
Inland Revenue (Amendment) (No. 3) Ordinance 2011

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HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 21 OF 2011

L.S.

Donald TSANG
Chief Executive
15 December 2011

An Ordinance to amend the Inland Revenue Ordinance to provide for the deduction in ascertaining profits chargeable to tax under the Ordinance of capital expenditure incurred on the purchase of a copyright, registered design or registered trade mark, to modify the provisions of the Ordinance governing such deduction of capital expenditure incurred on the purchase of patent rights and rights to any know-how, and to provide for incidental matters.

[16 December 2011]

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Inland Revenue (Amendment) (No. 3) Ordinance 2011.

2. Inland Revenue Ordinance amended

The Inland Revenue Ordinance (Cap. 112) is amended as set out in sections 3 to 9.

3. Section 15 amended (Certain amounts deemed trading receipts)

(1) Section 15(1)(b), English text—

Repeal

“trademark” (wherever appearing)

Substitute

“trade mark”.

(2) Section 15(1)(ba), English text—

Repeal

“trademark” (wherever appearing)

Substitute

“trade mark”.

4. Section 16 amended (Ascertainment of chargeable profits)

Section 16(1)(ga)—

Repeal

everything after “16E,”

Substitute

“16EA, 16F, 16G and 16I, as provided in those sections;”.

5. Section 16E amended (Purchase and sale of patent rights, etc.)

(1) Section 16E(1), before “expenditure”—

Add

“capital”.

(2) Section 16E(1)—

Repeal

“in Hong Kong”.

(3) After section 16E(1)—

Add

“(1A) A deduction allowable under subsection (1) includes legal expenses and valuation fees incurred in connection with the purchase of any rights of a kind referred to in that subsection.”.

(4) Section 16E—

Repeal subsection (2)

Substitute

“(2) If any rights of a kind referred to in subsection (1) are used partly in the production of profits chargeable to tax under this Part and partly for any other purposes, the deduction allowable under this section is that part of the capital expenditure referred to in subsection (1) that is proportionate to the extent of the use of the rights in the production of the profits chargeable to tax under this Part.”.

(5) Section 16E—

Repeal subsections (2A) and (2B).

(6) Section 16E—

Repeal subsection (3)

Substitute

“(3) Despite the exclusion relating to the sale of capital assets in section 14, where any rights of a kind referred to in subsection (1) in respect of which a deduction has been allowed to any person under that subsection in ascertaining the profits from a trade, profession or business are subsequently sold by the person, the relevant proceeds of sale are, to the extent that they are not chargeable to tax under any other section of this Part and do not exceed the amount of the

deduction, to be treated as a trading receipt of the trade, profession or business, arising in or derived from Hong Kong and accruing—

- (a) at the time of sale; or
- (b) if the sale occurs on or after the date on which the trade, profession or business is permanently discontinued, immediately before the discontinuance.”.

- (7) Before section 16E(4)—

Add

- “(3A) For the purposes of this section, any capital expenditure incurred for the purposes of a trade, profession or business by a person about to carry on the trade, profession or business is to be treated as if it had been incurred by that person on the first day on which the person carries on the trade, profession or business.”.

- (8) Section 16E(4), Chinese text, definition of *專利權*—

Repeal the semicolon

Substitute a full stop.

- (9) Section 16E(4)—

Repeal the definitions of *associate, associated corporation, beneficiary under the trust, control, principal officer and relative.*

- (10) Section 16E(4), after definition of *patent rights*—

Add

- “*relevant proceeds of sale* (有關售賣得益), in relation to any rights of a kind referred to in subsection (1) in respect of which a deduction has been allowed under that subsection, means—

- (a) if subsection (2) does not apply, the proceeds of sale of the rights; or
- (b) if subsection (2) applies, that part of the proceeds of sale of the rights that is proportionate to the extent to which the deduction has been allowed.”.

(11) Section 16E(5), Chinese text—

Repeal

“股份”

Substitute

“部分”.

