

A BILL

To

Amend the Inland Revenue Ordinance to provide for tax deductions for capital expenditures incurred as spectrum utilization fees; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Inland Revenue (Amendment) (Tax Deductions for Spectrum Utilization Fees) Ordinance 2023.

2. Inland Revenue Ordinance amended

The Inland Revenue Ordinance (Cap. 112) is amended as set out in sections 3 and 4.

3. Section 16 amended (ascertainment of chargeable profits)

Section 16(1)(ga)—

Repeal

“and 16I”

Substitute

“, 16I and 16N”.

4. Part 4, Division 4, Subdivision 7A added

Part 4, Division 4, after Subdivision 7—

Add

“Subdivision 7A—Spectrum Utilization Fees

16M. Interpretation of Subdivision 7A of Division 4 of Part 4

(1) In this Subdivision—

assignment term (指配期), in relation to the use of the radio spectrum that falls within any frequency band pursuant to an assignment under Cap. 106, means the period for which a person (including a person to whom the frequency band is unilaterally transferred or transferred on a swap) may so use the radio spectrum;

Cap. 106 (《第106章》) means the Telecommunications Ordinance (Cap. 106);

Communications Authority (通訊事務管理局) means the Communications Authority established by section 3 of the Communications Authority Ordinance (Cap. 616);

frequency band (頻帶) includes any frequencies or combination of frequencies;

radio spectrum (無線電頻譜) has the meaning given by section 2(1) of Cap. 106;

spectrum utilization fee (頻譜使用費) means a fee (however described) payable under section 32I of Cap. 106 for the use of the radio spectrum (including, for a payment of such a fee by instalments, any increment amount that is payable under or pursuant to Cap. 106 in respect of any of the instalments).

- (2) For the purposes of this Subdivision—
- (a) the use of the radio spectrum that falls within a frequency band assigned to a person (*Person A*) under Cap. 106 is unilaterally transferred from Person A to another person (*Person B*) if—
- (i) with effect from a date, Person B replaces Person A as the person to whom the frequency band is assigned under Cap. 106 for use; and
- (ii) Person A does not, with effect from that date, replace Person B as the person to whom any other frequency band of the radio spectrum is assigned under Cap. 106 for use,
- and a reference to a unilateral transfer of the use of the radio spectrum that falls within a frequency band in this Subdivision is to be construed accordingly; and
- (b) the use of the radio spectrum that falls within a frequency band assigned to a person (*Person C*) under Cap. 106 is transferred from Person C to another person (*Person D*) on a swap if—
- (i) with effect from a date, Person D replaces Person C as the person to whom the frequency band is assigned under Cap. 106 for use;
- (ii) with effect from that date, Person C replaces Person D as the person to whom another frequency band of the radio spectrum is assigned under Cap. 106 for use; and
- (iii) despite the replacements—

- (A) the assignment term that was applicable for Person C's and Person D's respective use of the radio spectrum that falls within the original frequency band (*original use*) continues to apply for their use of the radio spectrum that falls within the changed frequency band (*changed use*); and
 - (B) the respective spectrum utilization fee payable by Person C and Person D for the original use continues to be so payable for the changed use.
- (3) In subsection (2), a reference to a person's replacing another person as the person to whom a frequency band of the radio spectrum is assigned under Cap. 106 for use—
- (a) is a reference to such a replacement that occurs pursuant to the Communications Authority's exercise of a power under Cap. 106; but
 - (b) does not include such a replacement that occurs because of a sale and purchase between the persons in respect of the use of the radio spectrum that falls within the frequency band.

16N. Deductions for spectrum utilization fees

- (1) Despite section 17, this section applies in ascertaining the profits from a trade, profession or business in respect of which a person is chargeable to tax under this Part for any year of assessment.
- (2) Any capital expenditure that is a spectrum utilization fee incurred by the person is, to the extent that it is

so incurred in the production of the profits for the person's use of the radio spectrum in the carrying on of the trade, profession or business, to be allowed as a deduction from the profits.

