

Inland Revenue (Amendment) (No. 4) Bill 2017

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A BILL

To

Amend the Inland Revenue Ordinance to extend profits tax exemption to certain open-ended fund companies the central management and control of which is exercised in Hong Kong; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Inland Revenue (Amendment) (No. 4) Ordinance 2017.
- (2) Subject to subsection (3), this Ordinance comes into operation on the day appointed for the commencement of the Securities and Futures (Amendment) Ordinance 2016 (16 of 2016).
- (3) Section 6 (in so far as it relates to item 8 of the new Schedule 16A) comes into operation on the day appointed for the commencement of section 53(8) of the Securities and Futures (Amendment) Ordinance 2014 (6 of 2014).

2. Inland Revenue Ordinance amended

The Inland Revenue Ordinance (Cap. 112) is amended as set out in sections 3 to 6.

3. **Section 20AB amended (interpretation of sections 20AC, 20ACA, 20AD, 20AE and 20AF and Schedules 15 and 15A)**

(1) Section 20AB, heading—

Repeal

everything after “20AE”

Substitute

“, 20AF, 20AG, 20AH, 20AI, 20AJ, 20AK and 20AL and Schedules 15, 15A, 15B, 16A and 16B”.

(2) Section 20AB(1)—

Repeal

everything after “20AE”

Substitute

“, 20AF, 20AG, 20AH, 20AI, 20AJ, 20AK and 20AL and Schedules 15, 15A, 15B, 16A and 16B”.

4. **Sections 20AG to 20AL added**

After section 20AF—

Add

“20AG. Sub-funds of open-ended fund companies

(1) If the instrument of incorporation of an open-ended fund company (*main company*) provides for the division of its scheme property into separate parts (each of which is a *sub-fund*), then, when applying section 14 to the main company—

- (a) a reference to assessable profits in that section is a reference to the total of the assessable profits of all of its sub-funds; and

- (b) for computing the assessable profits of the sub-funds—
 - (i) each sub-fund is to be regarded as an open-ended fund company;
 - (ii) the main company is to be regarded as not being an open-ended fund company; and
 - (iii) the provisions of this Part apply to a sub-fund as if it were an open-ended fund company.
- (2) The part of the profits tax chargeable on a main company that is attributable to the assessable profits of one of its sub-funds may only be paid out of the assets of the sub-fund.
- (3) If the conditions for exemption from payment of tax under section 20AH are met (or regarded under this Part as having been met) in respect of a sub-fund, the sub-fund is exempt under that section even if the conditions are not met (or not regarded under this Part as having been met) in respect of another sub-fund of the same main company.
- (4) Any loss sustained by a sub-fund from a transaction referred to in section 20AH(1)(a) or (b) is not available for set off against any assessable profits of another sub-fund of the same main company.
- (5) In this section—

scheme property (計劃財產) has the meaning given by section 112A of the Securities and Futures Ordinance (Cap. 571).

20AH. Certain profits of certain open-ended fund companies exempt from payment of tax

- (1) If, in respect of an open-ended fund company, all the conditions set out in subsection (2) are met, or regarded under this Part as having been met, at all times during the basis period for a year of assessment, the company is exempt from the payment of tax otherwise chargeable under this Part in respect of its assessable profits for the period from—
- (a) qualifying transactions within the meaning of subsection (3); and
 - (b) subject to subsection (4), transactions incidental to the carrying out of qualifying transactions (*incidental transactions*).
- (2) The conditions are—
- (a) that the company is a resident person;
 - (b) that the company is non-closely held; and
 - (c) either—
 - (i) the trade, profession or business carried on by the company in Hong Kong does not involve transactions in assets of a non-Schedule 16A class; or
 - (ii) the trade, profession or business carried on by the company in Hong Kong involves transactions in assets of a non-Schedule 16A class but the percentage calculated according to the following formula does not exceed 10%—

$$A/B \times 100\%$$

where—

A = value of all the company's assets of a non-Schedule 16A class;

B = value of all the company's assets.

