy a charge for consultations concerning speculative development or redevelopment proposals between developers and the council's planning officers prior to the making of formal applications for planning permission. The House of Lords held that no charge could be made for pre-application advice in the absence of statutory authority, either expressly or arising by necessary implication. The respondent relied on section 111(1) of the Local Government Act 1972 (which is the equivalent provision of section 40 of Cap 1 in Hong Kong), arguing that this section empowered it to do anything that is calculated to facilitate, or is conducive or incidental to the discharge of any of its functions.[16] The House of Lords rejected that argument and held that the power to charge could not arise by necessary implication from this provision. It imposed a kind of remoteness test: 'it is one thing to say that the giving of pre-application planning advice facilitates or is conducive or incidental to the council's planning functions but it is quite another thing to say that *for the council to charge for that advice* also facilitates or is conducive or incidental to *those functions*.'[17] The argument that something is incidental to the incidental (but not incidental to the function) does not pass the test. The House further rejected an argument based on a distinction between duty and power. The respondent conceded that it could not without express authority charge for a 'duty function', but argued that there must be an implied power to charge for the exercise of a power which it was not obliged to do. Lord Lowry stated:

15 [1992] 2 AC 48 at 68, 70-71.

16 Section 111(1) reads:

'(1) Without prejudice to any powers exercisable part from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. (2) For the purposes of this section, transacting the business of a parish or community meeting or any other parish or community business shall be treated as a function of the parish or community council. (3) A local authority shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively. (4) In this section 'local authority' includes the common council.'

17 Note 15 above at 70.

> In their judgment the Court of Appeal have contrasted functions, such as planning, which the council has a duty to provide, with those, such as providing a museum, a library or a public park, which it has power to provide, on the basis that without statutory authority the council cannot charge for the provision of a function which it has a duty to provide, whereas it can charge for a function which it has merely power to provide (or not to provide) at its discretion....
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> The council's interpretation of section 111(1) is built on that proposition, but I consider its reasoning to be mistaken, because it does not by any means follow that all of the discretionary functions of the council or all of the facilitating or incidental activities contemplated or possibly contemplated by section 111 are services for which it is permissible to charge in the absence of express authority to do so. The rule is that a charge cannot be made unless the power to charge is given by express words or *by necessary implication.* These last words impose a rigorous test going far beyond the proposition that it would be *reasonable* or even conducive or incidental to charge for the provision of a service. Furthermore, as it seems to me, the relevance of the contrast attempted to be drawn, with respect to the power of a council to charge, between duty functions and discretionary functions is vitiated when one has regard to the large number of discretionary functions for the provision of which express statutory authority to charge has been enacted. (Italics original)[18]

This passage does not do away with the distinction between a duty and a power entirely. The House of Lords merely said that there is no principle that there is a power to charge merely because the function is a discretionary function. On the other hand, it must be far more difficult, if at all possible, to infer a power to levy charges for functions that fall within the statutory duty of the charging body in the absence of express statutory authority. As the Court of Appeal held in *McCarthy & Stone (Developments) Ltd,*[19] 'if Parliament has imposed on a local authority a duty, but has not at the same time seen fit to authorise it to impose charges on members of the public as a price for the performance of that duty, it is not open to the authority to invoke either the principle of *Attorney General v Great Eastern Railway Co*, 5 App Cas 473 or section 111(1) by claiming that the imposition of charges is 'calculated to facilitate' or 'conducive or incidental to' the discharge of such duties. If it were to seek to charge in such circumstances, it would—to echo the words of Lord Buckmaster in *Attorney General v Wilts United Dairies Ltd*—be calling on people to pay money for the exercise of a privilege.'[20]

[18] Ibid, at 70-71.
[19] [1992] 2 AC 48 at 56-57. This point was not disturbed by the House of Lords.
[20] Note 2 above, at 782.

Likewise, the existence of a provision providing that the payment and maintenance of the Government service is to be borne by general revenue will make it more difficult to argue for an implied power to levy charges for the statutory duties, for once the operational costs have been provided for, a power to levy charges cannot be reasonably necessary for, or conducive or incidental to the discharge of its duties. Taking this argument to its logical end, it may suggest that some Government services such as the Customs and Excise Service or the Immigration Service or the Police Force (whose enabling ordinances contain such a clause) could never charge for their services on the basis of an implied power. On the other hand, it seems only right that if they are to have a power to charge for the performance of their statutory duties, an express statutory power is required. For instance, in England, the Metropolitan Police has an express power to charge for its services if they are 'special police services'.[21]

The test in *McCarthy* was liberalised in a recent unreported decision. In *R v Police Authority, ex parte Century Motors (Farnworth) Ltd*,[22] the applicant sought to challenge the legality of a contract entered into between the Greater Manchester Police Authority and Automobile Association Developments Ltd ('AAD'). The Police Authority was responsible, inter alia, for the recovery, removal, storage and disposal of accident damaged, abandoned or stolen motor vehicles in their area. AAD was an organisation contractually liable to the Police Authority for the organisation of a vehicle recovery scheme. The applicant was a garage who was a recovery operator involved under a previous 'rota garage' system for the recovery of vehicles but was not one of the recovery operators now sub-contracted to AAD. The applicant argued, inter alia, that the requirement that AAD pay the Police Authority the sum of £20,000 and ADD thereafter seek to charge £40 per incident in its sub-contract with its operators was illegal because the Police Authority had no power to levy charges in respect of a recovery service or to require or permit AAD to levy charges on operators or for operators to levy charges on owners in turn.

