

## “Without prejudice save as to costs”

BY CURTIS H.L. WONG CPA, LLB, PCLL



**There are a number of ways in which a legal dispute may be compromised. Calderbank letter may cause significant cost consequences on rejection of an offer of compromise that brings pressure on the party who rejected that offer.**

Legal costs can be substantial. Calderbank offer is one of the principal ways in making a written offer to settle a legal dispute. Calderbank offer has its origin in an English case of *Calderbank v Calderbank* [1975] 3 WLR 586. It is an offer of settlement made by one party to another for the purpose of making the other party liable to pay legal costs if their claim or defence proceeds to a result at trial which is **no better** than the offer.

In litigation or arbitration, order for costs is a matter of the court's or arbitrator's discretion. In general, costs "follow event" i.e. a successful party is entitled to be compensated by the unsuccessful party for costs incurred in the proceedings.

Calderbank letter is phrased with the clear words:

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"without prejudice save as to costs." The purpose of such phrase is to reserve the right, in the event of the offer not being accepted, to bring it to the notice of the Court/Arbitrator on the issue of costs.

Where a Calderbank offer is rejected, it may be referred to after judgment has been given but before costs were decided. If the rejected offer is substantially the same as the Court's/arbitration award, the party giving the offer may be entitled to his costs from the date of the offer. Thus, the offer may afford some protection to the offeror in relation to legal costs.

For example, a Calderbank letter issued by the defendant may stop the costs from being continued in the plaintiff's favour after the time imposed for acceptance of the offer had expired. The plaintiff may have to consider the subsequent result on legal costs if he declined to compromise.

A Calderbank offer only influences, but does not govern, the final decision on costs. Where a Calderbank offer had not been accepted, the judge or arbitrator would ask whether the party to whom the offer was made ought reasonably to have accepted the proposal.

The use of Calderbank offer has its restriction. "Payment-in procedure" in civil litigation (which involves the offeror paying a certain sum of monies as security held in a court account to back its offer) is applicable to actions "for a debt or damages." The use of a Calderbank letter is limited to situations where no payment-in can be made. Despite of that, the effective use of Calderbank letter in appropriate circumstances may provide an incentive for parties to end their dispute as soon as possible.

**Author:** Curtis holds a U.S. CPA license and is a Barrister of the High Court of Hong Kong SAR. He is a member of American Institute of Certified Public Accountants; a U.S. Certified Management Accountant with Certified in Financial Management; and a fellow member of the Hong Kong Institute of Certified Public Accountants.

Curtis has extensive accounting and business management experience in multinational and listed corporations. He had been in legal practice for about 10 years and used to deliver lectures in tertiary education institutions and training courses to HKSAR Government Departments and various professions. He also got publications on law and accounting topics.

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## Tax Field Audit and Investigation

BY ANNIE K.Y. CHEUNG

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The Field Audit and Investigation Unit of Inland Revenue Department (“IRD”) is responsible for conducting tax field audits and investigations on businesses and individuals with a view to fight against possible tax evasion and avoidance.

In field audit, the IRD officers visit taxpayer’s business premises and examine the accounting records kept by the taxpayer in order to see if the reported profits are correct.



Tax investigation is an in-depth examination where tax evasion is suspected. It usually covers 6 years of assessment prior to the year of assessment in which the investigation commences. In the case of fraud or wilful evasion, the investigation can be extended to cover 10 years of assessment.

Besides cases being selected on a random basis, the IRD has indicated that the field audit and investigation works are largely targeted at areas where non-compliance is apparent. Field audit or investigation is normally initiated where there are characteristics or indications of non-compliance, such as:

- (a) the accounts of a company with heavily qualified auditors’ report;
- (b) a business, having regard its nature of the business and operation, has an unreasonably low turnover or profit percentage;
- (c) persistent failure to lodge or late lodgement of tax returns;
- (d) failure to keep proper business records; and/or
- (e) failure to provide material information as requested.

Moreover, where non-compliance is prevalent in a particular trade or industry, field audits or investigations are more likely undertaken in respect of the trade or industry concerned.

A field audit or investigation can be a consuming exercise. Get your accounts in order and avoid possible characteristics or indications of non-compliance.

**Author:** Annie is a practicing CPA and experienced in handling accounting, assurance and tax engagements and in working with a wide variety of business enterprises and organizations including listed companies, SME businesses, non-profit entities and charitable organizations. She held a Master of Arts in International Accounting and is a fellow member of the Hong Kong Institute of Certified Public Accountants and a member of the Institute of Chartered Accountants of England and Wales.

**Dare & Habere Consulting Ltd.**

Room 1201, 12/F  
Shanghai Industrial Investment Building  
48-62 Hennessy Road, Wanchai, Hong Kong

Phone : (852) 2110 6989  
Fax : (852) 2549 4866  
E-mail : [info@darehabere.com](mailto:info@darehabere.com)

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**China Update:**

PRC Customs Measures for Bonded Verification which were adopted, and shall come into force on 1 June 2008.

It regulates the Customs on bonded verification and strengthens the supervision and management in relating to bonded verification. Part 2 of the Measures sets out the verifications on bonded subcontracting business, logistics business and regions and areas under special monitor or supervision. Part 3 includes the bonded verification processes from preparation, verification and post-verification.

Measures on the Provision of Plastic Shopping Bags of Retailers will go into effect on 1 June 2008.

It regulates the materials and standards of plastic shopping bags. It covers retailers who provide retailing services at supermarkets, shopping malls, and country markets, and those plastic shopping bags supplied to consumers by the retailers but does not include those used for health and food security purposes, and the pre-packed fresh food, cooked food, pasta, etc.

The PRC Customs Measures for Managing Import and Export Manifests were passed on 10 March 2008, and shall come into force on 1 January 2009.

It sets out the requirements for: the administration of import and export manifests and any changes thereof; the documentation and filing procedures for transmission of manifests; and related electronic data transmission requirements. The electronic data formats for manifests will be separately enacted.

**Hong Kong Tax Reminder: Individual Tax Return**

Due date

- |            |   |
|------------|---|
| 2 Jun 2008 | For unrepresented cases not involving sole-proprietorship business.               |
| 2 Jul 2008 | For cases not involving sole-proprietorship business but with tax representative. |
| 2 Aug 2008 | For unrepresented cases involving sole-proprietorship business.                   |
| 2 Oct 2008 | For cases involving sole-proprietorship business but with tax representative.     |

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