

Newsletter Issue 11 (12/2008)

CHARITABLE TRUST 慈善信託基金 (Part II)

In the Part II issue, we shall explore other features of Charitable Trust and some of the points in relation to the public fund raising of Charitable Trust in Hong Kong.

Basic terms of Charitable Trust Deed or Declaration of Charitable Trust (慈善信託基金契約的基本條文)

Let us take a look at some of the major provisions which are normally stated in the Trust Deed.

The first part of the Charitable Trust Deed should include: (1) the background and purposes of setting up the charitable trust and identities of the related parties particularly the Trustees and Beneficiaries; (2) whether the trust is revocable.

In the second part of the Charitable Trust Deed, the details usually include:

1. The name of the Trust;
2. The definition, appointment, replacement and removal of the Trustees;
3. The definition of Trust Fund and Trust Period;
4. The definition of the charities;
5. The collection, preservation, management and application of Trust Fund;
6. The Powers, Duties and Liabilities of Trustees;
7. Provisions relating to the functioning of the Trust (e.g. the ways to pass a resolution and deal with other contingencies such as dissolution of the Trust);
8. The governing law, jurisdiction and conflict resolution mechanism.

Finally, a Charitable Trust Deed must be executed in the proper way.

Application to Inland Revenue Department for Charitable Status under section 88 Inland Revenue Ordinance Cap. 112 (慈善信託基金向香港稅務局申請「慈善團體」免稅地位)

In Hong Kong, in order for a donor to be exempted from tax in respect of his donation and for the trust to be exempted from tax in respect of the trust income and property, one must apply to Inland Revenue Department (the “IRD”) under section 88 of Inland Revenue Ordinance for a charitable body status.

Section 88 Inland Revenue Department Ordinance CAP 112 states that:

“Notwithstanding anything to the contrary in this Ordinance contained there shall be exempt and there shall be exempt and there shall be deemed always to have been exempt from tax any charitable institution or trust of a public character, provided that where a trade or business is carried on by any such institution or trust the profits derived from such trade or business shall be exempt and shall be deemed to have been exempt from tax only if such profits are applied solely for charitable purposes and are not expended substantially outside Hong Kong and either:-

- a. the trade or business is exercised in the course of the actual carrying out of the expressed objects of such institution or trust; or*
- b. the work in connection with the trade or business is mainly carried on by persons for whose benefit such institution or trust is established.”*

Under this section, if an organization is to be approved by IRD to be a charitable body, the charitable causes must be under four heads (the criteria laid down in the judgement of Lord MacNaghten in the case of I T Special Commissioners v Pemsel): (i) for the relief of a poverty; (ii) for the advancement of education; (iii) for the advancement of religion; and (iv) for the other purposes beneficial to the community.

Inland Revenue Department may take a few days to few months to approve the application under this section, depending on the circumstances of each case such as urgency.

Application to Social Welfare Department (“SWD”) for a public subscription permit under section 4(17)(i) of Summary Offences Ordinance Cap 228 (向社會福利署申請在公眾地方籌款的許可證)

Apart from an application to Inland Revenue Department for a charitable body status, one should be aware that in order to organize fund raising activities in “public places”, it will be necessary to apply to SWD for a Public Subscription Permit. In making the application, one has to state the particulars of the activities such as the time, location and charitable objective(s). In addition, one declares to the Social Welfare Department that the

organization is a charitable institution or a trust of a public character.

There is a specific form to the application and the form is the PSPAF05/08 Public Subscription Permit Application Form.

The Duration of a Charitable Trust (慈善信託基金有效期限)

A Charitable Trust, once established, will, unless stated otherwise, continue to operate indefinitely. Even in the case where the recipient organization ceases to exist or operate, the trust will not or be deemed to cease.

When the recipient organization ceases to exist or the particular charitable cause is satisfied, the Trust Deed normally provides that the Trustees can apply the trust monies for other charitable purposes. However, if no such specific provision is clearly stated in the Trust, the doctrine of cy-près will apply i.e. the Court may expound the expand the intentions of the donors in such a manner so that the intentions will still be carried into effect i.e. the property shall remain dedicated and applied to other related charities.

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Nothing shall constitute legal advice to any person by Messrs. Maurice WM Lee Solicitors (Tel: (852) 2537 5833) (Website: www.wmleehk.com)

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