



Inland Revenue Department  
Hong Kong

## **DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES**

### **NO. 31 (REVISED)**

### **ADVANCE RULINGS**

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 2011.

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Commissioner of Inland Revenue

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## No. 31 (REVISED)

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## INTRODUCTION

### *Definition of rulings*

In *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5—2015 Final Report* (Action 5 Final Report) published by the Organisation for Economic Co-operation and Development (OECD), rulings are defined as:

“any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely”.

### *Types of rulings*

2. The definition of rulings is wide and includes both general rulings and person-specific rulings. Rulings can also be categorised as follows:

#### Specific rulings

- (a) These rulings apply to a specific person and on which that person is entitled to rely. Such rulings can be given both pre-transaction and post-transaction in response to a ruling application by the person. Advance tax rulings, clearances and advance pricing arrangements (APAs) are included.

#### Advance tax rulings

- (b) These rulings are specific to an individual person and provide a determination of the tax consequences of a proposed transaction on which the particular person is entitled to rely. Advance tax rulings may come in a variety of forms and may include rulings or clearances that are given as part of a statutory process or an administrative practice, including rulings that are given informally. Such rulings are tailor-made for the person concerned as they take into account the factual situation of the person and are thus not directly applicable to other persons.

#### Advance pricing arrangements

- (c) Ruling under this category is defined in the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* as “an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria ... for the determination of the transfer pricing for those transactions over a fixed period of time.” These rulings provide certainty about how transfer pricing rules apply to future transactions within the scope of the APA. They normally do this by determining an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto and critical assumptions as to future events) for the determination of the transfer pricing.

#### General rulings

- (d) These rulings apply to groups or types of persons or may be given in relation to a defined set of circumstances or activities, rather than applying to a specific person. They typically provide guidance on the position of the tax authority on such matters as the interpretation of law and administrative practice and on their application generally, to a specified group of persons or to specified activities. This guidance typically applies to all persons that engage in activities or undertake transactions that fall within the scope of the ruling.

### ***Compulsory spontaneous exchange of information***

3. In the OECD framework for the compulsory spontaneous exchange of information set out in the Action 5 Final Report, it is agreed that six categories of specific rulings which in the absence of compulsory spontaneous exchange of information could give rise to base erosion and profit shifting (BEPS) concerns. These six categories are:

- (a) rulings relating to preferential regimes;
- (b) unilateral APAs or other cross-border unilateral rulings in respect of transfer pricing;

- (c) cross-border rulings providing for a downward adjustment of taxable profits;
- (d) permanent establishment rulings;
- (e) related party conduit rulings; and
- (f) any other type of ruling agreed by the Forum on Harmful Tax Practices (FHTP) that in the absence of spontaneous information exchange gives rise to BEPS concerns.

4. Hong Kong is a member of the Inclusive Framework on BEPS and has committed to implement the minimum standards of the BEPS package, including the spontaneous exchange of tax rulings. The Commissioner does not give rulings falling within category (c) while the exact scope for category (f) has yet to be decided by FHTP. Therefore, the Competent Authority for Hong Kong would only be required to exchange rulings falling within categories (a), (b), (d) and (e).

## **STATUTORY RULING SYSTEMS**

### ***Advance rulings under section 88A***

5. Under the advance ruling system, a person may apply to the Commissioner for a ruling on how a provision of the Inland Revenue Ordinance (Ordinance) applies to the person or the arrangement specified in the application. Specifically, section 88A of the Ordinance provides that the Commissioner may, on an application made by a person in accordance with Part 1 of Schedule 10, make a ruling on any of the matters specified in that Part in accordance with that Part.

6. An advance ruling is broadly a written confirmation of the Commissioner's view of the application of the Ordinance to a specific transaction or arrangement, for which the person applies can rely on in most circumstances. A fee which is calculated on the basis of cost recovery will be charged by the Commissioner for providing the advance ruling service.

### ***Advance pricing arrangement under section 50AAP***

7. Upon application, the Commissioner may make an APA with a person relating to how the person's income or loss is to be computed under section 50AAF (arm's length principle for provision between associated persons) or 50AAK (separate enterprises principle for attributing income or loss of non-Hong Kong resident person) for a fixed period of time. Details about APA are set out in Departmental Interpretation and Practice Notes (DIPN) No. 48 *Advance Pricing Arrangement*.

## **ADVANCE RULING SYSTEM**

### ***Objectives of advance ruling system***

8. The advance ruling system is designed to clarify the tax treatment of the arrangements contemplated. It does not in itself change that treatment: it simply explains what the treatment is likely to be, so that the person to whom the ruling applies can make informed decisions. The main objectives of the advance ruling service are to:

- (a) provide the person who applies for a ruling with a degree of certainty about the tax treatments basing on the current tax legislation for seriously contemplated arrangements;
- (b) promote consistency in the application of the Ordinance; and
- (c) minimise disputes between the Commissioner and the person.

### ***Seriously contemplated arrangement***

9. An advance ruling will only be given for a seriously contemplated arrangement but not one that is hypothetical or speculative. The term "arrangement", as defined in section 2 of the Ordinance, includes:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable or intended to be enforceable, by legal proceedings;

and

- (b) any scheme, plan, proposal, action or course of action or course of conduct.

### ***Scope of advance rulings***

10. Section 1 of Part 1 of Schedule 10 to the Ordinance provides generally that the Commissioner may make a ruling on how a provision of the Ordinance applies to the applicant or to the arrangement described in the application, whether or not reference is made to that provision in the application. The scope of the advance ruling service is wide. The matters for which ruling is sought include territorial source principle, preferential regime, general anti-avoidance provision, etc. Sections 1A, 2 and 3 of Part 1 of Schedule 10 set out the circumstances under which a ruling will/ may not be made. Generally speaking, the Commissioner will be accommodating to the applications for advance ruling unless they fall within the exceptions outlined in paragraphs 11 to 16 below.

### ***Subject matters not for ruling under Schedule 10***

11. Section 1A of Part 1 of Schedule 10 specifies that a ruling is not to be made on how a provision of the Ordinance applies if the provision relates to:

- (a) the imposition or remission of a penalty;
- (b) the correctness of a return or other information supplied by a person;
- (c) the prosecution of a person;
- (d) the recovery of a debt owing by a person; or
- (e) the computation of income or loss under section 50AAF or 50AAK.



