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an executor of the estate of a deceased owner. It has also included the Incorporated Owners established under the Management Ordinance (Cap 344), in whom had been vested rights of a car parking space forming part of the common area (see *D 27/98 13 IRBRD 227*). Similarly, in *D 80/02 17 IRBRD 227*, the Board of Review upheld a property tax assessment, in respect of car parks, issued to 'Mr A', who was one of 1,488 owners of some uncertainty as to the identity of those other owners that housing estate, 'and all other owners', even though there was an assessment raised on one co-owner (to the exclusion of other owners) of a shopping arcade, the common parts of which were leased to a building's management company. The Board noted: 'The Board permitted by section 56A to single out the appellants (the co-owners of the building) as the owners of the arcade, which was indisputably one of many of the co-owners of the arcade, and unfavourable treatment by assessing them alone to property tax on the substantive issue raised in these cases was put beyond doubt by enactment of paragraph (i) in the definition of 'owner', which was on 12 February 2010. In *D 14/17 33 IRBRD 263*, the Board rejected the ambitious argument that rent received from letting a part of the property in question was not a property within the meaning of the Ordinance. The Board had no hesitation in rejecting that argument, finding that the rental income she received fell squarely within the scope of the charging provision. The Commissioner's views on the letting of common areas of a building are set out in paragraphs 2 and 43-47.

[2705]-[2750]

Where land or buildings are owned by a partnership, rental income does not form part of the profits of the business run by the partnership, and is chargeable to property tax and should not be included in the assessment to profits tax. As a result, the actual expenses incurred will not be deductible but the statutory repairs allowance under section 5(1A) will be available in calculating the net assessable value for property tax (*D 83/07 22 IRBRD 422*).

[2751]

Where land or buildings are owned in joint tenancy, each joint owner has an equal undivided share in the whole of the property. The Inland Revenue Department's policy in assessing the joint owners has been set out as follows:

If a jointly owned property is let to derive rental income, the legal title to the income accrues to each of the joint owners in the same manner as if he or she has a legal entitlement. Assessments could not be made on the basis of a recipient in respect of income in excess of his or her joint ownership share of the total rent received. The only exception to this rule is for joint ownership properties where one joint owner occupies his share of the property.

(s 5) Charge of property tax II[2753]

other joint owner lets his half out for rental income. Here, only the joint owner letting out his share of the property would be assessed to property tax. (Source: Minutes of Annual Meeting between representatives of the IRD and the Hong Kong Society of Accountants, held in March 2000)

The Board of Review effectively upheld this practice in *D 52/08 23 IRBRD 960* [decision rendered in Chinese]. The Board held that a company which was an equal co-owner of land with three individuals was liable for property tax levied on '[the company] and other owners' even if the other owners had waived their right to their share of the rental income from the land giving the company the sole gratuitous right to receive all the rent. The Board held that each owner in common should be entitled to a share of the rental income in proportion to his or her share of and in the land, noting that section 56A authorised the assessment on '[the company] and the other owners'. The key to this appeal is to note that, unlike the company, the individual owners could not claim any exemption from property tax (and also presumably could not set-off the property tax against any profits tax liability).

[2752]

'land or buildings or land and buildings' As a matter of general law fixtures such as buildings are part of the land and therefore the concept implicit in the definition of 'owner' and the wording of section 5(1) that it is possible to have separate owners of the land and the buildings 'subject to a ground rent or annual charge' appears to be misconceived. It may be that a tenant (in strict law the sub-tenant) of the owner of a Government lease was intended to be included as an 'owner'. Indeed proviso (b) provides for separate assessments where the owner of the land is not the owner of the buildings. It has been suggested that this proviso excludes the normal land law principles (perhaps on the basis that section 16(1) of the Conveyancing and Property Ordinance (Cap 219) implicitly recognises the possibility of reserving fixtures from the transfer of land). However, this overlooks the fact that the owner of the Government lease will remain the owner of the reversion in the buildings even though he has granted a lease and accordingly he will always be the ultimate owner of any building on the land. The same analysis is equally applicable where there is multiple ownership of a Government lease following assignment of shares of the original lease to reflect separate ownership of the units of the building. If the lease granted by the owner of the Government lease is for the full term leaving him no reversion it will technically constitute an assignment of his interest with the result that the assignee will own the entire interest. It follows that proviso (b) is misconceived and based on a false premise. In practice, proviso (b) is treated as authorising separate assessments where there are separate owners of units within a multi-storey building.

[2753]

'net assessable value' See section 5(1A) and (1B), and section 5B (see generally, DIPN 14 at paragraphs 20-22). Until 1 April 1988 land and buildings in the New Territories were not always chargeable to property tax. However, from that date all land in Hong Kong, including the New

I A Guide to the Hong Kong
Inland Revenue Ordinance

II Inland Revenue
Ordinance Annotated

[3005] Inland Revenue Ordinance Annotated (s 5B)
Section 5B(5)
[3005]-[3050]
This subsection had a provisional effect which ceased to be in force on 1 April 1983. It was repealed by section 7 of the Inland Revenue (Amendment) (No 3) Ordinance 1993.

Section 5B(6)
[3051]
This extension of the meaning of 'consideration' has the effect of bringing into charge to tax payments to the landlord owner for services and benefits provided, such as fees for building management services (see D 23/11 26 IRBRD 391 [decision rendered by the Chinese]). This subsection was introduced as a consequential amendment in the Legislative Council to counteract the possible effect of granting leases or tenancies at low rents but high management fees. Where management fees are payable to an independent company or paid through the landlord acting as agent for the company, fees will not be part of the consideration. See further, D 23/11 paragraphs 15-17.

