

財經事務及庫務局
(庫務科)

香港下亞厘畢道
中區政府合署

CB(1)1182/03-04 (01)
**FINANCIAL SERVICES AND THE
TREASURY BUREAU
(The Treasury Branch)**
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本函檔號 Our Ref. : FIN CR 1/2306/00 Pt.10
來函檔號 Your Ref. :

1 March 2004

Ms Anita SIT
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central
Hong Kong
(Fax: 2121 0420)

Dear Ms SIT,

**Bills Committee on
Inland Revenue (Amendment) Bill 2000**

Exemptions to Market Making Activities

I refer to Paper CB(1)921/03-04 in which we reported that the Administration was working on the necessary Committee Stage Amendments (CSAs) to implement the proposed exemption of market-making activities from the operation of the interest deduction restriction provided in the proposed section 16(2C).

We have revised the draft CSAs (attached) along the lines suggested by the Hong Kong Chapter of the Capital Markets Tax Committee of Asia (CMTCA) in its letter of 16 January 2004 (Annex to CB(1)921/03-04). The revisions are on pages 10 and 23 to 25 and are highlighted for Members' easy reference.

As suggested by CMTCA in its letter, the Commissioner of Inland Revenue will make it clear in the practice notes that under normal circumstances, long-term holdings (more than three months) and substantial holdings (more than 5% of the issuance) of the debentures or instruments concerned would not be

considered as consistent with market making activities, unless there are reasonable explanations that can satisfy the Commissioner of Inland Revenue.

Yours sincerely,

(Ivanhoe Chang)
for Secretary for Financial Services and the Treasury

c.c.

LegCo Assistant Legal Adviser (Attn: Ms Bernice WONG) (Fax: 2877 5029)

Law Draftsman (Attn: Mr Allen LAI)

Commissioner of Inland Revenue (Attn: Mr Thomas LI)

**Proposed CSA on exemption from the proposed new section 16(2C) in
relation to market-makers**

"6. Ascertainment of chargeable profits

Section 16 is amended -

(a) in subsection (1)(a) -

(i) by repealing "the conditions set out in subsection (2) are satisfied" and substituting "the condition for the application of this paragraph is satisfied under subsection (2), and subject to subsections (2A), (2B) and (2C)";

(ii) by repealing "upon" and substituting "on";

(b) in subsection (2) -

(i) by repealing "The conditions referred to in subsection (1)(a) are that -" and substituting "The condition for the application of subsection (1)(a) is satisfied if -";

(ii) by repealing paragraphs (d), (e) and (f) and substituting -

"(d) the money has been borrowed from a financial institution or an

overseas financial institution;

(e) the money has been borrowed wholly and exclusively to finance -

(i) capital expenditure on the provision of machinery or plant incurred by the borrower, where such expenditure qualifies for an allowance under Part VI; or

(ii) the purchase of trading stock by the borrower, where the trading stock purchased is used by the borrower in the production of profits chargeable to tax under this Part,

(iii) the lender is not an associate of the borrower; and

(iv) where the lender is a trustee of a trust

estate or a
corporation controlled
by such a trustee,
neither the trustee
nor the corporation
nor any beneficiary
under the trust is the
borrower or an
associate of the
borrower; or

(f) the borrower is a corporation
and the deduction claimed is in
respect of interest payable by
it -

(i) on debentures listed
on a stock exchange in
Hong Kong or on any
other stock exchange
recognized by the
Commissioner for the
purposes of this
subparagraph;

(ii) on instruments (other
than debentures
described in
subparagraph (i)) -

- (A) issued bona fide
and in the course
of carrying on
business and
marketed in Hong
Kong or in a
major financial
centre outside
Hong Kong
recognized by the
Commissioner for
the purposes of
this sub-
subparagraph; or
- (B) issued pursuant
to any agreement
or arrangements,
where the issue
of an
advertisement,
invitation or
document in
respect of the
agreement or
arrangements has
been authorized

by the Securities
and Futures
Commission under
section 105 of
the Securities
and Futures
Ordinance (Cap.
571), and the
advertisement,
invitation or
document has been
issued to the
public; or

(iii) on money borrowed from
an associated
corporation of the
borrower, where the
money borrowed in the
hands of the
associated corporation
arises entirely from
the proceeds of an
issue by the
associated corporation
of debentures
described in

subparagraph (i) or of instruments described in subparagraph (ii), in an amount not exceeding the interest payable by the associated corporation to the holders of such debentures or instruments." ;