- (3) The deduction is to be allowed in accordance with—
 - (a) if the spectrum utilization fee is payable by annual instalments—section 16Q; or
 - (b) in any other case—section 16R,
but, in any event, the total amount of the deduction must not exceed the amount of the capital expenditure mentioned in subsection (2).
- (4) This section does not apply to—
 - (a) any capital expenditure that is reimbursed by way of or attributable to any grant, subsidy or similar financial assistance; and
 - (b) any capital expenditure incurred as a spectrum utilization fee that is prescribed or otherwise determined under Cap. 106 before the date on which the Inland Revenue (Amendment) (Tax Deductions for Spectrum Utilization Fees) Ordinance 2023 (of 2023) comes into operation.

16O. Capital expenditures deemed as incurred in case of unilateral transfers for spectrum utilization fees payable other than by annual instalments

- (1) This section applies if—
 - (a) a spectrum utilization fee is payable other than by annual instalments by a person (*preceding assignee*) for the use of the radio spectrum that falls within any frequency band; and

- (b) subsequently, such use of the radio spectrum is unilaterally transferred from a preceding assignee to another person (*subsequent assignee*).
- (2) For the purposes of section 16N—
 - (a) on the date of the transfer, a spectrum utilization fee of the specified amount is deemed to be payable by the subsequent assignee for the subsequent assignee's use of the radio spectrum that falls within the frequency band; and
 - (b) accordingly, the subsequent assignee is deemed to incur on that date a capital expenditure that is a spectrum utilization fee of the specified amount for the subsequent assignee's use of the radio spectrum.
- (3) In subsection (2), a reference to the specified amount is a reference to an amount arrived at by deducting from the total amount of the spectrum utilization fee that was paid before the transfer—
 - (a) if a preceding assignee has used the radio spectrum that falls within the frequency band in the production of profits chargeable to tax under this Part—the total amount of the deduction allowable to the preceding assignee under this Subdivision in respect of the preceding assignee's use of the radio spectrum that falls within the frequency band (*total deduction amount for the preceding assignee*); or
 - (b) in any other case—an amount that would be the total deduction amount for the preceding assignee had a preceding assignee used the radio spectrum that falls within the frequency band in

the production of profits chargeable to tax under this Part.

16P. Deductions not affected by transfers of frequency bands on swap

To avoid doubt, even if the use of the radio spectrum that falls within a frequency band is transferred from a person to another person on a swap, for applying this Subdivision to each of those persons, the use of the radio spectrum by either person is taken to remain the same one throughout the assignment term concerned as if the transfer had never occurred.

16Q. Deductions for spectrum utilization fees payable by annual instalments

- (1) Unless subsection (2) applies, for the purposes of section 16N(3)(a)—
 - (a) if the relevant use of the radio spectrum by the person begins in the basis period for the year of assessment in which the assignment term concerned begins (*assignment year of assessment*)—for each year of assessment in the basis period for which an instalment of the spectrum utilization fee is payable by the person, a deduction is allowable to the person for the relevant instalment amount; or
 - (b) if the relevant use of the radio spectrum by the person begins in the basis period for a year of assessment (*year of assessment A*) other than the assignment year of assessment—
 - (i) for year of assessment A, a deduction is allowable to the person for an amount equal to the sum of—

- (A) the relevant instalment amount of the spectrum utilization fee payable by the person in the basis period for year of assessment A; and
 - (B) the aggregate amount of all such instalments that were payable by the person in the basis period for any years of assessment that fall before year of assessment A; and
- (ii) for each year of assessment falling after year of assessment A in the basis period for which such an instalment is payable by the person, a deduction is allowable to the person for the relevant instalment amount.
- (2) If an instalment of the spectrum utilization fee is payable by the person for the person's use of the radio spectrum that falls within a frequency band pursuant to a unilateral transfer of such use to the person, then for the purposes of section 16N(3)(a)—
- (a) if the use begins in the basis period for the year of assessment in which the transfer is effected (*transfer year of assessment*)—for each year of assessment in the basis period for which an instalment of the spectrum utilization fee is payable by the person, a deduction is allowable to the person for the relevant instalment amount; or
 - (b) if the use begins in the basis period for a year of assessment (*year of assessment B*) other than the transfer year of assessment—

