Inland Revenue Department
Hong Kong

DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES

NO. 15(REVISED)

(A)	**LIMITATION OF LOSS RELIEF**	**(SECTION 22B)**
(B)	**LEASING ARRANGEMENTS**	**(SECTION 39E)**
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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 on 1 May 1986, on 15 November 1990 and in September 1992.

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Commissioner of Inland Revenue

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INTRODUCTION

An important attribute of an equitable tax system is that taxpayers are not able to avoid the imposition of taxation through the use of fictitious, artificial or contrived arrangements. The Government of the Hong Kong Special Administrative Region attempts to secure this attribute by enacting both specific and general anti-avoidance provisions in the Inland Revenue Ordinance ("the Ordinance"). These notes lay down broad statements on the interpretation and practices to be adopted by the Department in respect of a number of specific and general anti-avoidance provisions, namely sections 22B, 39E, 61, 61A and 61B. They also specify the information and documents that are required to be provided in relation to applications for advance ruling concerning leveraged lease transactions, general anti-avoidance provision (section 61A) and changes in shareholding. In addition, these notes set out the Department's minimum required standards in respect of leveraged lease transactions if they are to be acceptable under the Ordinance.

PART A - LIMITATION OF LOSS RELIEF (SECTION 22B)

Limitation of loss relief

2. Section 22B generally applies in respect of a share of a loss incurred under a transaction entered into on or after 15 November 1990. The section limits the amount of loss which a limited partner can set off against his other assessable profits in a year of assessment.

3. Three categories of persons are within the definition of a limited partner. First, a person who is a limited partner in a partnership registered under the Limited Partnerships Ordinance (Cap. 37). Second, a person who, albeit a general partner, is not entitled to or does not take part in the management of the partnership and whose liability (or liability beyond a certain limit) for debts or obligations incurred by the partnership may be met by another person. Third, a person who under the laws of a foreign territory is not entitled to or does not take part in the management of the partnership and who is not liable beyond a certain limit for debts or obligations incurred by the partnership.

4. A limited partner cannot claim a loss set-off in excess of the "relevant sum", which is the amount of his contribution to the partnership as at the end of the relevant year of assessment in which the loss is sustained. If the person ceased to be a partner in the partnership during that year of assessment the appropriate time is the time when he so ceased.

5. The loss set-off of a limited partner is restricted to the lesser of:

(a) his share of the partnership loss; or

(b) the relevant sum.

6. Any loss not set off is carried forward in the partnership and set off against future assessable profits of the partnership. They are not available for set-off against other assessable profits which the limited partner may have in subsequent years.

7. In applying the provisions it is necessary to ascertain the amount of the limited partner's contribution to the partnership. This is the aggregate of the amounts of capital contributed to the partnership and not withdrawn, whether directly or indirectly, or otherwise received back, and any profits or gains which have not been withdrawn from the partnership, whether in money or money's worth. Anything which the limited partner is, or may be, entitled to draw out, receive back, or be reimbursed from another person at any time whilst the partnership carries on the trade, profession or business must be deducted.

PART B - LEASING ARRANGEMENTS (SECTION 39E)

The position in general

8. Section 39E was enacted to limit the opportunities for tax deferral or avoidance through sale and leaseback, offshore equipment leasing and leveraged leasing arrangements. In broad terms section 39E operates to deny to a lessor (owner) initial and annual allowances ("depreciation allowances") in respect of any machinery or plant owned by him where a person holds rights as lessee under a lease of the machinery or plant and:

(a) the machinery or plant was previously owned and used by the lessee or his associate (i.e. a sale and leaseback arrangement), or

(b) the machinery or plant, other than a ship or aircraft or any part thereof, is while the lease is in force:

(i) used wholly or principally outside Hong Kong by a person other than the lessor; or

(ii) the whole or a predominant part of its cost of acquisition or construction was financed directly or indirectly by a non-recourse debt (i.e. a leveraged lease arrangement); or

(c) the machinery or plant is a ship or aircraft or any part thereof and:

(i) the lessee is not an operator of a Hong Kong ship or aircraft; or

(ii) the whole or a predominant part of its cost of acquisition or construction or the part thereof was financed directly or indirectly by a non-recourse debt.

The lease

9. Under section 2 of the Ordinance, lease in relation to any machinery or plant includes:

(a) any arrangement under which a right to use it is granted by the owner to another person; and

(b) any arrangement under which a right to use it, being a right derived directly or indirectly from a right referred to in paragraph (a), is granted by a person to another person,

but does not include a hire-purchase agreement or a conditional sale agreement unless the Commissioner considers that the right under the agreement to purchase or obtain the property in the goods would reasonably be expected not to be exercised.

Party identification

10. In general the reference to "taxpayer" in section 39E connotes the lessor (owner) who has incurred capital expenditure on the provision of the machinery or plant being leased. The party which ultimately uses the machinery or plant is described as the "end-user", who is either:

(a) the lessee, either alone or with others, or

(b) an "associate" of the lessee.

For this purpose the term "associate" has been defined widely in section 39E(5) in order to prevent circumvention of the provision by the interposition of third parties.

Sale and leaseback

11. Denial of depreciation allowances in section 39E(1)(a) is intended to prevent an overall tax benefit being obtained through the sale and leaseback of machinery or plant.

12. Section 39E(1)(a) refers to leased machinery or plant which at any time prior to its acquisition by the lessor was owned and used by the end-user. "Owned" is not defined but is a word of common usage and in practice will be given its ordinary meaning. "Used" is defined to include "held for use" meaning installed ready for use or held in reserve. The term "ready" denotes a condition of functional operability.

13. Section 39E(2) provides an exception to the general rule that no initial or annual allowances will be granted in respect of machinery or plant acquired under a sale and leaseback arrangement. This exception applies in the situation where:

(a) a lessor purchases machinery or plant from an end-user at a price not greater than the price paid to the supplier (being a supplier who is not an end-user) by the end-user; and

(b) no initial or annual allowances have been made to the end-user in respect of that machinery or plant prior to its acquisition by the lessor.

Example 1

Company L is a leasing company whereas Company A is a manufacturing company. Both companies are carrying on business in Hong Kong. Under a sale and leaseback arrangement, Company A after revaluing its old machinery and plant sold them to Company L. Company L in turn leased the machinery and plant back to Company A for rental. Before the arrangement, depreciation allowances on the machinery and plant were made to Company A.