- (3) For the purposes of this section, a transaction is a qualifying transaction if—
- (a) it is a transaction in assets of a class specified in Schedule 16A; and
 - (b) the activities that produce assessable profits from the transaction—
 - (i) are carried out in Hong Kong by or through a qualified person; or
 - (ii) are arranged in Hong Kong by a qualified person.
- (4) The company is not exempt under subsection (1) from the payment of tax in respect of its assessable profits for the basis period from incidental transactions if the percentage calculated according to the following formula exceeds 5%—

$$A/B \times 100\%$$

where—

A = the company's trading receipts from incidental transactions in the period;

B = the total of the company's trading receipts from qualifying transactions and incidental transactions in the period.

- (5) Despite subsection (1), if the company is exempt under that subsection because the company is regarded as non-closely held, and the company has not become non-closely held within 24 months after

the day on which it accepts its first investor, the exemption is to be regarded as never having been granted.

- (6) Despite subsection (1), if the company is exempt under that subsection because the company is regarded as non-closely held, and—
 - (a) within 24 months after the first day on which the company is regarded as non-closely held, the company becomes non-closely held (*qualifying event*); and
 - (b) within 24 months after the day of the qualifying event—
 - (i) the company ceases to carry on a trade, profession or business in Hong Kong; or
 - (ii) the company ceases to be non-closely held,the exemption is to be regarded as never having been granted.
- (7) Despite subsection (1), if the company is exempt under that subsection because the company has become non-closely held (*material event*), and within 24 months after the day of the material event—
 - (a) the company ceases to carry on a trade, profession or business in Hong Kong; or
 - (b) the company ceases to be non-closely held,the exemption is to be regarded as never having been granted.
- (8) The Commissioner may by notice published in the Gazette amend Schedule 16A.
- (9) In this section—

non-Schedule 16A class (非附表16A類別) means a class that is not specified in Schedule 16A;

qualified person (合資格人士) means a corporation licensed under Part V of the Securities and Futures Ordinance (Cap. 571) to carry on, or an authorized financial institution registered under that Part for carrying on, a business in Type 9 regulated activity as referred to in Part 1 of Schedule 5 to that Ordinance.

- (10) For the purposes of subsections (5), (6) and (7)—
- (a) ***non-closely held*** (非集中擁有)—see section 20AI(2); and
 - (b) ***regarded as non-closely held*** (視為非集中擁有)—see section 20AI(3).

20AI. Interpretation of section 20AH: meaning of non-closely held

- (1) This section applies to the interpretation of section 20AH.
- (2) An open-ended fund company is non-closely held if all the following conditions are met in good faith by the company—
 - (a) for a company that does not have any qualified investor—
 - (i) the company has at least the number of investors specified in Schedule 16B;
 - (ii) for at least 10 investors of the company, the participation interest of each of them exceeds the amount specified in Schedule 16B;

- (iii) the participation interest of each investor does not exceed the percentage of the company's issued share capital specified in Schedule 16B; and
 - (iv) the participation interest of the originators and their associates does not exceed the percentage of the company's issued share capital specified in Schedule 16B;
- (b) for a company that has one or more qualified investors—
 - (i) the company has at least the number of investors specified in Schedule 16B;
 - (ii) the participation interest of each qualified investor exceeds the amount specified in Schedule 16B;
 - (iii) for at least 4 investors (not being qualified investors) of the company, the participation interest of each of them exceeds the amount specified in Schedule 16B;
 - (iv) the participation interest of each investor (not being a qualified investor) does not exceed the percentage of the company's issued share capital specified in Schedule 16B; and
 - (v) the participation interest of the originators and their associates does not exceed the percentage of the company's issued share capital specified in Schedule 16B;
- (c) the company's instrument of incorporation and its prospectus contain—

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- (i) a statement that the company is non-closely held; and
 - (ii) a specification of the intended categories of investors of the company (*specification*);
 - (d) the specification, or other terms and conditions (whether or not contained in the instrument or prospectus referred to in paragraph (c)) governing participation in the company, do not have the effect of—
 - (i) limiting the investors of the company to a specific group of associates; or
 - (ii) deterring a reasonable investor belonging to an intended category of investors of the company from investing in the company.
 - (3) Further, the company is regarded as non-closely held during the period beginning on the day the company accepts its first investor and ending on whichever is the earlier of the following dates—
 - (a) the date on which the company becomes non-closely held under subsection (2);
 - (b) the expiry date of the period of 24 months after the day on which the company accepts its first investor.
 - (4) Subsection (3) does not apply to an open-ended fund company if—
 - (a) the Commissioner is of the opinion that—
 - (i) the company has failed to take any active steps to meet the conditions set out in subsection (2); and

