



Inland Revenue Department
Hong Kong

DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES

NO. 6 (REVISED)

INLAND REVENUE ORDINANCE – PROVISIONS AS TO

- (A) OBJECTIONS TO THE COMMISSIONER**
- (B) APPEALS TO THE BOARD OF REVIEW**
- (C) APPEALS TO THE COURTS**

These notes are issued for the information of taxpayers and their tax representatives. They contain the Department's interpretation and practices in relation to the law as it stood at the date of publication. Taxpayers are reminded that their right of objection against the assessment and their right of appeal to the Commissioner, the Board of Review or the Court are not affected by the application of these notes.

These notes replace those issued in November 1999.

LAU MAK Yee-ming, Alice
Commissioner of Inland Revenue

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(A) OBJECTIONS TO THE COMMISSIONER

Objections by taxpayers

A taxpayer who disputes an assessment must, under section 64 of the Inland Revenue Ordinance (“the Ordinance”), give notice of objection within one month after the date of the notice of assessment.

2. Provision is retained whereby the Commissioner may extend such period where he is satisfied that a person was prevented from giving notice within that period by reason of absence from Hong Kong, sickness or other reasonable cause.

Requirements of a valid objection

3. No objection is valid unless the following requirements are fulfilled :
- (a) The notice of objection is received by the Commissioner within the prescribed period or such extended period as he may consider reasonable in the circumstances mentioned in paragraphs 1 and 2 above. It should be noted that the prescribed period of one month runs from the day after the date of the notice of assessment to the receipt of the notice of objection.
 - (b) The notice must be in writing and must state precisely the grounds of objection to the assessment. The word “precisely” precludes any vague claim such as “the assessment is not agreed”. The grounds need not be stated in legal form; they can be expressed in ordinary language but they should be sufficiently explicit to direct the attention of the Commissioner to the particular aspects which the taxpayer contends are erroneous.
 - (c) If the assessment objected to has been made under section 59(3) in the absence of a specified return, less precise grounds of objection would be accepted in the first instance; but in addition to the notice of objection being given within the

prescribed period [sub-paragraph (a)], the required return, properly completed, must also be lodged within such period, or within such further period as the Commissioner may approve for the making of such return. Before granting any further period for lodging a return, the Commissioner will usually need to be satisfied that definite steps are being taken for the preparation of the return.

4. Where there is a reassessment of tax, either increasing or reducing the liability, the person assessed shall have no further right of objection than he would have had if the reassessment had not been made, except to the extent to which a fresh liability in respect of any particular item is imposed, or an existing liability is increased or reduced.

Acknowledgement of objections and payment of tax in dispute

5. It is, of course, impossible for the Commissioner personally to proceed to deal fully with each and every objection from the moment it is received. The preliminary stages must be delegated to the Assistant Commissioners and through them to the Assessors.

6. Upon receipt of an objection it will firstly be examined to see whether it fulfils the requirements of a valid objection. If not, the taxpayer and his representative will be informed of any defects promptly by an Assistant Commissioner or an officer authorized by the Commissioner and advised of any action which could make it a valid objection.

7. Within the number of working days pledged by the Department of the receipt of a valid objection, it will be acknowledged by an Assistant Commissioner or an officer authorized by the Commissioner who will also advise whether or not any of the tax has been stood over under section 71(2) pending the result of the objection or appeal.

8. The Commissioner is empowered to order the holdover of payment of tax, or any part thereof, conditional upon the person who or on whose behalf the objection or appeal is made providing security for the payment of the tax, or any part thereof, the payment of which is held over either :

- (a) by purchasing a certificate issued under the Tax Reserve Certificates Ordinance (Cap. 289), or
- (b) by furnishing a banker's undertaking,

as the Commissioner may require.