Company L would be denied depreciation allowances in respect of the machinery and plant under section 39E(1)(a) because they were owned and used by Company A prior to acquisition. The exception in section 39E(2) did not apply because depreciation allowances were previously granted to Company A.

Example 2

Company B purchased machinery of $100 million. Before putting them into use and claiming any depreciation allowances, Company B sold to and leased back from Company L the machinery. Under the sale and leaseback arrangement, Company B obtained cash proceeds of $100 million which was the price he paid the supplier and was required to pay a rental of $11 million for a consecutive period of ten years. Assuming each instalment contained an effective finance charge of $1 million whereas the market interest should have been $2 million, Company B in effect transferred the depreciation allowances to Company L in return for a lower rate of interest. Company B after receiving the cash of $100 million applied the money for other commercial transactions to produce chargeable profits.

The conditions in section 39E(2) are satisfied. Company L would not be denied depreciation allowances. Company B in effect made use of the sale and leaseback arrangement to obtain cheaper finance for its business use. Company L, the lessor, had in effect committed capital into the machinery, incurring genuine commercial risk. The whole arrangement is a normal commercial transaction.

14. Because entitlement to these allowances is mandatory upon acquisition of machinery or plant, in order for the exception in paragraph 13 to apply it will be necessary for the end-user to submit a disclaimer to the Commissioner in writing within 3 months of the date on which the machinery or plant was acquired, or within such further period as the Commissioner may permit. Generally, the Department will not entertain requests for an extension of the 3 months disclaimer period. A notice of disclaimer should be accompanied by the following information:

(a) a description of the relevant asset;

(b) the name and address of the supplier;

(c) the date of purchase from and price paid to the supplier;

(d) the date of sale to and price paid by the lessor; and

(e) the name and address of the lessor.

The above information must be supported by copies of purchase and sale agreements or invoices and the lease agreement.

15. After submitting notice of a disclaimer, the end-user might decide to retain the right to claim depreciation allowances and seek to cancel the sale and leaseback arrangement. As a concession, the Department is prepared to allow the withdrawal of a disclaimer, provided that the relevant assessment has not yet become final and conclusive.

Used wholly or principally outside Hong Kong

16. The "used wholly or principally outside Hong Kong" condition in section 39E(1)(b)(i) aims to encourage the generation of economic benefits in Hong Kong by the use of the machinery or plant in Hong Kong.

17. The question whether a particular item of machinery or plant is used "wholly or principally" outside Hong Kong is a question of fact to be decided having regard to the circumstances of the case. The following matters are, however, likely to be relevant in determining the issue:

(a) the place where the asset is physically located and put to use or held for use;

(b) the nature of the asset;

(c) the nature of the end-user's business;

(d) the locality in which the asset is, under the terms of the lease, designated for use throughout the period of the lease.

Example 3

Company L is a leasing company carrying on business in Hong Kong. Company C is an enterprise carrying on business in Mainland China. Company L leased its machinery to Company C for rental.

Company L would be denied depreciation allowances in respect of the machinery under section 39E(1)(b)(i) because the machinery was used wholly outside Hong Kong. It should be noted that no deduction would be given under section 16G because the machinery under a lease is an "excluded fixed asset" as defined in section 16G(6). As a practice, the rental income accrued to Company L from leasing the machinery would be regarded as non-taxable.

18. No doubt cases will arise where leased machinery or plant will be used, either in one year, or, over a period of years, both within and outside Hong Kong. In these cases the Department will look at each leased asset and each year of assessment separately. If in a particular year the machinery or plant is used wholly or principally in Hong Kong then the prescribed depreciation allowances will be granted. On the other hand, if in a particular year the machinery or plant is not used wholly or principally in Hong Kong then no allowances will be granted. For the purposes of determining the written down value of the item to be carried forward, the notional amount of allowances which would have been granted had the item been used in Hong

Kong will be deducted from the written down value brought forward. Any balancing adjustments on the sale of the item will be calculated on a pro-rata basis.

19. Under a contract processing arrangement with a Mainland Chinese enterprise, a Hong Kong company is often required to provide machinery or plant for the use of the Mainland Chinese enterprise. Such arrangement is a lease as defined in section 2 (see paragraph 9) and therefore section 39E needs to be considered. Even though the machinery or plant is not used wholly or principally in Hong Kong, the Department as a concession is prepared to allow 50 per cent of the depreciation allowances on the leased machinery or plant on the condition that the profits from manufacturing activities of the Hong Kong company are assessed on a 50:50 basis. The concession however will not apply where the Hong Kong company has ceased to be owner of the machinery or plant. For example, the Hong Kong company will be denied depreciation allowances on the machinery or plant which are injected as its share of equity of a "foreign investment enterprise" ("FIE") in the Mainland, as such machinery or plant is owned by the FIE.

Example 4

Company D is carrying on a manufacturing business in Hong Kong. Under a contract processing arrangement with a Mainland Chinese enterprise, Company D is required to provide machinery and plant to the Mainland Chinese enterprise for the latter's processing work. Company D did not charge the Mainland Chinese enterprise any rental for the use of the machinery and plant.

Although no rental is charged, the arrangement is still a lease as defined in section 2. As the machinery or plant is under a lease, it is an "excluded fixed asset" under section 16G(6) and falls outside the purview of section 16G. Hence, no deduction under that section would be given. Strictly, Company D should be denied depreciation allowances in respect of the machinery and plant leased to the Mainland Chinese enterprise under section 39E(1)(b)(i). However, if the profits from the manufacturing activities of Company D are assessed on a 50:50 basis, the Department would be prepared to grant 50 per cent of the depreciation allowances as a concession.

Example 5

Company G is carrying on business in Hong Kong and is the holding company of Company H. Company H is a wholly owned foreign enterprise set up as a separate legal person in the Mainland. Company G purchased machinery and plant and injected them into Company H as its capital contribution in specie.

As a result of the capital contribution, Company G has ceased to be owner of the machinery and plant. In effect, Company G has sold the machinery and plant in return for its equity interest in Company H. The question of a lease does not arise. Thus Company G would not be entitled to any depreciation allowances.