## ***Grounds for not making a ruling***

### ***Ruling declined under Schedule 10***

12. Pursuant to section 2 of Part 1 of Schedule 10, the Commissioner may decline to make a ruling if:

- (a) the application seeking the ruling would require the Commissioner to determine or establish any question of fact. In this regard a ruling will not be available on matters that are a pure question of fact (e.g. whether or not the gain arising from the disposal of property is chargeable to tax);
- (b) the Commissioner considers that the correctness of the ruling would depend on the making of assumptions, whether in respect of a future event or any other matter;
- (c) the matter on which the ruling is sought is subject to an objection or appeal, whether in relation to the applicant or any other person (i.e. the matter on which a ruling is sought is the same in character as a completed transaction entered into by the applicant in an earlier year and the tax effect of that earlier transaction is the subject of discussion with the applicant or is subject to an objection or appeal, whether in relation to the applicant or any other person, or the central issue concerns a matter that is before a board, a tribunal or the courts or, if a judgment has been issued, an appeal is under consideration); or
- (d) the matter on which a ruling is sought is the subject of a return which has been or is due to be lodged.

### ***Ruling refused under Schedule 10***

13. Under section 3 of Part 1 of Schedule 10, the Commissioner shall not make a ruling if:

- (a) the Commissioner considers that the arrangement in relation to which the ruling is sought is not seriously contemplated by the applicant;

- (b) the application is frivolous or vexatious;
- (c) the Commissioner is undertaking an audit on how any provision of the Ordinance applies to the applicant, or to an arrangement similar to the arrangement which is the subject of the application, during any period for which the proposed ruling would apply were the ruling to be made;
- (d) the Commissioner considers that the applicant has not provided sufficient information in relation to the application; or
- (e) the Commissioner considers that it would be unreasonable to make a ruling in view of the resources available to the Commissioner.

*Ruling declined or refused under other circumstances*

14. Despite not specifically stipulated in the provisions in Part 1 of Schedule 10, an application for a ruling would generally be declined in the following circumstances:

- (a) the ruling application contains alternative proposals or courses of action on the part of the applicant;
- (b) the matter is primarily one of fact and the circumstances are such that all the pertinent facts cannot be established at the time of the application for the ruling;
- (c) the ruling requires an opinion as to generally accepted accounting principles or commercial practices;
- (d) the matter is the law concerned with the administration of the tax system; or
- (e) the issue involves the interpretation of a foreign law.

15. The Commissioner may decline to make a ruling on a matter relating to the exercise of a discretion under a provision of the Ordinance if, in the

circumstances of the applicant's case, it would be more appropriate to exercise the discretionary power under that provision, or to inform the applicant that the discretionary power will not be exercised. Generally, applicants seeking the exercise of a discretionary power should request the exercise of that power rather than apply for an advance ruling on how that power might be exercised (e.g. in relation to a discretion to defer the time to enforce the payment of tax, the Commissioner may just decide to defer the time to enforce the tax payment rather than make an advance ruling).

16. It must also be stressed that the Commissioner will not help with tax planning, give advice as a purely academic exercise or allow any persons to meet their needs to the detriment of others and the robustness of the system as a whole.

### ***Notification of declining or refusing to make ruling***

17. In a case where an application for a ruling has been declined or a ruling is not made, the applicant will be notified in writing with the reasons therefor pursuant to section 4 of Part 1 of Schedule 10.

## **APPLICATIONS FOR ADVANCE RULING**

### ***Applications***

18. Any person may apply for an advance ruling on the way in which a provision of the Ordinance applies to the person or to any particular arrangement which falls within the purview of the ruling system. The person is allowed to withdraw the ruling application in writing at any time before the ruling is made.

### ***Extent of disclosure***

19. When seeking a ruling, all relevant information known to the applicant must be disclosed in the application. The applicant has to "put all his cards face upwards on the table" as explained in *R v IRC ex parte MFK Underwriting Agencies Ltd & Others* [1989] STC 873. The applicant is responsible for ensuring that the information provided is correct, accurate and complete. In *R v IRC ex parte Matrix Securities Ltd* [1994] STC 272, at the House of Lords it was held that the revocation of assurances was proper because the information

submitted by the company in respect of a proposed trust which was a tax avoidance scheme had been inaccurate and misleading.

20. Furthermore, it is not enough to merely disclose sufficient information so that appropriate inferences could be drawn. Apart from setting out all the relevant facts, the applicant is expected to draw the Commissioner's attention to all the crucial issues and questions of the arrangement. The Commissioner should also be made aware of relevant materials, matters or sources of information so as to ensure access to all the pertinent facts and law. The Commissioner shall not make a ruling where the information is not sufficient or the disclosure is inadequate.

### ***Information and documents required***

21. A checklist for making a ruling application is attached at Appendix 1. The checklist should be cross-referenced with the supporting documents where applicable. An application for a ruling should be made on a specified application form: "Application for Advance Ruling" (Form IR1297) together with supporting information and documents. What information and documents are required will depend on the circumstances of the ruling application. As explained in paragraph 22 below, the Commissioner may specify the information and documents. In any case, the application must contain the following:

- (a) the name of the person that the ruling applies, address and tax file number and similar information in respect of all other parties to the arrangement (any information not on hand at the time of application should be supplied as soon as it is available);
- (b) if the application is made by a representative of the person, written evidence showing that the representative is authorised to act for the person;
- (c) a cheque for the application fee and an undertaking to pay such further fees as may be payable in respect of the ruling application;
- (d) a statement as to whether any of the matters involved in the ruling application are, to the best of the person's knowledge, being considered in connection with a tax return already filed or any of the matters are under objection or appeal;