Section 5B(7)
[3052]
Section 5B(7) was enacted by Ordinance No 10 of 2013. It formed part of a suite of amendments to the IRO to provide a comparable framework for some common types of Islamic bonds (sukuk) applying to conventional bonds, with a view to promoting the development of a sukuk market in Hong Kong. By virtue of this amendment, investment return payable under a 'qualified (Islamic) bond' is referable to the use of land or buildings in Hong Kong is not subject to property tax (see Schedule 17A).

6. Collection of property tax
[3053]
6. (Repealed, 8 of 1983, s 7)

Annotation
[3054]
This section provided for collection of property tax from the owner or occupier who paid the rates. Where an occupier who was not the owner paid the tax a right of recovery from the owner was provided. The section was repealed with effect on and from 1 April 1983 subject to accumulation (see Interpretation and General Clauses Ordinance, section 23). The collection provided by section 6 was not appropriate for the purposes of the IRO.
II 554

(s 7B) Claims for refund of property tax II[3151]

system of property tax under which assessable values for years of assessment commencing on or after 1 April 1983 were changed from a notional basis to one based on the actual consideration received for the grant of a right to use land.

7. Reduction and refund in case of unoccupied property
[3055]-[3100]
7. (Repealed, 56 of 1993, s 5)

7A. Interpretation
[3101]
7A. In this Part -
buildings (建築物), except for the purposes of section 5(2), includes any part of a building; (Replaced, 35 of 1965, s 4. Amended, 56 of 1993, s 6)
land or buildings or land and buildings (土地或建築物或土地連建築物) includes piers, wharves and other structures;
occupied (佔用), in relation to land or buildings or land and buildings, means land or buildings or land and buildings which are being put to beneficial use. (Replaced, 76 of 1975, s 6)(Added, 36 of 1955, s 9)

Definitions
[3102]
'pier' ... S.3 Cap 1
'occupy' ... S.3 Cap 1

Cross References
[3103]
Section 5(2).

Annotation
[3104]
See DIPN No 14 at paragraphs 6-7.

7B. Claims for refund of property tax
[3105]-[3150]
7B. (Repealed, 56 of 1993, s 7)

Annotation
[3151]
This section was only relevant to assessments made under the law applicable before 1 April 1983. It was repealed by section 7 of the Inland Revenue (Amendment) (No 3) Ordinance 1993.

(s 5B)

(s 5B) Ascertainment of assessable value on or after 1
April 1983 II[2952]

landlord. If, however, the landlord pays the rates a deduction is allowed by section 5(1A)(b)(i) in addition to the normal 20% repairs allowance. Should a tenant agree to pay the owner landlord's property tax, a tax on tax situation will arise similar to that which arises where an employer pays an employee's salaries tax. The practice of the Commissioner is not to apply tax on tax *ad infinitum* but nevertheless to treat a payment of the landlord's tax by a tenant as part of the consideration. The calculation of the total 'consideration' for property tax assessment purposes will be made by treating the grossed up amount of the rent, together with any other payments made to or for the landlord, as the 'consideration'. Thus if the rent, together with other payments, is \$85,000, after deduction of the repairs allowance, the grossed up 'consideration' will be \$100,000 including tax at the standard rate.

[2951]

In the case of furnished tenancies any sum paid for the use of furniture, if not apportioned and not reserved as part of a total rent, will normally be part of the 'consideration' for the purposes of calculating the assessable value for property tax. If the rent is apportioned between that payable for the premises and reserved as rent and that payable in respect of the use of furniture it would seem that the 'consideration' for property tax purposes would be reduced. In addition there might be a saving of stamp duty which is assessable by reference to rent. However, the sum payable for the furniture would be caught by Section 15(1)(d) as a sum 'received by or accrued to a person by way of hire, rental or similar charges for the use of movable property' and be deemed a receipt arising in Hong Kong from a trade, profession or business carried on in Hong Kong. Furthermore, in the event of failure by the tenant to pay, the landlord would not have the special rights of recovery given to a landlord in respect of sums reserved as rent. Depending upon the facts of an individual case, the letting of furnished premises can fall within the meaning of 'business' (see the annotation to section 2(1), definition of business). Where the expenses of furnished lettings exceed 20% of the 'consideration' the landlord should consider whether it is possible to return the profits for profits tax having registered the furnished letting activity under the Business Registration Ordinance.

[2952]

An interesting case examining several of the matters referred to in the previous paragraph is *D 38/09 24 IRBRD 724* [decision rendered in Chinese]. In that case, the Board of Review held that 'consideration' for property tax purposes could be reduced if the money received from the tenant by the landlord for letting premises could be apportioned between rent for the premises and other items, such as utilities and facilities charges (although it was noted that payment for the latter items may still fall to be assessed to profits tax under section 15(1)(d)). The Board also decided that where a tenant failed to pay rent and the lease came to an end, the use by the landlord of the deposit to reduce the outstanding rent payable turned the deposit into chargeable rental income.

(s 8) Charge of salaries tax II[3205]

PART 3 SALARIES TAX

(Amended, 36 of 1955, s 10)

8. Charge of salaries tax

8. (1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources -

- (a) any office or employment of profit; and
- (b) any pension.

