APPENDIX
SUMMARIES OF THE CASES COMMENCED FOR FORMAL INVESTIGATION IN THE AREA OF OMBUDSMANSHIP

Appendix
Summaries of the Cases Commenced for Formal Investigation in the Area of Ombudsmanship

File No.: 01/2007

Subject: Post-revision of Established Recruitment Rules

In the course of handling a complaint, the CCAC noticed that in the recruitment of contractual senior technicians, Bureau F altered the examination rules without authorisation by adding a second-round written examination after the original examination was held, which is suspected of impairing the rights of the candidates. Further investigation by the CCAC proved that the bureau involved had indeed violated administrative law and consequently impaired the legal rights of the candidates. Since the open recruitment was launched with the approval of Bureau F's supervisory entity, the CCAC first sent a letter to the supervisory entity notifying them of the issue by way of informal advice, urging them to take appropriate measures to remedy the situation. The entity concerned later responded that they completely accepted the proffered advice and promised that they would take it into account when recruiting in the future. However, they explained that the second-round written examination was added to address problems resulting from the first, and as it was meant for recruiting contractual civil servants, the procedures for which were not as strict as those for recruiting permanent staff . As a result, the related assessments were deemed fair and objective. The case was commenced for further investigation as the CCAC considered the stance of the supervisory entity questionable.

1. On 20th June 2006, Bureau F announced in a newspaper that it would recruit 3 senior technicians on a contract basis, indicating recruitment and assessment rules with the approval of the supervisory entity. The rules stated that a written knowledge examination, a professional interview and resume analysis would be required. The written examination was not to exceed 3 hours. Candidates scoring less than 5 out of the full score of 10 would automatically be ineligible for the professional interview. The examination results would be based on the breakdown of 50% for the written examination, 35% for the interview and 15% for the resume assessment.

2. A total of 351 candidates were eligible to sit the written examination held on 11th June 2006.

Of the 206 candidates who actually sat the examination, 56 passed, 138 failed, and 12 were disqualified as they did not complete the paper as instructed.

3. On 17th July, the Examination Committee assessed the results of the written examination, and decided that a second-round written examination would be held for those who passed the first written examination. Only those who also passed the second-round examination would be eligible for interview. The result of the knowledge examination was to be calculated as the average of scores of the 2 written exams, while the total assessment breakdown would remain unchanged.

4. In other words, the Examination Committee decided to add a second-round examination after the first three-hour written examination was held, which in effect changed the original selection rules announced publicly and acknowledged by the supervisory entity.

5. It must be pointed out that even though current regime governing civil service laws does not specify the recruitment procedures of contractual civil servants, the general principles embodied in the *Code of Administrative Procedures* nonetheless apply where the administrative authority decides to recruit staff members through open examination – particularly with regard to the principles of legality, fairness, appropriateness, impartiality, selflessness and good faith.

6. Paragraph 1, Article 3 of the *Code of Administrative Procedures* provides that "civil administrative functionaries shall conduct their activities in accordance to the laws and regulations and within the limits of their conferred powers. Their activities shall be conducive to achieving the purposes for which these powers are conferred".

7. The laws and regulations mentioned here refer not only to the "formal laws" stipulated by due legislators but also as "substantive laws", which means that administrative functionaries shall be bound by all legal norms. In this case, the selection rules established by Bureau F for the purpose of recruitment were confirmed and announced by the authorised supervisory entity, and as such are taken as law applicable to its recruitment procedures and binding upon the administrative authority and candidates alike.

8. Therefore, having attended and passed the three-hour written examination, successful candidates should have been eligible for interview, a right that must be respected and acknowledged by the administrative authority.

9. The second-round written examination decided on by the Examination Committee in effect restricted the rights of the candidates who had passed the first examination since their eligibility for interview would then depend on the results of the second-round written examination. In fact, one candidate originally eligible to attend the interview was found later disqualified for being absent in the second-round examination; his legitimate rights and interests were thus obviously impaired.

10. In addition, the decision to add a second-round examination after the first substantially "shrunk" the total score of the first written examination taken on 11th June, from 50% to 25%, **which not only unreasonably downgraded the scores of some candidates but led to a different assessment result. Candidates who would have been admitted to the post (a candidate surnamed Kou ranked at the top third by the original grading fell to fifth in the revised screening) were eventually disqualified.**

11. Article 4 of the *Code of Administrative Procedures* stipulates that the administrative functionaries are authorised to seek public interest with respect to citizens' rights and their interests protected by law.

12. In other words, while administrative functionaries undertake the responsibility of seeking public interest, they should not disregard the legal rights of an individual in so doing. Just like this case, the right acquired by the candidates to attend interview by virtue of the established rules as well as the advantage won in the first examination by scoring high should be respected and not be impaired by what the administrative authorities may or may not do.

13. With regard to the 138 candidates who failed in the first written examination, their rights were likewise impaired by the same token as they were not given the same opportunity as those candidates who had passed the first written exam.

14. In fact, the Examination Committee applied different selection criteria to the same batch of candidates – for those who passed the first written examination, their final result was the average of the results of the two written examinations by virtue of the revised standard; for those who failed in the first written examination, they were simply eliminated by virtue of the established criteria - they were deprived of their right to sit in the second-round examination, which accounted for 50% of the two written examinations and 25% of the total of the revised standards, thereby lost their opportunity to score higher in the second

round in which their average total may have qualified them for interview.

15. The Examination Committee's resolution, moreover, was also unfair to the 145 candidates who were absent in the first written examination on 11th June.

16. This is because, those candidates who gave up the first examination held on 11th June chose to do so on the basis of the established recruitment and assessment rules announced by the Examination Committee with the approval by the supervisory entity. If they had been informed in advance that there would be a second-round examination opened to all candidates, they might have chosen to sit in the first examination held on 11th on account of the newly altered examination rules. Therefore, the decision by the bureau to alter recruitment criteria after the first examination was obviously disregarding to the candidates' trust in the screening rules originally publicized, thus violating the principle of good faith.

17. It is worth noting that the Examination Committee held a meeting on 9th June (before the first examination was held) during which it was pointed out that the 3 hours' time announced for the written examination may not be adequate for assessing a candidate's professional and written competency, and second round written examination for candidates who have passed the first, to test their writing skills may be held when necessary". However, it was not until after the first examination on 11th June that it was decided necessary to hold a second written examination, in which candidates who had passed the first examination would be eligible. This should have been done before the first written examination.

18. This approach naturally indicates that the authority did not treat all parties concerned with impartiality and selflessness.

19. While the functionaries have the authority to devise "rules" in choosing the right candidate, and it is understandable that amendments may sometimes be necessary to address inadequacies therein, it does not mean that the authority involved could make amendments at any time in the name of public interest, otherwise the principles laid down in the *Code of Administrative Procedures* for all administrative activities would become nominal.

20. In this case, therefore, should the Examination Committee deem it necessary to assess the diversified competency of the candidates through 2 written examinations they should revise and announce (or at least inform all qualified candidates) the amended assessment

standards before the first examination which held on 11th June, rather than overhaul the established criteria already in force. Once such assessment standards are confirmed and come into force (as in this case after the first written exam was held), the authorities could not make any amendments. The Examination Committee's decision to add a second examination after the first was thus held to constitute "a breach of law".

21. The examination hosting entity's amendment of its established recruitment procedures after it came into force constitutes a breach of the principles of legality, fairness, appropriateness, impartiality, selflessness and good faith; thus the examination results should be revoked as a result of the flaws in the relevant procedures.

In view of the fact that the supervisory entity of Bureau F had earlier indicated to the CCAC that they did not consider the recruitment procedures a breach of law and considered the examination results just and objective, they did not intend to make any correction. The CCAC therefore decided to inform the Chief Executive of the issue in accordance to our organisational law. Moreover, since it was still in the period in which the examination results could be revoked through judicial proceedings the CCAC referred the case to the Public Prosecutions Office, which has the due judicial power to bring the matter to court.

Eventually, the supervisory entity revoked the said recruitment examinations and its results before the prescription for judicial prosecution expired and later terminated the appointment of the candidates recruited.

File No.: 07/2007

Subject: Certificate of Sick Leave

While handling the case dealing with the sick leave of an employee of a higher educational institute, the CCAC noticed that where public departments and institutes had their own personnel regulations and accepted their employees' sick leave certificates other than legally designated format, their employees are subject to different disciplinary rights and obligations, giving rise to unfair situations. Therefore, the CCAC initiated an investigation.

1. Article 102 of the *General Regulations Governing the Staff of the Public Administration of Macao* (hereinafter referred to as the *General Regulations*) provides that where a sick civil

servant needs not stay in hospital but needs to rest at home - as indicated in the "doctor's note" to be submitted by the sick civil servant - the chiefs of the department concerned may ask a doctor on duty or a doctor from the Health Bureau to visit the civil servant at his or her home to verify his/her condition. If the employee is found absent from home without a proper explanation deemed acceptable by the employee's superior, his or her sick leave may be considered unjustified.

2. The "measure of home verification of sick employee" in the personnel regulations of the two institutes of higher education - P and M - are identical to Article 102 of the *General Regulations*, while institute F applies the *General Regulations'* measure supplementarily.

3. The 3 institutions accept the non-standard sick leave certificates, which are not conformable to the designated format (the "doctor's note" approved by directive 65/99/M), issued by Kiang Wu Hospital and Macau University of Science and Technology Hospital. Unlike the legally designated format, there are no options as "the patient needs to rest at home" and that "the patient cannot work but need not stay at home", to be ticked by the doctor. In other words, the 3 public entities have no means of judging whether the sick staff member needs to stay home for rest or not just by examining the information on the non-standard sick leave certificates submitted.

4. As a result, the "mechanism of home verification of sick employees" and its subsequent disciplinary provisions would have no effect upon the staff submitting the non-standard sick leave certificates. The measure is thus rendered non-applicable.

5. However, the "mechanism of home verification of sick staff" is still applicable to the sick employee who submit the standard sick leave certificates. For those who are instructed by their doctors "to rest at home" are found to be absent from their homes during their sick leave, they have to provide justification. If their explanation is not accepted by the departments or entities concerned, they are liable to disciplinary consequences.

6. Such a situation gives rise to unfair situation: employees who work for the same department or institution under the same condition are subject to different disciplinary requirement only because of the different formats of their sick leave certificates they sumbitted. This unfair situation needs to be eliminated.

7. Apparently, it is not within the authorities' powers to press private hospitals to change

their formats of sick leave certificates to indicate certain details. However, it is within their power to amend their internal rules.