- (e) an indication of the subject matter of the ruling application together with a complete description of all relevant facts and documents relating to the arrangement for which the ruling is sought and a complete description of each proposed transaction therein by setting out chronologically all transaction steps;
- (f) with regard to each proposed transaction covered by the ruling application:
  - (i) a statement of its purposes;
  - (ii) the applicant's interpretation of the application of the provisions of the Ordinance that are relevant;
  - (iii) the reasons why the particular way or method of implementation has been adopted;
  - (iv) details of how the transaction will be accounted for where relevant to the tax consequences;
  - (v) a description of the tax concern that is the cause of the application for ruling; and
  - (vi) statements or reasons and draft answers to the issues and questions identified to show clearly what ruling is being sought and why it is sought.
- (g) copies of any supporting documents, such as draft agreements or contracts, together with a summary of relevant facts contained therein;
- (h) the provision of the Ordinance in respect of which the ruling is sought;
- (i) the proposition of law, if any, which is relevant to the issues raised in the ruling application;
- (j) the assumptions made by the applicant in respect of the arrangement;

- (k) the years of assessment or period to which the application relates;
- (l) whether an application or similar application has been made about the arrangement for any other years of assessment or period;
- (m) where appropriate, a complete description of significant transactions completed by the applicant prior to the time of submission of the ruling application or that may be undertaken after the completion of the arrangement, which may be part of a series of transactions;
- (n) where the ruling application concerns the application of the general anti-avoidance rule (e.g. section 61A of the Ordinance) to the arrangement or any part thereof, submissions to establish that the arrangement or any part thereof would not directly or indirectly result in or amount to a misuse of the provisions of the Ordinance or an abuse having regard to the provisions of the Ordinance read as a whole;
- (o) where relevant to the ruling application, an analysis of authorities known to the person or the representative which support the person's position, and those that do not, with submissions why the authorities in support of the person's position should prevail;
- (p) copies of any legal opinions, professional or other advice obtained in relation to the arrangement;
- (q) if spontaneous exchange of information is required (see paragraphs 3, 4, 62 to 64), the Appendix to Form IR1297; and
- (r) a draft ruling in the format as outlined at Appendix 2.

22. Under sections 8 and 9 of Part 1 of Schedule 10, the Commissioner may require the applicant to provide further information for the purposes of the application for a ruling. Section 8 stipulates that the Commissioner may specify in writing that further information be provided. In this regard, it is hereby specified that if a ruling relates to a matter which falls within another DIPN, the application should include, in addition to the items listed in paragraph 21 above,

any further information which is specified in the relevant DIPN. It is also hereby specified that where an application for a ruling is in relation to a matter of the kind listed below, additional information should be provided as detailed in the corresponding Appendix.

- (a) On whether profits are to be treated as chargeable to profits tax under section 14 of the Ordinance as arising in or derived from Hong Kong for:
  - (i) trading profits from the purchase and sale of goods – Appendix 3
  - (ii) profits from manufacturing of goods – Appendix 4
  - (iii) commission income – Appendix 5
- (b) On whether remuneration under certain arrangements is to be treated as chargeable to salaries tax under section 9A of the Ordinance – Appendix 6
- (c) On whether the assessable profits are to be computed under section 21A as 30% or 100% of the sum deemed by section 15(1)(a), (b) or (ba) of the Ordinance – Appendix 7

### ***Quality and completeness of information***

23. In addition to the hard copies, the applicant can provide a CD-ROM containing the proposed draft ruling and, where available, other relevant documents, including all draft agreements and the draft public offer document.

24. Where an incomplete application is submitted, the applicant will be contacted and advised that the application is invalid and that work will not begin on it until the missing information has been provided. This ensures that applicants who do comply with all documentary and information requirements are not disadvantaged.

25. If the applicant cannot provide all the information required above, the applicant may make a request to the Commissioner for waiver of any of the

requirements. An explanation of why the information cannot be furnished, together with any supporting evidence, must accompany the request.

### ***Fees for ruling applications***

26. The fees, including any reimbursement, payable in respect of an application for a ruling are set out in Part 2 of Schedule 10 to the Ordinance and may, by notice published in the Gazette, be amended from time to time. Appendix 8 sets out details of those fees provided under the law as it stood at the date of this DIPN.

27. In particular, the applicant shall reimburse the Commissioner in relation to the ruling any fees incurred for external advice and any costs and reasonable disbursements.

28. Where an application for a ruling is withdrawn, the applicant is still liable to pay all the fees specified in Part 2 of Schedule 10 and incurred in respect of the application before the Commissioner receives notice of the withdrawal.

29. Pursuant to section 88A(5), any fees payable by an applicant for a ruling application may in exceptional cases be waived in whole or in part at the discretion of the Commissioner.

### ***Submission of ruling applications***

30. Applicants are encouraged to submit an application early in the year of assessment to which the proposed ruling relates. This should ensure sufficient time to finalise the ruling.

31. Applications for ruling, together with cheques for the application fee, should be forwarded to:

The Deputy Commissioner of Inland Revenue (Technical)  
15/F, Inland Revenue Centre  
5 Concorde Road, Kai Tak  
Kowloon, Hong Kong

Crossed cheques should be made payable to “The Government of the Hong Kong Special Administrative Region”.



### ***Processing of ruling applications***

32. Ruling applications will normally be dealt with in the order in which they are received. The Commissioner will, provided all relevant information is furnished with the application and further consultation with the applicant is unnecessary, endeavour to respond within six weeks of the date of receipt of the application. In case additional information is required, the six-week response period will count from the date when full information is received by the Commissioner. Obviously, an early submission of all information could speed up the processing. Whilst every effort will be made to deal with the applications for ruling as expeditiously as possible, there may be instances that the Commissioner will require additional time to fully consider an application (e.g. the arrangement involves complex issues). Applicants will be advised at the earliest possible time when any unusual delay is foreseen.

33. Any application for processing a ruling application ahead of its regular order will only be considered in exceptional circumstances. Such application should be made in writing to the Commissioner outlining the reasons for special consideration.

34. Upon processing a ruling application, further relevant information and documents or an on-site inspection may be requested in appropriate circumstances. Depending on the merits, the Commissioner may permit an applicant to have a meeting to provide new information, to clarify the facts or to clear up any misunderstandings or information previously provided. The applicant may also be given an opportunity to consult the person to whom the ruling applies if the ruling the Commissioner proposes to issue differs from that applied.

35. All documentation provided by the applicant in support of the ruling application will be retained by the Commissioner, irrespective of whether a ruling is issued or the application is subsequently withdrawn.