- (ii) the main purpose, or one of the main purposes, of such failure is to avoid, postpone or reduce the company's liability to tax under this Part; or
 - (b) the company has indicated to the Commissioner that it intends subsection (3) not to apply to it.
- (5) The Commissioner may by notice published in the Gazette amend Schedule 16B.
- (6) In this section and Schedule 16B—
 - associate* (相聯者) has the meaning given by section 20AC;
 - central bank* (中央銀行) has the meaning given by section 50A;
 - entity* (實體) has the meaning given by section 50A;
 - governmental entity* (政府實體) has the meaning given by section 50A but does not include a governmental entity that exercises commercial functions;
 - international organization* (國際組織) has the meaning given by section 50A;
 - investor* (投資者), in relation to an open-ended fund company, means a person who makes capital commitment to the company, other than the originators or their associates;
 - jurisdiction of residence* (居留司法管轄區) has the meaning given by section 50A;
 - originator* (發起人), in relation to an open-ended fund company, means a person who directly or indirectly—
 - (a) originates or sponsors the company; and
 - (b) has the power to make investment decisions on behalf of the company;

participation interest (參與權益), in relation to an open-ended fund company, means the issued share capital of the company held by the company's investors, originators or originators' associates;

qualified investor (合資格投資者), in relation to an open-ended fund company, means any of the following—

- (a) an institutional investor that meets all of the following conditions—
 - (i) it is established and operated in its jurisdiction of residence exclusively for religious, charitable, scientific, artistic, cultural, athletic or educational purposes;
 - (ii) it is exempt from income tax in its jurisdiction of residence;
 - (iii) it has no shareholders or members who have a proprietary or beneficial interest in its income or assets;
 - (iv) its formation documents or the applicable laws of its jurisdiction of residence do not permit its income or assets to be distributed to, or applied for the benefit of, a private person or non-charitable entity—
 - (A) other than pursuant to the conduct of the institutional investor's charitable activities;
 - (B) other than as payment of reasonable compensation for services rendered; or
 - (C) other than as payment representing the fair market value of a property which the institutional investor has purchased;

- (v) its formation documents or the applicable laws of its jurisdiction of residence require all of its assets to be distributed to a governmental entity or other non-profit organization, or to be escheated to the government of the jurisdiction or a political subdivision of the government, on the institutional investor's liquidation or dissolution;
- (b) a scheme—
 - (i) that is a collective investment scheme authorized under section 104 of the Securities and Futures Ordinance (Cap. 571); or
 - (ii) that is similarly constituted under the law of a place outside Hong Kong and, if it is regulated under the law of the place, is permitted to be operated under the law of the place;
- (c) a registered scheme, or its constituent fund, as defined by section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485), or—
 - (i) a person who, in relation to a registered scheme, is an approved trustee or service provider, as defined by section 2(1) of that Ordinance; or
 - (ii) a person who is an investment manager of a registered scheme or constituent fund;
- (d) an entity established to provide retirement, disability or death benefits (or a combination of any of them) to beneficiaries who are current or

former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, and—

- (i) the entity does not have a single beneficiary with a right to more than 5% of the entity's assets;
- (ii) the entity is subject to government regulation and provides information reporting to the tax authorities; and
- (iii) the entity meets any of the following conditions—
 - (A) the entity is generally exempt from tax on investment income, or taxation of such income is deferred or taxed at a reduced rate, owing to the entity's status as a retirement or pension plan;
 - (B) the entity receives at least 50% of its total contributions (other than transfers of assets from other entities described in this paragraph) from the sponsoring employers;
 - (C) distributions or withdrawals from the entity are allowed only on the occurrence of specified events related to retirement, disability or death (except rollover distributions to other entities described in this paragraph or to funds described in paragraph (f)), or penalties apply to distributions or withdrawals made before such specified events;