(c) by adding -

"(2A) Where -

(a) the condition for the application of subsection (1)(a) is satisfied under subsection (2)(c), (d) or (e);

(b) at any time during the basis period of the borrower for the year of assessment concerned, the payment of any sum payable by way of principal or interest in respect of the money borrowed is secured or guaranteed, whether wholly or in part and whether directly or indirectly, by a deposit or loan made by the borrower or an associate of the borrower with or to -

- (i) the lender or an associate of the lender;
- (ii) a financial institution or an associate of a financial institution; or
- (iii) an overseas financial institution or an associate of an overseas financial institution; and

(c) any sum payable by way of interest on the deposit or loan is not chargeable to tax under this Ordinance,

the amount of the deduction which, but for this subsection and subsections (2B) and (2C), would have been allowed under subsection (1)(a) for the year of assessment concerned in respect of sums payable by the borrower by way of interest on the money borrowed shall be reduced, having regard to the sum payable by way of interest on the deposit or loan, by an amount calculated on such basis as is most reasonable and appropriate in the circumstances of the case.

(2B) Where -

- (a) the condition for the application of subsection (1)(a) is satisfied under subsection (2)(c), (d) or (e); and

(b) at any time during the basis period of the borrower for the year of assessment concerned, arrangements are in place, whether between the borrower and the lender or otherwise, whereby any sum payable by way of interest on the money borrowed or on any part of the money borrowed is payable, whether directly or through any interposed person, to the borrower or to a person (other than the lender) who is connected with the borrower and in either case the borrower or the person, as the case may be, is not an excepted person as defined in subsection (2E)(c),

the amount of the deduction which, but for this subsection and subsections (2A) and (2C), would have been allowed under subsection (1)(a) for the year of assessment concerned in respect of sums payable by the borrower by way of interest on the money borrowed or on the relevant part of the money borrowed, as the case may be, shall be reduced by an amount calculated in accordance with the following formula -

$$\frac{A}{B} \times C$$

- where:
- A means the total number of days during the basis period of the borrower for the year of assessment concerned, at the end of each of which the principal in respect of the money borrowed or in respect of the relevant part of the money borrowed, as the case may be, remains outstanding and the arrangements are in place;
- B means the total number of days during the basis period of the borrower for the year of assessment concerned, at the end of each of which the principal in respect of the money borrowed or in respect of the relevant part of the money borrowed, as the case may be, remains outstanding; and
- C means the total amount of sums payable by the borrower by way of interest on the money

borrowed or on the relevant part of the money borrowed, as the case may be, which, but for this subsection and subsections (2A) and (2C), would have been deductible under subsection (1)(a) for the year of assessment concerned.

(2C) Where subject to subsection (2G)-

- (a) the condition for the application of subsection (1)(a) is satisfied under subsection (2)(f); and
- (b) at any time during the basis period of the borrower for the year of assessment concerned, arrangements are in place, whether between the borrower and the holders of the debentures or instruments concerned or otherwise, whereby any sum payable by way of interest on the debentures or instruments concerned or on any interest in the debentures or instruments concerned is payable, whether directly or through any interposed person, to the borrower or to a person who is connected with the

borrower and in either case the borrower or the person, as the case may be, is not an excepted person as defined in subsection (2F)(c), the amount of the deduction which, but for this subsection and subsections (2A) and (2B), would have been allowed under subsection (1)(a) for the year of assessment concerned in respect of -

(c) (where the condition for the application of subsection (1)(a) is satisfied under subsection (2)(f)(i) or (ii)) the sum payable by the borrower by way of interest on the debentures or instruments concerned or on the relevant interest in the debentures or instruments concerned, as the case may be; or

(d) (where the condition for the application of subsection (1)(a) is satisfied under subsection (2)(f)(iii)) the sum payable by the borrower by way of interest on money borrowed from the associated corporation, being money arising entirely from the proceeds of the

issue of the debentures or instruments concerned or of the relevant interest in the debentures or instruments concerned, as the case may be,

shall be reduced by an amount calculated in accordance with the following formula -

$$\frac{X}{Y} \times Z$$

where: X means the total number of days during the basis period of the borrower for the year of assessment concerned, at the end of each of which the principal in respect of the debentures or instruments concerned or in respect of the relevant interest in the debentures or instruments concerned, as the case may be, remains outstanding and the arrangements are in place;

Y means the total number of days during the basis period of the borrower for the year of assessment concerned, at the end of each of which the principal

in respect of the debentures or instruments concerned or in respect of the relevant interest in the debentures or instruments concerned, as the case may be, remains outstanding; and

Z means the total amount of sums referred to in paragraph (c) or (d), as the case may be, which, but for this subsection and subsections (2A) and (2B), would have been deductible under subsection (1)(a) for the year of assessment concerned.