- (i) for year of assessment B, a deduction is allowable to the person for an amount equal to the sum of—
 - (A) the relevant instalment amount of the spectrum utilization fee payable by the person in the basis period for year of assessment B; and
 - (B) the aggregate amount of all such instalments that were payable by the person in the basis period for any years of assessment that fall before year of assessment B; and
- (ii) for each year of assessment falling after year of assessment B in the basis period for which such an instalment is payable by the person, a deduction is allowable to the person for the relevant instalment amount.

16R. Deductions for spectrum utilization fees payable other than by annual instalments

- (1) Unless subsection (2) applies, for the purposes of section 16N(3)(b)—
 - (a) if the relevant use of the radio spectrum by the person begins in the basis period for the year of assessment in which the assignment term concerned begins (*assignment year of assessment*)—for each eligible year of assessment, a deduction is allowable to the person for an amount equal to the total amount of the spectrum utilization fee payable by the person, divided by the total number of eligible years of assessment; or

- (b) if the relevant use of the radio spectrum by the person begins in the basis period for a year of assessment (*year of assessment C*) other than the assignment year of assessment—
 - (i) for year of assessment C, a deduction is allowable to the person for an amount equal to the sum of—
 - (A) an amount (*subsection (1)(b)(i)(A) amount*) equal to the total amount of the spectrum utilization fee payable by the person, divided by the total number of eligible years of assessment; and
 - (B) an amount arrived at by multiplying the subsection (1)(b)(i)(A) amount by the total number of eligible years of assessment that fall before year of assessment C; and
 - (ii) for each eligible year of assessment that falls after year of assessment C, a deduction is allowable to the person for the subsection (1)(b)(i)(A) amount.
- (2) If the spectrum utilization fee is payable by the person for the person's use of the radio spectrum that falls within a frequency band pursuant to a unilateral transfer of such use to the person, then for the purposes of section 16N(3)(b)—
 - (a) if the use begins in the basis period for the year of assessment in which the transfer is effected (*transfer year of assessment*)—for each remaining eligible year of assessment, a deduction is allowable to the person for an

- amount equal to the total amount of the spectrum utilization fee deemed under section 16O to be payable by the person, divided by the total number of remaining eligible years of assessment; or
- (b) if the use begins in the basis period for a year of assessment (*year of assessment D*) other than the transfer year of assessment—
- (i) for year of assessment D, a deduction is allowable to the person for an amount equal to the sum of—
- (A) an amount (*subsection (2)(b)(i)(A) amount*) equal to the total amount of the spectrum utilization fee deemed under section 16O to be payable by the person, divided by the total number of remaining eligible years of assessment; and
- (B) an amount arrived at by multiplying the subsection (2)(b)(i)(A) amount by the total number of remaining eligible years of assessment that fall before year of assessment D; and
- (ii) for each remaining eligible year of assessment that falls after year of assessment D, a deduction is allowable to the person for the subsection (2)(b)(i)(A) amount.
- (3) In this section, in relation to the use of the radio spectrum that falls within a frequency band by a person—