36. The Commissioner is entitled to decline to make a ruling where the correctness of the ruling would depend on assumptions about future events or other matters, and that the Commissioner is not obligated to first request that information from the applicant in those circumstances: *Commissioner of Taxation v Hacon Pty Ltd* (2017) 106 ATR 863. If the Commissioner considers that the correctness of a ruling would depend on assumptions being made about a future

event or any other matter, the Commissioner may:

- (a) make any assumptions that are considered to be most appropriate under section 10 of Part 1 of Schedule 10; or
- (b) decline to make the ruling under section 2 of Part 1 of Schedule 10.

37. Pursuant to section 11 of Part 1 of Schedule 10, the Commissioner may not make assumptions about information which the applicant can provide.

## **EFFECTS OF A RULING**

### ***Finality of ruling***

38. A ruling made by the Commissioner, whether advantageous to the applicant or not, is final. Once a ruling has been issued, no further correspondence will be entertained and it will not be subject to objection or appeal. However, in the case of an unfavourable ruling, the applicant has the choice of not carrying out the proposed arrangement. If the proposed arrangement is effected, the ruling has to be complied with. A person's right of objection against an assessment subsequently issued in accordance with the Commissioner's unfavourable ruling is not affected.

### ***Applying ruling to the arrangement***

39. The ruling made by the Commissioner will state:

- (a) the identity of the person, the provisions of the Ordinance and the arrangement to which the ruling applies;
- (b) the period for which the ruling applies; and
- (c) any material assumptions about future events or other matters made by the Commissioner.

40. Generally, the period for which the ruling is valid will be the period to which the particular arrangement relates. A ruling in respect of an arrangement

that is intended to apply to similar arrangements that are capable of application over an extended period of time will generally only be valid for the current year of assessment. In general, such a ruling will not be valid for more than two years of assessment from the year of issue of the ruling.

41. According to section 5 of Part 1 of Schedule 10, where the Commissioner has made a ruling to a person on the application of any provision of the Ordinance in relation to an arrangement, and:

- (a) the ruling applies in relation to the arrangement during the whole or any part of the period specified in the ruling; and
- (b) the person has disclosed in the return provided under the Ordinance that the ruling has been relied on in preparing and providing the return,

the Commissioner shall apply the provision in relation to the person and the arrangement in respect of the whole of the period or the part of the period, as the case may be, in accordance with the ruling.

42. A ruling on a provision of the Ordinance only applies to a person in relation to an arrangement if the provision is expressly referred to in the ruling and only for the period specified in the ruling. It is important to note that each ruling is confined to its specific terms and it cannot be relied upon as a precedent for similar arrangements or for a future ruling application regardless of how similar the facts of that arrangement or application may be to the issued ruling.

### ***Applying ruling to a class of persons***

43. Where appropriate, the Commissioner will issue a class ruling in response to an application seeking advice about the application of a relevant provision to a specific class of persons in relation to a particular arrangement. The purpose of a class ruling is to provide certainty to participants (e.g. employees participating in a share award scheme) and obviate the need for individual participants to seek rulings.

44. A class ruling describes the relevant details of a particular arrangement. It contains the Commissioner's opinion about the application of the relevant

provisions to a specific class of persons in relation to the particular arrangement. The following are examples of situations where such a ruling may be given:

- (a) an employer seeks ruling about the tax consequences of a redundancy plan for a class of employees;
- (b) an employer seeks ruling about the tax consequences of an employee share acquisition plan for a class of employees;
- (c) a company seeks ruling about the tax consequences for its shareholders as a result of a restructure of the company, a split or consolidation of its shares, or any other proposed transaction of the company affecting the tax affairs of its shareholders.

45. The Commissioner will apply a class ruling to all persons in the specific class concerned, although such persons might not be a party to, or might have not authorised, the application. Such treatment, however, does not affect the objection and appeal rights of those persons. The applicant should ensure that all concerned persons are informed of the application and the ruling made.

46. It has to be made explicitly clear that class rulings will not be issued in relation to “tax products” or “tax schemes” designed to obtain tax benefits for the participants, whether identified or not.

### ***Not applying the ruling***

47. A ruling is given subject to the condition that the arrangement will be implemented in the way stated in the application and the ruling. Section 7 of Part 1 of Schedule 10 states that a ruling shall not apply to a person in relation to an arrangement if:

- (a) the arrangement is materially different from the arrangement identified in the ruling;
- (b) there was a material omission or misrepresentation in, or in connection with, the application for the ruling; or

- (c) any assumption of the Commissioner about a future event or any other matter that is stated in the ruling is incorrect.

48. A ruling has no binding effect on the Commissioner if the arrangement entered into is materially different from the arrangement ruled upon: see *Bellinz Pty Ltd v FCT* (1998) 39 ATR 198. The word “material” is not defined in the Ordinance. For the purpose of ascertaining whether there is material difference, omission or misrepresentation, the Commissioner will look at the arrangement on a case-by-case basis, having regard to the individual circumstances of the person. A difference will be material if it results in a tax outcome being different to that set out in the ruling: see *Carey v Field* (2002) 51 ATR 40.

### ***Guidelines that are not rulings***

49. The Commissioner may issue guidelines or pamphlets, including DIPNs, setting out the Commissioner’s interpretations on certain provisions and the practices in relation to the law. These guidelines do not apply to a specific person or a class of persons and should not be regarded as rulings. If a representation made in the guidelines is so clear and unqualified, then a person may be entitled to rely on it: see *Samarkand Film Partnership No 3 and others v Revenue and Customs Commissioners* [2017] STC 926.

50. The judgment in *R (on the application of Aozora GMAC Investment Ltd) v Revenue and Customs Commissioners* [2019] STC 2486 confirms that there will be circumstances in which the guidance issued by a tax authority can give rise to a legitimate expectation. However, it should be clear that the situations in which a person will be able to bring a successful claim for a breach of that legitimate expectation are not unlimited. In *R (on the application of Hely-Hutchinson) v Revenue and Customs Commissioners* [2017] STC 2048, it was held that there had to be sufficient unfairness to support the claim of legitimate expectation. The unfairness had to reach a very high level and had to be outrageously or conspicuously unfair.

## MISCELLANEOUS ISSUES

### *Disclosure*

51. Where —

- (a) a person has obtained a ruling;
- (b) the person is required to provide a return; and
- (c) in preparing the return the person is required to take into account the way in which a provision of the Ordinance applies to the arrangement identified in the ruling, the person must disclose in the return:
  - (i) the existence of the ruling;
  - (ii) whether or not the person has relied on the ruling in preparing and providing the return; and
  - (iii) any material changes to the arrangement identified in the ruling.