9. The policy with regard to the issue of stand-over orders is as follows :

- (a) Unconditional stand-over - Where, upon receipt of a valid objection and request for holdover, it is immediately apparent to an Assistant Commissioner, or other officer authorized by the Commissioner, that the objection should be allowed forthwith an unconditional stand-over will be ordered pending revision of the assessment. However, interest will be payable if any tax so held-over is finally found payable [see paragraph 14 below].
- (b) No stand-over - Where, upon receipt of a valid objection and request for holdover, it is the opinion of an Assistant Commissioner, or other officer authorized by the Commissioner, that the objection has little chance of success, no stand-over will be ordered and the tax will be payable on the due date(s) contained in the notice of assessment.
- (c) Purchase of tax reserve certificates - Where, upon receipt of a valid objection and request for holdover, it is the opinion of an Assistant Commissioner or other officer authorized by the Commissioner that the objection has some merit but that the balance of probability, based on the facts known to exist at the date of the objection, does not weigh definitely in favour of the taxpayer, a stand-over will be ordered conditional upon the purchase of tax reserve certificates in the amount of the tax stood-over. It is emphasized that, in the generality of cases falling into this category, the purchase of certificates will be required.

- (d) Banker's undertakings - Consideration will, however, be given to applications received offering to provide a bank undertaking in lieu of the purchase of certificates, where it can be established to the satisfaction of the authorized officer that the purchase of tax reserve certificates would cause undue hardship to the taxpayer, having regard to his present financial resources. It is not possible to lay down hard and fast guidelines and it will be for the taxpayer who is seeking the alternative of a bank undertaking to demonstrate his inability to purchase certificates. Similar to unconditional stand-over, interest will be payable if any tax covered by a bank undertaking is finally found payable [see paragraph 14 below].
- (e) Section 59(3) assessments - Valid objections (i.e. validated by the submission of a full and proper return) against estimated assessments issued pursuant to section 59(3) will be dealt with on their respective merits. In cases where a reduction of the assessment to the quantum of returned profits is envisaged, an unconditional stand-over will normally be ordered. In cases where an Assistant Commissioner or other officer authorized by the Commissioner is of opinion that an adjustment to the returned profits is appropriate, the tax on the difference between the estimated assessment and the returned profits so adjusted will normally be stood-over unconditionally, whilst a purchase of tax reserve certificates in respect of tax on the adjustment will normally be required. The decision whether or not to hold over the tax in these cases will be made having regard to the principles enunciated in sub-paragraphs (a) to (d) above.

10. It is to be noted that where a conditional order is made requiring the purchase of tax reserve certificates, section 71(7) provides that these are to be purchased within a period of 14 days of the date of the order or on or before the due date for payment of the tax specified in the notice of assessment whichever is the later. Failure to purchase the requisite certificates within the prescribed time will have the effect of nullifying the order, thereby rendering the underlying tax payable in full on the relevant due date(s).

11. Provision is made for the payment of interests on certificates purchased in pursuance of a conditional order, to the extent to which the certificates are not required to meet tax held-over, i.e. to the extent that the Taxpayer's objection or appeal is successful. Interest is payable from the date of issue of the certificate to the date of final determination of the objection or appeal. For those certificates purchased on or before 31 August 1999, interest is calculated at the rate prescribed by the Tax Reserve Certificates (Fourth Series) Rules at the date of purchase of the certificate. For those certificates purchased on or after 1 September 1999, interest is calculated on the prescribed rates in force from time to time over the tenure of the certificate. The holder may surrender the certificate or part to the Commissioner and request him to :

- (a) repay the principal value represented by the certificate or part together with any interest thereon; or
- (b) make an entry in an account in the name of the holder maintained under the Tax Reserve Certificates Ordinance (Cap. 289) for the principal value represented by the certificate or part together with the interest thereon.

12. Where the objection or appeal is withdrawn or determined against the Taxpayer (wholly or in part), he may tender the certificate or a part of a certificate in payment of so much of the tax held-over as is found payable. No interest is payable upon any certificate or part thereof so tendered. No certificate purchased in pursuance of a conditional order may be used for any other purpose. A certificate so purchased will be inscribed with an identifying mark to such effect.

13. Where a conditional order permits the Taxpayer to furnish a banker's undertaking as security for the tax held-over, the undertaking must be in a form acceptable to the Commissioner and must be given by a bank as defined under the Banking Ordinance (Cap. 155). Except with the consent of the Commissioner, the undertaking must be irrevocable and contain an undertaking to pay an amount equal to the tax held-over and any interest accrued thereon. Further, the undertaking must be provided within a period of 14 days from the date of the order or on or before the due date for payment of the tax specified in the notice of assessment, whichever is the later; and must provide for payment to the Commissioner upon due written notification to the bank that the

objection or appeal has been withdrawn or finally determined and that the amount and interest stated by him is now due.

