

## **MANDATORY PROVIDENT FUND SCHEMES AUTHORITY**

### **IV.15 Guidelines on Person Exempt under section 4(3) of the Mandatory Provident Fund Schemes Ordinance**

#### **INTRODUCTION**

Section 4(3) of the Mandatory Provident Fund Schemes Ordinance (“the Ordinance”) provides that any person entering Hong Kong for the purpose of being employed or self-employed for a limited period only or who is a member of a provident, pension, retirement or superannuation scheme of a place outside Hong Kong shall be exempt from the provisions of the Ordinance.

2. Section 6H of the Ordinance provides that the Mandatory Provident Fund Schemes Authority (“the Authority”) may issue guidelines for the guidance of approved trustees, service providers, participating employers and their employees, self-employed persons and other persons concerned with the Ordinance.

3. The Authority hereby issues guidelines to set out the circumstances in which persons entering Hong Kong can be exempt from the provisions of the Ordinance.

#### **BASIC PRINCIPLES**

4. Section 203 of the Mandatory Provident Fund Schemes (General) Regulation (“the Regulation”) provides that in order for a person to be exempt under section 4(3) of the Ordinance, the following criteria have to be satisfied by the person:-

- (a) the permission is given to the person to land or remain in Hong Kong for the purposes of employment under the conditions of stay imposed in accordance with section 11 of the Immigration Ordinance (Cap. 115); and
- (b) either -
  - (i) the period during which the person is given permission to remain in Hong Kong does not exceed 12 months; or
  - (ii) the person is a member of a provident, pension, retirement or superannuation scheme established outside Hong Kong.

5. Exemption under section 4(3) of the Ordinance is automatic.

### **For the Purposes of Employment**

6. Only persons (employees or self-employed persons) who need to apply for employment visas in order to work in Hong Kong are eligible for the exemption. In other words, the exemption is only applicable to those persons who do not have the right of abode, or the right to stay or who have not been granted unconditional stay in Hong Kong under the immigration regulations and whose visas are granted for employment purposes.

7. In order to qualify for exemption under section 4(3) of the Ordinance, a person must be given the permission to stay in Hong Kong *for the purposes of employment*. If the permission to stay is given for other purposes, the person will not be exempt. For example, if a person is permitted to stay and work in Hong Kong by virtue of a dependent visa, although the conditions of his / her stay would still be imposed under section 11 of the Immigration Ordinance (Cap. 115), that person would not be exempt from the provisions of the Ordinance as his / her stay is not for the purposes of employment. Similarly, Hong Kong permanent residents

who return to Hong Kong after migrating to other countries or new immigrants entering Hong Kong for settlement purposes would not be exempt from the provisions of the Ordinance since these persons are not required to apply for employment visas to work in Hong Kong.

### **Permission Does Not Exceed 12 Months**

8. A person who has been granted an employment visa for permission to work in Hong Kong for a period of 12 months or less would be exempt from the provisions of the Ordinance. No exemption would be given to a person if the permission granted to him is for a period of more than 12 months. The length of the employment contract for the person to work in Hong Kong or the actual number of days the person has worked in Hong Kong is irrelevant.

### **Renewal of Employment Visa**

9. If the original period of a person's employment visa for permission to work in Hong Kong is not more than 12 months, but the visa is renewed and brings the person's total continuous period of permission for employment in Hong Kong to over 12 months, that person would cease to be exempt from the provisions of the Ordinance from the first day after the 12-month period. Whether the renewal of employment visa of the person relates to a different employment or relates to the extension of the first employment is also irrelevant.

10. In the event an employment visa granted to a person expires and the person re-applies for another employment visa, the counting of the 12-month period will start afresh from the commencement of the new employment visa.

11. For example, a person, who had been granted an employment visa to work in Hong Kong for a period of 12 months, left Hong Kong and applies for

another employment visa to work in Hong Kong a few years later, the 12-month period would be counted afresh from the commencement of the second employment visa although the person may have worked in total for more than 12 months in Hong Kong.

### Cessation of Exemption

12. Sections 120 and 121 of the Regulation provide that if a relevant employee or a self-employed person who, having been exempted from the Ordinance for a limited period because of the operation of section 4(3) of the Ordinance, continues to be employed or self-employed after that period, sections 7, 7A and 7B (for relevant employee) or 7C (for self-employed person) of the Ordinance would apply to the person as if the employment or self-employment had begun immediately after the end of that period. No retrospective contributions are required to be made in respect of the person for the period of exemption.

13. For example, a relevant employee entering Hong Kong for the purposes of employment is granted an employment visa to work in Hong Kong for a period of 12 months from 1 April 2000 to 31 March 2001. If the person renews his employment visa in March 2001 which brings his total continuous period of permission for employment in Hong Kong to over 12 months, the person would cease to be exempt from the provisions of the Ordinance from 1 April 2001. If the employee remains in the same employment on 30 May 2001 (i.e. the 60<sup>th</sup> day of employment from 1 April 2001), his employer is required to enrol him to become a member of a registered scheme and make mandatory contributions for his relevant income from 1 April 2001.

### **Person who is a Member of a Provident, Pension, Retirement or Superannuation Scheme Established Outside Hong Kong**

14. For the purposes of exemption on the ground of overseas retirement scheme membership, the overseas scheme refers to any type of scheme, including a statutory, or social security or government retirement scheme which provides retirement benefits. Moreover, as long as the person is a member of an overseas scheme, whether contributions are made to the overseas scheme during the period the person is in Hong Kong is irrelevant.

### **AUTOMATIC EXEMPTION**

15. Employees or self-employed persons who are eligible to be exempt from the provisions of the Ordinance under section 4(3) of the Ordinance are not required to apply for exemption. The exemption is automatically granted to the person. The Authority advises that employers should act in a prudent and reasonable manner in considering whether an employee should be exempt under section 4(3) of the Ordinance. For example, an employer concerned may wish to obtain written confirmation or other evidence from the relevant employee of the employee's membership of an overseas retirement scheme as evidence for the exemption.

### **DEFINITION OF TERMS**

16. Except where otherwise specified in the Guidelines, the terms common to the Ordinance and the subsidiary legislation of the Ordinance carry the same meanings as defined in the Ordinance and the subsidiary legislation. Reference should be made to the Ordinance and the subsidiary legislation, where necessary.

**WARNING**

17. While the above represents the current view of the Authority, it must be stressed that the Authority is not empowered to definitively interpret the law. The Authority, therefore, urges you to obtain advice from your own professional advisers, particularly your solicitor. In the event that the Authority's advice or opinions are subsequently determined to be wrong by a court of law, the Authority will not be held liable for consequent loss or damage.