8. Therefore, the CCAC suggested that higher education institutes P and M and institute F amend their internal rules so that the aforementioned discriminatory situation can be avoided.

The institutions concerned all accepted the CCAC's suggestion, and took various remedy measures: F and P decided to accept only the legally designated sick leave certificates in the near future. M decided to amend its internal personnel regulations by adding a rule that "where the certificate does not indicate whether home stay is required, it will be regarded as necessary". In addition, M required that when employees attend Kiang Wu Hospital to see a doctor they should apply for a legally designated doctor's certificate when applying for a sick leave certificate.

File No.: 13/2007

Subject: Prosecution Procedures Concerning Acts Against *Foreign Trade Law*

In the course of handling a complaint, the CCAC found that officers stationed at South Sampan Pier had misinterpreted the current law and internal instructions, which have resulted in some contravention of the *Foreign Trade Law* regarding inspection and penalties. An investigation was thus commenced. In the course of investigation, the CCAC also collected from Department A case files information of administrative offence apropos of *Foreign Trade Law* for analysis:

1. According to Paragraph 1 of Article 12 and Paragraph 1 of Article 21 of the *Foreign Trade Law* all foreign trade activities conducted in ports other than those officially designated shall constitute a criminal offence.

2. On the other hand, according to the stipulations of Article 9 and 10 of the *Foreign Trade Law*, all foreign trade activities in Macao must be conducted with relevant import-export licenses or import-export declaration forms, except for those specified by law. Otherwise, the authority shall prosecute such trade conducted without licence or declaration form for administrative penalties in accordance with Paragraph 1 of Article 36 or Paragraph 1 of Article 37 of the *Foreign Trade Law*.

3. This shows that Paragraph 1 of Article 12 and Paragraph 1 of Article 21 of the *Foreign Trade Law* seeks to restrict the locations for foreign trade activities to officially designated ports. While foreign trade not conducted in official designated ports, whether or not the conducting parties have the required licence or declaration form, shall constitute a criminal offence. On the other hand, the stipulations of Article 9, Article 10, Paragraph 1 of Article 36 and Paragraph 1 of Article 37 of the *Foreign Trade Law* aim at classifying the conditions under which foreign trade transactions at the statutory ports shall be conducted with a licence and those that require the declaration form. Thus, if trade is conducted without the requisite licence or declaration form, it will result in an administrative penalty.

4. According to the stipulations of Paragraph 1 of Article 12 of the *Foreign Trade Law*, Article 3 of *Foreign Trade Regulations* and Article 1e) of Notice 1/2004 issued by the Maritime Administration, the South Sampan Pier is officially designated by authorities as a venue for the cut flower trade only, it is not a port officially designated for the foreign trade activities for any other kind of good. In other words, **nobody is permitted to conduct any foreign trade other than that of cut flowers at the South Sampan Pier**, in contravention of which shall constitute a criminal offence of importing or exporting goods at non-statutory port.

5. However, Department A, **charged foreign traders license holder conducting non-cut flower trade with the stipulations of Article 36 or 37 of the *Foreign Trade Law***, for the lack of licences or declaration forms. Department A's practices were **administratively illegal and distorted the stipulations of the *Foreign Trade Law*.**

6. It is necessary to point out that an administrative offence is subject to an administrative penalty since the offender fails to act in accordance with the law. The requirements of the relevant law are preventive in nature and as such do not contain criminal elements.

7. For persons who violate the stipulations of Article 9 or 10 of the *Foreign Trade Law*, the authority impose penalties in accordance with Paragraph 1 of Article 36 or Paragraph 1 of Article 37 of the *Foreign Trade Law*, on the grounds that such persons fail to comply with the preventive regulations of the *Foreign Trade Law* by conducting foreign trade activities without a "licence" or "declaration form".

8. In other words, where Department A charges persons involved in conducting foreign trade (exporting goods from Macao) other than that of cut flowers at the South Sampan Pier for

the abovementioned regulations, it implies that such persons should apply for a "licence" or file a "declaration form" for their non-cut flower trade, and that they are subject to administrative penalty because of their failure to do so.

9. However, according to the current *Foreign Trade Law* and the regulations of Circular Notice 1/2004 issued by the Maritime Administration, the South Sampan Pier may only be used for the cut flower trade, which means that even if the persons involved have applied for a licence or filed a declaration form, the departments responsible (including Department A) have no authority to allow such conduct. In other words, applying for a licence or filing a declaration form for such trade in such a place is impossible in law.

10. Thus, how could Department A charge the parties concerned for failure to comply with some requirements that are legally impossible or even illegal and subject them to penalty?

11. On the contrary, if Department A's practice on charging persons for failure to apply for a license or file a declaration form were correct, then it would follow that the application for a licence or filing of a declaration form may be granted or approved had they been made accordingly, so that foreign trade on other than cut flowers at the South Sampan Pier would be legal. This inference obviously contradicts the intention of the *Foreign Trade Law* and the provisions of Circular Notice 1/2004 issued by the Maritime Administration concerning the designated function of the pier.

12. **Thus, Department A's practice of charging trading licensees for conducting foreign trade other than cut flowers at the South Sampan Pier for the stipulations of Article 36 and Article 37 of the Foreign Trade Law is obviously constituted an administratively illegal.**

13. **It must be emphasised that from the perspective of foreign trade policy or practical operational needs, if the authorities considered that laying criminal charges against persons conducting foreign trade on goods other than cut flowers at the South Sampan Pier is not feasible, then Department A should pay more attention to the issue and take proper measures (such as considering amending the law) in order to close the loopholes in the law due to policy considerations, so that both penalisation and prevention may be effective.**

14. On the other hand, Department A issued an instruction (Memo 02/ADG_SIN/2001) for

officers performing duties at South Sampan Pier in 2001 which instructs front line officers to strictly execute the regulations of the *Foreign Trade Law*, and where trade licensees leave Macao with over 3 cartons of cigarettes (200 cigarettes each), 2 bottles of wine (1 litre each) or any similar goods valued over MOP2,000, they shall be required to register before they may pass.

15. Nevertheless, according to the statements of the commander in charge of the management of the Inner Harbour Customs and the 2 officers who have been on duty there (second-in-command to the commander and responsible for referring orders to the subordinates), they had divergent interpretations and practice regarding **the abovementioned instruction concerning the declaration and let-pass procedures.** Some of them claimed they should demand those carrying goods worth over MOP5,000 to register their goods while others indicated they should not let those carrying goods worth over MOP5,000 pass the customs, and still others said they would seize the goods worth over MOP5,000. Moreover, different interpretations existed over the circumstances under which trading licensees should be charged in accordance with Article 37 of the *Foreign Trade Law*, as some indicated they would charge the trading licensees whether they concealed their goods or not, as long as their goods are found to be worth more than MOP5,000, while others said they would bring charges only if the licensees are found deliberately smuggling the goods.

16. **In view of the abovementioned circumstances, it is doubtful whether the front line officers are able to duly execute proper measures in line with the objectives of the instructions (monitoring the goods exported by the trading licensees and preventing them from violating the laws of Macao) and requirements (strictly implement the Foreign Trade Law by subjecting licensees to registration under necessary circumstances for the purpose of monitoring).**

17. According to the data in the Register of Good for Personal Consumption of Foreign Trade Licensees at South Sampan Pier provided by Department A, the total value of goods carried by some foreign trade licensees, even on a daily basis, grossly exceeded MOP5,000. From the quantity of goods and frequency of the same products trafficked, it would be hard to conclude that these goods were meant for personal consumption. The goods were, obviously, designated for cross-border trade. However, Department A considered these as goods for personal consumption and let them pass after simple registration.

18. This is because, according to the commander of the Inner Harbour Customs, the trade licensees can usually produce the invoices indicating that the value of the goods they are carrying does not exceed MOP5,000, whose authenticity is always confirmed by the issuing shops when Department A seeks verification. Department A thus has no evidence to allege otherwise.

19. As a matter of fact, where invoices are questionable, Department A may, by virtue of the *Foreign Trade Law*, evaluate the value of the goods based on the following criteria:

    i) the average price of the most recently imported or exported goods, of the same or similar type and quantity and origin;

    ii) the average selling price of the same or similar products in 3 business premises of Macao SAR, excluding of the gross business profit and tax on consumption. Prices of one and two premises are also accepted if a third premise is not available; If the prices are retail, then gross business profit deducted from the prices shall not exceed 30%.

    In other words, where Department A doubts the value of goods indicated in the invoice, it is not impossible for further verification.

20. In addition, it is provided by the *Foreign Trade Law* that, the statement-making party is required to indicate the types, quantity and prices of goods imported or exported on the licence or declaration form, of which one copy is to be filed by Department A, thus Department A is supposed to have a record of prices regarding goods imported and exported. According to the information obtained from Department A, there have been *Foreign Trade Law* violation cases where the pre-examiner has adopted the abovementioned methods of enquiring 3 sellers to ascertain the value of goods involved.

21. Therefore, the explanation of the commander of the Inner Harbour Customs is not convincing enough - on legal and practical grounds - especially, according to the data shown in the abovementioned Register, that goods carried by the relevant trade licensees are by no means "rare" in Macao.

22. **It should be emphasized that according to the regulations of Article 86 of the *Code of Administrative Procedures*, authorities have the duty to determine the facts. Once it is known that certain facts are helpful in making a correct and swift resolution the authorities concerned should strive to investigate such facts and use all evidence**

permissible by law. Otherwise, such administrative authorities might have violated the *Code of Administrative Procedures.*

23. **Nevertheless, even when Department A believes it is really difficult to conduct the said measures of investigation and evaluation stipulated in the *Foreign Trade Law*, for the sake of "administration of law", the department should study and propose the legal amendment of law to facilitate law enforcement or establish practical law enforcement (evaluation) standards, rather than "revising laws" by allowing "incidental enforcement of law".**

24. With regard to the standard by which a person carrying goods that "constitute part of an overall trafficking activity of value over MOP 5,000" resulting in violation of Paragraph 1b) of Article 10 of the *Foreign Trade Law* should be judged, the commander of the Inner Harbour Customs said that it is in Department A's practice to judge the total value of goods carried by the same person in the same day.

25. However, according to this rule anyone who transports goods of the same kind out of Macao valued at less than MOP5,000 **once or more than once a day** (e.g. with an invoice indicating the value of goods at MOP4,999) - even though he may do this for a month - may not be seen as exporting goods in a piecemeal manner. Such an interpretation encourages traders to "break up" foreign goods to circumvent the law.