- (D) contributions (other than certain permitted make-up contributions) by an employee to the entity are limited by reference to the earned income of the employee;
- (e) a governmental entity;
- (f) a fund established by a governmental entity, international organization, central bank or the Hong Kong Monetary Authority to provide retirement, disability or death benefits to beneficiaries or participants who—
 - (i) are current or former employees (or persons designated by such employees); or
 - (ii) are not current or former employees, if the benefits provided to such beneficiaries or participants are in consideration for personal services rendered for the governmental entity, international organization, central bank or the Hong Kong Monetary Authority.

20AJ. Supplementary provisions for section 20AH

- (1) If the condition set out in section 20AH(2)(b) is not met in respect of an open-ended fund company (*failure*), the Commissioner may, on application by the company, nevertheless regard the condition as having been met in respect of the company if—
 - (a) the Commissioner is satisfied that—
 - (i) the failure is due to the winding down of the company's activities and investments; and

- (ii) the company has notified its investors that its activities and investments are being wound down; or
 - (b) the Commissioner is satisfied that—
 - (i) the failure is due to circumstances not reasonably foreseeable by the company;
 - (ii) the failure is temporary; and
 - (iii) it is fair and reasonable to regard the failure as not having occurred after taking into account all relevant factors, including—
 - (A) the cause, nature, extent and duration of the failure; and
 - (B) the remedial actions taken by the company to address the failure, and the speed of taking such actions.
- (2) If an open-ended fund company carries on a trade, profession or business in Hong Kong involving transactions in assets of a non-Schedule 16A class and the condition set out in section 20AH(2)(c)(ii) is not met (*failure*), the Commissioner may, on application by the company, nevertheless regard the condition as having been met in respect of the company if the Commissioner is satisfied that the failure is temporary and due to circumstances not reasonably foreseeable by the company, including—
 - (a) fluctuations in the value of the company's assets; and
 - (b) redemptions by investors beyond the company's control.

(3) If an open-ended fund company is not exempt from the payment of tax chargeable under this Part in a year of assessment, then despite section 26(a), the consideration or remuneration that a person received, in the form of a dividend from the company, for providing any services in Hong Kong, directly or indirectly, to the company is chargeable to tax under this Part.

(4) In this section—

non-Schedule 16A class (非附表16A類別) means a class that is not specified in Schedule 16A;

services (服務), in relation to an open-ended fund company, includes—

- (a) seeking funds for the company from participants or potential participants;
- (b) researching potential investments to be made for the company;
- (c) acquiring, holding, managing or disposing of property for the company; and
- (d) acting for the company with a view to assisting an entity in which the company has made an investment to raise funds.

20AK. Assessable profits of open-ended fund companies regarded as assessable profits of resident person

(1) If—

- (a) a resident person has, during any period of time, a beneficial interest, whether direct or indirect or both, in an open-ended fund company to the extent set out in subsection (2); and

- (b) the company is exempt from the payment of tax under section 20AH,
- the assessable profits of the company for the period of time that would have been chargeable to tax under this Part but for that section are to be regarded as the assessable profits arising in or derived from Hong Kong of the resident person for the year of assessment from a trade, profession or business carried on by the resident person in Hong Kong.
- (2) The extent is that the resident person, either alone or jointly with any of the resident person's associates (whether a resident person or not), holds or is interested in not less than 30% of the issued share capital of the company.
- (3) If—
- (a) a resident person has, during any period of time, a beneficial interest, whether direct or indirect or both, in an open-ended fund company that is exempt from the payment of tax under section 20AH; and
- (b) the company is an associate of the resident person,
- the assessable profits of the company for the period of time that would have been chargeable to tax under this Part but for that section are to be regarded as the assessable profits arising in or derived from Hong Kong of the resident person for the year of assessment from a trade, profession or business carried on by the resident person in Hong Kong.
- (4) Subsections (1) and (3) apply in relation to a resident person irrespective of whether the person has received, or will receive, directly or indirectly, from

the open-ended fund company concerned any money or other property representing the profits of the company for the relevant year of assessment.