(12) After section 16E(6)—

Add

- “(7) If any rights of a kind referred to in subsection (1) are purchased or sold together or with any other assets for one consideration, the Commissioner may, for the purposes of the calculation of the deduction under subsection (1) or the calculation of the trading receipt under subsection (3), and having regard to all the circumstances of the transaction, allocate a consideration for the purchase or sale of each individual asset.
- (8) For the purposes of this section, if the Commissioner is of the opinion that the consideration for the purchase or sale of any rights of a kind referred to in subsection (1) does not represent the true market value of those rights at the time of that purchase or sale, the Commissioner may determine the true market value, and the amount so determined is to be treated—
 - (a) for the purposes of subsection (1), as the capital expenditure incurred on purchase; and

- (b) for the purposes of subsection (3), as the proceeds of sale, and a reference to relevant proceeds of sale is to be construed accordingly.
- (9) To avoid doubt, any expenditure incurred on the acquisition of a licence (as defined by section 16EC(8)) of any rights of a kind referred to in subsection (1) is not deductible under that subsection.”.

6. Sections 16EA, 16EB and 16EC added

After section 16E—

Add

“16EA. Purchase of specified intellectual property rights

- (1) Despite section 17, this section applies in ascertaining the profits from a trade, profession or business in respect of which a person is chargeable to tax under this Part for any year of assessment.
- (2) Any specified capital expenditure incurred by the person during the basis period for a year of assessment is to be deducted if the specified intellectual property right concerned is purchased for use in the trade, profession or business in the production of profits in respect of which the person is chargeable to tax under this Part.
- (3) Unless subsection (4) applies and subject to subsections (5) and (6), a deduction allowable under subsection (2) is to be deducted by 5 equal amounts—
 - (a) one for the year of assessment in the basis period for which the specified capital expenditure is incurred; and
 - (b) one for each of the next succeeding 4 years of assessment.

- (4) If the specified intellectual property right—
- (a) is a copyright or registered design; and
 - (b) is due to expire at the end of its maximum period of protection, and that expiry is to occur before the expiry of the basis period for the last of the 5 succeeding years of assessment mentioned in subsection (3),
- subject to subsections (5) and (6), a deduction allowable under subsection (2) is to be deducted by a number of equal amounts—
- (c) one for the year of assessment in the basis period for which the specified capital expenditure is incurred; and
 - (d) one for each of the next succeeding years a part or the whole of the basis period of each of which years coincides with a part or the whole of the remaining part of the maximum period of protection.
- (5) A deduction mentioned in subsection (3) or (4) is allowable only if, at the end of the basis period for a year of assessment for which an amount is to be deducted, the specified intellectual property right concerned has not been sold by the person who incurred the specified capital expenditure.
- (6) A deduction mentioned in subsection (3) or (4) is allowable only if—
- (a) the specified intellectual property right concerned has been used in the trade, profession or business in the production of profits in respect of which the person who incurred the specified capital expenditure is chargeable to tax under this Part;

- (b) (in the case of the specified intellectual property right being a copyright) the copyright subsists;
 - (c) (in the case of the specified intellectual property right being a registered design) the registration of the design is in force; and
 - (d) (in the case of the specified intellectual property right being a registered trade mark) the registration of the trade mark is in force,
- during a part or the whole of the basis period for a year of assessment for which an amount is deducted.
- (7) If any specified intellectual property right is used partly in the production of profits chargeable to tax under this Part and partly for any other purposes, the deduction allowable under this section is that part of the specified capital expenditure that is proportionate to the extent of the use of the specified intellectual property right in the production of the profits chargeable to tax under this Part.
 - (8) If any specified intellectual property rights in respect of which a deduction is allowable under this section are purchased or sold together or with any other assets for one consideration, the Commissioner may, for the purposes of the calculation of the deduction under subsection (2) or the calculation of the trading receipt under section 16EB(2), and having regard to all the circumstances of the transaction, allocate a consideration for the purchase or sale of each individual asset.
 - (9) For the purposes of this section and section 16EB, if the Commissioner is of the opinion that the consideration for the purchase or sale of any specified intellectual property right does not represent the true market value of the specified intellectual property right at the time of that purchase or sale, the Commissioner

may determine the true market value, and the amount so determined is to be treated—

- (a) for the purposes of subsection (2), as the specified capital expenditure; and
 - (b) for the purposes of section 16EB(2), as the proceeds of sale of the specified intellectual property right, and a reference to relevant proceeds of sale is to be construed accordingly.
- (10) For the purposes of this section, any specified capital expenditure incurred for the purposes of a trade, profession or business by a person about to carry on the trade, profession or business is to be treated as if it had been incurred by that person on the first day on which the person carries on the trade, profession or business.