26. **Certainly, it is necessary for Department A to lay down a set of feasible and reasonable rules for supervising foreign trade that front line personnel can implement accordingly, and know under what circumstances they should consult their superiors so that they may not be accused of abusing their power by extending favours to certain persons.**

27. Apart from that, the CCAC also found that the personnel of Department A did not identify themselves when logging in the Register of Good for Personal Consumption of Foreign Trade Licensees at South Sampan Pier, and that register data was not digitally processed.

28. In fact, even if the registering party is required to identify themselves when entering registering data (such as staff number), it is not substantial enough to conclude that it increases workload. On the contrary, given the identity data, it will definitely help the internal management of the department, particularly in tracing the handler of a specific case.

29. **Furthermore, data management by digital means will, on one hand, simplify the registration procedures of front line personnel, and on the other hand provide systemic information on the goods exported via certain trading licensee, which will help law enforcement officers in determining whether the goods involved should be categorised as for "personal use or consumption" or "part of an overall activity worth over MOP5,000".**

30. **Therefore, if Department A is able to employ information technology to effectively analyse information over goods exported by trade licensees it will not only help the application of the above evaluation standard but also strengthen Department A's law enforcement credibility**.

31. Finally, while the CCAC was investigating this case it also studied the files of the *Foreign Trade Law* violation cases provided by Department A where administrative illegalities and malpractices were spotted therein.

32. For one thing, the procedures of handling the cases concerning administrative offences by Department A were very slow in which some of the cases even expired the prescription for prosecution. According to the Head of Intellectual Property Department responsible for dealing with administrative offences, this was due to the shortage of pre-examiners in handling such cases, this issue has been referred to the management board.

33. However, according to stipulations of Article 11 (The Principle of Decision Making) and Article 12 (The Principle of Non-bureaucracy and The Principle of Efficiency) of the *Code of Administrative Procedures*, Department A is obliged to follow up and handle administrative offence cases within the prescription to comply with the primary principle of administration of law. Where there is indeed a shortage of manpower, a case handling system **in written form** shall be devised to determine the priority and urgency of cases, especially those whose prescription for prosecution are about to expire, and those cases involving serious offences such as those involving huge sums of money. The authorities should formulate a criteria and mechanism to establish the priority for processing the cases, to ensure that citizens' faith in the government and maintain the credibility of authorities, as well as avoiding being suspected of deliberately sheltering offenders by allowing the prescription for prosecution to expire.

34. On the other hand, the CCAC noted that in some cases pre-examiner mistakenly applied

Article 25 of the *Foreign Trade Law*, which states, "when the goods involved is of a petty value and such offence is committed on rare occasions, the offender may be subjected to a reduced penalty or be exempted from the penalty herein stipulated". This resulted in letting offenders off without penalty on some occasions.

35. It is necessary to point out that Article 25 of the *Foreign Trade Law* can only be applied under two conditions: **1) the goods involved are of petty value and 2) the offender commits the offence on rare occasions**.

36. Though Article 25 of *Foreign Trade Law* does not specify how much value is "petty", according to the opinion presented on a general and a specific review of the draft of *Foreign Trade Law* by the Second Standing Committee of Legislative Assembly, the legislator intended to use the definition of Article 196 of *Penal Code*, i.e. less than MOP500, to define "petty" as provided in this Paragraph.

37. The abovementioned stipulation in Article 25 of *Foreign Trade Law* is legislatively devised as a penalty exemption for various kinds of administrative offences and penalties. Whether it can be applied to specific cases will depend on whether they meet the two criteria, i.e. **1) the goods involved are of a small value and 2) the offender commits the offence on rare occasions.** For example, if a person transports some uninspected fresh meat worth less than MOP500 into Macao, and it is his first instance of offence, the authority may apply the abovementioned exemption Paragraph stipulated in Article 25 of the *Foreign Trade Law*.

38. However, where an offender commits an offence by transporting **goods worth over MOP5,000 into Macao** without a duly submitted declaration form, then **the exemption Paragraph in Article 25 of the *Foreign Trade Law* will not be applicable** because the **value of goods involved (at least MOP5,000) definitely exceeds MOP500.**

39. It is worth noting that this Paragraph is not specially devised for goods which are impossible to be of petty value, bear in mind that law interpreters cannot deny that "the solution devised by the legislators is the most appropriate, and that the legislators know how to convey their intentions in appropriate language" (Paragraph 3, Article 8 of *Civil Code*). Thus, in cases where statutory requirements concerning penalty exemption are impossible to be met completely, law enforcement officers must not assume that when a case meets "any one of the conditions" the offender may be exempted from penalty.

40. Actually, if the exemption Paragraph as stipulated in Article 25, "the goods involved are of petty value **and** the offence is committed" could be interpreted case by case as "the goods involved are of petty value or the offence is committed", then the wrong conclusion would follow, that as long as it is the first or occasional instance of offence of importing goods without declaration regardless of the value of goods - which may total hundreds of thousands or even millions of dollars, the provisions of Article 25 of the *Foreign Trade Law* regarding penalty exemption may well be applied.

41. Moreover, if it were appropriate to apply a looser standard in terms of Article 25 of the *Foreign Trade Law* then the phrase "the goods involved are of petty value" might be interpreted as the portion of the transported goods exceeding the statutory quota rather than the total value of transported goods. In other words, in cases where goods valued over MOP5,000 are transported without making the required declaration, when judging whether the goods' value qualify for the exemption Paragraph, the "petty value" may be construed as referring to the portion of goods in excess of the statutory quota (goods worth MOP5,000) under which no declaration is required. Even against this looser standard, the exemption Paragraph stipulated in Article 25 of the *Foreign Trade Law* would apply only when the total value of goods involved is no more than MOP5,500, and only if the offence is very occasional.

42. However, the CCAC discovered that in some cases handled by pre-examiner whereby the exemption Paragraph of Article 25 of the *Foreign Trade Law* has been applied the value of goods involved obviously exceeded MOP5,500 and in several cases reached the definition of "enormous value" as defined by Article 196 of the *Penal Code*.

43. **Therefore, in order to avoid the incorrect application of the exemption Paragraph, it is necessary for Department A to establish standards for the pre-examiners to follow regarding the application of the exemption Paragraph as stipulated in Article 25 of the *Foreign Trade Law* so as to avoid pre-examiner from being suspected of abusing their authority because of their mistaken application of the legal provisions thereof, and protect the credibility of the administrative function.**

44. To address the above issues, the CCAC decided to issue a formal recommendation to advise Department A to adopt the following measures:

(1) In terms of customs duties:

A. In general, customs officers should be provided with a clearly written operational guide, particularly with regard to the standards used to judge goods transported into or out of Macao should be considered as personal use, and standard for considering goods as part of the a piecemeal valued over MOP5,000.

B. Customs duties at South Sampan Pier:

a. Halt the practice of charging trade licensees conducting foreign trade activities other than the cut-flower trade at the South Sampan Pier under Article 36 or 37 of the *Foreign Trade Law*. If it is established that the feasibility of imposing criminal charges against the trade licensees is questionable in terms of practical operation, the law concerned should be revised to facilitate the policies or effects of punishment and warning.

b. Review and rectify the confusing enforcement of the existing operational instructions at South Sampan Pier, particularly with regard to the standards for pass on registration, seizure for prosecution. If the Department decides to continue the existing registration measures, the measures must be improved.

c. Where the value of goods is apparently greater than that indicated by the invoice presented, the Department involved should seriously and actively investigate and collect evidence as stipulated in the current *Foreign Trade Law*. If the measures provided prove inapplicable the Department involved should consider amending the law by due process and establish a transition mechanism prior to the amendment of the law.

(2) As to charging and penalising administrative offences under the *Foreign Trade Law*, the Department should:

A. Devise an importance-and-urgency-based processing mechanism in writing to address the problems arising from the shortage of labour.

B. Establish standards for pre-examiner regarding the application of the exemption Paragraph stipulated in Article 25 of the *Foreign Trade Law*..

In response to the recommendations listed above, Department A explicitly promised

that it would handle the administrative offences on an importance-and-urgency basis and that it would strictly enforce the provisions of Article 25 of the *Foreign Trade Law*. They made no response, however, as to whether the abovementioned system would be committed to paper. No definite response was made regarding the other recommendations, thus the CCAC sent a letter to the Department and is awaiting reply.

File No.: 15/2007

Subject: Deferring Unused Annual Leave After a Public Servant is Suspended From His or Her Job

This case involved a public servant who was denied the right to transfer his/her unused annual leave for 2 consecutive years after being suspended from his or her job. The CCAC found that the stance of the supervisory entity of Department P differs from the opinions of the Public Administration and Civil Service Bureau (SAFP) and the Financial Services Bureau. In order to ensure that administrative functionaries adopt the same rules regarding this issue and to safeguard the legitimate rights and interests of public servants as specified in law the case was filed for formal investigation.

1. Regarding the right to annual leave in this case, both the SAFP and Financial Services Bureau held that according to Paragraph 2 of Article 39 of *General Regulations Governing the Staff of the Public Administration of Macao (Regulations)*, suspended public servants are not entitled to annual leave in the first year of their reinstatement, whereas Paragraph 4 and 5 of Article 83 of the *Regulations* only provides that a public servant may reallocate their unused annual leave (a maximum of 11 working days) to the next year. Even if it is because of the bureau's work, the unused annual leave of up to 11 days may be transferred to the next year but not to the year following that or 2 years later. Therefore, if a public servant's suspension straddles 2 calendar years, when he or she has not taken his annual leave before suspension, while ineligible to claim annual leave during suspension and for one year following reinstatement, and since the *Regulations* mentioned above provides that annual leave cannot be transferred over 2 consecutive years, unused annual leave may become unusable. Moreover the law does not provide compensation for this. Thus, civil servants involved in similar cases may not receive compensation, monetary or otherwise.

2. However, the supervisory entity of the department involved argued that annual leave is

a right that may not be infringed and that in principle the execution of the disciplinary penalty should not result in depriving the public servant's right to annual leave. If the public servant is unable to use or carry forward unused annual leave due to suspension from duty, he/she should be entitled to corresponding compensation.

3. First of all, it must be admitted that public servants are entitled to rest after working for a certain period of time, to the benefit of both the public servant and the department for which he/she works. As a matter of fact, the entitlement of annual leave is deemed a fundamental right of an employee in both national and international law. According to the provision of Paragraph 7d) of Article 40 of the Basic Law of the Macao Special Administrative Region (Macao Basic Law) the International Covenant on Economic, Social and Cultural Rights applicable to Macao shall remain in force, and definitely protect an employee's right to regular paid annual leave.