Ships or aircraft

20. Where the asset is a leased ship or aircraft the law prescribes a different test for deciding whether initial or annual allowances shall be granted to the taxpayer (lessor) – see section 39E(1)(c). In such cases the question is not whether the ship or aircraft is used wholly or principally outside Hong Kong but whether the person holding rights as lessee (the end-user) is an operator of a Hong Kong ship or aircraft. An operator of a Hong Kong ship or aircraft is a person who carries on business as an operator of ships or aircraft being a business controlled and managed in Hong Kong and:

(a) in the case of an aircraft, holds an air operator's certificate issued under the Air Navigation (Hong Kong) Order 1995 (Cap. 448 sub. leg. C); or

(b) in the case of a ship, is responsible for meeting all, or a substantial portion of the operating expenses of the ship and the ship operates mainly in the waters of Hong Kong or between the waters of Hong Kong and waters within the river trade limits.

Leveraged leases

21. A leveraged lease arrangement, as it has become known to this Department, is typically one in which a partnership of companies acquires machinery or plant (generally ships or aircraft) which it leases for a term of

years to a lessee and where, by reason of the "leverage" obtained from the borrowing of a substantial non-recourse loan, the members of the partnership are effectively at risk for no more than a relatively small part of the funds used to acquire the asset. The lenders' security for the substantial amounts lent to acquire the asset is limited to the asset itself and/or by way of a charge over the lease and the related lease payments.

22. So far as it relates to leveraged leases, section 39E denies initial and annual allowances to a taxpayer (lessor) where the whole or a predominant part of the cost of machinery or plant was financed directly or indirectly by a non-recourse debt.

23. The term "non-recourse debt" is defined extensively in section 39E(5) but in broad terms means, as mentioned above, a method of financing where the borrower has no absolute liability in respect of the borrowing and in the event of default in repayment the rights of the lender are restricted to the asset itself or the income generated by it. For the purposes of this provision the Department will generally accept that where a taxpayer (lessor) actually contributes or is fully at risk for at least **51** per cent of the cost of the asset then the financing is not predominantly by a non-recourse debt and in such cases section 39E(1) will have no application.

PART C - GENERAL ANTI-AVOIDANCE PROVSION (SECTION 61)

The position in general

24. Section 61 empowers the Assessor to disregard certain transactions or dispositions and assess the taxpayer accordingly. This section is not a charging section, but serves to protect the liability for tax established under other sections of the Ordinance. This proposition is consistent with the dicta of Richardson J in *Challenge Corporation Limited [1986] 8 NZTC 5,001 [CA]* on the status of New Zealand's general anti-avoidance provision *(at page 5,019)*:

> "Section [the relevant general anti-avoidance provision] is not an independent charging provision. It does not itself create a liability for income tax; its function is to protect the liability for income tax established under other provisions of the legislation."

25. The essential factors for section 61 to apply are:

(a) there must be a transaction;

(b) the transaction has the effect of reducing the tax payable by the taxpayer concerned; and

(c) the transaction is artificial or fictitious, or that any disposition is not in fact given effect to.

The "transaction"

26. The scope of section 61 was considered in the Hong Kong tax cases *Rico Internationale Limited v. CIR [1965] 1 HKTC 229* and *Kum Hing Land Investment Company Limited v. CIR [1967] 1 HKTC 301*. Both cases concerned payment of commissions which were held to be artificial and fictitious as no real service was rendered. In the *Kum Hing* case, the Court held that the word "transaction" in section 61 must include the whole of any particular transaction, and not merely part of it. Therefore, "transaction" in that case was not merely the payment and receipt of the commission but included the whole transaction from the inception of the idea to pay commission to the final completion of the deal. The significance of this ruling is that although a part of the transaction (i.e. payment and receipt of commission) may be real, the transaction as a whole may be held as both artificial and fictitious. When the Assessor is considering whether or not a transaction as a whole is artificial or fictitious, he would take into consideration all the surrounding circumstances to form an opinion.

The meaning of artificial or fictitious

27. The words "artificial" and "fictitious" though not defined in the Ordinance have been considered in *CIR v. Douglas Henry Howe, 1 HKTC 936*. In the decision, Cons J followed the Privy Council decision in *Seramco Limited Superannuation Fund Trustee v. ITC [1977] AC 287* and adopted the following interpretations:

(a) "artificial" is an adjective in general use in the English language, capable of bearing a variety of meanings according to the context; and

(b) a "fictitious" transaction is one which those who are ostensibly the parties to it never intended should be carried out.

28. In *Cheung Wah Keung v. CIR, 5 HKTC 698*, Woo JA at the Court of Appeal held that whether a transaction which is commercially unrealistic must necessarily be regarded as being "artificial" depends on the circumstances of each particular case and that commercial realism can be one of the considerations for deciding artificiality. To ascertain whether a transaction is artificial, it is thus necessary to scrutinise the terms of the particular transaction to be impugned and the circumstances in which it was made and carried out.

29. When the transaction is disregarded pursuant to section 61, the Assessor must look at the reality of the payment and the relationship of parties to the transaction and then proceed to raise an assessment on the person concerned.

PART D - GENERAL ANTI-AVOIDANCE PROVISION (SECTION 61A)

The position in general

30. The general anti-avoidance provision, section 61A, was introduced in 1986 to strike down blatant tax avoidance arrangements. While section 61A gives the Department a degree of discretion to disregard or reconstruct a transaction, it, like section 61 (see paragraph 24), is not a charging section; and a balance will be struck between the interests of the Department and taxpayers. The practice to be followed by this Department in applying section 61A will be in line with the stated policy which laid behind the introduction of this provision, namely, that it should strike down blatant or contrived tax avoidance arrangements but should not cast unnecessary inhibitions on normal commercial transactions by which taxpayers legitimately take advantage of opportunities available for the arrangement of their affairs.

31. In brief, the general anti-avoidance provision, section 61A, applies to any transaction entered into for the sole or dominant purpose of enabling a person to obtain a tax benefit. Where it applies section 61A provides for an assessment to be made as if the transaction or any part thereof had not been

entered into or carried out or in such other manner as is considered necessary to counteract the tax benefit which would otherwise be obtained.

32. Section 61A is modelled on the Australian general anti-avoidance provision (Part IVA of ITAA 1936). The Australian authorities on this topic are highly pertinent to the interpretation of this section.

Section 61A - the basic questions

33. In order that section 61A may apply to a taxpayer there are three prerequisites:

(a) there must be a transaction as defined;

(b) the taxpayer must obtain a tax benefit as defined; and

(c) having regard to seven specific matters, the transaction must be entered into or carried out for the sole or dominant purpose of enabling the taxpayer to obtain a tax benefit.