- (11) In this section and sections 16EB and 16EC—

copyright (版權) means—

- (a) a copyright within the meaning of section 2(1) of the Copyright Ordinance (Cap. 528), including an unregistered corresponding design as defined by section 87(5)(b) of that Ordinance; or
- (b) any right that—
 - (i) subsists under the law of a place outside Hong Kong in any work in which a copyright referred to in paragraph (a) may subsist; and
 - (ii) corresponds to a copyright referred to in paragraph (a);

maximum period of protection (最長保護限期) means—

- (a) in the case of a specified intellectual property right that is a copyright—

- (i) (if the copyright subsists under the Copyright Ordinance (Cap. 528)) the maximum period for which the copyright may subsist under that Ordinance; or
 - (ii) (if the copyright subsists under the law of a place outside Hong Kong) the maximum period for which the copyright may subsist under the law of that place;
- (b) in the case of a specified intellectual property right that is a registered design—
- (i) (if the design is registered under the Registered Designs Ordinance (Cap. 522)) the maximum period for which the design may be registered under that Ordinance; or
 - (ii) (if the design is registered under the law of a place outside Hong Kong) the maximum period for which the design may be registered under the law of that place;

registered design (註冊外觀設計) means a design registered under section 25 of the Registered Designs Ordinance (Cap. 522) or under the law of any place outside Hong Kong;

registered trade mark (註冊商標) means a trade mark registered under section 47 of the Trade Marks Ordinance (Cap. 559) or under the law of any place outside Hong Kong;

specified capital expenditure (指明資本開支)—

- (a) means any capital expenditure incurred on the purchase of any specified intellectual property right and includes legal expenses and valuation fees incurred in connection with the purchase; but
- (b) does not include any capital expenditure that may be deducted under any other section of this Part;

specified intellectual property right (指明知識產權) means a copyright, registered design or registered trade mark.

- (12) In this section and sections 16EB and 16EC, a reference to the purchase or sale of any specified intellectual property right includes the purchase or sale of a share or interest in the specified intellectual property right.
- (13) To avoid doubt, any expenditure incurred on the acquisition of a licence (as defined by section 16EC(8)) of any specified intellectual property right is not deductible under this section.
- (14) This section applies only in ascertaining the profits in respect of which a person is chargeable to tax under Part IV of this Ordinance for the year of assessment beginning on 1 April 2011 and any subsequent year of assessment.

16EB. Proceeds of sale of specified intellectual property rights to be treated as trading receipts

- (1) This section applies despite the exclusion relating to the sale of capital assets in section 14.
- (2) Where any specified intellectual property right in respect of which a deduction has been allowed to any person under section 16EA in ascertaining the profits from a trade, profession or business is subsequently sold by the person—
 - (a) if there is an unallowed amount that exceeds the relevant proceeds of sale, the excess is to be deducted for the year of assessment in the basis period for which the sale occurs;
 - (b) if there is an unallowed amount but the relevant proceeds of sale exceed that amount, the excess is, to the extent that it is not chargeable to tax under

any other section of this Part and does not exceed the amount of the deduction, to be treated as a trading receipt of the trade, profession or business, arising in or derived from Hong Kong and accruing—

- (i) at the time of the sale; or
 - (ii) if the sale occurs on or after the date on which the trade, profession or business is permanently discontinued, immediately before the discontinuance; or
- (c) if there is not an unallowed amount, the relevant proceeds of sale are, to the extent that they are not chargeable to tax under any other section of this Part and do not exceed the amount of the deduction, to be treated as a trading receipt of the trade, profession or business, arising in or derived from Hong Kong and accruing—
- (i) at the time of the sale; or
 - (ii) if the sale occurs on or after the date on which the trade, profession or business is permanently discontinued, immediately before the discontinuance.
- (3) In this section—
- relevant proceeds of sale* (有關售賣得益), in relation to any specified intellectual property right in respect of which a deduction has been allowed under section 16EA, means—
- (a) if section 16EA(7) does not apply, the proceeds of sale of the specified intellectual property right; or
 - (b) if section 16EA(7) applies, that part of the proceeds of sale of the specified intellectual property right that is proportionate to the extent to which the deduction has been allowed;

unallowed amount (未獲容許扣除額), in relation to any specified intellectual property right in respect of which a deduction has been allowed under section 16EA and which is subsequently sold, means—