4. Article 303 of the *Regulations* classifies 3 levels of job suspension according to the gravity of relevant offence - with the first level set at 10 to 120 days, the second at 121 to 240 days and the third at 241 days to one year - and Paragraph 2 of Article 309 of the *Regulations* also provides that a public servant suspended from his or her job may not take annual leave within one year on his or her reinstatement. The restriction on the use of annual leave should not result in the public servant being completely unable to enjoy his originally entitled annual leave since the right to annual leave during the period of suspension and the first year after reinstatement is only temporarily suspended, and should resume upon the expiration of one year. After the expiration of the prohibition against enjoying annual leave, if the public servant is still denied of his right to enjoy the unused annual leave which he/she was entitled to before suspension, then the consequence will be more serious than the penalty stipulated in Paragraph 2 of Article 309 of the *Regulations* concerning the prohibition of taking annual leave one year after reinstatement.

5. It should be noted that according to Paragraph 1 of Article 308 of the *Regulations*, "disciplinary penalties should only produce the effect specified by law". Since the law does not provide that public servants suspended from their jobs shall be deprived of their right to the unused annual leave previously accrued, the administrative authorities should not allow their disciplinary measures to result in public servants' loss of their right to annual leave.

6. The Court of Second Instance noted in Verdict No. 97/2006/A on 20th April 2006 that allowing public servants to use the due and unused annual leave after a span of reinstatement normally would not be "detrimental" to the department concerned. Therefore, the department should have the power to approve the taking of annual leave by the applicant, taking into account the basis of the department's operations and other conditions. On these grounds, the Court of Second Instance sustained the request of the petitioner in the verdict and order to suspend the effect of the job suspension, i.e., the prevention of the petitioner from taking annual leave one year from reinstatement, so that the petitioner may apply for the use of the due annual leave.

7. What follows is that the bottom line of applying the restrictions stipulated in Paragraph 2 of Article 309 of the *Regulations* is that public servants suspended from duty should not lead to a complete deprivation of the unused annual leave accrued since such a consequence of loss is not proscribed by law.

8. One solution to the difficulties arising from meeting the "bottom line" mentioned above is to suspend the effect of the job suspension in order to enable personnel concerned to apply for the use of due and non-transferable annual leave within one year of reinstatement. Another feasible solution is to allow the person concerned to use the due annual leave prior to suspension.

9. According to the understanding of the SAFP and Financial Services Bureau, public servants should not receive any monetary compensation for their unused annual leave accrued before job suspension as this is not proscribed by law. Obviously, the understanding was based on the fact that "such provision is not expressly specified by law". This logic leads to the questionable consequence that public servants concerned should be deprived of the right to use their remaining annual leave to which they were otherwise entitled after one year of their job suspension. However, this consequence is not proscribed by law, especially when Paragraph 1 of Article 308 of the *Regulations* stipulates that "disciplinary penalties shall produce only the effects proscribed by law". Therefore, if it is reasonable for the administrative authorities concerned to prevent suspended public servants from receiving any compensation for deprivation of their unused annual leave accrued before suspension on the premise that no such provision is proscribed by law, then likewise the administrative authority shall not allow the penalty to lead to a consequence of deprivation of their right to annual leave.

10. Another facet of the consideration is that when public servants are penalised by mandate retirement they are still entitled by law to receive corresponding compensation for the due and unused annual leave accrued prior to termination. Relatively speaking, does this not mean that the consequences of the penalty of duty suspension are more severe than that of mandate retirement, as those involved in the former penalty will not be able to take due and non-transferable annual leave after reinstatement or receive any compensation? Does it mean that the rationality of the legislator is misinterpreted by the interpreters of the law?

11. Obviously, it does not follow that a public servant's right to annual leave must be compensated in the form of money; therefore it is necessary to revise the civil service regime to prevent public servants from bearing consequences that are not proscribed by law as a solution to the administrative problem. In this regard, the CCAC suggests that:

    A. New provisions be introduced in revising public service regime entitling public servants to use due annual leave prior to job suspension, or be given corresponding monetary compensation in cases where he/she is unable to take such annual leave.

    B. Before the public service regulations are revised, a public servant should be allowed to take entitled annual leave prior to suspension to which he or she is subject; alternatively, suspend the effect of "prohibition from enjoying annual leave one year after suspension" in order to enable relevant personnel to take due and non-transferable annual leave within one year of reinstatement.

    The CCAC briefed the Chief Executive, the Offices of the Secretaries, the departments and organisations reporting to the Chief Executive and Secretaries of the advice and suggestions mentioned above. The Chief Executive sent a reply prepared by the Office of the Secretary for Administration and Justice, and an analytical report on Paragraph 2 of Article 309 of the *Regulations* in response to the advice proffered by the CCAC. However, we noted that while the Office of the Secretary for Administration and Justice basically agreed with the CCAC's view that a public servant's right to annual leave should be protected, they misunderstood the stance of the CCAC and the grounds on which the advice was given.

    The CCAC subsequently drafted a report and sent it to the Chief Executive with a copy

to the Office of the Secretary for Administration and Justice and relevant departments involved, such as the supervisory entity of Department P, in order to clarify the CCAC stance. It was emphasised that while CCAC respects the interpretation of public service regulations made by the SAFP, it also holds that the legitimate rights and interests of public servants should be protected. The CCAC therefore adopted the legal interpretation which is not in direct conflict with that of the SAFP on condition that the legitimate rights and interests of civil servants may still be practically protected and finally issued the recommendation without completely negating the stance of SAFP.

File No. 43/2007

Subject: Prosecution and Penalty Mechanism Concerning Unlicensed Meat Roasting Factory

The CCAC received a complaint about an unlicensed meat roasting factory which operated in a business unit on the ground floor of residential premises for quite some time. However, Bureau E seemed to have neglected checking the shop. Initial enquiries with Bureau E appeared to confirm the situation. The CCAC retrieved the relevant case file from the bureau for analysis, which suggested that Bureau E was administratively illegal. The CCAC consequently instigated formal investigation:

A. Bureau E's administrative illegality and malpractice

(a) <u>When referring the case to another administrative authority, Bureau E failed to fulfil its legal responsibility to inform the party concerned</u>

1. On 15th November 1995, a citizen submitted to the predecessor of Bureau E an application to set up a meat roasting factory in a shop within a residential premise. Bureau E's predecessor determined that the shop's primary business was the direct sale of food it produced, hence on 17th January 1996 it referred the application to a department that had the authority to assess and approve such applications (the former Macau Government Tourist Office).

2. However, since the predecessor of Bureau E failed to fulfil its responsibility pursuant to Article 34, Section 1 of the *Code of Administrative Procedures* then in force to inform the person concerned of the authority's opinion when referring the application to the former

Macau Government Tourist Office. Consequently, the applicant could not make any representation to the Bureau regarding its qualification of the facility. Bureau E executives admitted that its predecessor had indeed mishandled the case.

3. Therefore, Bureau E should have taken appropriate measures to avoid such situations arising from its failure to inform the persons concerned, who were subsequently unable to exercise their right of defence effectively.

(b) <u>Failure to execute the operation suspension order of the Acting Director in 2001</u>

1. On July 26th 2000, Bureau E found that the unlicensed meat roasting factory was still in operation. Following an investigation, the Acting Director announced a directive fining the shopkeeper MOP10,000 and demanded that he/she cease operating immediately on 31st August 2001. The notice of the decision was sent to the shopkeeper on 17th September 2001. On October 15th, the shopkeeper filed a judiciary appeal against the decision with the Administrative Court. However, before the court reached a verdict declining the appeal, Bureau E neither followed up on its order nor executed the penalty stipulated. Bureau E neither sent personnel to the site to ascertain whether the factory operation had been suspended nor collected the fine when the due date of voluntary payment had expired claiming that, "the related judiciary appeal has yet to be processed".

2. According to the *Code of Administrative Procedures and Code of Administrative Litigation*, the aforementioned penalty decision became enforceable the moment it was made known to the offender. Even if the alleged offender filed a judiciary appeal, the appeal did not have the effect of suspending the penalty decision; in addition, the alleged offender had not requested the court to suspend the effect of the decision on raising the judicial appeal. Therefore, Bureau E's excuse that the related judiciary appeal has yet to be processed for not enforcing the penalty decision is administratively illegal.

3. On 13th May 2002, the Administrative Court ruled that the plaintiff's appeal was groundless. Consequently, Bureau E sent a notice to the Tax Enforcement Division to urge coercive collection of the fine but no action was actually taken to check whether the operation of the factory had been suspended or not. An inspector from the Investigation Department even suggested closing the case merely because the alleged offender had paid the fine on 22nd July 2002. Based on the aforementioned, Investigation Department officers - the team leader, the division head and the department head - had all been collectively negligent

by not checking whether the factory had complied with the bureau's order to suspend operations. The case was closed on 26th July 2002 merely because the alleged offender had paid the fine. That very act violated the general procedures and constituted administrative misconduct.

4. On 22nd July 2002, while paying the fine, the shopkeeper sent a letter to Bureau E requesting an industrial licence for the factory. At that time, Bureau E was, in fact, well aware that the shopkeeper had been fined and that he had been instructed to suspend operations forthwith for running an unlicensed meat roasting factory at the location. As the factory was equipped with all kinds of equipment and facilities for meat roasting, Bureau E should have realised the high probability that the shop was still in operation. For that reason, unlike other simple applications for industrial licences. Thus, Bureau E should have utilized its internal communication system properly and sent personnel to the shop, having received the offender's application for licence, in order to establish as soon as possible if the shop had been operating without a licence, and handled the case accordingly.

5. In fact, after receiving the licence application, Bureau E only wrote to the Land, Public Works and Transport Bureau to ascertain the information contained in the building utility licence. Bureau E was then informed that the premises where the factory was located on a building where most individual flats were residential. The bureau rejected the application because no operation of an industrial nature is permissible in such a location, but it never sent inspectors to check the site and the operation continued unlicensed for years.

(c) <u>Failure to verify or clarify the promise "while the fine must be paid, the operation of the factory may continue"</u>

1. Coincidentally, when the unlicensed meat roasting factory at the aforementioned site was found to be operating again on 23rd February 2006, the alleged offender insisted that the department head of Bureau E had promised that "while the fine must be paid, the operation of the shop may continue". This defence seemed to have been substantiated by the fact that the bureau had never sent a staff member to check the site or follow up on the case after the alleged offender had paid the fine. It was indeed conducive to the belief that an official promise had been made. What is baffling is that although staff members of Bureau E had already submitted a written report of the case, Bureau E neither initiated investigative proceedings nor followed up. Neither did Bureau E make any clarification or

response to the alleged offender. The Acting Deputy Director merely stated that he had orally checked the point with the Director, the department head and other staff members, although all of them denied this. Therefore, the Acting Director did not take any notice of the case.