### *Withdrawal of a ruling*

52. Section 13 of Part 1 of Schedule 10 provides that the Commissioner may at any time withdraw a ruling by notifying the person to whom the ruling applies in writing of the withdrawal and the reasons therefor.

53. If an arrangement is entered into or effected after the date of withdrawal of a ruling, the ruling shall cease to apply in relation to the arrangement. If the arrangement has been entered into or effected on or before the date of the withdrawal:

- (a) where a person to whom the ruling applies has disclosed in the return provided under the Ordinance that the person has relied on the ruling in preparing and providing the return, the ruling shall, after the date of the withdrawal, continue to apply in relation to

the arrangement for the remainder of the period specified in the ruling;

- (b) in any other case, the ruling shall cease to apply in relation to the arrangement.

### ***Impact of legislative amendment on rulings***

54. Section 16(a) of Part 1 of Schedule 10 provides that if any provision of the Ordinance that is the subject of or affects a ruling is repealed, the ruling ceases to apply to the extent of, and from the effective date of, that repeal.

55. If any provision of the Ordinance that is the subject of a ruling is amended, or repealed in part only, in a manner that alters the way in which the tax law applies, according to section 16(b) of Part 1 of Schedule 10, the ruling ceases to apply to the extent of, and from the effective date of, the amendment or partial repeal.

56. If an interpretation of the law, on which a ruling is based, is changed as a result of a court decision, the ruling ceases to apply to the extent of, and from the date of, the court decision.

### ***Post-implementation review***

57. The Commissioner reserves the right to call for documents and other information in respect of the completed arrangement to ensure that it has been carried out in the way stated in the ruling application and the ruling.

### ***Incorrect information or false answer***

58. If an applicant of a ruling gives any incorrect information in relation to any matter or thing affecting the applicant's liability to tax or the liability of any other person or gives any false answer whether verbally or in writing to any question or request for information asked or made in accordance with the provisions of the Ordinance, including sections 8 and 9 of Part 1 of Schedule 10, the Commissioner will consider to take penal action under Part 14 of the Ordinance. Thus the applicant of a ruling should make an immediate disclosure if an arrangement has been carried out on the basis that it conforms with a ruling

but which is instead implemented in a way that is materially different to that described in the relevant ruling.

### ***Publication of rulings***

59. In appropriate circumstances the Commissioner may publish selected rulings on the Department's website ([www.ird.gov.hk](http://www.ird.gov.hk)) where they are considered to be of general interest. Accordingly, any ruling made by the Commissioner may become a published ruling. The Commissioner will preserve the confidentiality of the applicant and entities covered by the ruling. The selected rulings will be edited prior to publication. All information that may enable identification of the applicant will be removed from the edited version.

60. Rulings will be published for general reference only. The published rulings are non-binding and provide no protection to any persons other than the applicants. Other persons should exercise caution in relying upon them. Reference can only be made to a ruling if the facts are identical to the proposed transactions. To that end it should be borne in mind that similar transactions often have different facts. If there are any doubts as to the similarity of the proposed transactions, the person should apply for a ruling.

61. The Commissioner will not update the published rulings to reflect any subsequent changes of the tax law. Caution should thus be exercised to ensure that the relevant provisions of the Ordinance or the relevant case law interpretation and practice of those provisions have not changed as the Commissioner is bound to apply the current tax law. Similarly, a ruling may no longer be appropriate if an administrative practice outlined therein turns out to be used as a tax avoidance device.

### ***Exchange of rulings***

62. Rulings, mentioned in paragraphs 3 and 4 and given on or after 1 April 2016, are required to be exchanged within three months of the date received by a competent authority. The applicant for an advance ruling under section 88A is required to complete Form IR1297 and the attached Appendix for spontaneous exchange of information on rulings.



63. The table at Appendix 9 summarises the jurisdictions with which rulings should be exchanged. The first column of the table describes what rulings are covered by the obligation to spontaneously exchange and the second column sets out the jurisdictions with which rulings need to be exchanged.

64. Rulings exchanged will be protected under the tax confidentiality provisions in the relevant treaty or convention. The provisions operate to ensure that information is only used for specified purposes and only disclosed to specified persons and cannot be forwarded or disclosed to other jurisdictions.

**Checklist for an Application for Ruling**

1. Complete the application form (Form IR1297) which can be downloaded from the IRD website ([www.ird.gov.hk](http://www.ird.gov.hk)).
2. Explain the issue(s) in question and give a full description of the facts.
3. State the law, including the relevant section(s) of the Inland Revenue Ordinance (Cap 112), in respect of which a ruling is required.
4. State the propositions of law, if any, that relate to the issue(s) raised in the ruling application.
5. State the period(s) to which the ruling application relates.
6. Indicate whether a ruling application has been lodged about the arrangement for any other period.
7. If the application is made by a representative or on behalf of more than one person, indicate that the consent of the person(s) has been obtained.
8. Include copies of all relevant documents that relate to the question(s) raised.
9. Include copies of any legal or other opinions that have been obtained on the question(s) raised.
10. Include a draft ruling.
11. Include the relevant application fee.
12. Submit the ruling application to the Deputy Commissioner of Inland Revenue (Technical), 15/F, Inland Revenue Centre, 5 Concorde Road, Kai Tak, Kowloon, Hong Kong.

### **Format for Draft Rulings**

There is no prescribed format for a draft ruling to be submitted with the application for ruling. The draft ruling should contain all information required to be stated in a ruling and answers to the questions raised in the application for ruling. It could take the following form:

#### *Ruling*

This is a ruling made under section 88A of the Inland Revenue Ordinance (Cap 112).

#### *Person to whom the ruling applies*

This ruling applies to (*state the name and file number of the person*).

#### *Tax provision*

This ruling applies in respect of section(s) (*number*) of the Inland Revenue Ordinance (Cap 112).

#### *Arrangement*

This arrangement is (*describe the arrangement to which the ruling is to apply*).

#### *Assumptions*

This ruling is based on the assumption(s) that (*list the assumption(s) made*).