(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment -

- (a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services; (Amended, 69 of 1987, s 2)
- (b) subject to subsection (1AB), excludes income derived from services rendered by a person who -

- (i) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft; and
- (ii) renders outside Hong Kong all the services in connection with his employment; and (Added, 2 of 1971, s 5; Amended, 69 of 1987, s 2)

(c) subject to subsection (1C) and section 50AA, excludes income derived by a person from services rendered by him in any territory outside Hong Kong where -

- (i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and
- (ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income. (Added, 69 of 1987, s 2)

(1AB) If- (Amended, 27 of 2018, s 3)

- (a) a person's income is derived from services rendered by the person as a visiting teacher or researcher in a territory outside Hong Kong (territory);
- (b) the double taxation arrangements made with that territory provide for exemption from tax in that territory on income derived from services rendered as a visiting teacher or researcher in that territory (the provision is referred to as exemption provision); and

II[2953] Inland Revenue Ordinance Annotated (s 5B)
[2953]
In D 27/98 13 IRBRD 227 the fact that licence fees for a car...

paid to the Incorporated Owners of a building were payable to the building management fund did not prevent the Board from assessing these fees as 'payable to ... the owner'. Similarly, in D 49/12 28 IRBRD 1146 [decision rendered in Chinese] telecommunications company licence fees for the installation of equipment and antennae in the area of certain residential buildings. Although the fees were not paid to the owners, they were used to meet management expenses of the buildings. The Board upheld the assessment on the basis that the licence fees for the installation of equipment and antennae in the area were paid to the owner of property let to property tax payers. In D 49/12 28 IRBRD 477 the owner of property was held liable to property tax on the fact that the property was let by his mother (who was not an owner) and that she received the rent. Presumably, the Board took the view (although it did not expressly hold) that the rent was consideration for the benefit of the owner. Compare D 6/10 25 IRBRD 24 and D 27 IRBRD 24 [decisions rendered in Chinese] where the Board held that an owner of property (which was acquired by the taxpayer from his mother for nil consideration) was liable to property tax on the rental income notwithstanding that the taxpayer was never in receipt of such income. In this case the Board noted that there was no credible evidence that the mother had retained an interest in the property by way of reservation.

[2954]
'the right of use of that land' This term is not defined and therefore it should be appreciated that, while property tax will normally be charged on the profits derived from land and buildings, the scope of the tax in respect of such profits extends beyond rents, premiums and other payments made by tenants for the benefit of landlords. Licences, grants of easements, grants of rights and possibly also positive covenants in respect of land and buildings should be within the scope of the undefined term 'right of use' and therefore consideration given for a consideration in money or money's worth are appropriate to be included in assessable value (see D 27/98 13 IRBRD 227 and D 49/12 28 IRBRD 1146, the two 'licence' cases annotated above). In the case of a restrictive covenant granted for a consideration in money or money's worth it would seem that although the grantee gains a benefit which entitles him to the use of his land the consideration is received by the grantor for the use of his land. Presumably an obligation not to use land in a particular way is not covered by a 'right of use'.

[2955]-[3000]
Where a 'right of use' is involved the fact that the sum received for the grant of the right is of a capital nature payable once and for all does not appear to be relevant although the consideration may be spread over several years under section 5B(4). Therefore, a capital premium paid for the grant of a long lease will be liable to property tax by virtue of section 5B(4) (although the matter was not directly in issue, see generally *Development Inc v CIR* [1996] 1 HKC 703).

(s 5B) Ascertainment of assessable value on or after 1 April 1983 II[3005]

[3001]
'consideration ... payable to ... the owner ... in respect of the right of use' Rent paid in advance is a payment for the 'right of use' of the premises and is thus fully assessable to property tax, even though the lease was terminated and possession returned to the landlord before the end of the period for which the rent was paid (D 49/12 28 IRBRD 35).

Section 5B(3)

[3002]
This subsection together with subsection (4) provides for a feature that was new to property tax in 1983. Subsection (3) provides for the spreading of lump sums such as lease premiums over the period of the right of use, or three years, whichever is the shorter. The subsection only applies, however, where the consideration for the right was paid before 1 April 1983 in respect of a right which either 'starts after, or extends beyond, 1 April 1983'.

Section 5B(4)

[3003]
This subsection provides for the spreading of premiums over the period of a lease or tenancy, or three years, whichever is the shorter. The subsection is not outstanding for its clarity but the clue to understanding it is to appreciate that the words 'which is not contained within any one year of assessment' are intended to qualify 'the right of use' and not 'Any consideration payable'. What the section seems to mean is that where a right to use land is granted after 31 March 1983 and that right is for a period greater than one year, then the consideration is to be spread on a monthly basis over the period of the right or three years whichever is the shorter.

[3004]
The spreading provisions of section 5B(4) will often work to the advantage of the taxpayer because they ensure a more even distribution of taxable income and avoid a heavy charge falling in the year of receipt. The taxpayer and the Commissioner will also stand to benefit or lose by changes in the standard rate of taxation. As a final general comment on the spreading provisions it should be noted that lettings by individuals of residential premises form the main source of property tax revenue. Since the majority of such lettings are for terms of two years the limitation of the spreading period to a maximum of three years is realistic. Terms of five years are to some extent encouraged by the Landlord and Tenant (Consolidation) Ordinance (Cap 7) because tenancies for such periods are exempt from the rent and security of tenure controls imposed. However, this exemption does not apply to leases or tenancies granted for five years at a premium with the result that the property tax spreading provisions for premiums have no relevance to exempted five-year tenancies.