14. In cases where tax reserve certificates are not purchased i.e. in cases where an unconditional order is made or a conditional order is made requiring the provision of a banker's undertaking, subsections (10) and (11) of section 71 provide that interest shall be payable on so much of the tax held-over which, upon the withdrawal or final determination of the objection or appeal, is found payable. The rate of interest payable is the judgment debt rate fixed from time to time by the Chief Justice by notice in the Gazette under section 50 of the District Court Ordinance (Cap. 336). Interest accrues from the due date for payment of the tax specified in the notice of assessment or the date of the order made under section 71(2), whichever is the later, up to the date of withdrawal or final determination of the objection or appeal. It should be noted that the imposition of this interest is mandatory and there is no provision for waivers or remissions. Furthermore, the judgment debt interest rate, by virtue of its nature, is usually substantially higher than the interest rate applicable to tax reserve certificates.

15. The Department takes the view that the definition of "tax" in section 2 of the principal ordinance which includes provisional tax charged under Parts XA, XB and XC applies to section 71. However, in cases where a hold-over, either unconditional or conditional, of the "basic" tax is ordered an unconditional hold-over of the appropriate portion of the provisional tax will be ordered having regard to the provisions of section 63E, section 63J or section 63O as the case may be and no interest will accrue on such provisional tax held-over.

Processing of objections

16. The Departmental procedure is aimed at avoiding, as far as possible, any delay in dealing with objections. This can only be achieved if there is firstly a proper presentation of the objection by the taxpayer or his representative, followed by a prompt reply to any further information requested by the Assessor or Assistant Commissioner on behalf of the Commissioner. With cooperation all round it is hoped that objections can be speedily considered with a view to reaching an early agreement, and where that is not possible, preparations will then be made to have the case referred to the Commissioner for his determination as soon as practicable.

17. A proper presentation of the objection will involve not only a statement of the precise grounds of objection [paragraph 3(b) above] but also the furnishing of evidence and arguments in support of the contention that the assessment is erroneous. As there is no formal hearing of the objection before the Commissioner, any arguments advanced in support of the grounds of objection should quote the reference to any relevant authorities or decided cases.

18. There will be cases where, by reason of the information and evidence given in support of a properly prepared objection, the Commissioner may be able to admit promptly the taxpayer's claim. In that event the taxpayer and his representative will be so informed by an Assessor on behalf of the Commissioner and a revised notice of assessment will then be issued, with an advice of any refund due.

19. In many cases further information or facts may be required before the Commissioner can determine the objection. These will be asked for as soon as possible after receipt of the notice of objection. The prompt submission of this information will enable the objection to be dealt with expeditiously. Undue delay by a taxpayer or his representative may result in the withdrawal of any stand-over of tax or if the delay is prolonged, in the objection having to be determined forthwith.

20. Attempts will be made to see if further explanation of the assessment or of the provisions of the law, can remove misunderstanding and bring about agreement to the original assessment. In other cases, after consideration of the fresh and further information, a revision of the assessment may be proposed by the Assessor in settlement of the objection. If agreement can be reached as to the revised assessment, the objection can be settled and any necessary adjustment of the assessment can be made in accordance with section 64(3).

21. In cases where no agreement is possible (or where there is undue delay in furnishing further facts or particulars which have been sought), the objection will be referred to the Commissioner for his determination in accordance with section 64(4).

22. In the process of attempting to reach agreement or of finally determining the objection, the Commissioner may by notice in writing require

the taxpayer to furnish such particulars as may be deemed necessary in connection with the assessment. He may require the production of all books or other documents, and may summon any person, who in his opinion is able to give evidence respecting the assessment, to attend before him and may examine such person on oath or otherwise - section 64(2).

23. Where the Commissioner proposes to examine any person on oath, he is required to give prior notice in writing so as to afford the taxpayer or his authorized representative a reasonable opportunity to be present at such examination.

24. Where a case has been referred for the Commissioner's determination, a draft "statement of facts" based on the information available to the Department will normally be sent to the taxpayer or his representative for comment. A request will also be made that any further facts, documentary evidence or arguments should now be brought forward. A draft statement of facts will however not be issued (unless requested by the taxpayer or his representative) in simple cases, or cases where there have already been long delays on the part of the taxpayer or his representative or where, for other reasons, an urgent determination is considered desirable. In the absence of any comments within 21 days, the Commissioner will then proceed to determine the objection.