- (5) The extent of a resident person's beneficial interest in an open-ended fund company is to be determined in accordance with Part 2 of Schedule 15B.
- (6) The amount regarded as the assessable profits of a resident person for a year of assessment under subsection (1) or (3) is to be ascertained in accordance with Schedule 15B.
- (7) If—
 - (a) a resident person is liable to tax in respect of the profits of an open-ended fund company by the operation of subsection (1) or (3) by reason of the person's having an indirect beneficial interest in the company through an interposed person or through a series of 2 or more interposed persons; and
 - (b) the interposed person or any of the interposed persons is a resident person who is also liable to tax in respect of the profits by the operation of subsection (1) or (3),

the resident person mentioned in paragraph (a) is discharged from the person's liability to tax in respect of the profits.

- (8) In this section—

associate (相聯者) has the meaning given by section 20AC.

20AL. Losses from section 20AH(1) transactions and non-Schedule 16A transactions

- (1) If an open-ended fund company is exempt from the payment of tax under section 20AH in respect of its assessable profits in a year of assessment, any loss sustained by the company from a transaction referred to in section 20AH(1)(a) or (b) in the year of assessment is not available for set off against any assessable profits of the company in the year of assessment or any subsequent year of assessment.
- (2) If an open-ended fund company is not exempt from the payment of tax under section 20AH in respect of its assessable profits in a year of assessment, any loss sustained by the company from a transaction referred to in section 20AH(1)(a) or (b) in the year of assessment is only available for set off against any assessable profits of the company from transactions referred to in section 20AH(1)(a) or (b) in the year of assessment or any subsequent year of assessment.
- (3) Any loss sustained by an open-ended fund company from a non-Schedule 16A transaction in a year of assessment is only available for set off against any assessable profits of the company from non-Schedule 16A transactions in the year of assessment or any subsequent year of assessment.
- (4) In this section—

non-Schedule 16A class (非附表16A類別) means a class that is not specified in Schedule 16A;

non-Schedule 16A transaction (非附表16A交易) means a transaction in assets of a non-Schedule 16A class.”.

5. Schedule 15B added

After Schedule 15A—

Add**“Schedule 15B**

[ss. 20AB & 20AK]

Provisions for Ascertaining Amount of Assessable Profits of Resident Person under Section 20AK**Part 1**

1. The amount regarded as the assessable profits of a resident person for a year of assessment is the total sum arrived at by adding up the assessable profits of the open-ended fund company that would have been chargeable to tax under Part 4 but for section 20AH (*exempt profits*) for each day in the period in the year of assessment during which the resident person has a direct or indirect beneficial interest in the company.
2. For the purposes of section 1 of this Part, the exempt profits of an open-ended fund company for a particular day in a year of assessment are to be ascertained in accordance with the following formula—

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

where—

A = the exempt profits of the company for a particular day in a year of assessment;

- B = the extent of the resident person's beneficial interest in the company on the particular day, expressed as a percentage determined in accordance with Part 2 of this Schedule;
- C = the exempt profits of the company for the accounting period of the company in which the particular day falls;
- D = the total number of days in the accounting period of the company in which the particular day falls.

Part 2

1. Where a resident person has a direct beneficial interest in an open-ended fund company, the extent of the beneficial interest of the resident person in the company is the percentage of the issued share capital of the company held by the resident person.
2. Where a resident person has an indirect beneficial interest in an open-ended fund company, the extent of the beneficial interest of the resident person in the company is—
 - (a) if there is only one interposed person, the percentage arrived at by multiplying the percentage representing the extent of the beneficial interest of the resident person in the interposed person by the percentage representing the extent of the beneficial interest of the interposed person in the company; or
 - (b) if there is a series of 2 or more interposed persons, the percentage arrived at by multiplying the percentage representing the extent of the

beneficial interest of the resident person in the first interposed person in the series by—

- (i) the percentage representing the extent of the beneficial interest of each interposed person (other than the last interposed person) in the series in the next interposed person in the series; and
- (ii) the percentage representing the extent of the beneficial interest of the last interposed person in the series in the company.