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- 14U. Safe harbour rule—ship leasing [14169]
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II[2452] Inland Revenue Ordinance Annotated (s.4)
Definitions
[2452]
'person'

- 'executor' ... S 2(1)
- 'authorised representative' ... S 3 Cap 1
- 'Commissioner' ... S 2(1)
- 'Board of Inland Revenue' ... Ss 2(1) and 2A
- 'oath' ... S 3(1)
- 'document' ... S 3 Cap 1
- 'court' ... S 3 Cap 1
- 'tax' ... S 3 Cap 1
- 'Secretary for Justice' ... S 2(1)
- 'Board of Review' ... S 3 Cap 1
- 'public officer' ... S 65(1)
- 'Financial Secretary' ... S 3 Cap 1
- 'GloBE rules' ... Ss 2(1) and 26AD(1) and Schedule 6
- 'HKMTT' ... Ss 2(1) and 26EP
- 'top-up tax' ... S 2(1)

Cross references

[2453] Sections 3A, 45, 49(5), 68(5), 71(1) and 81, Part 4AA and Schedule 1 and Criminal Procedure Ordinance (Cap 221), Schedule 1

Annotation
General

[2454] In a pamphlet explaining the purpose and effect of the Inland Revenue Ordinance 1947, the then Commissioner of Inland Revenue stated:
The staff of the Inland Revenue Department have all taken a solemn affirmation of secrecy under the provisions of section 4 of the Ordinance and any breach of this oath will be dealt with with the utmost severity. The staff may confidently rely on their private affairs being kept strictly confidential. Revenue Department Officers with whom they have to deal

[2455]–[2500] The penalty for an infringement of the provisions of section 4 of the Ordinance is level 5 as prescribed by the Criminal Procedure Ordinance (Cap 221), Schedule 8 (section 81).

(s 4) Official secrecy II[2505]

[2501] The duty of secrecy under section 4 is subject to Hong Kong's obligations to exchange information under any comprehensive double taxation agreement (DTA) or any Tax Information Exchange Agreement (TIEA) it has entered into (see section 49). Details of Hong Kong's tax treaty policy and the safeguards it has adopted before exchanging information are contained in the annotations to section 49 and in DIPN No 47. For the purposes of Hong Kong domestic law, tax information may only be used for certain limited non-tax related purposes.

[2502] The duty of secrecy under section 4 is also subject to the implementation of the GloBE rules and HKMTT under Part 4AA as is necessary for the determination of the amount of any top-up tax payable by, or chargeable in respect of the income of any entity of an MNE group, or the performance of duties under the IRO involving top-up tax.

[2503] Specifically, the duty of secrecy imposed by section 4 is subject to section 23(1) of the Drug Trafficking (Recovery Of Proceeds) Ordinance (Cap 405) which provides that the Court of First Instance may, upon application by the prosecutor, order any material which is in the possession of a public body (which includes the Department) to be produced to the court. The materials may include any documents submitted to the public body and any correspondence passing between an officer of the public body and the defendant. Section 23(9) then provides that materials may be disclosed by the public body notwithstanding any obligation as to secrecy imposed by statute upon officers of that public body.

[2504] The duty of secrecy is also subject to the provisions of the Organized and Serious Crimes Ordinance (Cap 455). General reference should be made to Part 2 of that Ordinance and specifically to section 3(11) which states that a person is not excused from furnishing information or producing material on the ground that to do so would involve breaching an obligation of secrecy imposed by statute. Where any information subject to an obligation of secrecy has been obtained from the Commissioner of Inland Revenue or his officers, section 6 of that Ordinance states that information may then in turn be disclosed to the Secretary for Justice for the purposes of (a) any prosecution of a specified offence, (b) any application for a confiscation order, or (c) any application for a restraint or charging order, but may not otherwise be disclosed.

[2505]–[2550] Further legislative inroads into the duty of secrecy are found in sections 13A–13C of the Prevention of Bribery Ordinance (Cap 201) where provisions similar to those described at II [2503]–[2504] are contained and section 12 of the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575).

4(1). In the result, the Society's investigation showed no evidence that the author of the letter was an Assessor or that the materials had emanated from the Department.

Section 4(1)

[2555]-[2600]

'Except in the performance of his duties under this Ordinance' While the duty of secrecy is strict it cannot be absolute. Thus an official of the Inland Revenue Department may disclose information when performing his duties under the Ordinance. This will cover, eg, disclosure to counsel employed in the Department of Justice where legal advice is sought on taxation matters and to the police in relation to a crime involving the breach of taxation law (*R v Yates* (1991) 22 ATR 424). In *Neil Pryde Ltd v Bryan Chau* [1995] 2 HKC 812 the Court of Appeal held that it is the duty of the Commissioner of Inland Revenue to collect and secure the collection of revenue and, in that context, it must be in the performance of duty to request the Attorney-General to prosecute tax evasion cases and for that purpose to furnish to the Attorney-General such information as he had in his possession in order to investigate those offences. Information may also be disclosed to three categories of persons:

- (a) The person to whom such matter relates; or
- (b) his executor; or
- (c) the authorised representative of such person or such executor . . .'

In this regard, it should be noted that the Official Receiver, when acting as trustee for a deceased bankrupt's estate, is within the definition of 'executor' set out in section 2(1). Where information can be disclosed to the above categories of persons, it generally only consists of copies of notices of assessments, tax computations, depreciation schedules and letters issued by the Inland Revenue Department. Normally, returns, accounts and other information supplied by the taxpayer or his representative are not disclosed (Cheung, 'The Challenge to the Tax Secrecy Provisions in Hong Kong' *Taxation* (14 September 1993); Taxation Institute of Hong Kong).

[2601]

Information may also be disclosed to individual taxpayers in particular cases, eg for the purpose of proving a right to permanent residency in Hong Kong in accordance with the provisions of the Basic Law. The practice in such cases is for the Inland Revenue Department to issue a statement showing liability to, and payment of, tax in Hong Kong during the relevant period. This statement is issued to the taxpayer personally and not issued direct to the Immigration Department.