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- (a) a reference to an eligible year of assessment is a reference to a year of assessment the basis period for which is—
 - (i) unless subparagraph (ii) applies—
 - (A) the first basis period; or
 - (B) every subsequent basis period that ends before the last day of the assignment term; or
 - (ii) if the assignment term and the first basis period begin on the same date—every basis period that overlaps with the assignment term; and
 - (b) a reference to a remaining eligible year of assessment is a reference to an eligible year of assessment other than one for which—
 - (i) a deduction is allowable to a transferor under this Subdivision in respect of the transferor's use of the radio spectrum that falls within the frequency band; or
 - (ii) a deduction would have been allowable to a transferor under this Subdivision had the transferor used the radio spectrum that falls within the frequency band.
- (4) Despite any other provision to the contrary in this section, if the use of the radio spectrum that falls within a frequency band is unilaterally transferred, no deduction under this Subdivision is allowable to the transferor for any year of assessment the basis period for which begins after the date of the transfer.

- (5) In this section, a reference to the first basis period is, in relation to the use of the radio spectrum for an assignment term, a reference to a period—
 - (a) that is a basis period of the person to whom such use is first assigned for the assignment term; and
 - (b) in which the assignment term begins.
- (6) For the purposes of subsection (3)(a)(i)(B) and (ii), every period of 12 months after the first basis period is, in relation to the use of the radio spectrum for an assignment term, taken to be a basis period (in addition to the first basis period).
- (7) In this section, a reference to a transferor is, in relation to the use of the radio spectrum that falls within a frequency band, a reference to a person from whom the frequency band is unilaterally transferred to another person.

16S. Released liabilities to pay spectrum utilization fees treated as trading receipts

If, in ascertaining the profits from a trade, profession or business carried on in Hong Kong, any capital expenditure incurred by a person has been deducted under section 16N, but the person's liability to pay the whole, or any part, of the spectrum utilization fee concerned is subsequently released, the amount of the liability so released is to be treated as a trading receipt arising in or derived from Hong Kong of the trade, profession or business accruing—

- (a) subject to paragraph (b), at the time of the release; or

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- (b) if the release occurs on or after the date on which the trade, profession or business is permanently discontinued—immediately before the discontinuance.”
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Explanatory Memorandum

The object of this Bill is to amend the Inland Revenue Ordinance (Cap. 112) (*Ordinance*) to provide for tax deductions for capital expenditures incurred as spectrum utilization fees that are payable for the use of the radio spectrum.

2. Clause 1 sets out the short title.
3. Clause 4 adds a new Subdivision 7A (new sections 16M to 16S) to Division 4 of Part 4 of the Ordinance.
4. The new section 16M provides for the interpretation of terms and expressions used in the other new sections added to the Ordinance by the Bill.
5. The new section 16N provides that capital expenditures that are spectrum utilization fees are to be allowed as deductions from profits chargeable to tax under the Ordinance.
6. The new section 16O provides that, where the use of the radio spectrum that falls within a frequency band is unilaterally transferred from a preceding assignee to a subsequent assignee, and the spectrum utilization fee is payable other than by annual instalments, the subsequent assignee is deemed to incur a capital expenditure that is a spectrum utilization fee so that the subsequent assignee may claim the deduction.
7. The new section 16P clarifies that a transfer of the use of the radio spectrum that falls within a frequency band on a swap does not affect the deduction.

8. The years of assessment for which the deduction is allowable to a person and the amount for deduction are provided for in the new sections 16Q and 16R. Generally speaking—
 - (a) for a spectrum utilization fee that is payable by annual instalments, the deduction is allowable for each year of assessment in the basis period for which an instalment is payable;
 - (b) for a spectrum utilization fee that is payable other than by annual instalments, the deduction is allowable for each of the eligible years of assessment or remaining eligible years of assessment (as determined by reference to the assignment term for the person's use of the radio spectrum) for an amount determined by spreading the total amount of the fee over such years of assessment; and
 - (c) the deduction is allowable only when the person has begun to use the radio spectrum.
9. The new section 16S provides for the treatment of the released liabilities to pay spectrum utilization fees as trading receipts.
10. Clause 3 makes a consequential amendment to section 16(1)(ga) of the Ordinance.