

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-

- (a) for a limited period only; or
- (b) 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 provide guidance in relation to 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 13 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 13 Months

8. A person who has been granted an employment visa for permission to work in Hong Kong for a period of 13 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 13 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 13 months, but the visa is renewed and brings the person's total continuous period of permission for employment in Hong Kong to over 13 months, that person would cease to be exempt from the provisions of the Ordinance from the first day after the 13-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 13-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 13-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 13 months in Hong Kong.

Cessation of Exemption

12. Sections 120(1) and 121(1) 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)(a) of the Ordinance, continues to be employed by the same employer or self-employed after that period, 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 May 2001 to 30 April 2002. If the person renews his employment visa in April 2002 which brings his total continuous period of permission for employment in Hong Kong to over 13 months, the person would cease to be exempt from the provisions of the Ordinance from 1 June 2002. If the employee remains in the same employment on 30 July 2002 (i.e. the 60th day of employment from 1 June 2002), 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 June 2002.

14. Similarly, sections 120(2) and 121(2) of the Regulation provide that if a relevant employee or a self-employed person who, having been exempted from the Ordinance because the person is a member of an overseas retirement scheme by virtue of section 4(3)(b) of the Ordinance, continues to be employed by the same employer or self-employed after ceasing to be a member of an overseas retirement scheme, the Ordinance would apply to the person as if the employment or self-employment had begun on the day on which he ceased to be such a member.

15. For example, a relevant employee entering Hong Kong for the purposes of employment is a member of an overseas retirement scheme. If the person ceases to be a member of the overseas retirement scheme on 1 September 2008, the person would cease to be exempt from the provisions of the Ordinance from 1 September 2008. If the employee remains in the same employment on 30 October 2008 (i.e. the 60th day of employment from 1 September 2008), his employer is required to enrol him as a member of a registered scheme and make mandatory contributions relating to his relevant income from 1 September 2008.

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

16. 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.

VOLUNTARY CONTRIBUTIONS

17. The employer may arrange for the employee to join and pay voluntary contributions to a registered scheme notwithstanding that the employee is exempted under section 4(3) of the Ordinance.

18. A self-employed person may join and pay voluntary contributions to a registered scheme notwithstanding that the self-employed person is exempted from section 4(3) of the Ordinance.

AUTOMATIC EXEMPTION

19. 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 in an overseas retirement scheme as evidence of the exemption.

DEFINITION OF TERMS

20. 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

21. 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.