#### *The way in which the tax law applies to the arrangement*

The tax law applies to the arrangement as follows (*state the proposed ruling*).

#### *The period for which the ruling applies*

This ruling applies for the period (*state the relevant period or year(s) of assessment*).

**Information to be Supplied in respect of  
Trading Profits from the Purchase and Sale of Goods**

1. Provide an organisation chart with full details of the applicant's organisation both in Hong Kong and outside Hong Kong. This should include the location and size of the office(s), the number of personnel to be employed, their full names, post titles, duties and responsibilities and remuneration package.
2. Provide details of the business and its functions both in Hong Kong and outside Hong Kong for the applicant. Provide documents relating to its establishment, such as certificate of incorporation, shareholders agreements, joint venture agreements, registration certificates with government authorities, memorandum and articles of association and its issued and paid up capital.
3. If the applicant is part of a group, provide details of the group. This should include the names of the group companies with which the applicant has trading transactions, the normal places of business of these companies, their management and the nature of their business. Provide similar documents relating to the establishment of these group companies as set out in paragraph 2 above.
4. Provide details of the purchase and sale transactions including:
  - (a) the type of goods to be purchased/ sold;
  - (b) the name and location of each supplier; how, where and by whom the suppliers are contacted or procured;
  - (c) the name and location of each customer; how, where and by whom the customers are first contacted or procured;
  - (d) how, where and by whom the purchase orders are initiated, processed and placed with the suppliers;

- (e) how, where and by whom the purchase orders from customers are initiated, processed and placed with the applicant, and the names of staff members who have the ultimate authority to accept the orders;
  - (f) how the purchase/ sale prices of the goods are determined; if by negotiation, how, where and by whom the negotiations are carried out;
  - (g) whether formal contracts in respect of the purchase/ sale are entered into for every order/ repeated order; how, where and by whom the contracts are prepared and signed; provide samples of the contracts used;
  - (h) the routing of the purchase/ sale orders; particulars of the personnel involved in handling the orders; provide samples of the orders used;
  - (i) if goods are stored in Hong Kong, how, where and by whom the arrangements are made;
  - (j) how, where and by whom shipment, including inspection before shipment, of the goods is made; and
  - (k) how, where and by whom payments for the goods are received/ paid.
5. If any overseas establishment/ office of the applicant is involved in the sale and purchase transactions, describe in detail its functions and specify its authorities.
6. If the applicant is deriving profits from the purchase/ sale of goods to/ from related companies, provide the following additional information in respect of the transactions with the related companies:
- (a) the type of goods purchased/ sold;
  - (b) how the purchase/ sale prices are determined; how these prices compare with the prices for similar goods purchased from or sold to unrelated parties; and

- (c) the relative volume/ amount of transactions with related companies as compared to those with unrelated parties, if any.
- 7. If the applicant is deriving trading profits outside Hong Kong, justify how the offshore transactions are distinguished from the onshore transactions, if any.
- 8. Identify the jurisdiction where the profits from such offshore transactions are generated and provide details of economic activities carried out in that jurisdiction.
- 9. Confirm whether the profits from such offshore transactions are or will be taxed in the jurisdiction where the profits are generated.

**Information to be Supplied in respect of**  
**Profits from Manufacturing of Goods**

1. Provide an organisation chart with full details of the applicant's organisation both in Hong Kong and outside Hong Kong. This should include the location and size of the office(s), the number of personnel to be employed, their full names, post titles, duties and responsibilities and remuneration package.
2. Provide details of the business and its functions both in Hong Kong and outside Hong Kong for the applicant. Provide documents relating to its establishment, such as certificate of incorporation, shareholders agreements, joint venture agreements, registration certificates with government authorities, memorandum and articles of association and its issued and paid up capital.
3. If the applicant is part of a group, provide details of the group. This should include the names of the group companies with which the applicant has trading transactions, the normal places of business of these companies, their management and the nature of their business. Provide similar documents relating to the establishment of these group companies as set out in paragraph 2 above.
4. If the applicant is deriving profits from the sale of goods manufactured outside Hong Kong, justify how the offshore manufacturing operations are distinguished from the onshore manufacturing operations, if any. Provide details of the manufacturing activities, both in Hong Kong and outside Hong Kong to earn the profits.
5. If the goods are manufactured by an entity outside Hong Kong (the Entity), provide details of the Entity and its activities, including:
  - (a) the name and address of the Entity;
  - (b) documents relating to its establishment such as certificate of incorporation, shareholders agreements, joint venture agreements,

registration certificates with government authorities, memorandum and articles of association and its issued and paid up capital;

- (c) an organisation chart and details of the Entity's overseas establishment. This should include the location and size of the office and factory, the number of employees, their respective name, post title and duties (details of the factory workers employed by the Entity could be excluded);
  - (d) the nature of the goods to be manufactured;
  - (e) which party, the applicant or the Entity, will be responsible for procuring raw materials for the manufacture of the goods;
  - (f) details of the manufacturing activities to be carried out by the Entity; the state of the goods (finished or semi-finished) before their shipment to Hong Kong;
  - (g) details of the machinery to be installed for the Entity and the party responsible for the supply of the machinery;
  - (h) the fees, sub-contracting charges, etc., to be paid to the Entity and the basis of calculation of the fees, charges, etc.;
  - (i) the involvement of the applicant in the activities of the Entity, if any; details of that involvement including the extent and nature of work performed, personnel engaged, etc.; and
  - (j) subcontracting agreements or any other agreements between the applicant and the Entity reflecting the information and arrangements in (e) to (i) above.
6. In case where the applicant is responsible for the supply of raw materials and/ or sale of the manufactured goods, provide the following details:
- (a) the nature of the raw materials supplied and the goods manufactured and sold;