2. Regarding the aforementioned promise alleged by the alleged offender, Bureau E should have initiated formal investigations in order to ascertain the facts and make a written report of the explanations of Bureau E's personnel and the findings of the investigation, to ensure the seriousness and fairness of the procedures. If any signs of functionary crimes were found, a report should be made to the CCAC. In addition, the alleged offender repeatedly mentioned the promise in later meetings with bureau staff. If the bureau had reached a conclusion via investigation or had taken a stance on the case, they should have made a clarification or response so that people (including the frontline bureau personnel) might not suspect that the bureau had already "tacitly acknowledged" the promise. Over the four years since the operation of the factory was ordered to stop on 31st August 2001, the bureau in effect did not "realise" that the unlicensed operation was continuing. Such circumstances undoubtedly aroused suspicions that the unlicensed factory was able to operate because it was shielded by bureau personnel.

(d) <u>Failure to commence procedure of administrative penalties and implement preventive measures upon finding that the same unlicensed factory was still in operation</u>

1. When Bureau E found that the operation of the factory had not been suspended on 23rd February 2006, the four-year prescription of the penalty pursuant to Article 81 of Decree Law no. 11/99/M should not yet have expired. Therefore, the aforementioned violation should have been considered in breach of the supervision order issued by the bureau in 2001. Consequently, the bureau should have taken preventive measures against the factory under Article 86 of the Decree Law, to prosecute and penalize the alleged offender according to Article 82a of the Decree Law. However, the chiefs and department heads of the bureau had neglected such objective facts.

2. It should be noted that when Bureau E found that the operation of the factory was continuing on 23rd February 2006, it neglected the relationship between the ongoing unlicensed operation and the former Acting Director's suspension order, or mistaken that the four-

year prescription of the penalty pursuant to Decree Law no. 11/99/M to have expired and granted the alleged offender an ordinary grace period for the voluntary suspension of operations, as if the alleged offender was only found to be operating an unlicensed business for the first time. Even so, the period offered by the bureau should not be longer than the previous one offered to the alleged offender when the unlicensed operation was first discovered.

3. Nevertheless, the grace period offered to the alleged offender to voluntarily suspend operations on 10th August 2000 lasted for 15 days, whereas a more lenient 20-day grace period was offered on 24th May 2006 more puzzling. The Acting Director's explanation starting from the day the bureau sent out the registered administrative notice the 15-day grace period would have almost expired, by the time it reached the addressee the period. Thus, the grace period was generally extended by the bureau from 15 days to 20 days. In fact, the law prescribed that the grace period should start from the day the alleged offender received the notice. The problem stated by the Acting Director probably would not exist.

4. What is even more puzzling is that following the granting of the initial 20-day grace period for voluntary suspension, on July 14th 2006, the bureau offered the alleged offender an additional 60-day transition period to meet official requirements. The Acting Deputy Director explained that the alleged offender had submitted an application for an operation licence for a meat roasting factory in that shop to the predecessor of Bureau E in 1995. However, since the Portuguese Macao authorities did not handle the case properly, the licence was issued before the new law came into effect. Under the new law, the alleged offender was not qualified for an industrial licence, and hence resulting in the somewhat "pardonable" situation. In addition, the alleged offender was emotionally unstable and claimed that he/she owed many debts and had children to support so the suspension of factory operations would leave him or her without a livelihood. In order to prevent situations as "inspectors being attacked by a citizen with a knife", Bureau E adopted a more conciliatory approach, offering 60 days to the alleged offender to move the operation elsewhere, provided that the factory compiled hygiene, fire control and safety regulations.

5. In fact, the alleged offender's application for the licence was rejected in 2002 because the location did not qualify. When the alleged offender was discovered conducting an unlicensed operation on 23rd February 2006, four years had passed in which the alleged

offender could have got ready to meet the condition that "if you want to legally operate a meat roasting factory you must move to an industrial property and submit another application for a licence". Therefore, the alleged offender had no valid reason to ask for more time to arrange for relocation. As to the other reasons presented by the alleged offender for non-compliance with the law, Bureau E should not have accepted them without verification.

6. In addition, a lenient approach should not be adopted merely because of the emotional reaction of the person concerned. Prevention of "inspectors being attacked by a citizen with a knife" should rely on the bureau's crisis management mechanism rather than via the practice of selective law enforcement by giving way to violence. If the bureau really deemed it necessary to have a "lenient" approach it should have established a set of objective criteria for law enforcement in advance so that all parties concerned would have been treated fairly and the exercise of discretion would not be boundless or even abused.

7. In the letter to the alleged offender regarding the granting of 60 days grace, the Investigation Department of Bureau E should have clearly alerted the alleged offender to the adverse consequences that he or she would incur regarding non-compliance with the law. In particular, an explicit warning should have been made that once the operation of the factory had been found unsatisfactory per the bureau's requirements the bureau would no longer allow it to remain in business and an immediate prosecution would follow. However, the bureau did not make these points in its letter to the alleged offender.

8. The Acting Director told the CCAC that when he learned that the Acting Deputy Director was going to offer the alleged offender a further 60-day grace period he clearly indicated the Acting Deputy Director that if the alleged offender failed to move the business elsewhere by the end of the 60-day transition period administrative penalty proceedings should be initiated against the alleged offender. However, on 28th November 2006, when the alleged offender had indeed failed to comply by the end of the 60-day period, the Acting Director did not approve the motion as suggested by the head of the Investigation Department to initiate penalty proceedings and preventive measures. The Acting Director explained that he did not approve because he did not want to be "ruthless" and because the alleged offender had in fact purchased an industrial property; the shop had not moved into the new place because the original owner of the new premises had not moved out;

thus, it required four more months for the alleged offender to move, a delay not due to the alleged offender, who was doing what he or she could to comply.

9. However, records showed that the alleged offender only orally claimed that he or she had purchased an industrial property unit at Edf. Industrial da Ilha Verde as the new factory facility – what he or she submitted to the bureau was nothing more than an unsigned lease; no evidence of purchase of the industrial unit was ever submitted. Information from Property Registration Database also indicated that the ownership of the aforementioned industrial unit had never been transferred to the alleged offender or his/her spouse. When Bureau E finally approved the industrial license to that industrial unit, the holder was neither the alleged offender nor his/her spouse. The alleged offender later informed the bureau that the licence holder of the industrial unit was his/her new business partner, but he or she had never submitted any proof that a partnership existed.

10. In other words, the Deputy Director aborted the proceedings of administrative penalty against the alleged offender on the basis of his/her oral claim and a lease without the landlord's signature. Without taking verifying measures, the bureau was too hasty in taking the alleged offender, who had run the business without a licence for many years, as "sincerely intended" to move away as required, especially in view of the fact that the alleged offender had never formally submitted an application for a licence.

11. Afterwards, Bureau E realised that the alleged offender was only making excuses for the delay of relocation, and initiated proceedings of administrative penalty against him or her on 24th January 2007. In view of the seriousness of the offences, the team leader and the division head of the Investigation Department suggested to raise the fine to MOP20, 000 and ordered the alleged offender to suspend operations forthwith. However, on 7th May 2007, the department head instructed the inspection team to investigate the current status of the shop but made no legal explanation as to why he did not adopt the suggested measures. In this case, even if the alleged offender did take corrective actions or even if the operation was indeed halted and the factory moved elsewhere thereafter, made no grounds for exempting the alleged offender from penalty for his/her past offences. The Investigation Department indeed had no reason to compromise the previous administrative measure against the alleged offender. The department head's delay in adopting penalty measures against the alleged offender was indeed administratively illegal.

12. On 30th May 2007, the team leader and division head of the Investigation Department suggested fining the alleged offender MOP20,000 and ordering the latter to suspend the operation of the factory. The department head pointed out that after the alleged offender obtained a temporary industrial licence for the new factory, he/she had not moved to the new factory and continued operating in the old premises. However, the department head only suggested fining the alleged offender and his/her spouse (both of whom ran the factory) MOP10,000 in total. The suggestion was approved by the Acting Deputy Director on 1st June 2007. In other words, the bureau fined the alleged offender the lower penalty as if the act was a first offence, instead of punishing him/her more heavily. For the offender, such punishment could be interpreted as a "cheap" cost for the unlicensed operation over the years. Such conduct would not prompt citizens to obey the law, let alone suppressing repeated offences.

13. After that, the alleged offender filed an essential petition to the bureau but without providing any evidence to disprove the bureau's accusation against him/her. Also, there was no sign of relocation. Therefore, the team leader and the division head of the Investigation Department suggested rejecting the petition on 2nd July 2007, but the department head only issued a directive to initiate a further check on the factory instead of immediately agreeing to reject the petition. In fact, the punishment to be exerted by the bureau was the lowest limit of the fine pursuant to Section b, Article 82 of Decree Law no. 11/99/M, so there was no room for alleviating the penalty. Moreover, Decree Law no. 11/99/M did not empower Bureau E with the discretion to exempt the alleged offender from punishment. In addition, when the bureau was deciding whether or not to reject the petition, it was unnecessary to consider whether the alleged offender would move away after being fined or whether he/she had obtained a licence for the new factory.

14. As the essential petition had the effect of suspending administrative measures taken against the petitioner, the authorities should have decide whether to accept the petition within 30 days upon receiving the petition. If further inspection and complementary measures were necessary, the time limit for decision making would be extended to a maximum of 90 days. In this case, the head of the Investigation Department conducted meaningless investigations or ineffective complementary measures. As a result, the bureau took almost 90 days (on 11th September 2007) to make the decision. In other words, the conduct substantially deferred the execution of punishment against the offender, thus allegedly violating the

general principles of administrative procedures – the principles of legality and efficiency.

15. On 22nd October 2007, the Investigation Department sent its personnel to check the factory, which they found was still in operation with no sign of equipment being moved. The bureau prosecuted the alleged offender under Section b, Article 1 of Decree Law no. 11/99/M but did not adopt immediate preventive measures. Although the fine under Section a, Article 82 of Decree Law no. 11/99/M has been increased from MOP20,000 to MOP200,000 there was a certain time lapse after the bureau filed the prosecution and issued the penalty. The bureau's failure to adopt preventive measures that could effectively halt the operation of the factory. As a result, the previous suspension order to the alleged offender was rendered "nominal".