3. For the purposes of section 2 of this Part—

- (a) section 1 of this Part applies in determining the extent of the beneficial interest of a resident person in an interposed person as if references to an open-ended fund company in that section were references to an interposed person;
- (b) section 1 of this Part applies in determining the extent of the beneficial interest of an interposed person in an open-ended fund company as if references to a resident person in that section were references to an interposed person; and
- (c) section 1 of this Part applies in determining the extent of the beneficial interest of an interposed person (*Interposed Person A*) in another interposed person (*Interposed Person B*) as if—
 - (i) references to a resident person in that section were references to Interposed Person A; and
 - (ii) references to an open-ended fund company in that section were references to Interposed Person B.”.

6. Schedules 16A and 16B added

After Schedule 16—

Add

“Schedule 16A

[ss. 20AB, 20AH, 20AJ
& 20AL]

**Classes of Assets Specified for Purposes of
Section 20AH**

1. Securities as defined in Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571).
2. Futures contracts as defined in Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571).
3. Foreign exchange contract under which the parties to the contract agree to exchange different currencies on a particular date.
4. Deposits (as defined in section 2(1) of the Banking Ordinance (Cap. 155)) made with a bank (as defined in Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571)).
5. Foreign currencies.
6. Certificates of deposit as defined in Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571).
7. Cash.

8. OTC derivative products as defined in Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571).

Schedule 16B

[ss. 20AB & 20AI]

Meaning of Non-closely Held

1. For an open-ended fund company that does not have any qualified investor—
 - (a) the company has at least 10 investors;
 - (b) for at least 10 investors of the company, the participation interest of each of them exceeds \$20,000,000;
 - (c) the participation interest of each investor does not exceed 50% of the company's issued share capital; and
 - (d) the participation interest of the originators and their associates does not exceed 30% of the company's issued share capital.
2. For an open-ended fund company that has one or more qualified investors—
 - (a) the company has at least 5 investors;
 - (b) the participation interest of each qualified investor exceeds \$200,000,000;

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- (c) for at least 4 investors (not being qualified investors) of the company, the participation interest of each of them exceeds \$20,000,000;
 - (d) the participation interest of each investor (not being a qualified investor) does not exceed 50% of the company's issued share capital; and
 - (e) the participation interest of the originators and their associates does not exceed 30% of the company's issued share capital.”.
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Explanatory Memorandum

The object of this Bill is to amend the Inland Revenue Ordinance (Cap. 112) (*principal Ordinance*) to extend profits tax exemption to certain open-ended fund companies the central management and control of which is exercised in Hong Kong.

2. Clause 4 adds new sections 20AG to 20AL to the principal Ordinance.
3. The new section 20AG provides that if the instrument of incorporation of an open-ended fund company provides for the division of its scheme property into separate parts (each of which is a *sub-fund*), then each sub-fund is to be regarded as an open-ended fund company for computing the assessable profits of the sub-fund.
4. The new section 20AH exempts an open-ended fund company from paying profits tax on its assessable profits in relation to certain transactions if certain conditions are met.
5. The new sections 20AI and 20AJ respectively set out the interpretation provisions and supplementary provisions for the new section 20AH.
6. The new section 20AK provides that the assessable profits of an open-ended fund company are to be regarded as the assessable profits of a resident person (within the meaning of section 20AB(2) of the principal Ordinance) under certain circumstances.

7. The new section 20AL sets out the circumstances under which the losses sustained by an open-ended fund company from certain transactions are available, or not available, for set off against the assessable profits of the company. By virtue of the new section 20AG, the new section 20AL also applies to a sub-fund.
8. Clause 5 adds a new Schedule 15B to the principal Ordinance to deal with ascertaining the amount of assessable profits of a resident person under the new section 20AK.
9. Clause 6 adds new Schedules 16A and 16B to the principal Ordinance. The new Schedule 16A sets out the classes of assets specified for the purposes of the new section 20AH. The new Schedule 16B sets out the criteria for determining whether an open-ended fund company is non-closely held. Both Schedules may be amended by the Commissioner of Inland Revenue by notice published in the Gazette (new section 20AH(8) and new section 20AI(5)).