[2602]

Section 4(1) prohibits access by *any person* to the records in the possession, custody or control of the Commissioner. This extends to the taxpayer himself. Sometimes the Inland Revenue Department will nevertheless

II[2653] Inland Revenue Ordinance Annotated (s 4)
Section 4(6)
[2653]
No annotation.

Section 4(7)
[2653.1]
This subsection allows the Commissioner and his staff to examine any entity or permanent establishment of an MNE group in order to determine the relevant HKMTT and top-up tax liability under the rules.

Section 4(8)
[2653.2]
No annotation.

(s 5) Charge of property tax II[2654]

PART 2
PROPERTY TAX

Charge of property tax

5. [2654]
(1) Property tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person being the owner of any land or buildings or land and buildings wherever situate in Hong Kong and shall be computed at the standard rate on the net assessable value of such land or buildings or land and buildings for each such year. (Amended, 76 of 1975, s 3; 8 of 1983, s 4; 7 of 1986, s 12) Provided that -
(a) (Repealed, 76 of 1975, s 3)
(b) where the owner of the land is not the owner of the buildings thereon, separate assessments shall be made for the land and for the buildings;
(c) (Repealed, 26 of 1969, s 5)
(d) (Repealed, 76 of 1975, s 3)
(e) (Repealed, 56 of 1993, s 2)

(Replaced, 36 of 1955, s 6)

(1A) In subsection (1), 'net assessable value' means the assessable value of land or buildings or land and buildings, ascertained in accordance with section 5B -

- (a) (Repealed, 56 of 1993, s 2)
- (b) less -
 - (i) where the owner agrees to pay the rates in respect of the land or buildings or land and buildings, those rates paid by him; and
 - (ii) an allowance for repairs and outgoings of 20% of that assessable value after deduction of any rates under subparagraph (i). (Added, 76 of 1975, s 3. Amended, 8 of 1983, s 4; 56 of 1993, s 2).

(1B) The percentage allowance specified in subsection (1A) may be amended by Resolution of the Legislative Council.
(Added, 76 of 1975, s 3)

(2) (a) Notwithstanding subsection (1), any corporation carrying on a trade, profession or business in Hong Kong shall, on application made in writing to the Commissioner and on proof of the facts to the satisfaction of the Commissioner, be entitled to exemption from the property tax for any year of assessment in respect of any land or buildings or land and buildings owned by the corporation where the corporation would be entitled under section 25 to a set-off of the property tax which, if exemption were not granted under this subsection would be paid by the corporation; and the property shall be and remain exempted from property tax for each year of assessment in which the circumstances are such as to qualify the property for such exemption for that year. (Amended, 7 of 1986, s 12; 56 of 1993, s 2)

Inland Revenue Ordinance Annotated (s 5)
 (b) (Repealed, 56 of 1993, s 2)
 (c) Every corporation exempted from property tax under subsection in respect of any land or buildings or land and buildings shall, within 30 days after the event, notify the Commissioner in writing of any change in the ownership thereof or in any other circumstances affecting such exemption. (Added, 35 of 1965, s 3)
 (2A)-(5) (Repealed, 56 of 1993, s 2)

Definitions

[2655]-[2700]

'year of assessment'	...	S.2(1)
'year'	...	S.3 Cap 1
'person'	...	S.2(1) S.3 Cap 1
'owner'	...	S.2(1)
'building'	...	S.7A and see also S.5(3)(c) 'land or buildings or land and buildings' S.7A and see also S.5(3)(c)
'standard rate'	...	S.2(1)
'net assessable value'	...	S.5(1A)
'per cent'	...	S.3 Cap 1
'Legislative Council'	...	S.3 Cap 1
'corporation'	...	S.2(1)
'trade'	...	S.2(1)
'business'	...	S.2(1)
'Hong Kong'	...	S.3 Cap 1
'writing'	...	Ss.2(1) and 3A
'Commissioner'	...	S.3 Cap 1
'property'	...	S.2(1)
'tax'	...	

Cross References

[2701] Section 3A, 5B, 7A, 25, 42(1)(a)(ii) and proviso, 63M(7) and 80V(1) Schedule 1; Proclamation No 1 of 1987 (LN 405/87).

Annotation

General

[2702] This section imposes the charge to property tax. The tax used to be assessed since it was not levied on actual rental profits derived from ownership.

(s 5) Charge of property tax II[2704]

land but on a theoretical income. However, the notional basis of the tax was changed for years of assessment commencing on or after 1 April 1983. Property tax should not be confused with rates levied by reference to rateable values under the Rating Ordinance (Cap 116). The two systems have some similar features but are entirely separate and administered by different Government departments. Rates are essentially a tax on occupiers of premises designed to defray the cost of providing local services whereas property tax is intended to be a tax on income derived from ownership of property. For a useful account of the history and working of property tax reference should be made to the Third Inland Revenue Ordinance Review Committee's Report (1976), chapter 8. A general review of, and guidance relating to, property tax can be accessed electronically from the IRD's website under the heading 'Tax Information: Individuals/Businesses'.