If the three prerequisites are satisfied, section 61A applies and the Assistant Commissioner shall cancel the tax benefit.

Existence of a "transaction"

34. "Transaction" is defined to include a transaction, operation or scheme whether or not such transaction, operation or scheme is or is intended to be enforceable by legal proceedings. The term will therefore cover situations involving single, multiple or composite transactions. In *Yick Fung Estates Limited v. CIR, 5 HKTC 52*, Rogers JA at the Court of Appeal ruled that a transaction can be carried out by a person alone and need not for two parties to be involved. In other words, a transaction can be carried out by a sole protagonist and includes a unilateral scheme, plan etc.

35. For section 61A to apply, the identified transaction, operation or scheme must fall within the broad definition of "transaction". In *FCT v. Spotless Services Limited, 32 ATR 309*, Cooper J at the Australian Federal Court said *(at page 338)*:

> "the parties to the scheme, insofar as they are known, must be identified and the terms or content of any agreement, arrangement, understanding, promise or undertaking and the steps or stages of any course of action or proposal, insofar as they are relevant, be identified. It is not sufficient to identify a scheme by reference to a hoped for fiscal outcome."

36. In *FCT v. Peabody, 28 ATR 344*, the Australian High Court ruled that if a wider scheme has been identified, the Commissioner may also rely on a narrow scheme (sub-scheme) as meeting Part IVA. In other words, if part of a wider transaction may be identified as a transaction in itself, the Commissioner is not precluded from relying upon it for the purposes of section 61A.

Was a tax benefit obtained

37. "Tax benefit" is defined in section 61A(3) to mean "the avoidance or postponement of the liability to pay tax or the reduction in the amount thereof". The Departmental view is that the definition contemplates the following situations:

(a) The avoidance of liability by getting out of the way of or escaping from or preventing an anticipated liability to tax in respect of income which has "accrued" to the taxpayer.

(b) The postponing of liability for tax by shifting the incidence of tax on an amount or stream of income to a later year or years.

(c) The reduction in the amount of tax by altering the quantum of assessable income to a level lower than it would have been or might reasonably be expected to have been but for the transaction.

38. In *Cheung Wah Keung v. CIR,* Woo JA rejected the argument that section 61A(3) requires some pre-existing liability to tax which is being avoided, or some pre-existing circumstances which would give rise to, or might be expected to give rise to, a liability to pay tax.

What was the sole or dominant purpose

39. Section 61A provides that in deciding the sole or dominant purpose of the person who entered into or carried out the transaction only seven specified matters are to be taken into account. These matters are:

(a) ***The manner in which the transaction was entered into or carried out***

In considering the manner, the relevant factors to take into account include:

(i) the way in which the particular transaction was structured;

(ii) the background of the transaction, the time at which the transaction was entered into and the alternative purposes which could objectively be attributed to the taxpayer in entering into the transaction;

(iii) whether the transaction which the taxpayer entered into was promoted by a professional adviser; and

(iv) the way in which the taxpayer operated before and after the transaction and the relevant commercial practices.

(b) ***The form and substance of the transaction***

Form refers to the legal rights and obligations created by a transaction; it is the legal effect of the transaction. Substance on the other hand means the practical or commercial end result of a transaction as opposed to its legal effect. In considering this matter it is necessary to compare the legal effect of the transaction with its commercial end result.

(c) ***The result in relation to the operation of this Ordinance that, but for this section, would have been achieved by the transaction***

The relevant result is that which would arise out of the normal operation of the provisions within the Ordinance excluding the possible application of section 61A. Equally relevant is the result which would have arisen had the transaction not been entered into. It involves a comparison between the two results.

(d) ***Any change in the financial position of the relevant person that has resulted, will result, or may reasonably be expected to result, from the transaction***

This matter compares the financial position of the relevant person after the transaction has been entered into with that which would have existed had the transaction not been entered into.

(e) ***Any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant person, being a change that has resulted, will result or may reasonably be expected to result from the transaction***

This matter focuses on the change in the financial position of any person connected with the transaction, irrespective of whether the person has any family or business connection with the taxpayer.

(f) ***Whether the transaction has created rights and obligations which would not normally be created between persons dealing with each other at arm's length under a transaction of the kind in question***

This test looks at the rights or obligations created by the transaction in contrast to (a) above which looks at the method or manner in which it was entered into or carried out. The actual rights and obligations created are to be compared with those that would normally be created under a similar transaction carried out at arm's length. In making this comparison due regard must, of course, be given to the surrounding circumstances. The presence of unusual features arising from the transaction need to be carefully considered.

(g) ***The participation in the transaction of a corporation resident or carrying on business outside Hong Kong***

This test requires, in particular, an examination of a special purpose vehicle to the transaction that was incorporated outside Hong Kong.

40. It is necessary for the Assistant Commissioner to consider each of the seven matters referred to in paragraphs (a) to (g) of section 61A(1). However, not all of the matters will be equally relevant in every case. Before a conclusion on purpose can be reached, the Assistant Commissioner must weigh carefully the seven matters and have regard to all the relevant evidence. Regard must be had to all the matters and not merely (c) which is the tax consequence criterion. The matters listed are of varying kinds and obviously do not have equal weight, for example, because there are seven matters it does not mean that a 14 per cent mark can be attached to each of them. In this regard, (a) and (b), the manner in which the transaction was entered into and form and substance are in the nature of items that form a background picture to the transaction and help to set the scene. The next three matters, (c) to (e), involve monetary questions: the tax saving for the taxpayer, how much he is otherwise in or out of pocket, and the same for connected persons. In other words, these three matters direct attention to the tax and non-tax economic realities of the transaction in question and call for a contrast between them. Finally there are matters (f) and (g) which, where they are present, can be relevant as indicators of a purpose of obtaining a tax benefit; they are not, however, conclusive.

41. Section 61A requires that having regard to the seven listed matters a decision must be made as to whether it would be concluded that the transaction was entered into for the sole or dominant purpose of obtaining the tax benefit in question. In arriving at the decision, the strength or otherwise of the various resulting conclusions in respect of the seven matters must be looked at globally. The conclusion in section 61A(1) is an objective one which a reasonable person would draw on the basis of the seven matters viewed in their proper context. It is also the Departmental view that because the words of section 61A are "would be concluded", and not "could be concluded" or "might reasonably be concluded", the provision will only be applied in cases where the sole or dominant tax purpose is clearly evident.

