

MANDATORY PROVIDENT FUND SCHEMES AUTHORITY

IV.12 Guidelines on Relevant Income in Respect of a Relevant Employee

INTRODUCTION

The Mandatory Provident Fund Schemes (Amendment) Bill 2007 was passed by the Legislative Council on 9 January 2008. The Mandatory Provident Fund Schemes (Amendment) Ordinance 2008 (“Amendment Ordinance 2008”) was gazetted on 18 January 2008. Part 24 of the Amendment Ordinance 2008, which amends the definition of “relevant income” in section 2 of the Mandatory Provident Fund Schemes Ordinance (“the Ordinance”), shall come into operation on the day appointed by the Secretary for Financial Services and the Treasury (i.e. 1 November 2008) by notice published in the Gazette.

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 and other persons concerned with the Ordinance.

3. The Authority hereby issues guidelines on determination of relevant income of a relevant employee.

EFFECTIVE DATE

4. These revised Guidelines (Version 2 – July 2008) shall become effective on the date of commencement of operation of Part 24 of the Amendment Ordinance 2008 (i.e. 1 November 2008) and are applicable to contribution periods beginning on or after that date of commencement. The

previous version of these Guidelines (July 2000) shall be superseded on that day.

RELEVANT INCOME

Definition

5. Section 2 of the Ordinance sets out the definition of relevant income in respect of a relevant employee.

6. “Relevant income”, in respect of a relevant employee, is defined in section 2 of the Ordinance to mean any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance, expressed in monetary terms, paid or payable by an employer (directly or indirectly) to that relevant employee in consideration of his employment under that contract, but does not include severance payments or long service payments under the Employment Ordinance (Cap. 57).

Basic Principles

7. An item is not a relevant income if it is a severance payment or long service payment.

8. A relevant income item must fulfill all of the following criteria:

- (a) being wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance;
- (b) being expressed in monetary terms;
- (c) being paid or payable by the employer (directly or indirectly) to the relevant employee; and
- (d) being in consideration of the employee’s employment under that contract.

Each of these criteria is discussed below.

9. Relevant income of a relevant employee is to be calculated on a per employment basis. If a relevant employee holds more than one employment, then the employer of each of his employment is required to enrol him in a registered scheme and make mandatory contributions for him in respect of the employment contract concerned.

Criteria set out in Paragraph 8

Wages, Salary, Leave pay, Fee, Commission, Bonus, Gratuity, Perquisite or Allowance

10. Items mentioned above are expected to cover the most common form of emoluments given to a relevant employee. Any loan or advance of money made to a relevant employee should not be included as part of the relevant income of the employee, but if the loan or advance of money is subsequently released in consideration of his employment, such amount should be included as relevant income in the contribution period in which it is released.

11. If a payment is made by an employer to a relevant employee on a significant personal event such as on the employee's marriage, it is generally not included as relevant income since it is not considered as falling within any of the categories of "wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance". For an award determined by a court or tribunal representing "wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance", it should be included as relevant income.

12. If a payment is made to a relevant employee as reimbursement for the expenses which are necessary in the performance of an employment duty incurred by that employee, this payment does not fall within any of "wages,

salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance” and hence should not be included as relevant income of the employee. Examples of such expenses are entertainment expenses, uniform laundry expenses, mobile phone service charge expenses and mileage duty expenses.

Expressed in Monetary Terms

13. Benefits may be provided to a relevant employee either in the form of cash or in the form of goods or services. Non-monetary benefits (such as meals, uniforms, travelling, medical service, life insurance, furniture or education) should not be included as relevant income as they are not expressed in monetary terms.

Paid or Payable

14. Income which is “paid” refers to an actual payment. Income which is “payable” refers to monies that have fallen due for payment at a certain time (even if they are not paid until a later time). Legally, relevant income does not become payable to a relevant employee until the amount of income is ascertainable and the payment becomes due in accordance with the contract of employment as expressly agreed between the employer and the employee or as implied from the circumstances of the employment. For example, contract gratuities are not usually payable to a relevant employee until the employee’s satisfactory completion of the employment contract. Another typical example is that employers of restaurants may pay the service charges collected from customers to their relevant employees in the month following the month in which the service charges are received. This is done because the amount of service charges to be shared amongst the relevant employees for a particular month cannot be ascertained until after the end of that month. The practice between the employers and the employees (payment of service charges in the following

month) becomes an implied term in the employment contract of each relevant employee. As a result, the service charges do not become payable to the employee until the following month after the service charges are received and are not relevant income until that (the following) month.