Section 5(1)

[2703] Property tax is charged on the owner by reference to the actual rent receivable (including lease premium) in the year of assessment. The Commissioner's practice in interpreting, assessing and administering property tax is contained in *Departmental Interpretation and Practice Notes No 14: 'Property Tax'*. At paragraph 11 of DIPN 14, the schematic depiction of property tax is usefully set out as follows:

s 5B(2) Consideration receivable in respect of the right of	A
use of the property	
s 7C(2) Add: Rent recovered	B
s 7C(1) & (3) Less: Irrecoverable rent	C
Assessable Value	(D)
s 5(1A)(b)(i) Less: Rates paid by owner*	E
s 5(1A) (b)(ii) Less: 20% on 'G' as standard allowance	(F)
for repairs and outgoings	G
Net Assessable Value	(H)
* excluding Government rent	(I)

[2704]

'owner' The definition in section 2(1) of 'owner' is extremely wide (see II [991] et seq). It will include a tenant under a Government lease, an assignee of a Government lease or undivided shares in a Government lease, a mortgagee in possession, a mortgagor, a beneficial owner where the legal ownership is held by a trustee, a person claiming title by adverse possession

205] Inland Revenue Ordinance Annotated (s 8)
YCS is the employee's completed years of service with the employer;
RAB is -

- (a) in the case of a recognized occupational pension scheme, zero; or
- (b) in the case of a mandatory provident fund scheme, the amount of the relevant accrued benefit that the employee has received from the scheme as is attributable to mandatory contributions paid to the scheme by the person's employer.

(Added, 4 of 1998, Sch 5, item 6)

(9) If -

- (a) the service of a person in respect of whom an employer has made voluntary contributions to a mandatory provident fund scheme is terminated; and
- (b) the accrued benefit attributable to those contributions retained within the scheme or is transferred to another mandatory provident fund scheme,

the person is, for the purposes of subsection (2)(cc), taken to have received the benefit as is attributable to those contributions. (Added, 4 of 1998, Sch 5, item 6)

(10) Subsection (4) does not apply to a part of a person's accrued benefit in a mandatory provident fund scheme that has previously been taken to have been paid to the person because of the operation of subsection (9). (Added, 4 of 1998, Sch 5, item 6)

Definitions

[3251]

'year of assessment'	...	S.2(1)
'person'	...	S.2(1)
	...	S.3 Cap 1
	...	S.9(1) and (2)
'income'	...	S.3 Cap 1
'Hong Kong'	...	S.9(3)
'pension'	...	S.3 Cap 1
'master'	...	S.3 Cap 1
'Government'	...	S.3 Cap 1
'ship'	...	S.2(1)
'aircraft'	...	S.3 Cap 1
'basis period'	...	S.2(1)
'consul'	...	S.3 Cap 1
'recognized occupational retirement scheme'	...	S.2(1)
'per cent'	...	Ss.2(1) and 3A
'tax'	...	
'Commissioner'	...	

Cross Reference

[3252] Sections 3A, 9(1)(aa), (2) and (3), 9A, 17(2), 52(3), 87, and 87A, Part XA and Schedule 2 to the Inland Revenue Ordinance; Occupational Retirement Schemes Ordinance (Cap 426); and Exemption from Salaries Tax Orders.

Annotation

General

[3253] Section 8 contains the charge to salaries tax. This section must be read in conjunction with section 9 which extends the meaning of 'income from any office or employment'. The interpretation of section 8 has been a contentious matter for several years as is apparent from the large number of reported decisions of the Board relating to salaries tax liability, particularly the source of employment income.

[3254]

Until the High Court decision in *CIR v Goepfert* (1987) 2 HKTC 210, [1987] HKCU 211, no case concerned with the source of employment income for salaries tax had been taken on appeal to the courts. Cases from other jurisdictions are said to be of limited assistance (see *D 13/71* 1 IRBRD 55 at 56) as they are concerned with different legislation, although it should be noted that the decision in *Goepfert's* case relied on various English cases on source of income.

[3255]-[3300]

The main area of difficulty concerns employees who perform services both within and outside Hong Kong. In such cases it might at first appear that the simple solution is one of apportionment. However, this is not always possible. The general rule established as a result of a series of Board decisions, and confirmed by *Goepfert's* case, is that it is necessary to distinguish between a source of income that is fundamentally a Hong Kong employment and a source that is fundamentally an employment outside Hong Kong. In making this distinction the place where services are rendered is irrelevant in deciding whether or not the source is a Hong Kong employment. The application of the 'operations test' approach applied for profits tax purposes in such cases as *CIR v Hong Kong and Whampoa Dock Co Ltd* (1960) 1 HKTC 85 (see annotations to section 14) was specifically rejected by the Board in *D 20/69* 1 IRBRD 3 at 4; *D 25/94* 9 IRBRD 184 at 188 and also by implication in *Goepfert's* case. Where the source of an employment is essentially outside Hong Kong only remuneration for services performed in Hong Kong will be liable to salaries tax. Usually this will involve an apportionment.

[3301]

The Department's official interpretation and practice in relation to the charge to salaries tax is contained in *Departmental Interpretation and*

[3352] Inland Revenue Ordinance Annotated (s 8)
for the purpose of conducting public local enquiries into
matters. His appointment lacked the characteristics of
existence and continuance essential to an 'office'. (For a discussion
of *Edwards v Clinch* in Hong Kong see *Law Commission
Practitioners 1981 at 18*; see more generally, Ward, 'What Constitutes
Why Should it Matter? The Taxation of Offices and Employment
BTR 281). Although dealing with very different legislation, the
of 'public office' in the context of Hong Kong's electoral legislation
been canvassed in several cases (see, eg, *Chan Po-fan, Peter
Hong-yuen, Peter* [1989] 2 HKLR 411).

[3353]
A shadow director (see section 2 of the Companies Ordinance and
previously section 158(10) of the Companies Ordinance (Cap 216))
any person occupying a position similar to that of a director who
president of a US corporation will be treated as holding an office for
purposes of salaries tax.