42. The presence of a commercial objective in a particular transaction does not mean that section 61A will necessarily have no application to that transaction. In *FCT v. Spotless Services Limited, 34 ATR 183*, the Australian High Court observed that a person may enter into or carry out a transaction for the dominant purpose of enabling the relevant person to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business.

43. Although the conclusion under section 61A(1) is an objective one, it does not mean that the intention of the person or their advisers can never be relevant. In *FCT v. Consolidated Press Holdings Ltd, 47 ATR 229*, the Australian High Court ruled that there can be situations whereby attributing the purpose of a professional adviser to one or more persons to the transaction is both possible and appropriate. It is clear that subjective purpose is not one of the seven listed matters. However, evidence of the subjective purpose, in some cases, may be relevant to one or more of the seven matters.

44. Obviously no problems will arise in cases where the sole purpose of a transaction was to obtain a tax benefit or even where there were only two purposes. However, in cases where there are more than two purposes it may be more difficult to determine whether the "dominant" purpose was the obtaining of a tax benefit. At the same time, the words "dominant purpose" are well known in the field of taxation law and their interpretation should pose few problems. In *FCT v. Spotless Services Limited*, the Australian High Court observed that, in its ordinary meaning, "dominant" indicates that purpose which was the "ruling, prevailing, or most influential purpose". In other

words, it is not a case of comparing individual purposes but of dividing those purposes into "tax purposes" on the one hand and "non-tax purposes" on the other. Before section 61A can apply those tax purposes must outweigh the non-tax purposes.

The mechanics of an assessment

45. Where the three prerequisites mentioned in paragraph 33 are satisfied, then section 61A(2) applies to enable an assessment to be made by an Assistant Commissioner by either of the following methods:

(a) "as if the transaction or any part thereof had not been entered into or carried out" – this means that the assessment is made on the basis that the transaction or part of it did not take place and the tax liability of the taxpayer is arrived at by disregarding all the consequences of the transaction or part thereof.

(b) "in such manner as the assistant commissioner considers appropriate to counteract the tax benefit which would otherwise be obtained" – here the Assistant Commissioner will form an opinion as to what the situation would have been had the transaction been carried out at "arm's length" or in a normal manner. In other words, he will make an assessment on the basis that the transaction did take place but was entered into or carried out in the manner normally employed in carrying out such a transaction by parties at arm's length.

46. Section 61A has an overriding effect and the Assistant Commissioner is entitled to counteract the tax benefit in an appropriate manner. In applying section 61A(2) the Assistant Commissioner will adopt the following broad principles:

(a) The ultimate assessment to be made must be within the scope of the Ordinance. For example, an amount of income on which it is sought to charge the taxpayer must be an amount of income received or accrued (albeit by a person other than the taxpayer now to be charged) and properly chargeable on general principles.

(b) Where a taxpayer could have achieved a particular financial result in two different ways, one of which would have attracted tax and the other not, there being no abnormal features in either event, the Assistant Commissioner will not contend that an assessment should be made on the basis that the taxpayer followed a method which would have attracted tax. In other words, the Department accepts that a taxpayer is not obliged to maximise his tax liability.

(c) A manner appropriate to counteract a tax benefit may involve:

(i) Making adjustments to assessments for years subsequent to the year of assessment in which the transaction was entered into where the tax benefit would otherwise have been obtained in those subsequent years;

(ii) Making corresponding adjustments to assessments of other persons affected by the transaction. For example, if a particular amount of income received by one person is to be assessed to another person pursuant to section 61A then that income will be deleted from the assessment of the original recipient.

47. Where the situation demands, the Assistant Commissioner will seek to assess, and to issue assessments to, more than one person in respect of the same tax benefit. In *Nina T. H. Wang v. CIR, 3 HKTC 483*, Mayo J recognised at the Court of Appeal that there was no inherent objection to the Commissioner entertaining alternative assessments. Although it is possible for multiple concurrent assessments in respect of the same benefit to co-exist, the Assistant Commissioner will exercise the power under section 61A(2) to ensure that tax will ultimately be collected from the relevant person truly liable.

Application of the two general anti-avoidance provisions

48. Sections 61 and 61A give similar powers to disregard the transaction in question. In *Cheung Wah Keung v. CIR,* the Court of Appeal held that the application of the two sections, both aiming at tax-avoidance transactions, is

not mutually exclusive. The decision of the Court of Appeal in the *Yick Fung* case also makes it clear that the "choice principle" has no application in relation to section 61A, namely a taxpayer is not entitled to "choose" to enter into a transaction which has a sole or dominant purpose of enabling him to obtain a tax benefit.

49. Where a tax avoidance arrangement has been made to exploit a specific relief or exemption afforded by a particular section of the Ordinance in such a way that is not intended by the legislature, the general anti-avoidance provisions of sections 61 and 61A can be applied to deny the favourable tax consequences even if the taxpayer has complied literally with the requirements of the particular section. The case in point is *CIR v. Challenge Corporation Limited [1986] STC 548*, which has decided that a general anti-avoidance provision is of general application and can apply to specific relief/exemption provisions. The *Challenge* case has also decided that a general anti-avoidance provision can apply notwithstanding the existence of specific anti-avoidance provisions. It is relevant to note that in *Yick Fung*, Rogers JA said *(at page 119)* "the wording of section 61A "... that transaction has, or would have had but for this section, the effect ..." makes quite clear that section 61A has an overriding effect".

PART E - LOSS COMPANIES (SECTION 61B)

The position in general

50. The Ordinance has always contained provisions which enable companies, which in a year of assessment have sustained a loss in any trade, profession or business, to carry forward the amount of that loss for set-off against profits in subsequent years of assessment. The Inland Revenue (Amendment) Ordinance 1986 introduced provisions which seek to give effect to a policy of restricting the trafficking in loss companies for the purpose of tax avoidance. In general terms, section 61B is aimed at the situation where companies with accumulated tax losses are sold for their losses to the proprietors of businesses which are trading profitably. Once ownership of the loss company has changed hands the profitable business is introduced into the company and the losses brought forward are set off against profits derived. Section 61B will restrict this avoidance practice by allowing the Commissioner

to refuse to set off losses brought forward where he is satisfied that the sole or dominant purpose of a change in shareholding was the utilisation of those losses to obtain a tax benefit.