- (a) if section 16EA(7) does not apply, the amount of specified capital expenditure incurred in relation to the specified intellectual property right that is still unallowed as at the time of the sale; or
- (b) if section 16EA(7) applies, that part of the amount referred to in paragraph (a) that is proportionate to the extent to which the deduction has been allowed.

16EC. Deduction under section 16E or 16EA not allowable under certain circumstances

- (1) No deduction is allowable under section 16EA in respect of any specified intellectual property right purchased by a person if—
 - (a) at any time before the commencement date, the specified intellectual property right had been used by the person under a licence the expiry date of which fell on or after the commencement date;
 - (b) the licence was terminated before that expiry date; and
 - (c) the Commissioner is of the opinion that, having regard to the early termination of the licence, the consideration for the purchase is not reasonable consideration in the circumstances of the case.
- (2) No deduction is allowable under section 16E or 16EA in respect of any relevant right purchased by a person wholly or partly from an associate.

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- (3) For the purposes of subsection (2), any relevant right that is purchased or sold by a trustee of a trust estate or a corporation controlled by the trustee is deemed to have been purchased or sold by each of the trustee, the corporation and the beneficiary under the trust.
- (4) No deduction is allowable under section 16E or 16EA in respect of any relevant right purchased by a person (*taxpayer*) if at a time when the relevant right is owned by the taxpayer, a person holds rights as a licensee under a licence of the relevant right, and—
- (a) the relevant right was, before it was purchased by the taxpayer, owned and used by that person (whether alone or with others) or any associate of that person (which person or any such associate is referred to in this section as *the end-user*);
 - (b) the relevant right is, while the licence is in force, used wholly or principally outside Hong Kong by a person other than the taxpayer; or
 - (c) the whole or a predominant part of the consideration for the purchase of the relevant right was financed directly or indirectly by a non-recourse debt.
- (5) Subsection (4)(a) does not apply if—
- (a) the relevant right was purchased by the taxpayer from the end-user with a consideration not more than the consideration paid by the end-user to the supplier for purchasing the relevant right from the supplier (not being a supplier who is an end-user);
 - (b) the purchase referred to in paragraph (a) by the end-user from the supplier occurred on or after the commencement date; and

- (c) no deduction under section 16E or 16EA has been allowed to the end-user in respect of the relevant right at any time before the purchase of the relevant right by the taxpayer.
- (6) For the purposes of subsection (5), a deduction is deemed not to have been made if the end-user, by notice in writing to the Commissioner within a period of 3 months beginning on the day on which the capital expenditure or specified capital expenditure is incurred in relation to the relevant right giving rise to the deduction, or within a further period that the Commissioner may in any particular case permit, disclaims the deduction.
- (7) For the purposes of subsections (4) and (5), if a trustee of a trust estate or a corporation controlled by the trustee—
- (a) owns any relevant right; or
 - (b) holds rights as a licensee under a licence of the relevant right,
- the trustee, the corporation and the beneficiary under the trust are each deemed to be—
- (c) the owner of the relevant right; or
 - (d) the holder of rights as a licensee of the relevant right
- (as the case may be).
- (8) In this section—
- associate** (相聯者), in relation to a person who purchases a relevant right or holds rights as a licensee under a licence of a relevant right (including a person who is deemed to have purchased a relevant right or deemed to be holding rights as such licensee) (**first-mentioned person**), means—