[3354]
A managing director has two capacities, as an employee and as an
officer, (see *Southern Foundries v Shirlaw* [1941] AC 701 and
Sutherland [1941] SC 203 at 218). Accordingly in *D 1/81* (1981),
was held that a non-resident managing director was able to claim
under section 8(1A)(b)(ii) and (1B) (see II [4154] et seq) in respect of
salary as an employee. However, a proportion of his remuneration was
to represent director's fees which were therefore liable to salaries tax.

Meaning of Employment

[3355]
An 'employment' exists where there is a contract of service as opposed
a contract for services (see *Cassidy v Ministry of Health* [1951] 1 All ER
574 (CA, Eng)). In *Fall v Hitchen* [1973] 1 WLR 286, it was held that
word 'employment' was coterminous with the words 'contract of service'.
The distinction can be important since it decides whether salaries tax
applies with the benefit of concessionary deductions and personal
allowances (section 12B and Parts IVA and V) and marginal rates (sections
13 and Schedule 2) but subject to the harsh expenses rules (section
12(1)(a)), or whether profits tax applies at the two tier rate (section 17
but with the benefit of more generous expenses rules (section 17A) and
also relevant in relation to relief under section 8(1A)(b)(ii) and (1B)).
II [4154] et seq).

[3356]
The Court of Appeal held that no single test determines whether a contract
is one 'of service' or 'for services' and that ultimately this is a question
of fact in *Chan Kwok-kin v Mok Kwan-hing* [1990] 2 HKC 63, (1990)
HKLR 631 (CA), a case involving whether the applicant was an employee

(s 8) Charge of salaries tax II [3357.01]

for the purposes of section 2(1) of the Employees' Compensation Ordinance
(Cap 282).

[3357]
In the English case of *Ready Mixed Concrete (South East) Ltd v Minister
of Pensions and National Insurance (RMC)* [1968] 2 QB 497, MacKenna
J at 515 held the following considerations to be relevant in establishing an
employment:

A contract of service exists if these three conditions are fulfilled. (i) The servant
agrees that, in consideration of a wage or other remuneration, he will provide
his own work and skill in the performance of some service for his master. (ii)
He agrees, expressly or impliedly, that in the performance of that service he
will be subject to the other's control in a sufficient degree to make that other
master. (iii) The other provisions of the contract are consistent with its being a
contract of service.

The first condition is taken to refer both to mutuality of obligation and
personal service (see II [3362] et seq and II [3365] et seq).

In *Belcher v Autoclenz Ltd* [2009] EWCA Civ 1046 (CA, Eng), which
turned on the employment status of car valeters engaged by Autoclenz, the
English Court of Appeal approved the judgment of MacKenna J in *Ready
Mixed Concrete*, and the tests for determining a contract of employment.

[3357.01]
In the English case of *Professional Game Match Officials Ltd v Revenue
and Customs Commissioners* [2024] UKSC 29, [2025] 1 All ER 289, the
Supreme Court effectively downplayed the importance of the first two tests
in *RMC*. Although they still need to be considered, such consideration could
take place at the third stage of the *RMC* tests in determining whether the
other provisions of the contract are consistent with its being a contract of
service. Lord Richardson, who gave the leading judgement, said:

not only did MacKenna J himself [in *RMC*] make clear that mutuality of
obligation and control were necessary, but not necessarily sufficient, conditions
of a contract of employment, but there are decisions of high authority which
emphasise the need to address 'the cumulative effect of the totality of the
provisions [of the contract] and all the circumstances of the relationship created
by it' and to view 'in the round, the relationship between the parties recorded
in the agreement in the setting of the surrounding circumstances': *White v
Trotbeck SA* [2013] EWCA Civ 1171, [2013] IRLR 949, per Sir John
Mummery at paras 38 and 41, and see, also *O'Kelly v Trusthouse Forte plc*
[1984] QB 90, *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 (PC), *Hall
v Lorimer* [1992] 1 WLR 939 (Mummery J) and [1994] 1 WLR 209 (CA).

The Supreme Court has referred this issue back to the First Tier Tribunal for it
to consider the test in the third limb of *RMC* on the facts. Considerations as to
mutuality of obligation and control will feed into this more holistic analysis.
Although stages one and two of *RMC* are still relevant, the focus will generally
be on the third stage of *RMC*. Courts have applied the third stage by looking at
the wider picture, including factors outside the contract itself (see commentary
on *Lee Ting-Sang v Chung Chi-Keung and Anor* [1990] 2 AC 374 at II [3357.2]).

II[3205] Inland Revenue Ordinance Annotated (18)