- (b) the name and location of each supplier of raw materials/each customer; how, where and by whom they are first contacted or procured;
  - (c) how, where and by whom the purchase orders are initiated, processed and placed with the suppliers of raw materials;
  - (d) how, where and by whom the purchase orders from customers are initiated, processed and placed with the applicant, and the names of staff members who have the ultimate authority to accept the orders;
  - (e) how the purchase price of the raw materials and the sale price of the manufactured goods are determined;
  - (f) whether there will be formal contracts for every purchase/ sale order; how, where and by whom the contracts are prepared and signed; provide samples of the contracts used;
  - (g) the routing of the purchase/ sale orders; particulars of the personnel involved in handling the orders; provide samples of the orders used;
  - (h) if raw materials/ goods are stored in Hong Kong, how, where and by whom the arrangements are made;
  - (i) how, where and by whom shipment, including inspection before shipment, of the raw materials/ goods is made; and
  - (j) how, where and by whom payments/ receipts for the raw materials/ goods are received/ paid.
7. If the applicant obtains the raw materials from or sells the manufactured goods to related companies, provide the following additional information in respect of transactions with related companies:
- (a) the nature of raw materials/ manufactured goods purchased/ sold;
  - (b) how the purchase price of the raw materials and the sale price of the manufactured goods are determined; how these prices compare with

the prices for similar raw materials or goods purchased from or sold to unrelated parties; and

- (c) the relative volume/ amount of transactions with related companies as compared to those with unrelated parties, if any.
8. Identify the jurisdiction where the profits from such offshore manufacturing operations are generated and provide details of economic activities carried out in that jurisdiction.
  9. Confirm whether the profits from such offshore manufacturing operations are or will be taxed in the jurisdiction where the profits are generated.

**Information to be Supplied in respect of  
Derivation of Commission Income**

1. Provide an organisation chart with full details of the applicant's organisation both in Hong Kong and outside Hong Kong. This should include the location and size of the office(s), the number of personnel to be employed, their full names, post titles, duties and responsibilities and remuneration package.
2. Provide details of the business and its functions both in Hong Kong and outside Hong Kong for the applicant. Provide documents relating to its establishment, such as certificate of incorporation, shareholders agreements, joint venture agreements, registration certificates with government authorities, memorandum and articles of association and its issued and paid up capital.
3. If the applicant is part of a group, provide details of the group. This should include the names of the group companies with which the applicant has trading transactions, the normal places of business of these companies, their management and the nature of their business. Provide similar documents relating to the establishment of these group companies as set out in paragraph 2 above.
4. Provide a detailed description of the functions carried out by the applicant in order to earn the commission income. For each of the activities identified, specify the name(s) of the responsible staff member(s) and the place where such activity is performed.
5. Provide a copy of the service agreement with each of the commission payers.
6. In respect of each commission payer involved, provide details of the following:
  - (a) the name and address of the payer, its relationship with the applicant, its directors and/ or shareholders; and

- (b) how the commission is determined.
7. Provide details of the transactions whereby the applicant is to derive commission from the purchase/ sale of goods including:
- (a) the type of goods to be purchased/ sold;
  - (b) the name and location of the corresponding suppliers/ customers;
  - (c) how, where and by whom the suppliers/ customers are contacted and procured;
  - (d) how the price of the goods purchased/ sold is determined; if by negotiation, how, where and by whom the negotiations are carried out;
  - (e) whether there is negotiation of the price of the goods for each and every purchase/ sale order placed with each of the suppliers/ customers;
  - (f) whether there are formal contracts for each order/ repeated order; how, where and by whom the contracts are prepared and signed; provide samples of the contracts to be used;
  - (g) the routing of the purchase/ sale orders and repeated orders; particulars of the personnel involved in handling the orders; provide samples of the orders to be used;
  - (h) if goods are stored in Hong Kong, how, where and by whom the arrangements are made;
  - (i) how, where and by whom the shipment, including the inspection before shipment, of the goods is made;
  - (j) how, where and by whom payments/ receipts for the goods purchased/ sold are made; and

- (k) copies of agreements entered into by the applicant with each of the persons responsible for the work in sub-paragraphs (c) to (j) above, if any.
- 8. If the applicant is to derive commission income from the purchase/ sale of goods to/ from related companies, provide the following additional information in respect of the transactions with the related companies:
  - (a) the type of goods to be purchased/ sold;
  - (b) how the commission is determined; how such rate of commission compares with that charged on unrelated parties in respect of similar lines of business; and
  - (c) the relative volume/ amount of transactions with related companies as compared to those with unrelated parties, if any.
- 9. If the applicant is deriving commission income outside Hong Kong, justify how the offshore service is distinguished from the onshore service, if any.
- 10. Identify the jurisdiction where the commission income from such offshore service is generated and provide details of economic activities carried out in that jurisdiction.
- 11. Confirm whether the commission income from such offshore service is or will be taxed in the jurisdiction where the commission income is generated.

**Information to be Supplied in respect of Income from  
Service Company Arrangements under Section 9A**

1. Provide copies of the agreement and any related undertaking among the relevant person, the relevant individual and the service company covered by the arrangement. If an agreement or undertaking has not been reduced to writing, give an explanation of why this is the case together with full details of its terms and conditions.
2. If not otherwise apparent, provide full details of the remuneration payable under each agreement or undertaking, including fringe benefits, share awards, share options, etc.
3. Provide copies of the respective organisation charts of the relevant person and the service company.
4. Provide details of the relevant individual's:
  - (a) duties and obligations in relation to the relevant person and the service company respectively; and
  - (b) previous employment history, if any, with the relevant person or any associated party.
5. Explain, together with supporting details, how the criteria specified in section 9A(3) of the Ordinance have been satisfied.
6. Explain why it is considered that the relevant individual does not in substance hold an office or employment of profit.
7. Provide answers to the questions listed below to facilitate consideration of the application. Give a brief explanation if a particular question is not pertinent to the relevant individual's situation.

**The Control Test** *(To determine whether the relevant individual is controlled by the relevant person)*

- (a) Who decides the work to be done by the relevant individual? Who prescribes the time schedule?
- (b) Is there a fixed place of work? Who provides the place of work?
- (c) Does the agreement (or related undertaking) between the service company and the relevant person require the relevant individual to perform the work personally?
- (d) Is the relevant individual required to follow the rules and regulations of the relevant person?
- (e) Can the service company or the relevant individual work for others without the approval of the relevant person? Can the service company or the relevant individual refuse the performance of a particular task or job requested by the relevant person?

**Integration Test** *(To determine whether the relevant individual is holding a position within the organisation of the relevant person)*

- (f) Does the relevant individual represent to third parties that the relevant individual is a staff member of the relevant person?
- (g) Does the relevant individual get promotions within the organisation framework of the relevant person?
- (h) Does the relevant individual have subordinates who are the staff of the relevant person?
- (i) Is the relevant individual part and parcel of the organisation of the relevant person?
- (j) Is the relationship a continuing one or does it exist only to procure a result?