16. It was true that the chiefs of the bureau thought that Decree Law no. 11/99/M was unreasonable and unfeasible as it required that all home-based workshops move to industrial properties. Therefore, they refrained from executing the 'rigid' decree law. The bureau adopted any preventive measures against unlicensed factories or workshops.

17. However, the CCAC holds that as the supervising and enforcing authoritative organ of execute Decree Law no. 11/99/M, the bureau should not abandon its responsibility to legal enforcement merely because the law was evil. Otherwise, the bureau might violate the principle of legality - the most basic principle that all administrative functionaries should comply with. Even though the authorities thought that it was difficult to execute the decree law thus adopting "revised measures" in accordance with factual situations, the measures should be impartial and known to citizens. However, while Bureau E required that the workshop operate in an industrial property they did not punish an unlicensed factory operating in non-industrial property. Such an approach was indeed unfair to legitimate operators who obtain industrial licences. This obviously violated the principle of fairness.

(e) <u>Failure of Bureau E to correctly understand and enforce the "warning" measures provided in Article 84 of Decree Law no. 11/99/M</u>

1. During the course of investigation, the CCAC found that if the reported unlicensed factories were not qualified for an industrial licence because of the location of the factories (e.g.) in residential properties, Bureau E generally offered those operators a period of time – about 15 to 20 days - to suspend operations voluntarily. However, bureau personnel variously

interpreted the criteria and basis for the offer. Some of them thought that the offer was based on law, while some asserted that the offer did not have any legal basis but was rather a general policy for the purpose of giving offenders a chance to comply voluntarily. Some personnel maintained that regardless of whether the offenders were found in their first instance of offence or not, they were offered the period to voluntarily suspend their operations. By contrast, other personnel said that only first-time offenders or those who did not commit the same offence again within two years were offered the grace period.

2. In fact, under Decree Law no. 11/99/M, all industrial activities are prohibited in properties primarily comprised of residential flats. Therefore, if the reported unlicensed factories were located in such residential properties, it was impossible to have such an offence amended; and even impossible to offer the period pursuant to Article 84 of the decree law. In this case, the law did not allow Bureau E the discretion of offering offenders a chance to voluntarily suspend unlicensed operations.

3. For the sake of precise adherence to the law, once Bureau E received the complaint about the unlicensed factory, they should have taken measures to verify if an industrial licence was applicable to the location of the reported unlicensed factory, in addition to sending personnel to check the factory. If the location was unfit for an industrial licence, the bureau should have made an on-site record of the offence and initiated proceedings of administrative punishment against the offending party.

4. If the bureau thought that there were difficulties in the strict enforcement of the law, they should have initiated amendments to the law. As to legal enforcement during the transition period before the amendment had not been completed, they should have established relevant criteria through due process and informed public. In any case, the bureau should not offer sites legally incapable of getting industrial licenses with longer "warning" (grace) periods than those with such capability!

5. Moreover, the operation of an unlicensed factory in a residential property may constitute improper use due to the change of purpose of a property. Therefore, once Bureau E had received such a complaint they should have immediately informed the Land, Public Works and Transport Bureau in order that the latter could adopt measures to follow up and investigate the matter. At the same time, Bureau E should inform the party concerned.

B. Problems arising from Department I's handling of document delivery, receipt and archiving

1. In the process of investigating this case, the CCAC found that after the predecessor of Bureau E had received an application for a licence for operating a meat roasting factory in 1996, they categorised it as an application for a licence for catering facilities. On 17th January 1996, therefore, Bureau E referred the application to the former Macau Government Tourist Office. When the latter received the file they no longer had the power to issue licences for catering facilities or regulate such facilities due to the introduction of new regulations. Consequently, they referred it to the predecessor of Department I on 17th June 1996 and informed the party concerned.

2. Department I, however, was now unable to locate the file delivered by the former Macau Government Tourist Office in 1996, and claimed that no data was available to trace the process of the original delivery and receipt of the file. Since this was not the only case which involved the transfer of files from one functionary to another as a result of functional transference, there were reasons to be concerned about whether the predecessor of Department I had properly verified the files received from the former Macau Government Tourist Office at their transfer, and whether Department I (or its predecessor) had lost any of the files.

3. To prevent such things from happening again the CCAC held that Department I should take measures to improve its internal supervision mechanism in order to better control the process of file transfer when exchanging documents with other departments in case of functional transference.

C. The CCAC solution

Thus, the CCAC adopted the following measures within its power:

1. The CCAC advised Bureau E to undertake a thorough review of how they implemented Decree Law no. 11/99/M, especially their precise application of the rules pursuant to Article 84 of the above decree law. In particular, CCAC wanted to know how the bureau would implement a reporting mechanism against the improper use of properties with the Land, Public Works and Transport Bureau, the setting up of a supervisory mechanism verifying whether a banned, unlicensed operation was actually suspended or not, and standardize

the conditions under which preventive measures may be taken and their implementation, in order to enhance the legal enforcement of their staff. If the bureau thought that Decree Law no. 11/99/M was "too stringent" and hard to implement it should "amend the law". As to how legal enforcement should be enacted during the transition period of law amendment, they should establish relevant criteria in due process and informed citizens accordingly. At any rate, the bureau should not have offered a longer "warning" (grace) period for unqualified applicants for an industrial licence than qualified ones.

2. The CCAC advised Bureau E that if there were accusations that its public servants had made illegal promises, it should initiate internal investigative proceedings and report to the CCAC any suspected functionary crimes. Also, it must clarify such accusations and respond to the public when necessary.

3. The CCAC suggested that Department I take measures to improve its internal supervision mechanism for better control of file transfer process when exchanging documents with other departments, in terms of document receipt and archiving, when such transfer is necessary for functionary transference.

Bureau E fully accepted CCAC's advice and responded that it would take its suggestions into account when amending Decree Law 11/99/M in the future.

File No.: 05/2007

Subject: Prosecution of Illegal Hotel Proprietors and Unlicensed Tourist Guides

According to information provided by residents, and files concerning illegal hotels obtained from Bureau T during the examination on systems conducted last year on the *Power of Intervention of the Public Administration Concerning the Misuse and Poor Management of Private Premises*, Bureau T was found to have allegedly committed a series of administrative illegalities and malpractices in its handling of cases concerning breaches of administrative regulations and their penalties. A formal investigation was initiated to further analyse how Bureau T handled such administrative penalty cases. The CCAC retrieved data from Bureau T regarding the administrative breach cases against several unlicensed tourist guides.

I. **Bureau T personnel responsible for monitoring the lawful operation of the tourism**

industry were found to have misapplied the law and to have held shifting positions, lacked of reasoning and standards in case handling.

1. In early 2004, Bureau T identified consecutively 2 cases of illegal hotel operation in which the same offender was involved. Investigations were completed at the end of January 2005 and the offender ended in 2 separated fines of MOP60,000 and the orders to close the business premises. The offender subsequently appealed to Bureau T. In April 2005, 2 pre-examiners analysed the case for appeal and recommended in sustaining the 2 original penalties of MOP60,000 fine and closure of premises. The acting department head of the Licensing and Inspection Department, however, accepted the plea **that the offender was a divorcee and had to care for her 4 children**, and suggested in late May that the execution of the penalty be suspended according to the provisions of Paragraph 1 of Article 65 of Decree Law no. 16/96/M, which states that "The execution of penalty may be suspended if there is a reasonable explanation, provided that such suspension be no less than 6 months and no more than one year". This recommendation was eventually approved by the Director of Bureau T.

2. **However, the offender had repeatedly violated the regulations concerning unlicensed hotel operations and owned at least 8 apartments in a certain building. Under such circumstances, the acting department head exercised his discretion to suspend the penalty based merely on the aforementioned explanation was farfetched. Furthermore, the head involved may have incorrectly applied the law.**

3. The puzzling thing is, one month after Bureau T decided to suspend the penalty decision - in late June 2005 – the bureau displayed inconsistency in its handling of a case involving another offender. The pre-examiner once again recommended the suspension of a penalty decision on the similar grounds that the offender was a first-time offender, was elderly and uneducated, and of limited financial resources. However, the above acting department head and his superior - who was a Deputy Director especially responsible for directing the duties of inspection and procedures of administrative offences in the bureau - rejected the recommendation. Nevertheless, at the end of May 2005 the acting department head and Deputy Director involved in fact approved the suggestion of penalty suspension by the pre-examiner in yet another case concerning unlicensed hotel operations, in which a similar plea was put forward that it was a first offence and that the offender was out of

work and lived on subsidies from the Social Welfare Bureau and Social Security Fund.

4. **In other words, bureau staff assumed absolutely different positions in applying provisions of Article 65 of Decree Law no. 16/96/M in the span of just one month.**

5. A similar situation arose in the handling of cases concerning unlicensed tourist guides with regard to breaches of administrative regulations.

6. In March 2004, Bureau T inspectors identified Leong as an unlicensed tourist guide while he was taking a tourist group arranged by a travel agency to a restaurant. According to Decree Law no. 48/98/M then in force, if the unlicensed tourist guide was proved rendering services to a travel agency, the agency involved should also be fined.

7. In handling the case of Leong, the pre-examiner recommended in mid-August that the travel agency be penalised because it must have known that Leong was representing them. However, the Deputy Director of Bureau T questioned the judgement of the pre-examiner and in late August ordered him to hear the explanation made by a licensed tourist guide that the agency claimed was the originally scheduled tourist guide involved in the case. Accordingly, it was evident that the Deputy Director believed that the declaration by this licensed tourist guide constituted important evidence in judging whether the unlicensed tourist guide had rendered services to the travel agency.

8. In another case concerning an unlicensed tourist guide identified on the spot whilst guiding a tour group for another travel agency some 10 days after the Deputy Director gave the aforementioned instructions, the travel agency likewise claimed that they had originally arranged a licensed tourist guide, Chio, to guide the group and were ignorant as to if and how an unlicensed tourist guide had been involved in their tour. However, the Deputy Director echoed the challenge made by the pre-examiner that "**how could he (the unlicensed tourist guide) have got on the tour bus and guided the group arranged by that travel agency without the approval of the travel agency?**" He consequently declared that the travel agency should be punished as the unlicensed tourist guide was arranged by them.

9. It is worth noting that in the case decision mentioned above - in which the Deputy Director **disapproved the penalty against the travel agency** - the unlicensed tourist guide surnamed Leong, was caught by Bureau T while he was guiding the group to a restaurant.