- (i) any amount received by way of periodical payments of alimony or maintenance by a person from his spouse or former spouse; (Added, 33 of 1986, s 2)
 - (j) income derived from services rendered as member of the crew of a ship or as commander or member of an aircraft by a person who was present in Hong Kong not more than -
 - (i) a total of 60 days in the basis period for the assessment; and
 - (ii) a total of 120 days falling partly within each of the periods for 2 consecutive years of assessment, which is that year of assessment; (Added, 1 of 1986, s 3)
 - (k) any salary or other remuneration paid by another person which is chargeable to profits tax under Part 4 which, under section 17(2), would be deductible in computing the profits of such other person for the purposes of that Part; (Added, 1 of 1986, s 3)
- (2A) In computing the income of any person for the purposes of section 17(2), there is to be excluded any amount that, had it been payable before the date of commencement of section 17 of Schedule 1 to the Laws (Military References) Ordinance 2012 (2 of 2012), would be excluded under subsection (2)(e) or (f) as in force immediately before the commencement of that Ordinance; (Added, 2 of 2012, s 2)
- (3) For the purposes of subsection (2)(c) and (cc) -
 incapacity (無行為能力) means permanent inability to perform the kind of work that a person was last performing before becoming incapacitated; (Added, 1 of 1986, s 3)
- retirement (退休) means -
- (a) a retirement from the service of the employer at some specified age of not less than 45 years; or
 - (b) a retirement after some specified period of service with the employer of not less than 10 years; or
 - (c) the attainment of the age of 60 years or some specified age of retirement, whichever is the later;
- terminal illness (罹患末期疾病) means a terminal illness within the meaning of section 158(3) of the Mandatory Provident Fund Schemes (Mandatory Provident Fund Schemes) Regulation (Cap 485 sub leg A); (Added, 1 of 2012, s 2)
- termination of service (服務終止) means a termination of employment with the employer other than upon retirement, death, incapacity or termination of the contract of employment; (Added, 76 of 1993, s 3, Amended, 4 of 1998, Sch 5, item 5; Amended, 1 of 2012, s 2)
- (4) For the purposes of paragraphs (c) and (cc) of subsection (2), any amount that a person -
- (a) has received from a recognised occupational retirement scheme on the person's termination of service; or
 - (b) has received, or is taken to have received, from a mandatory provident fund scheme on termination of service,
- may be excluded under those paragraphs to the extent that it is attributable to voluntary contributions made by the person's employer and does not exceed the amount of those contributions.

(s 8) Charge of salaries tax II[3205]

- proportionate benefit calculated in accordance with subsection (5). However, where, in the case of a recognised occupational retirement scheme approved by the Commissioner under section 87A before its repeal by the Inland Revenue (Amendment) (No 5) Ordinance 1993 (76 of 1993), an amount payable on termination of service in accordance with the rules of the scheme (as approved by the Commissioner before that repeal) exceeds the proportionate benefit so calculated, that amount is to be taken to be the proportionate benefit. (Replaced, 4 of 1998, Sch 5, item 6)
- (5) For the purposes of subsection (4), the formula for calculating the proportionate benefit is -
- $$PB = \frac{CMS}{120} \times AB$$
- where -
- PB is the proportionate benefit to be calculated;
 - CMS is the number of completed months of service that the person has completed with the employer; and
 - AB the amount of the person's accrued benefit. (Added, 4 of 1998, Sch 5, item 6)
- (6) In subsection (5), 'accrued benefit', in relation to a person, means -
- (a) if the person is a member of a recognised occupational retirement scheme, the maximum benefit that the person would have been entitled to receive from the scheme for the person's service recognized for the purposes of the scheme if, at the date on which the person's employment was terminated, the person had retired (within the meaning of subsection (3)); and
 - (b) if the person is a member of a mandatory provident fund scheme, the person's accrued benefits attributable to voluntary contributions paid to the scheme in respect of the person for that service. (Added, 4 of 1998, Sch 5, item 6)
- (7) If -
- (a) the recognized occupational retirement scheme referred to in subsection (2)(cc)(i) is established by an employer who is not chargeable to tax under Part 4, or
 - (b) the employer who contributes to the mandatory provident fund scheme referred to in subsection (2)(cc)(ii) is not so chargeable, the sum excluded by subsection (2)(cc) must not, with respect to the part of the sum that is attributable to the employer's voluntary contributions to the scheme, exceed the amount calculated in accordance with subsection (8). (Added, 4 of 1998, Sch 5, item 6)
- (8) For the purposes of subsection (7), the formula is -
- $$A = [(EI \times 15) \times YCS] - RAB [(100)]$$
- where -
- A is the amount to be calculated;
 - EI is the employee's income from the employee's office or employment for the period of 12 months preceding the date on which the relevant benefit is received or taken to have been received;

DIVISION II

Inland Revenue Ordinance Annotated

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DIVISION I

A Guide to the Hong Kong Inland Revenue
Ordinance

A. INTRODUCTION

1. Background to the Inland Revenue Ordinance

a. Historical origin

[1] Taxation of earnings and profits was first introduced in Hong Kong in 1940, when the War Revenue Ordinance 1940 (13 of 1940), was enacted 'to impose War taxes and to regulate collection thereof'. The Ordinance was based on Addington's Income Tax Act 1803, which introduced the concept of a schedular tax system in the United Kingdom. Its brief life ended on Christmas Day 1941 when the Japanese occupied Hong Kong. No successor appeared until 3 May 1947, when the Inland Revenue Ordinance 1947 (20 of 1947), was enacted 'to impose a Tax on Earnings and Profits'.

b. Inland Revenue Ordinance

[2]

The War Revenue Ordinance was designed to raise revenue in the special circumstances which prevailed in 1940 and was never intended to be an income tax enactment as such. However, it influenced the ultimate form of the 1947 Ordinance. Moreover, factors such as the privacy of the individual, the advantages of a conveniently situated free port and the fear of driving away foreign investment helped to persuade the Government against the introduction of an orthodox income tax system. This was in spite of the view expressed by the Committee on Taxation set up at the end of the Second World War that:

the imposition of a tax on incomes would theoretically result in the most equitable distribution of the burden of taxation and that a tax on income is inevitable here if the budget of the Colony is to be balanced and if Hong Kong is to conform to the standards generally expected in the middle of the 20th Century.

Subsequent Inland Revenue Ordinance Review Committees in 1954, 1968 and 1976 have proceeded on the basis that it was not part of their duty to recommend fundamental changes in the system of taxation. The result is an Inland Revenue Ordinance which, despite extensive amendments in 1955, 1965, 1973, 1975, 1989, 1996 and 1998 and many piecemeal changes, is today broadly similar in form and intent to the 1940 Ordinance.