(2D) For the purposes of subsection (2A), if a deposit or loan is made by a trustee of a trust estate or a corporation controlled by such a trustee, the deposit or loan shall be deemed to have been made by each of the trustee, the corporation and the beneficiary under the trust.

(2E) For the purposes of subsection (2B) -
(a) any reference in that subsection to any sum payable by way of interest on the money borrowed or on any part of the money borrowed, however described,

shall be construed as including a reference to any sum payable by way of principal or interest in respect of any other loan, where the payment of such sum is -

(i) secured or guaranteed, whether wholly or in part and whether directly or indirectly, by any sum payable by way of principal or interest in respect of the money borrowed or in respect of any part of the money borrowed; or

(ii) conditional, whether wholly or in part and whether directly or indirectly, on the payment of any sum payable by way of principal or interest in respect of the money borrowed or in respect of any part of the money borrowed;

(b) if any sum payable by way of interest on the money borrowed or on any part of the money borrowed, as construed

in accordance with paragraph (a), is payable, whether directly or through any interposed person, to a trustee of a trust estate or a corporation controlled by such a trustee, such sum shall be deemed to be so payable to each of the trustee, the corporation and the beneficiary under the trust; and

(c) "excepted person" (除外人士) means -

(i) a person who is chargeable to tax under this Ordinance in respect of any sum payable by way of interest on the money borrowed or on any part of the money borrowed, as construed in accordance with paragraph (a);

(ii) in the case of a person (other than the lender) who is connected with the borrower -

(A) a person who is entitled to any sum referred to in

subparagraph (i) in
the capacity of -

(I) a person acting
as a trustee of a
trust estate or
holding property
belonging to
others pursuant
to the terms of a
contract, where
the person is not
beneficially
entitled to the
sum in question;

(II) a beneficiary of
a unit trust to
which section
26A(1A)(a)(i) or
(ii) applies,
where the sum in
question is
payable to a
trustee of the
unit trust in
respect of a
specified

investment scheme

referred to in

section

26A(1A)(b); or

(III) a member of a

retirement scheme

which is either a

recognized

retirement scheme

or a substantially

similar retirement

scheme established

outside Hong Kong,

where the

Commissioner is

satisfied that the

latter scheme

complies with the

requirements of a

supervisory

authority within an

acceptable

regulatory regime;

(B) a public body;

(C) a body corporate,

where the Government

owns beneficially more than half in nominal value of the issued share capital of that body corporate for the time being; or

(D) a financial institution or an overseas financial institution.

(2F) For the purposes of subsection (2C) -

(a) any reference in that subsection to any sum payable by way of interest on the debentures or instruments concerned or on any interest in the debentures or instruments concerned, however described, shall be construed as including a reference to any sum payable by way of principal or interest in respect of any other loan, where the payment of such sum is -

(i) secured or guaranteed, whether wholly or in part and whether directly or indirectly, by any sum payable by way of principal or interest in respect of

the debentures or
instruments concerned or in
respect of any interest in
the debentures or
instruments concerned; or

- (ii) conditional, whether wholly
or in part and whether
directly or indirectly, on
the payment of any sum
payable by way of principal
or interest in respect of
the debentures or
instruments concerned or in
respect of any interest in
the debentures or
instruments concerned;

- (b) if any sum payable by way of interest
on the debentures or instruments
concerned or on any interest in the
debentures or instruments concerned,
as construed in accordance with
paragraph (a), is payable, whether
directly or through any interposed
person, to a trustee of a trust
estate or a corporation controlled by
such a trustee, such sum shall be

deemed to be so payable to each of the trustee, the corporation and the beneficiary under the trust; and

(c) "excepted person" (除外人士) means -

(i) a person who is chargeable to tax under this Ordinance in respect of any sum payable by way of interest on the debentures or instruments concerned or on any interest in the debentures or instruments concerned, as construed in accordance with paragraph (a);