25. Most objections are expected to be settled within 4 months from the date of receipt. In any event, the Assessor would have communicated with the taxpayer within the first 4 months in connection with the processing of his objection, other than the acknowledgement referred to in paragraph 7. Cases carrying over nine months will be kept under constant review by senior management of this Department. There will, of course, be little point for either party to press for the early determination of objections concerning questions of law which may still be sub-judice and pending clarification in other appeals already before the Board of Review or the Court.

Determination of an objection by the Commissioner

26. There is no formal hearing and the taxpayer or his representative will not appear before the Commissioner unless the Commissioner so requires or they specifically so request and the Commissioner is of the opinion that

granting the request could assist in the determination. They will, of course, be given an opportunity to be present if the Commissioner proposes to examine any person on oath.

27. If the Commissioner requires any person to attend before him in connection with the determination of an objection, he may allow any such person, other than the taxpayer or his authorized representative, any reasonable expenses necessarily incurred by him in so attending.

28. The Commissioner may authorize a Deputy Commissioner or an Assistant Commissioner to determine any objection and the Deputy Commissioner or the Assistant Commissioner then has all the powers and functions of the Commissioner.

29. The Commissioner is required to consider every valid objection and within a reasonable time may confirm, reduce, increase or annul the assessment. Within one month after the determination he will transmit his determination in writing to the person objecting to the assessment, together with his reasons for such determination. There will also be given a statement of the facts which the Commissioner has considered in arriving at his determination. A determination is not necessary where agreement as to the amount of the assessment is reached between the taxpayer and the Commissioner or an Assessor acting on behalf of the Commissioner.

30. In determining an objection, the Commissioner acts in an administrative, not a judicial, capacity. He is not a tribunal deciding an issue between the Assessor and the objecting taxpayer. His function is purely an administrative one in which he puts himself in the place of the Assessor and determines what according to his view the assessment ought to be, subject to the right of appeal to the Board of Review.

(B) APPEALS TO THE BOARD OF REVIEW

Constitution of the Board of Review

31. An appeal against the determination of the Commissioner on any valid objection may be made to the Board of Review - section 66.

32. The Board of Review is an independent tribunal consisting of persons drawn from various walks of life and activity. Appointments are made by the Chief Executive. There is a chairman, several deputy chairmen, and not more than 150 other members. For the purpose of hearing appeals, three or more members, including the chairman or a deputy chairman, are nominated by the Chief Secretary, as may be necessary from time to time. Decisions are based on a majority vote, with the chairman or deputy chairman having, if necessary, a second or casting vote.

Requirements of a valid appeal

33. For an appeal to be valid, it must :

- (a) be made in writing to the Clerk to the Board of Review within one month of the transmission of the Commissioner's written determination, or within such further period as the Board may allow if satisfied that the appellant was prevented by illness or other reasonable cause from giving the notice within one month;
- (b) be accompanied by a copy of the Commissioner's written determination, and the reasons therefor and of the statement of facts, with all appendices;
- (c) contain a statement of the grounds of appeal [paragraph 43];
and
- (d) the Commissioner must at the same time be served with a copy of the notice of appeal and of the statement of the grounds of appeal.

34. An appeal can also be made under section 82B against assessment to additional tax raised under section 82A. For such an appeal the appellant has to give notice in writing to the Clerk to the Board within 1 month after notice of assessment to additional tax is given to him or within such further period as the Board may allow if satisfied that the appellant was prevented by illness or other reasonable cause from giving the notice within one month. The notice of appeal has to be accompanied by :

- (a) a copy of the notice of assessment,
- (b) a statement of the grounds of appeal,
- (c) a copy, if any, of the notice of intention to assess additional tax from the Commissioner or Deputy Commissioner given under section 82A(4), and
- (d) a copy of any written representations made under section 82A(4).

Hearing and disposal of appeals

35. A time and date for the hearing of an appeal is fixed as soon as possible after the receipt of a notice of appeal. Fourteen clear days' notice is given to both the appellant and the Commissioner. Appeals will be heard in the office of the Board of Review.