If the aforementioned question by the pre-examiner was applied to this case, one should arrive at the same doubt as "whether Leong, the unlicensed tourist guide, could have been guiding the tour group without the approval of the travel agency", with which the testimony of the licensed tourist guide could have been overthrown by the same logic. In this way, it should not be necessary for the Deputy Director to order the pre-examiner to hear the testimony of the licensed tourist guide Chan once more.

10. If, according to the abovementioned point (8), the Deputy Director's rejection of the explanation that the "travel agency was ignorant of the replacement of the unlicensed tourist guide" was made after the instruction for "leniency" for another travel agency on August 2005, logically he should have stuck to his ground in enforcing the law by likewise rejecting any further explanation. However, within a fortnight the Deputy Director involved approved again the exemption of the travel agency from the penalty in the case of Leong, the unlicensed tourist guide, by accepting the claim of the licensed tourist guide, Chan, that the tour agency was ignorant of the replacement by an unlicensed tourist guide.

11. Quite evidently, the Deputy Director shifted his stance several times within a short period of time regarding the circumstances under which a travel agency may be penalised.

12. In handling another case in October 2005 in which an illegal transportation service was involved, the Deputy Director issued a "warning" penalty to the tourist guide as well as the travel agency in the absence of any recommendation from the pre-examiner, acting division head or acting department head and without stating the reasons for penalty in accordance with the provisions of Articles 113 to 115 of the *Code of Administrative Procedures*.

13. The abovementioned cases undoubtedly confirm that Bureau T incorrectly applied the regulations regarding penalty suspension by making totally inconsistent decisions on similar cases within a short period of time, and even taking the "initiative" to penalise the parties concerned without giving reason. On one hand, this led to doubts about whether public servants are discharging duties in an uncorrupted, impartial, objective and neutral manner; on the other hand, it makes it impossible for pre-examiners to identify the principles upheld by the bureau in handling such cases.

14. In view of the fact that the tourism industry is a mainstay of Macao's economy, and that impartial and standardised supervision is the basic means of ensuring the orderly develop-

ment of the local tourism industry and maintaining Macao's image as an international tourist destination, it is deemed necessary that the administrative authority conduct a thorough review of the situation and adopt a better management approach.

II. Bureau T's chaotic procedures in handling administrative offences, lack of appropriate and effective progress in supervision mechanism

1. We noticed that the pre-examination proceedings concerning the illegal operation of a lodging house in early 2004 lasted for 1 year and 8 months. Primarily, the case took so long because of confusion in notifying the suspect to submit a defense, collecting penalty notice, etc. In particular, where the suspect repeatedly failed to attend appointment, the pre-examiners continued to attempt to contact the suspect by telephone in order to schedule another appointment. According to the bureau personnel, this was the normal practice by the pre-examiner.

2. In fact, should a suspect intend to disrupt the legal process by rejecting the notice from the authority (e.g. by failing to collect official notice or refusing to receive letters from the authority), then such acts obviously violate the Principle of Good Faith stipulated in Article 8 of the *Code of Administrative Procedures* and may have abused his of rights. The authority should have foreseen that adopting the contact measures provided by Article 72 Paragraph 1 of the *Code of Administrative Procedures*, by contacting the suspect in person or by post, etc, would not be successful. Public announcement as stipulated in Article 72 Paragraph 2 of the *Code of Administrative Procedures* should be used if necessary to ensure the efficacy of the administrative process.

3. According to Bureau T personnel, the Bureau have adopted new measures regarding administrative offence cases concerning illegal lodging, which may make simultaneous use of public announcements and registered letters when it is deemed necessary to notify the suspect.

4. However, the new measures in handling cases also stipulate that when the authority receives the on-site record, it will appoint an individual pre-examiner for each case. But when it comes to other pre-examination procedures - such as holding written hearings, analysing statements in written hearings and giving advice on formal charges and so forth - an inspector would be appointed to handle matters such as conducting a hearing with

the parties involved, analysing statements presented in written hearings, giving advice on legal charges or keeping the case on file, etc, on a "10 cases as a batch" basis following up by pre-examiners. This arrangement evidently violates the provisions of Article 93 to 95 of Decree Law no. 16/96/M as the investigation and evidence collection measures for the verification of administrative offences - including a series of pre-examination procedures such as analysing offender's statements in the written hearing, advising on prosecution and proposing on a final decision, etc. - shall be conducted by the appointed pre-examiner. The new measures currently adopted by Bureau T will make the functions of the pre-examiners "nominal".

5. The inspector assigned to "follow up cases on a batch basis" is neither the pre-examiner nor a superior (such as the head of Inspection Division). It then becomes questionable as to what capacity the inspector undertakes his task and the commensurate responsibilities. On the other hand, should the case be handed to an official pre-examiner who finds that the "inspector" has failed to weigh and process the case properly, should he be responsible for advising the superior to remedy the situation? Or if the pre-examiner chooses to "pass the buck" should he or she take responsibility for failing in his or her duties (as a pre-examiner)?

6. Moreover, even if Bureau T decided to adopt the "new measures" above to standardise the operational work by, for example, notifying offenders identified within the same period to defend themselves through the same public notice or with registered letter. There is no good reason for this measure since the same result can be achieved with the statutory measure of appointing a pre-examiner as long as there is proper co-ordination between corresponding managerial and operational entities.

7. In addition, if Bureau T allows a small number of inspectors to handle pre-examination for a long period of time, it will largely increase the risk of individual inspectors illegally manipulating pre-examination proceedings and subsequent results. Should Bureau T believe that only a small number of inspectors are qualified to serve as pre-examiners because of their competency and experience, then it is necessary for the bureau to specify the qualifications for the job and offer training to unqualified personnel so that they may qualify for the position of pre-examiner.

8. **At any rate, even if it was indeed necessary to have the cases handled on a batch basis, Bureau T should officially appoint the pre-examiner to undertake such duties; it should**

also take measures to reduce the risk of manipulation and increase the predictability of the procedure. Regardless of the number of pre-examiners utilizing such functions, standardised criteria should be introduced for handling such cases.

9. Furthermore, in 2 other cases of administrative offence involving illegal tourist guides in 2004, the CCAC found that a Bureau T inspector responsible for pre-examination failed to notify the offender in time of the penalty decision made by the bureau in one case and no follow-up action in another, resulting in the expiration of the prosecution prescription period. Since the cases involved breaching of discipline, the CCAC alerted Bureau T, which initiated disciplinary proceedings regarding the cases.

10. The CCAC found many incidences where reports documenting the on-site record or penalty advice by the appointed pre-examiners were sent back to the Inspection Division some three months after being presented to the auxiliary office of the Chief in October 2004, without giving any instructions.

11. A worse situation was uncovered in still **another case where reports documenting penalty advices were submitted for decision in early August 2005, only to be returned without instruction in mid-November 2006, one year and three months later. By then the prosecution prescription had already expired. This administrative inadequacy directly resulted in the inability to prosecute the offender**.

12. The CCAC contacted the Deputy Director of Bureau T responsible for inspection and procedures of administrative offence to clarify the reason for the above situation. According to the Deputy Director, the testimonial transcript and penalty advice report of the case were submitted to the senior officer when he was on a business trip or leave, thus he was unable to give timely instructions.

13. According to Bureau T personnel, should a Deputy Director be on leave or on a business trip, his caseload would be transferred to the Director of Bureau T, in which case the proceedings of the cases concerned would lie dormant because the Director was too busy.

14. Although it is not inferred in the cases mentioned above that there were personnel(s) responsible for the pre-examination being "frozen", **it is evident that the supervisory system of Bureau T had gone seriously awry in that nobody followed up on the case even though it had lain dormant for several months or more than a year.**

15. According to Bureau T personnel, although starting from one or two years earlier the Inspection Division was required to submit a progress chart to the head of Licensing and Inspection Department and Deputy Director indicating name of case, date of commencement and current status (such as stages of interview, response given by person(s) involved, report writing and notification, etc). However in terms of practical operations, it was conceded that these "stages" were too general and were not good for supervisory purposes. So, **Bureau T should improve its monitoring measures for pre-examination procedures forthwith.**

16. In addition, it is obvious that the file keeping of Bureau T is seriously problematical because a **proposal concerning punishment written by the acting head of the Licensing and Inspection Department were missing without a clue**.

17. **In a case happened in October 2004, the CCAC discovered that a pre-examiner had failed to include the record of an offender's previous offences in his written report of May and July 2005, which resulted in the repeated offender being treated as a first-time offender.**

18. As far as the CCAC is aware, the Inspection Division of Bureau T has a computer system for tracing a suspect's offences record. However, the system is not good enough, and pre-examiners have to rely on their memory or query colleagues, manually check case files. This inevitably increases the opportunities for wrong reference and analysis in the offender's record. Thus, personnel find themselves in a minefield of potential malfeasance. Consequently, **the bureau involved must not ignore the situation and should initiate a system for checking previous offences record without delay.**

19. A case filed in October 2005 involved an unlicensed transportation guide. Bureau T originally charged the person involved as illegal tourist guide and as such summoned him to defence. After further analysis, the pre-examiner considered the offender an unlicensed provider of transportation services and suggested a penalty accordingly. However, **the pre-examiner did not inform the offender about the change of allegation as a result of change in illegal facts discovered in prosecuting procedures. He also failed to follow up with the necessary hearing. Consequently, the relevant penalty was invalidated because it breached the *General Regime of Administrative Offences and the Respec-***

tive Procedures.

20. Simultaneously, **although no penalty was suggested by the pre-examiner, the Deputy Director arbitrarily decided to impose a "warning" penalty upon the travel agency responsible for organising the groups as well as the original scheduled licensed tourist guide. Neither of the two parties involved was informed about the allegation or summoned him to defend. In other words, the penalties imposed by the Deputy Director in this case were also illegal and invalid.**

21. In addition to the illegality of the abovementioned issues, **although the deputy director decided upon the "warning" penalty for the licensed tourist guide, the pre-examiner failed to notify the tourist guide involved: this meant that the penalty was decided but not notified, reflecting in the bureau's acute leak in its notification procedure.**

22. During the course of investigation, the CCAC noticed that there was a lack of effective communication between Bureau T's superiors and their subordinates, who did not have enough support from the former when they found difficulties in their work. (An officer claimed, for example, that it was difficult to follow some cases because of language barriers, yet the superior failed to offer support or solution; another officer complained that proceedings dragged on as the superior often raised problems and questions irrelevant to the case during the pre-examination process.)