15. Back payments (e.g. payments relating to an earlier period perhaps arising from a salary adjustment or a time lag between the ascertainment and payment of commissions, tips or bonuses) to a relevant employee are not relevant income, in general, until the contribution period in which the back payment is ascertained and paid.

16. Similarly, any payment made to a relevant employee for a period or periods not specifically identifiable should be included as relevant income of the employee for the contribution period in which it is made.

17. If a relevant employee receives payments after the cessation of employment, such income should generally be regarded as relevant income when it is ascertainable and becomes due, provided that the employee is entitled to receive such income under his contract of employment. Contributions should be made to the scheme of which the employee is/had been a member. The approved trustee of that scheme shall hold the money on trust and contact the member or ex-member for advice, if required.

18. Income should be included as relevant income for mandatory contribution purposes in the earlier of the contribution period in which it is earned and paid or the contribution period in which it is payable but not both. In case relevant income is paid in a contribution period before the contribution period in which the income is earned, the payment is in fact an advance payment

or a loan of future income. The income should be included as relevant income in the contribution period in which it is earned.

By the Employer (directly or indirectly)

19. The payment of income by an employer may sometimes be made to a relevant employee by a third party. In such cases, whether such payment should be included as relevant income of the employee would depend on the relationship of that outsider with the employer. If an outsider is an agent of the employer and pays at the direction and on behalf of the employer, then the payment should be included as part of the relevant income of the employee. For example, remuneration of relevant employees of companies in the same group may be paid by a particular company in that group.

20. A payment received by a relevant employee should be excluded as relevant income if the payment is not made by or for the employer or if the amount, timing or method of payment is not under the employer's control.

21. Sometimes, a payment is due by a relevant employee to the employer (e.g. a payment in lieu of notice made by a relevant employee to the employer) or a deduction may be made from the income payable to a relevant employee. These payments or deductions should not be taken into account in determining the relevant income of the relevant employee. Similarly, the expenses which have been borne by the employer on a relevant employee's behalf (e.g. personal long distance calls telephone charges) should not be deducted from his income when determining his relevant income if the employer offsets the expenses against the salaries of the relevant employee.

To the Employee

22. A payment made by an employer should be included as relevant income if it is made to a relevant employee, an agent of the employee or a third party on behalf of or at the direction of the employee. For example, salaries tax or debt repayment paid by the employer to third parties (e.g. the Official Receiver if the employee was bankrupt) in respect of a relevant employee should be included as relevant income of that employee.

In Consideration of Employment under that Contract

23. Income must be made in consideration of employment in order to be included as relevant income (i.e. it must be a payment for services, past or present, rendered in performing the duties of the employment). Payments made to an employee but not in consideration for the services rendered, such as damages for termination of an employment, should not normally be included as relevant income. Other examples would be medical claims reimbursements or payments that are made by third parties to the employee pursuant to an insurance contract purchased by the employer covering that employee.

Examples

24. The following examples illustrate:
- (a) the items to be included or excluded as relevant income; and
 - (b) the relevant income amount to be included in a contribution period.

Items to be Included or Excluded as Relevant Income

Principle illustrated: Allowances Distinguished from Reimbursements and Other Payments

25. A payment provided in the form of an allowance is included as relevant income. However, if a payment is provided in the form of a

reimbursement or some other types of payments (e.g. an employer may give a payment to an employee to obtain goods or services from a service provider on behalf of the employer) are provided for employment related goods (e.g. office requisites, meals provided or obtained during working hours) or employment related services (e.g. professional organisation membership, self improvement education or medical treatment), these payments should not be included as relevant income. (For other examples see paragraph 12 above.) A further example is where an employer provides meals to an employee during overtime work and gives a payment to the employee for the purchase of a meal directly from a provider on its behalf.

Principle illustrated: Income Expressed in Monetary Terms

Non-monetary Emolument as an Alternative to Monetary Emolument

26. A non-monetary emolument will not become monetary even if it is an alternative to a monetary emolument. For example, in the case where a relevant employee may opt for free meals in the employer's cafeteria as an alternative to a cash allowance, the free meals would still be considered as non-monetary benefits and therefore excluded from the relevant income of the employee.