36. At any time before the hearing, the appellant may give notice in writing to the Clerk to the Board withdrawing the appeal. If before the hearing, the appellant and the Commissioner have reached a settlement on the amount at which the appellant is liable to be assessed, the terms of settlement shall be reduced to writing in a form specified by the Board and signed by the parties. The settlement shall then be submitted to the Board for endorsement. If endorsed by the Board, the settlement shall be final and conclusive for purposes of the Ordinance. The Assessor, however, is entitled to make assessment or additional assessment which does not involve re-opening matters covered by the settlement endorsed by the Board. Where a settlement is not endorsed by the Board, the Board shall proceed to hear the appeal.

37. An appellant shall attend each meeting of the Board at which his appeal is heard either in person or by an authorized representative. An "authorized representative" is a person authorized in writing by a person to act on his behalf for the purposes of the Ordinance.

38. If the appellant does not attend on the date fixed for the hearing of an appeal, the Board may either - (i) postpone or adjourn the hearing if satisfied that non-attendance was due to sickness or other reasonable cause, or (ii) proceed to hear the appeal [see paragraph 39 below], or (iii) dismiss the appeal.

If the appeal is dismissed, the appellant is given 30 days in which to ask for a review. Should the Board be satisfied that non-attendance was due to sickness or other reasonable cause, it would set aside the order for dismissal and hear the appeal.

39. The Board may, if satisfied that an appellant is outside Hong Kong and is unlikely to be in Hong Kong within a period considered reasonable by the Board, on the application of the appellant which is received by the Board at least seven days before the day fixed for the hearing, hear the appeal in the absence of the appellant or authorized representative, taking into consideration any written representations made to it by the appellant.

40. The Assessor who made the assessment appealed against or some other person authorized by the Commissioner attends each meeting of the Board in support of the assessment.

41. All appeals are heard in camera, but official publication of the hearings may be made in such a manner that the identity of the appellant is not disclosed.

42. The onus of proving that the assessment appealed against is excessive or incorrect is on the appellant. Failure to discharge this onus can be fatal to the appeal.

43. An appellant may not at a hearing rely on any grounds other than the grounds contained in his statement of grounds of appeal unless the Board so consents.

44. Either party may adduce written evidence or cite authorities in support of the appeal during the hearing. If this is done, the Clerk to the Board would require specified number of copies (4 for cases conducted in Chinese and 5 for cases conducted in English) of such paginated documents to be sent to the Board for distribution to the members and one copy to the other party at least 7 days before the hearing. The Board also encourages the parties to prepare a statement of agreed facts as far as possible for purpose of the hearing.

45. The Board has power to summon any person to attend as a witness at any meeting if it considers such person may be able to give evidence affecting

the appeal. A witness may be examined on oath or otherwise and may be allowed any reasonable expenses for so attending. For the purposes of appeals the Board has the powers granted under paragraphs (d), (e), (f) and (g) of section 4(1) of the Commissions of Inquiry Ordinance (Cap. 86).

46. The Board may admit or reject any evidence adduced, whether oral or documentary and the provisions of the Evidence Ordinance (Cap. 8), relating to the admissibility of evidence do not apply. This gives the Board greater freedom of action in ascertaining or reaching a conclusion as to the facts on which to base a decision.

47. In so far as the facts are not agreed by the parties, the Board is the fact-finding body. If certain facts are not agreed, the onus of introducing evidence before the Board, in the first instance, lies upon the appellant. If he gives no evidence, the Board will deal with the case on the material before it. If all the facts are agreed, then only points of law are involved in deciding the issue.

48. The Board sits as a judicial tribunal with the duty firstly of ascertaining the primary facts. Where these are agreed by the parties, the Board may accept them without further proof. If they are in issue in any respect, then the Board must resolve this issue judicially. Having ascertained the primary facts, it will then draw inferences therefrom, and finally comes to a conclusion as to the merits of the appeal.

49. After hearing the appeal, the Board may confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with the opinion of the Board thereon. The Commissioner shall then revise the assessment in accordance with the opinion of the Board. If necessary, the Commissioner may go back to the Board for direction as to how to give effect to that opinion.