Matters for consideration

51. For the purpose of section 61B the Department would consider a change of shareholding as having been effected whenever shares are transferred from one person to another person. In other words, a change of shareholding takes place when shares are transferred to a person who was not previously a shareholder and also when shares are transferred from one existing shareholder, who may or may not continue to be a shareholder, to another existing shareholder.

52. The second element to the application of section 61B is the Commissioner's satisfaction that as a direct or indirect result of the change in shareholding, "profits" have been received by or accrued to the company during any year of assessment. In order to decide whether profits have been received as a result of the change of shareholding the flow of profits before and after the change will be examined, having particular regard to matters such as:

(a) the nature and conduct of the company's business,

(b) income and expenditure patterns,

(c) management and control,

(d) the background of the party to whom shares were transferred.

53. It should also be noted that section 61B refers to profits received during "any" year of assessment. Consequently, section 61B may apply even where profits are introduced in any year subsequent to the change of shareholding.

54. The final matter which must be considered is whether the sole or dominant purpose of the change in shareholding was the utilisation of the losses to avoid or reduce the tax liability of the company or any other person. In other tax jurisdictions comparable legislation uses as indicators of purpose factors such as, continuity of business and level of ownership and major

changes in the nature and conduct of business. These matters will obviously have some relevance in Hong Kong. At the same time it is recognised that because of the more dynamic economic environment existing in Hong Kong other factors may constitute more important indicators of purpose. Furthermore it has never been the intention that section 61B should create unnecessary inhibitions in the case of genuine commercial company acquisitions or group reconstruction which involve changes in shareholding. It is therefore not likely that the Department would attempt to apply section 61B in these situations. Finally, in applying section 61B the Department will regard the phrase "dominant purpose" as having the same meaning as that explained in paragraph 44 in relation to section 61A. In other words the dominant purpose is the purpose which outweighs all other purposes combined.

PART F - RAMSAY PRINCIPLE

55. The Ramsay principle was developed by the courts in the United Kingdom to strike out intermediate steps in a series of transactions or a composite transaction, which were entered into for no commercial purpose, so as to subject the end result of the transaction to scrutiny for tax purposes.

56. This principle is regarded as an approach in statutory interpretation, a purposive interpretation, in a number of English and Hong Kong cases such as *Collector of Stamp Revenue v. Arrowtown Assets Ltd 6 HKTC 273*. The principle as explained by Ribeiro PJ in *Arrowtown* was adopted by the House of Lords in *Barclays Mercantile Business Finance Limited v. Mawson [2005] STC 1 (at page 13)*:

> "[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

57. In applying the provisions laid down in the Ordinance, the Commissioner is entitled to adopt this purposive interpretation of the statutory provisions to the facts viewed realistically. Being an interpretation approach, the Ramsay principle can co-exist and operate alongside the general

anti-avoidance provisions. As was stated by Lord Cooke *(at page 920)* in *IRC v. McGuckian [1997] STC 908*, the Ramsay approach to the interpretation of taxing Acts did not depend on general anti-avoidance provisions such as were found in Australasia; rather, it was antecedent to or collateral with them. Under this principle, the Commissioner in appropriate cases is thus entitled to look at the substance of the transactions and not just their legal forms. Sir Anthony Mason also expounded the Ramsay principle in *Shiu Wing Ltd. v. CED 5 HKTC 338 (at page 411)*. He said the principle was both a rule of statutory construction applicable to revenue statutes and an approach to the analysis of facts. Where there was a single pre-ordained, composite transaction intended to be carried out in its entirety, the Commissioner would not ignore the composite character and apply the legislation to the individual constituent steps separately. If the purpose of intermediate steps in the composite transaction was fiscal, the Commissioner would disregard them and bring the composite transaction within a charging provision.

PART G - PENALTY ON TAX AVOIDANCE CASES

58. Penalties are provided in the Ordinance to ensure compliance by taxpayers with the various statutory requirements. In the present context, non-compliance includes, among other things, the submission of incorrect returns and giving incorrect statement or information. Any wrongdoing in these respects committed "wilfully with intent to evade or to assist any person to evade tax" (section 82) or "without reasonable excuse" (sections 80 and 82A) may attract penalty by way of prosecution or imposition of pecuniary penalty.

59. Penalty action is therefore not confined to evasion cases, but may also apply to tax avoidance cases to which the general anti-avoidance provisions have been successfully applied, provided that the conditions laid down in the relevant penalty provision have been satisfied. Thus, the mere labeling of a scheme as a tax avoidance scheme may not exonerate the taxpayer from penalty.

60. Generally speaking, tax evasion attracts heavier penalty than tax avoidance. However, the dividing line between the two is very thin. As a simple practical test to distinguish the two: if a scheme whose possibility of success is entirely dependent upon the Department never finding out the true

facts (i.e. facts have not been disclosed in the return, accounts or any statement submitted to the Department), it is likely to be a scheme of tax evasion rather than tax avoidance.

61. On the penalty aspect of tax avoidance cases, the Department takes the following views:

(a) Whether a certain tax avoidance scheme may be regarded as a tax evasion arrangement and be penalised as such depends on the availability of evidence to prove that the tax avoidance scheme was a sham set up for the purposes of tax evasion. No single factor may conclusively lead to such a conclusion. The wrongdoer would be penalised if there is sufficient admissible evidence to prove that the taxpayer and/or his tax advisor has committed an offence under section 80(2) or section 82 of the Ordinance;

(b) The provisions in section 61/61A and section 80(2)/82A are not mutually exclusive. As such, penalty actions can be invoked under section 80(2) or section 82A against the taxpayer concerned regardless of whether section 61 or section 61A has been applied to bring the profits/income in question into the tax net.

62. In considering whether any penalty action should be invoked, the facts and the circumstances of the particular case will be carefully examined. In general, the Department will impose penalty on the taxpayers if there were elements of dishonesty or fraudulence involving the use of artificial or fictitious devices, or where the transactions (e.g. expenditure claims) were false or unsubstantiated.