Marketable Goods or Services

27. The provision of marketable goods or services, such as farm produce or factory goods, as part of a relevant employee's remuneration is an emolument not expressed in monetary terms. The amount of cash realized by the employee from selling the marketable goods should not be included as relevant income of the employee. However, in the case that the employer repurchases these marketable goods from the relevant employee (directly or indirectly), the actual amount received by the employee from the repurchase would normally be

relevant income.

Share Options

28. The provision of share options to a relevant employee is another non-monetary emolument. Even if gains are realized subsequently by the employee from the share options obtained by him through the employment, these gains should not be included as relevant income.

Principle illustrated: Income Paid by the Employer

Tips

29. Tips paid by the customers directly to an employee and retained by the employee without any intervention by the employer should not be included as relevant income. Similarly, money put in tin box or money left by the customers on the table which is shared among the employees without any control by the employer should not be included as relevant income. In cases where tips from customers are collected by the employer and distributed by the employer among the employees, tips received by the employees in this regard should be included as relevant income. In some establishments the employer will include a service charge in the bill and subsequently distribute all or part of the service charge received to the employees. The service charge received by the employees should be regarded as their relevant income.

Principle illustrated: Income in Consideration of Employment

Director's Fees

30. In case a director is a relevant employee of an employer, whether the director's fees received by the director should be included as relevant income or not would depend on whether the director's fees are received from the employment contract or solely from his being an office holder. If a director does

not have an employment relationship with a company, the director's fee received is solely for holding an office and should not be included as his/her relevant income.

Relevant Income Amount to be Included in a Contribution Period

Principle illustrated: Income Paid or Payable in a Contribution Period

Salary Normally Paid in the Month in which It is Earned

31. An employer normally pays salary to a relevant employee on the last day of each month and the salary of the relevant employee is \$20,000 per month. The salary payment for June 2001, which is due on 30 June 2001, is actually paid on 2 July 2001. The salaries for May and July 2001 are paid on schedule, i.e. on 31 May and 31 July 2001 respectively.

32. The relevant income of employee is \$20,000 for each of the three months from May to July 2001. The salary payment for June 2001 becomes payable on 30 June 2001 and therefore should be included as the employee's relevant income in June 2001. The fact that the payment is made in the following month is irrelevant. A time-line chart illustrating the example is set out in the Annex.

Salary Normally Paid in the Month Following the Month in which It is Earned

33. Some relevant employees may receive their monthly salaries after month end. For most of these cases, the employers in fact are liable to pay the salaries by the end of the month in which the income is earned but the payments are deferred for administrative or cash flow purposes. The salary payment should therefore become relevant income in the month when it is earned. For example, an employer may agree with a relevant employee to pay his salary for each month within the period from the end of each month to the 5th of the

following month, and the employer selects to pay on the 5th. If that employee receives \$10,000, \$12,000 and \$14,000 on the 5th of June, July and August 2001 respectively, the relevant income for June 2001 should be \$12,000 (although the employee receives \$10,000 in June 2001) and the mandatory contributions from both the employer and the employee for the contribution period of June 2001 should be \$1,200. Similarly, the mandatory contributions for this employee for the contribution period of July 2001 should be \$1,400 (although the employee receives \$12,000 in July 2001). A time-line chart illustrating the example is set out in the Annex.

34. On the other hand, if the salary payment actually falls due on the 5th of the following month (e.g. the amount cannot be ascertained before month-end), then the salary payment becomes relevant income in the month when it falls due, and contribution should be made accordingly.

Bonus

35. Any bonus payment to an employee (regardless of whether the bonus is in the form of an annual bonus, thirteenth month salary payment or profit sharing bonus) under the terms of employment should generally be included as the employee's relevant income in the contribution period in which the bonus is ascertainable and falls due. For example, if an employee, who is remunerated on a calendar month basis, is entitled to receive his annual bonus on 1 April under the terms of employment, the bonus amount should be included as relevant income in the contribution period of April.

DEFINITION OF TERMS

36. Where a term used in the Guidelines is defined in the Ordinance or the subsidiary legislation then, except where specified in the Guidelines, that

term carries the meaning as defined in the Ordinance or the subsidiary legislation.

WARNING

37. 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.