50. Where the Board does not reduce or annul the assessment, the appellant may be ordered to pay as costs of the Board a sum not exceeding an amount specified in Part I of Schedule 5 of the Ordinance, which shall be added to the tax charged.

51. There is no provision for the awarding of costs to either the appellant or the Commissioner on an appeal to the Board of Review.

52. Under section 85(2)(d) of the Ordinance, the Board of Inland Revenue may prescribe any procedure to be followed in relation to an appeal to the Board of Review.

53. A decision of the Board of Review is final, subject to the rights of appeal to the Court of First Instance as explained in Part (C).

(C) APPEALS TO THE COURTS

Transfer of appeals to the Court of First Instance

54. Where a valid notice of appeal is given to the Board of Review and within 21 days after the date that the notice of appeal has been received by the Clerk to the Board, or such further time as the Board may permit upon written application by the appellant or the Commissioner, the appellant or the Commissioner may, by notice in writing to the other party, request the appeal to be transferred to the Court of First Instance for hearing and determination. At the same time a copy of such notice should be sent to the Board.

55. If the other party agrees to the request and gives his consent in writing to the Board within 21 days after the date of such notice, or such further time as the Board may permit upon written application by the appellant or the Commissioner, the Clerk to the Board will transmit the appeal to the Court of First Instance - section 67. Appeals so transmitted cannot be withdrawn unless with the permission of the Court.

Appeals to the Court of First Instance by way of case stated

56. If either the appellant or the Commissioner is dissatisfied with a decision of a Board of Review, they may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance - section 69.

57. Applications requiring the Board to state a case must be made in writing and delivered to the Clerk to the Board of Review within one month of the date of the Board's decision, or the date of the communication by which the decision is notified if the decision is notified to the appellant or the Commissioner in writing. A fee as specified in Part II of Schedule 5 of the Ordinance must accompany the application for a case stated.

58. Guidance on the law and practice of stating a case pursuant to section 69(1) of the Ordinance has been provided by the courts. The classic case is that decided by Barnett J. in *Commissioner of Inland Revenue v. Inland Revenue Board of Review and Another* [1989] 2 HKLR 40. The following guidelines laid down in that case are relevant :

- (a) An applicant for a case stated had to identify a question of law which it was proper for the court to consider.
- (b) The Board of Review is under a statutory duty to state a case in respect of that question of law.
- (c) The Board has a power to scrutinize the question of law to ensure that it is one which it is proper for the court to consider.
- (d) If the Board is of the view that the point of law is not proper, it may decline to state a case.
- (e) Unless there is no evidence to support a finding of primary fact, or unless the primary facts cannot support an inference found by the Board, whether the onus of proof is discharged is a question of degree which depends upon the evaluation by the Board as a tribunal of fact. To impugn the Board's evaluation would be to undermine the whole purpose of the Board as a fact-finding tribunal.
- (f) The court would interfere with an inference drawn from primary facts or with a conclusion drawn from a combination of primary facts and inference, if the true and only reasonable inference or conclusion was not the one reached by the Board. Where the primary facts themselves were disputed, it was

necessary for the applicant to demonstrate that there was simply no evidence to support such findings.

59. A judge of the Court of First Instance may hear and determine any question of law on a stated case and may confirm, reduce, increase or annul the assessment determined by the Board of Review, or may remit the case to the Board with the opinion of the Court thereon. In that event the Board will revise the assessment in accordance with the opinion of the Court.

Right to appeal directly to Court of Appeal

60. Under section 69A, either the appellant or the Commissioner may, with the leave of the Court of Appeal, appeal against the decision of the Board of Review directly to the Court of Appeal instead of the Court of First Instance. Leave to appeal may be granted on the ground that in the Court's opinion it is desirable that, by reason of the amount of tax in dispute or of the general or public importance of the matter or its extraordinary difficulty or for any other reason, the appeal be heard and determined by the Court of Appeal.

Appeals from decisions of the Court

61. Appeals from decisions of the Court of First Instance to the Court of Appeal or to the Court of Final Appeal are governed by the provisions of the High Court Ordinance (Cap. 4), the Rules of the High Court (Cap. 4A), and the Orders and Rules governing appeals to the Court of Final Appeal.

Costs

62. In any proceedings before the Court, the Court may make such order as to costs as it may seem fit.