- (a) if the first-mentioned person is a natural person—
 - (i) any relative of the first-mentioned person;
 - (ii) any partner of the first-mentioned person;
 - (iii) if a partner of the first-mentioned person is a natural person, any relative of that partner;
 - (iv) any partnership of which the first-mentioned person is a partner;
 - (v) any corporation controlled by—
 - (A) the first-mentioned person;
 - (B) a relative of the first-mentioned person;
 - (C) a partner of the first-mentioned person;
 - (D) if a partner of the first-mentioned person is a natural person, any relative of that partner; or
 - (E) a partnership of which the first-mentioned person is a partner; or
 - (vi) any director or principal officer of a corporation referred to in subparagraph (v);
- (b) if the first-mentioned person is a corporation—
 - (i) any associated corporation;
 - (ii) any person who controls the first-mentioned person;
 - (iii) any partner of a person who controls the first-mentioned person;
 - (iv) if a person who controls the first-mentioned person is a natural person, any relative of that person;

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- (v) if a partner referred to in subparagraph (iii) is a natural person, any relative of that partner;
 - (vi) any director or principal officer of the first-mentioned person or of any associated corporation;
 - (vii) any relative of a director or principal officer referred to in subparagraph (vi);
 - (viii) any partner of the first-mentioned person; or
 - (ix) if a partner of the first-mentioned person is a natural person, any relative of that partner; or
- (c) if the first-mentioned person is a partnership—
- (i) any partner of the first-mentioned person;
 - (ii) if a partner of the first-mentioned person is a partnership, any partner (*Partner A*) of that partnership or any partner (*Partner B*) with that partnership in any other partnership;
 - (iii) if Partner A is a partnership, any partner of Partner A;
 - (iv) if Partner B is a partnership, any partner of Partner B;
 - (v) if a partner of, or with, or in any of the partnerships referred to in subparagraph (ii), (iii) or (iv) is a natural person, any relative of that partner;
 - (vi) any corporation controlled by—
 - (A) the first-mentioned person;
 - (B) a partner of the first-mentioned person;

- (C) if a partner of the first-mentioned person is a natural person, any relative of that partner; or
- (D) a partnership of which the first-mentioned person is a partner;
- (vii) any director or principal officer of a corporation referred to in subparagraph (vi); or
- (viii) any corporation of which any partner of the first-mentioned person is a director or principal officer;

associated corporation (相聯法團), in relation to a person who purchases a relevant right or holds rights as a licensee under a licence of a relevant right (including a person who is deemed to have purchased a relevant right or deemed to be holding rights as such licensee) (***first-mentioned person***), means—

- (a) a corporation over which the first-mentioned person has control;
- (b) a corporation which has control over the first-mentioned person; or
- (c) a corporation which is under the control of the same person as is the first-mentioned person;

beneficiary under the trust (信託的受益人) means any person who benefits or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting under a trust estate, either directly or through any interposed person, or who is able or might reasonably be expected to be able, whether directly or indirectly, to control the activities of the trust estate or the application of its corpus or income;

commencement date (生效日期) means the day on which the Inland Revenue (Amendment) (No. 3) Ordinance 2011 (21 of 2011) comes into operation;

control (控制), in relation to a corporation (**first-mentioned corporation**), means the power of a person to secure—

- (a) by means of the holding of shares or the possession of voting power in or in relation to the first-mentioned corporation or any other corporation; or
- (b) by virtue of any powers conferred by the articles of association or other document regulating the first-mentioned corporation or any other corporation,

that the affairs of the first-mentioned corporation are conducted in accordance with the wishes of that person;

end-user (最終使用者) means any person (whether alone or with others) holding rights as a licensee under a licence of any relevant right or any associate of the person;

licence (特許), in relation to a relevant right—

- (a) means a licence (however described and whether general or limited) authorizing the licensee to use the relevant right in the manner authorized by the licence; but
- (b) does not include an agreement under which the ownership of the relevant right will or may be sold to or pass to the licensee unless, in the opinion of the Commissioner, the right under the agreement to purchase or obtain the ownership of the relevant right would reasonably be expected not to be exercised,

and **licensee** (特許持有人) is to be construed accordingly;

non-recourse debt (無追索權債項), in relation to the financing of the whole or a predominant part of the consideration for the purchase of any relevant right, means a debt where the rights of the creditor in the event of default in the repayment of principal or payment of interest—