The Police contended that the fee of £20,000 was not tantamount to a charge for the provision of police services but a one-off payment to cover the costs of setting up the system. It accepted that there was no express provision entitling the authority to charge for the provision of police services in relation to this scheme, but it relied on section 111(1) of the Local Government Act 1972 to levy the charges. Popplewell J held that one of the functions of the

[21] See, for example, *Harris v Sheffield United* [1987] 3 WLR 305 at 315-6, where the court discussed what constituted 'special police service' which could justify a charge. It was held that attendance of police officers at a football ground to deal with an outbreak of violence which has occurred or is immediately imminent could not constitute the provision of special police services, even though officers who would otherwise be off duty had to be deployed, whereas regular police attendance throughout the football season within the club's ground did constitute the provision of special police service.

[22] *The Times*, 31 May 1996, CO/1151/95 (Crown Office List), unreported.

Police Authority was to maintain an adequate and efficient and effective police force. The use of civilians to take over some of those responsibilities subject to the direction of the police authority itself so as to relieve police manpower to carry out other duties of maintaining law and order is likely to facilitate or be conducive or incidental to the discharge of those functions. Accordingly, the charge for the recovery services was covered by implication by section 111(1) of the Local Government Act 1972.

Popplewell J has adopted a rather sweeping test of necessary implication that does not fit well with the restrictive and curtailed approach adopted by the House of Lords in *McCarthy & Stone (Developments) Ltd.* It is submitted that as far as the test is concerned, this case is of dubious value, and as far as the decision is concerned, it could be explained on the basis that the recovery and disposition of abandoned or stolen cars is arguably not the statutory duty of the Police Authority. It involves an area of operation where specialist civilian expertise is required and therefore, co-operation with civilian authority and charges for the service is reasonably incidental to the discharge of police functions.[23]

Contract

If there is no statutory power to levy charges in the first place, the Government cannot derive such a power from contract. Atkin LJ (as he then was) stated in *Attorney General v Wilts United Dairies Ltd:*

> It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use.[24]

Restitution

The law on recovery for payment made pursuant to demands that are made in excess of authority is quite complicated and could not be dealt with here. In the

[23] Interestingly, Popplewell J was also the first instance judge in *McCarthy*, a decision that was reversed by the House of Lords.

[24] (1922) 38 TLR 781 at 887.

leading case of *Woolwick Building Society v IRC (No 2)*,[25] the House of Lords held by a majority that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right (with interest), regardless of the circumstances in which the tax was paid, unless special circumstances and principles of public policy required otherwise. This was again explained on the ground that taxes should not be levied without the authority of Parliament. However, neither special circumstances nor principles of public policy have been clearly defined. It appears that the voluntariness or otherwise of the payment, the power relationship of the parties, and the disruption to public finance are some of the relevant factors. It is also unclear whether the private law of duress has any room for application here.[26]

Conclusion

It is all too often that an administrative decision is successfully challenged because the Government officials have failed to ask themselves before they make the decision an important question, namely where does the power to make the decision come from? Levying charges for public services may appear at first sight to be a purely administrative decision. Yet if the sources of the power are not first clarified, the exercise may well turn out to be futile.

[25] [1993] AC 70. This case was followed in many jurisdictions, see, for example, *Edmunds v Lawson* [2000] IRLR 18; *Lamesa Holding BV v Federal Commissioner of Taxation* (1999) 163 ALR 1; *Hillsdown Holdings plc v Inland Revenue Commissioners* [1999] STC 561; *Nurdin & Peacock plc v Ramsden* [1999] 1 All ER 941; *Daymond v South West Water Authority* [1976] AC 609 at 645; *Eadie v Township of Brantford* (1976) 63 DLR (2d) 561 at 572; *Mason v State of New South Wales* (1959) 102 CLR 108; *Air Canada v Attorney General of British Columbia* (1987) 32 DLR (4th) 1 at 5; *Re Federal Commissioner for Taxation, ex parte Just Jeans Pty Ltd* (1986) 65 ALR 147 at 152. For a useful summary, see Clark & McCoy, supra, at 301-304

[26] See, Clark & McCoy, ibid, at 303-304 and the footnotes cited therein. For a useful discussion, see J Beatson, 'Restitution of Taxes, Levies and other Imposts: Defining the Extent of the Woolwich Principle' (1993) 109 LQR 401 and R Goff and G Jones, *The Law of Restitution* (London: Sweet & Maxwell, 5th ed, 1998), at pp 676-686. A distinction between payment under mistake of facts and under mistake of law used to be drawn, but this distinction has since been rejected: *Kleinwort Benson v Glasgow County Council* [1999] 1 AC 153. I am grateful to my colleague Ms Lusina Ho for her helpful comments on this point.