**Economic Reality Test** *(To determine whether the income of the relevant individual is in effect derived from the relevant person and whether the capital provided by the relevant individual is at risk)*

- (k) Does the relevant person provide the equipment or assistants while the relevant individual is performing duties?
- (l) Does the relevant individual contribute capital and in what amount? Can the capital be at risk and in what way?
- (m) How is the remuneration received by the service company from the relevant person computed? How is the remuneration received by the relevant individual from the service company computed?
- (n) What is the duration of the agreement between the service company and the relevant person? Will the agreement be renewed and on what basis?

**Mutuality of Obligation Test** *(To determine whether there has been some form of mutual obligation between the relevant individual and the relevant person)*

- (o) Is the relevant person obliged to pay a wage or remuneration?
- (p) Is the relevant individual obligated to provide personal work or skill?
- (q) Is the relevant person under an obligation to provide work?
- (r) Is the relevant individual under an obligation to carry out the work?
- (s) Can either the relevant person or relevant individual terminate the relationship without incurring any liabilities?
- (t) Can either the relevant person or relevant individual apply any sanction to the other in the event that work is refused or not offered?



**Information to be Supplied in respect of  
the Percentage Applied for Computing Profits under Section 21A**

1. Provide a copy of the agreement under which the applicant acquired the intellectual property concerned and submit a statement of the reasons for acquisition of the intellectual property.
2. Provide a copy of the agreement under which the payment is to be made.
3. If the intellectual property is not wholly owned by the applicant, provide details of other owners, their respective interests in the intellectual property and, if an associate is involved, state the nature of the relationship with the applicant.
4. Provide a statement setting out the full ownership history of the intellectual property. If it is not possible to provide a full history of the ownership of the intellectual property, give an explanation. In any event, where a previous owner was, or is, an associate of the applicant, provide details of the nature of the relationship.
5. Provide a declaration made by the applicant and the payer declaring that to the best of the knowledge of the applicant and the payer, no person carrying on a trade, profession or business in Hong Kong has at any time wholly or partly owned the relevant intellectual property.

**Fees for Ruling Applications**

1. The fees payable in respect of an application for a ruling as specified under Part 2 of Schedule 10 are as follows:

(a) Application fee:

- (i) for a ruling on whether profits are to be treated as chargeable to profits tax under section 14 of the Ordinance as arising in or derived from Hong Kong \$45,000
- (ii) for a ruling on whether remuneration is to be treated as chargeable to salaries tax by virtue of section 9A of the Ordinance \$15,000
- (iii) for any other ruling \$15,000

(b) Where the time spent in consideration of the application, including any time spent in consulting with the applicant, exceeds the time specified in paragraph 3 below for the type of rulings to which the ruling belongs, an additional fee calculated on the basis of each hour or part hour spent by:

- (i) a Deputy Commissioner \$2,650
- (ii) an Assistant Commissioner \$2,240
- (iii) any other person appointed under the Ordinance \$1,730

2. In an application for a ruling, reimbursement shall be made in respect of:

- (a) any fees paid by the Commissioner to any person if the Commissioner requires external advice in relation to the ruling; and
- (b) any costs and reasonable disbursements incurred by the Commissioner in relation to the ruling.

3. The time specified for the purposes of paragraph 1(b) above is as follows:

- |     |  |          |
|-----|--|----------|
| (a) | for a ruling on whether profits are to be treated as chargeable to profits tax under section 14 of the Ordinance as arising in or derived from Hong Kong | 23 hours |
| (b) | for a ruling on whether remuneration is to be treated as chargeable to salaries tax by virtue of section 9A of the Ordinance                             | 11 hours |
| (c) | for any other ruling   | 7 hours  |

**Jurisdiction with which Information is Exchanged**

Rulings covered	
<b>1. Rulings related to a preferential regime</b>	<p>(a) The jurisdictions of residence of all related parties (a 25% threshold would apply), with which the applicant enters into a transaction for which a preferential treatment is granted or which gives rise to income from related parties benefiting from a preferential treatment (this rule also applies in a PE context); and</p> <p>(b) The residence jurisdiction of:</p> <ul style="list-style-type: none"> <li>(i) the ultimate parent company; and</li> <li>(ii) the immediate parent company.</li> </ul>
<b>2. Cross-border unilateral APAs and any other cross-border unilateral tax ruling (such as an advance tax ruling) covering transfer pricing or the application of transfer pricing principles</b>	<p>(a) The jurisdictions of residence of all related parties with whom the applicant enters into transactions that are covered by the APA or cross-border unilateral tax ruling; and</p> <p>(b) The residence jurisdiction of:</p> <ul style="list-style-type: none"> <li>(i) the ultimate parent company; and</li> <li>(ii) the immediate parent company.</li> </ul>
<b>3. Cross-border rulings giving a unilateral downward adjustment to the applicant's taxable profits in the jurisdiction giving the ruling</b>	<p>(a) The jurisdictions of residence of all related parties with whom the applicant enters into transactions covered by the ruling.</p> <p>(b) The residence jurisdiction of:</p> <ul style="list-style-type: none"> <li>(i) the ultimate parent company; and</li> <li>(ii) the immediate parent company.</li> </ul>
<b>4. PE rulings</b>	<p>(a) The residence jurisdiction of the head office, or the jurisdiction of the PE, as the case may be; and</p> <p>(b) The residence jurisdiction of:</p> <ul style="list-style-type: none"> <li>(i) the ultimate parent company; and</li> <li>(ii) the immediate parent company.</li> </ul>
<b>5. Related party conduit rulings</b>	<p>(a) The jurisdiction of residence of any related party making payments to the conduit (directly or indirectly);</p> <p>(b) The jurisdiction of residence of the ultimate beneficial owner (which in most cases will be the ultimate parent company) of payments made to the conduit; and</p> <p>(c) To the extent not already covered by (b), the residence jurisdiction of:</p> <ul style="list-style-type: none"> <li>(i) the ultimate parent company; and</li> <li>(ii) the immediate parent company.</li> </ul>