(ii) in the case of a person who is connected with the borrower -

(A) a person who is entitled to any sum referred to in subparagraph (i) in the capacity of -

(I) a person acting as a trustee of a trust estate or

holding property
belonging to
others pursuant
to the terms of a
contract, where
the person is not
beneficially
entitled to the
sum in question;

(II) a beneficiary of
a unit trust to
which section
26A(1A)(a)(i) or
(ii) applies,
where the sum in
question is
payable to a
trustee of the
unit trust in
respect of a
specified
investment scheme
referred to in
section
26A(1A)(b); or

(III) a member of a

retirement scheme
which is either a
recognized
retirement scheme
or a
substantially
similar
retirement scheme
established
outside Hong Kong,
where the
Commissioner is
satisfied that
the latter scheme
complies with the
requirements of a
supervisory
authority within
an acceptable
regulatory regime;

(B) a public body;

(C) a body corporate,
where the Government
owns beneficially more
than half in nominal
value of the issued

share capital of that
body corporate for the
time being; or

(D) a financial institution
or an overseas
financial institution;

(2G) Subsection (2C) shall not apply where
under the relevant arrangements, the
relevant sum payable by way of interest on
the debentures or instruments concerned or
on any interest in the debentures or
instruments concerned is payable to a
market maker who holds such debentures or
instruments or such interest in debentures
or instruments in the ordinary course of
his trade, profession or business in
respect of market making.

(2H) For the purposes of subsection (2G),
"market maker" () means a person
who -

- (i) is licensed or registered for dealing in securities under the Securities and Future Ordinance (Cap. 571) or authorized to do so by a regulatory authority in a major financial centre outside Hong Kong recognized by the Commissioner for the purposes of subsection (2)(f)(ii)(A);
- (ii) in the ordinary course of a trade, profession or business holds himself out as being willing to buy and sell securities on his own account and on a regular basis;
- (iii) actively makes a market in securities issued by a wide range of unrelated institutions; and
- (iv) buys and sells the debentures or instruments

described in subsection (2)(f)(i) or (ii) in the ordinary course of his trade, profession or business for the purpose of providing liquidity in respect of such debentures or instruments.-"

(d) in subsection (3) -

- (i) by repealing "subsection (2) and this subsection" and substituting "this section";
- (ii) by repealing the definitions of "control" and "debentures";
- (iii) in the definition of "overseas financial institution", by repealing "subsection (2)" and substituting "this section";

(e) by adding -

"(3A) In this section -

- (a) a corporation shall be regarded as being controlled by a person if the person has the power to secure -

- (i) by means of the holding of shares or

the possession of
voting power in or in
relation to that or
any other corporation;
or

(ii) by virtue of any power
conferred by the
articles of
association or any
other document
regulating that or any
other corporation,
that the affairs of
the first-mentioned
corporation are
conducted in
accordance with his
wishes; and

(b) a person (other than a
corporation) shall be regarded
as being controlled by another
person if the first-mentioned
person is accustomed or under an
obligation, whether express or
implied, and whether or not
enforceable or intended to be

enforceable by legal proceedings,
to act, in relation to his
investment or business affairs,
in accordance with the
directions, instructions or
wishes of that other person.

(3B) In this section, a person shall be
regarded as being connected with a
borrower if the person is -

(a) an associated corporation of the
borrower;

(b) a person (other than a
corporation) -

(i) who controls the
borrower;

(ii) who is controlled by
the borrower; or

(iii) who is under the
control of the same
person as is the
borrower.";

(f) in subsection (4), by repealing "subsection
(2)" and substituting "this section";

(g) by adding -

"(5A) The amendments made to this
section by section 6(a), (b), (c), (d), (e)

and (f) of the Inland Revenue (Amendment) Ordinance 2003 (of 2003) ("the Amendment Ordinance") do not apply to sums described in subsection (1)(a) which were incurred -

- (a) before the commencement of the Amendment Ordinance;
- (b) under a transaction which was the subject of an application for advance clearance made to the Commissioner before 1 April 1998, and the Commissioner has before the commencement of the Amendment Ordinance expressed the opinion that the transaction would not fall within the terms of section 61A; or
- (c) under an arrangement which was the subject of an application made to the Commissioner under section 88A, and the Commissioner has before the commencement of the Amendment Ordinance

made a ruling under that
section that the
arrangement would not fall
within the terms of section
61A."."