- (a) are limited wholly or predominantly to any or all of the following—
 - (i) rights (including a right to moneys payable) in relation to the relevant right or the use of the relevant right;
 - (ii) rights (including a right to moneys payable) in relation to goods or services that are produced, supplied or provided using the relevant right;
 - (iii) rights (including a right to moneys payable) in relation to the loss or disposal of the whole or a part of—
 - (A) the relevant right; or
 - (B) the taxpayer's interest in the relevant right;
 - (iv) any conjunction of those rights referred to in subparagraphs (i), (ii) and (iii);
 - (v) rights in respect of a mortgage or other security over the relevant right;
 - (vi) rights arising out of any arrangement relating to the financial obligations of the end-user of the relevant right towards the taxpayer, being financial obligations in relation to the relevant right;

- (b) are in the opinion of the Commissioner capable of being limited as described in paragraph (a), having regard to either or both of the following—
 - (i) the assets of the taxpayer;
 - (ii) any arrangement to which the taxpayer is a party; or
- (c) if paragraphs (a) and (b) do not apply, are limited by reason that not all of the assets of the taxpayer (not being assets that are security for a debt of the taxpayer other than a debt arising in relation to the financing of the whole or part of the consideration for the purchase of the relevant right) would be available for the purpose of the discharge of the whole of the debt so arising (including the payment of interest) in the event of any action or actions by the creditor or creditors against the taxpayer arising out of the debt;

principal officer (主要職員), in relation to a corporation, means—

- (a) a person employed by the corporation who, either alone or jointly with one or more other persons, is responsible under the immediate authority of the directors of the corporation for the conduct of the business of the corporation; or
- (b) a person employed by the corporation who, under the immediate authority of a director of the corporation or a person to whom paragraph (a) applies, exercises managerial functions in respect of the corporation;

relative (親屬), in relation to a person, means the spouse, parent, child, brother or sister of that person, and, in deducing such a relationship—

- (a) an adopted child is regarded as a child of both the natural parents and the adopting parents; and
- (b) a step child is regarded as a child of both the natural parents and the step parents;

relevant right (有關權利) means any patent rights (as defined by section 16E(4)), rights to any know-how (as defined by section 16E(4)) or specified intellectual property right.”.

7. Section 21A heading amended

Section 21A, English text, heading—

Repeal

“**trademarks**”

Substitute

“**trade marks**”.

8. Section 89 amended (Transitional provisions)

At the end of section 89—

Add

“(8) Schedule 24 sets out transitional provisions that have effect for the purposes of the Inland Revenue (Amendment) (No. 3) Ordinance 2011 (21 of 2011).”.

9. Schedule 24 added

At the end of the Ordinance—

Add

“Schedule 24

[s. 89(8)]

**Transitional Provisions for Inland Revenue
(Amendment) (No. 3) Ordinance 2011**

1. The amendments made to section 16E(1), (2), (2A), (2B), (4) and (5) of this Ordinance by section 5(1), (2), (4), (5), (8), (9) and (11) of the Inland Revenue (Amendment) (No. 3) Ordinance 2011 (21 of 2011) (*2011 Ordinance*) do not apply in ascertaining the profits in respect of which a person is chargeable to tax under Part IV of this Ordinance for any year of assessment preceding the year of assessment beginning on 1 April 2011.
2. Section 16E(1A), (3A) and (9) of this Ordinance applies only in ascertaining the profits in respect of which a person is chargeable to tax under Part IV of this Ordinance for the year of assessment beginning on 1 April 2011 and any subsequent year of assessment.
3. The amendments made to section 16E(3) and (4) of this Ordinance by section 5(6) and (10) of the 2011 Ordinance do not apply in respect of any rights of a kind referred to in section 16E(1) of this Ordinance—
 - (a) in respect of which a deduction has been allowed under section 16E(1) of this Ordinance to any person; and
 - (b) that are sold by the person during the basis period for any year of assessment preceding the year of assessment beginning on 1 April 2011 or are sold by the person under a contract entered into during such a basis period.

4. Section 16E(7) and (8) of this Ordinance does not apply in respect of any rights of a kind referred to in section 16E(1) of this Ordinance that are purchased or sold during the basis period for any year of assessment preceding the year of assessment beginning on 1 April 2011 or are purchased or sold under a contract entered into during such a basis period.”.