PART H - GUIDELINES ON LEASE FINANCING

Leases in general

63. Following the enactment of section 39E with its application to sale and leaseback and certain leveraged lease situations it is considered appropriate

to lay down what the Department considers are basic requirements for all leases. In this regard in recent years it has become clear that some so-called leases are in fact purchase agreements. The position has now been reached where it will be necessary for Assessors to carefully consider whether payments made by a "lessee" are lease rentals or whether they are, in substance, consideration for the sale of the goods purported to be leased. In the latter case, of course, the payments would be outgoings of a capital nature which are not deductible for profits tax purposes although they may qualify for initial and annual allowances.

64. In line with tax administrations in other parts of the world, factors to be examined by this Department to determine the question will include:

(a) the existence of any agreement, express or implied, and whether in the lease agreement or in subsidiary documents or correspondence, under which the property in the goods would pass from the lessor to the lessee, and

(b) the degree of relativity between the "residual value", by which the amount of monthly lease rentals is usually determined, and the reasonable commercial value of the goods at the expiry date of the lease.

65. So far as factor (a) is concerned, an agreement will generally be regarded as a purchase agreement if the lessee has a right or option to purchase the goods. If in the opinion of the Commissioner, such right or option would reasonably be expected not to be exercised, then such an agreement, notwithstanding its form, is a lease as defined. An agreement will be accepted as a lease, as distinct from a purchase agreement, if the lessee does not, either during the term of the lease or at its end, have an obligation, right or option to purchase the goods. It will correspondingly be unacceptable if the lessor has a right or option to require the lessee to purchase. An agreement is unlikely to be accepted as a lease if an associate of the lessee is given an obligation, right or option to purchase or the lessor has a right or option to require an associate of the lessee to purchase on the basis that such an arrangement is made to circumvent the law. Any right in the lessee to nominate a third party purchaser will be examined to ensure that it does not amount to an arrangement for purchase. An agreement for the lessee to have obligations, rights or

options to lease the goods for extended further periods, and the terms of any such extension will also be examined to determine whether the entire arrangement really amounts to a purchase.

66. As to residual values, it is the usual commercial practice for the amount of rent to be calculated, in so far as it is designed to cover the cost of the goods, on the basis of the difference between the cost of the goods and their assessed residual value at the end of the lease. Accordingly, the larger the residual value, the smaller would be the lease rentals. The residual value should represent a fair estimate of the market value of the goods at expiration of the lease.

Leveraged leases

67. In situations where the tax deferral benefits to a leveraged lessor represent a substantial part of the lessor's effective return on its own (non-leveraged) investment there may be a question whether section 61A would apply, i.e. whether it would be concluded that a lessor's participation had attaching to it a sole or dominant purpose of obtaining a tax benefit. It is therefore considered appropriate to set out the Department's views on the minimum standards with which leveraged lease transactions must comply if they are to be acceptable under the Ordinance. In this regard it is expected that future leveraged lease transactions should observe the following requirements.

Period of the lease

68. Generally, the lease period should not exceed 10 years. In appropriate cases the Department will consider longer periods where it can be established that the leased machinery or plant has an economic life greater than 10 years.

Rental rebate

69. Lease transactions which provide for a rental rebate to be paid to the lessee upon expiry or termination of the lease will not be acceptable.

Number of partners

70. Transactions involving more than 3 partners or where any partner's share in the profits/losses of the partnership is less than 30% will not be acceptable.

Partnership accounting period

71. Where partners in a leveraged lease partnership have common accounting periods, the return of income of the partnership should be furnished for the same accounting period. Where the partners do not share common accounting periods the Department will, as a general proposition, accept a partnership accounting period which corresponds to that of the majority partner(s).

Losses

72. The transaction should result in assessable profits to the partnership, before the set-off of losses, after the first three years' operation of the lease. The Department requires a profit of at least 1% of the cost of machinery or plant in the fourth year of assessment.

Rental structure

73. The total rental payable under the lease should be payable in equal amounts over the term of the lease – pro-rata in the first year where that year is less than a full year of income. Where rentals are payable in arrears it is expected that the partnership will return as assessable profits for a year the amount of rent that has been earned during the year; ie the assessable profits for a year will include rentals accrued at the end of the year.

Ships and aircraft

74. The lessee/ultimate end user must be a Hong Kong operator (see paragraph 20). Transactions involving ships will not generally be given a clearance.

Advances by lessee

75. The lease should not involve any arrangement for the lodging by the lessee with the lessor of security deposits or for the lessee to make any kind of advance to the lessor. In relation to partners' capital contributions, this requirement would extend to any indirect arrangements having much the same practical effect as an advance by the lessee to the lessor. No objection will be taken, however, where the lessee enters into back-to-back loan arrangements with the lessor on identical terms and conditions that apply to an existing loan between the lessee and a third party lender where that loan had been raised originally by the lessee to purchase the machinery or plant.

Premature termination of lease

76. If the lessee has a right to terminate the lease on payment of an amount to the lessor – for example, once the tax-loss phase of the partnership's life has passed – the amount so paid will be treated as assessable profits of the partnership. Similarly, amounts received by partners for an assignment of partnership interests will be regarded as assessable profits of the recipient.

Interest

77. Interest on moneys borrowed to produce assessable profits is incurred, and thus is allowable as a deduction, when it becomes due and payable. However, transactions under which more than what would normally be a year's interest is sought to be deducted in one year – or more than an appropriate portion where the first income year is not a complete year – will not be acceptable. Transactions which will not be acceptable will include those where the whole of the interest applicable to a loan is payable by instalments before any repayments of principal are to be made, and those where interest is capitalised back into a loan in any year because, inter alia, rental is insufficient to meet commitments under the loan.

Non-recourse debt

78. Financing on a recourse basis should be for at least 51% of the cost of the machinery or plant throughout the term of the lease.

Equity

79. In cases which do not involve a limited partnership it is expected that lessors themselves contribute capital for at least 35% of the cost of the machinery or plant. Interest free and interest bearing loans, even with recourse, will not be accepted. The minimum capital contribution should be maintained throughout the term of the lease. The partners must be fully at risk in relation to their capital contributions to the partnership. Arrangements, direct or indirect but having the same practical effect, which would result in reducing the capital at risk by the partners below 35% of the cost of the machinery or plant are not acceptable. The Department will not accept lease transactions where the partners use borrowed funds to specifically finance their capital contributions to the lease partnership. Such capital contributions will be required to be financed from the general pool of funds out of which the partner funds assets in the normal course of business.

Profit motive

80. The lessors (which generally should be financial institutions) must demonstrate a profit motive, aside from gaining tax benefits, for the transaction. This will generally be regarded by the Department as being satisfied where the aggregate taxable income of the lessors (or investors) over the term of the lease, after the set-off of losses, is not less than 1% of the cost of the machinery or plant.

General

81. Leveraged lease transactions that do not comply with these requirements may lead the Department to conclude that the arrangement has a sole or dominant purpose of obtaining a tax benefit. On the other hand it should not be assumed that because a transaction does comply it will thereby not be considered in the context of section 61A. There are other aspects of lease arrangements which do not lend themselves to specific guidelines but which, if encountered in practice, may lead to a conclusion that the arrangement has a dominant purpose of obtaining a tax benefit.

82. Finally, the requirements set out above will be reviewed from time to time and amended as necessary in the light of actual experience.

PART I - ADVANCE RULINGS

Information to be supplied

83. The Department requires maximum disclosure in connection with requests for advance rulings. A request for an advance ruling must contain the information and documents as listed in paragraph 15 of Departmental Interpretation and Practice Notes No. 31 ("Advance Rulings"). The specific information required to be provided in respect of rulings on leveraged lease transactions, general anti-avoidance provision (section 61A) and changes in shareholding are set out below:

I. Leveraged lease transactions

(a) Lessee

(i) Full name and Profits Tax file number.

(ii) Place of incorporation and residence.

(iii) Place of operations at which the lessee proposes to use the equipment to be leased.

(iv) If the arrangements are to be a sale and lease back, advise the date on which the equipment was first used or is proposed to be first used by the lessee and/or by any associate of the lessee.

(v) Where a headlease or loan financing is involved, details of the arrangement, cash collaterals, cash flows, interest and other deductions should be provided.

(b) Equipment to be leased

(i) Sequence of events, including dates, relating to the ordering, delivery and construction, if any, of the equipment.

(ii) A schedule of the equipment showing for each item, its cost, its depreciation rates and the amount of its cost qualifying for initial and annual depreciation allowances.

(iii) A break-up of costs will be necessary where costs exceed amounts payable to suppliers and construction contractors.

(iv) The proposed residual value and how it has been determined.

(v) Advise whether any item of the equipment has previously been subject to advance clearance/advance ruling applied for by the lessee or any other person and if so, give the details.

(c) Lessor partnership

(i) Full name of the partnership.

(ii) Full names of the partners, their book balance dates and the amount of equity to be contributed by each.

(iii) Advise nature of each partner's normal business operations.

(iv) Profits Tax file number of each partner.

(v) The amount of debt, equity and the debt equity ratio.

(vi) A statement of the forecast annual partnership losses and profits over the term of the lease, including details of rental, depreciation, interest and other deductions.

(vii) A statement setting out details of all cash flows, with dates, forming part of or associated with the leasing arrangements, supported by explanations of any cash flows that do not enter into the calculation of the partnership losses or profits.

(viii) A statement showing in the event of an early termination of the lease details of the termination sums payable to the lessor and how the lessor's aggregate taxable income of not less than 1% of the cost of machinery or plant (see paragraph 80) can be achieved.

(ix) A statement showing the return on investment in the leveraged lease partnership to be derived by each partner and how it is calculated.

(d) Borrowings

(i) A schedule of borrowings including dates and the amount of each draw down.

(ii) A schedule of proposed repayments of principal and payments of interest, including dates.

(iii) Rates of interest.

(iv) Where a lessee to lessor loan is involved details as in (i), (ii) and (iii) above should be provided in respect of the reciprocal loan between the lessee and lender.

(v) Where the borrowings are secured by deposit or loan, or sub-participation arrangement is in place, give details as in (i), (ii) and (iii) above.

(e) Documents and information

(i) A set of all documentation involved should be provided.

(ii) Expected date of execution.

(iii) The period of the lease.

(iv) Draw attention to any provisions in the documents that may have a bearing on tax considerations, eg options or rights in the lessee or an associate to purchase.

II. General anti-avoidance provision – section 61A

(a) The transaction

Full details of each stage of the proposed transaction, operation or scheme including:

(i) its proposed date of execution; and,

(ii) its purpose.

(b) The parties

The following particulars in respect of all parties to the transaction:

(i) full name and address;

(ii) in the case of corporations, place of incorporation;

(iii) Hong Kong business registration number and Profits Tax file number, if any; and,

(iv) any relevant connection between the parties, for example, whether individuals are family relatives, whether corporations are in any way associated, whether individuals have shareholdings in corporations, etc.

(c) The details

All the details which are necessary to form a conclusion as to the purpose of the transaction having regard to the seven matters prescribed in section 61A(1) – in this regard refer to paragraph 39 of the notes.

III. Loss companies

(a) The loss company itself

(i) Full name and address.

(ii) Business registration number and Profits Tax file number.

(iii) Details of proposed changes in shareholding including full names and addresses of both vendor and purchaser together with the number of shares to change hand.

(iv) Likely changes in management to be made after change in shareholding.

(b) Business of loss company

(i) Details of business carried on by the loss company before the proposed change in shareholding, including its profitability.

(ii) Proposed changes to (i) to be made after change in shareholding.

(iii) Details of business presently engaged by persons who are to acquire shares in the loss company.

(c) Acquisition

(i) The manner in which vendor and purchaser were introduced to each other.

(ii) Any prior connections between vendor and purchaser.

(iii) The reasons for the sale and acquisition.

84. In relation to advance rulings on leveraged lease transactions, the Department should be advised of the name of the lessor partnership and its business registration number as soon as they are available. When the initial Profits Tax return is submitted a copy of all relevant documentation to the transaction should be forwarded. In the case where aircraft is involved, this should include a copy of the Certificate of Acceptance.

Time for the lodgement of ruling requests on proposed leveraged lease transactions

85. Requests for advance rulings on proposed leveraged lease transactions must be filed at least 8 weeks from the anticipated implementation date of the contemplated arrangement. The Department will not accept applications where the anticipated implementation date for the transaction is more than 5 months after the date of application. Failure to supply any required information may lead to the Department's refusal of the application. A minimum period of 8 weeks will generally be required to process applications. However, the Department will not be bound by such period if the application does not contain all material information required for its processing.

86. The Department will not entertain applications for holdover of provisional tax lodged by the partners in the leveraged lease partnership if the request for an advance ruling has not been filed at least 8 weeks before the due date for payment of the provisional tax.