23. According to the stipulations of Paragraph 2b) and d) of Article 279 of *General Regulations Governing the Staff of the Public Administration of Macao* regarding the obligation of zeal and loyalty, Bureau T personnel, including pre-examiners, heads and chiefs, are obligated to ensure that offence cases followed up by the Bureau are handled as soon as possible within the prosecution prescription. If not, it will result in the authority's efficacy being questioned and expose them to suspicion of rendering "favours" to certain violators, thus impairing the reputation of the administrative authority, the above relevant personnel may have to bear disciplinary consequences or even criminal responsibility.

24. Finally, **should Bureau T suffer from a shortage of manpower as the flooding emergence of illegal lodging cases while their duties in other inspection tasks (such as inspection activities for restaurants and tourist guide services) were still ongoing, a case handling criteria must be devised in writing to determine the priority or urgency of the cases. For example, those cases which are large in scale or cause more serious social**

harm, or whose prosecution prescription is about to expire, should be prioritised and brought to the attention of the handling officers and the public in order to avoid the authorities or their personnel from being suspected of shielding offenders.

25. To sum up, the administrative functionary should pay close attention and take appropriate measures to remedy the situations mentioned above regarding its various illegalities, inefficiency in processing cases, chaotic procedures and lack of effective supervision, etc. They should formulate working guidelines and instructions in written form for bureau personnel and establish an effective system for monitoring the handling of cases.

III. In investigating and deciding on cases of illegal lodging houses, Bureau T did not verify whether the operator provided inherent services to lodgers

1. According to information about handling cases concerning illegal lodging services provided by Bureau T and statements made by its personnel, Bureau T relied upon checking the method of their rental payment, be it daily or monthly, but did little in investigating and analysing whether the operator had provided related services to lodgers such as room cleaning or towel supply. Some of its inspectors even claimed that it was difficult to verify these things.

2. Summarizing the provisions stated in Decree Law no. 16/96/M and the *Commercial Code*, a **hotel and lodging contract is considered a transaction of commercial activities in supplying accommodation and other related services; facilities supplying such services are naturally subject to the *Commercial Regime of Hotel and Similar Facilities.* Any person engage in such commercial activities of providing lodging services without the required licence commits the offence of operating illegal lodging.**

3. Real estate tenancy contract, on the other hand, is a civil activity that does not involve the commercial activities of providing lodging. Such a contract generally only concerns the lease of a property to a tenant and does not usually include the supply of related services. Therefore, such non-commercial, purely civil lease contracts are naturally out of the scope of the *Commercial Regime of Hotel and Similar Facilities*.

4. What should be noted here is that in such cases, whether the person concerned pays rent on a daily or monthly basis **does not constitute an essential criterion for determining whether a contract is a tenancy contract for civil residential purposes hotel lodging**

contract, since the rent stipulated in the tenancy agreement for residential purposes can also be computed on a daily basis. Consequently, the rental payment method alone is insufficient in proving that an individual is operating a hotel lodging service, or operating it illegally.

5. Relatively speaking, whether the accommodation provider offers inherent hotel services to lodgers is an important factor in determining whether the accommodation provider operates a lodging house or merely leases his or her property to a third party for residential purposes. By commonsense or referencing the regulations of other jurisdictions, a hotel business is understood to provide not only accommodation to guests but inherent services.

6. **In summary, the CCAC does not endorse Bureau T's practice of disregarding of whether lodgers have been supplied with related hotel services, nor its judgement on such poor grounds as rental payment method in determining whether the illegal operation of a lodging house is applicable.**

7. **It may be true that it is hard to obtain evidence in practice, especially in determining which conditions should be considered as providing related hotel services. If so, Bureau T should amend its regulations to further clarify the issue. Before making the amendment, however, it is advisable for the bureau to refer to current regulations, in particular the stipulations of the *Commercial Code* regarding services that must be provided by the accommodation provider, and issue a guide to inspection personnel in writing to clarify the standard of law enforcement.**

8. **Under no circumstances can the bureau rule out the existence of illegal lodging services on the basis of the fact that their facilities, partitions or related services fail to meet the minimum statutory standards that qualify a lodging house for an operation license. If a lodging house were illegal, then it would be normal that their services and facilities fall below statutory standards. It is because they are unlicensed that their services and facilities are not guaranteed to meet statutory standards.**

9. **In addition, in view of the fact that the police are often the first to detect such instances, it is necessary for Bureau T to communicate and co-ordinate with the Public Security Police Force on the criteria for judging the existence of an illegal lodging house, so that the police can effectively collect firsthand evidence. For example, consulting lodgers**

and recording "live" evidence may help Bureau T enforce the law and successfully prosecute illegal lodging house owners.

IV. Responsibility of travel agencies regarding unlicensed tourist guides

1. Both the former (Decree Law no. 48/98/M) and the current law revised and re-promulgated by Executive Order no. 42/2004 provide that a tour group arranged by the travel agency shall be escorted by a tourist guide, otherwise the travel agency shall be subject to fine. In addition, it is stipulated that a tourist guide shall hold the required licence or be subject to penalty. Once an unlicensed tourist guide is proved to be providing services to a travel agency the agency involved shall also be subject to penalty.

2. Past cases indicate that tour groups which claimed to be serviced by licensed tourist guides were found to be serviced by unlicensed individuals. In such cases, the travel agency concerned and/or the licensed tourist guides usually claimed that the unlicensed tourist guides were personally hired by the licensed tourist guide, and that the travel agency was totally ignorant of the arrangement, so that the travel agency would escape penalty.

3. **Such a defence should not, of course, be accepted without analysis or investigation. As pointed out by a pre-examiner of Bureau T, a tourist guide not working for the travel agency would not have been authorised to guide the tour group on board the tourist bus or to the restaurant reserved by the travel agency, or even pay the bill in the name of the travel agency. Consequently, it is necessary for the authority to devise clearer guidelines for law enforcement and how to judge the defence made by licensed tourist guides and/or travel agencies in the case of unlicensed tourist guides. This would prevent the recurrence of "non-standard and inconsistent" treatment of cases mentioned above, which provably damage the image of Macao as an international tourism destination and impair residents' faith in the government's administration of law and impartiality.**

4. On the other hand, **should the authority find the existing law not effective enough to tackle unlicensed tourist guide cases, or it requires improvement in terms of procedures of evidence collection and prosecution, the authority should amend its regulations in order to fully utilise penalty measures. However, certain appropriate measures should be taken prior to amendment in order to prevent the recurrence of "inconsistency and**

non-standardisation" of law enforcement.

V. Measures adopted by the CCAC

1) To address these administrative illegalities and malpractices, the CCAC issued a formal recommendation and Bureau T to adopt the following remedial measures:

i. Inspection

a. Formulate working guidelines and instructions in written form for bureau personnel, especially with regard to the duties enacted by Bureau T, the workflow of inspection and pre-examination proceedings, and the standards in handling cases, etc.

b. Improve the monitoring mechanism for inspection and pre-examination progress.

c. Improve the computer information system regarding reference to the offence record.

d. Devise a priority-and-urgency-based processing mechanism.

e. Enhance communication between superior and subordinates.

ii. Handling of illegal lodging cases

a. Amend the current approach and standards of evidence which neglect the verification of provision of hotel inherent services by the suspected business operator. If it is hard to obtain evidence especially in determining which situation should be regarded as provision of inherent hotel services, Bureau T should amend its regulations to further clarify the issue. Before making the amendment, however, the bureau can refer to current regulations, in particular to stipulations of the *Commercial Code* regarding the services that must be provided by the accommodation provider, and issue a guide to inspection personnel in writing to clarify the standards of law enforcement.

b. Since the police are often on the frontline of law enforcement, it is necessary for Bureau T to communicate and co-ordinate with the Public Security Police Force on the criteria for judging the existence of an illegal lodging house, so that the police can effectively collect firsthand evidence, such as by consulting lodgers and recording "live" evidence which may help Bureau T enforce the law and successfully prosecute the illegal lodging operators.

c. **Through experience, if Bureau T regards it necessary to process illegal lodging house cases via pre-examination conducted on a batch basis, it may appoint one pre-examiner to handle a batch of cases but should do everything possible to reduce the opportunities for individual manipulation and predictability with regard to the appointment mechanism.**

iii Handling of unlicensed tourist guide cases

a. Clarify how law enforcement officers should review the explanation made by licensed tourist guides and/or travel agencies in the case of unlicensed tourist guides - namely, that such unlicensed tourist guides are only assistants personally hired by the licensed tourist guide without the approval and knowledge of the travel agency, so as to avoid "inconsistency and non-standardization" in the approach to such cases.

b. Should the bureau find the current law impracticable in tackling unlicensed tourist guide cases, especially in terms of collecting evidence and prosecution, it should, in addition to setting up the instructions mentioned above, amend the law concerned.

2) The tourism industry is a mainstay of Macao's economy. The impartial and standard supervision of the sector is an important means of ensuring its orderly development, as well as maintaining its image as an international tourist destination. This case revealed that Bureau T officials responsible for supervising the lawful operations and management of the tourist industry were administratively illegal and inappropriate in misapplying the law and were inconsistent in their approach and handled cases without proper reason and criteria. Hence, the CCAC referred its findings to Bureau T's supervisory entity for a more in-depth review of the situation and rectification may be undertaken.

With regard to the advice mentioned above, Bureau T responded as follows:

I. Inspection

Bureau T accepted most of the recommendations proffered by the CCAC but stressed that the existing manpower, in particular its inspection personnel, was inadequate to match up with the workload. It believed that the problems mentioned above might be resolved by re-structuring the bureau, reallocating some of its offices and recruiting more personnel.

II. Handling of unlicensed tourists guides cases

1. With regard to the cases of the unlicensed tourist and transportation guides, Bureau T maintained that they have always acted according to the law by verifying case facts and whether the unlicensed tourist guides and transportation guides actually conducted services on behalf of the travel agency or on their own. In fact, while unlicensed tourist guides and transportation guides may be penalised if no travel agency proves to be the organizer of the group they guide because the current law provides that only licensed travel agencies are authorised to organise and operate tour services;

2. Bureau T claimed that the verification of facts was based on the evidence documented in the case file, including statements made by the relevant travel agency, tourist guide and parties involved.

3. Bureau T claimed that the facts of 2 unlicensed tourist guide cases indicated in the report attached to the recommendation sent by the CCAC (hereunder referred to as "Recommendation Report") were not identical: in the first case, the travel agency appointed a tourist guide to service a tour group but was ignorant of the latter's commissioning of a third party (an unlicensed tourist guide) to guide the tour group, while in the second case the travel agency involved arranged for a licensed guide to service a tour group but was ignorant of the appearance of an unlicensed tourist guide servicing the group on the tour bus.

4. Bureau T emphasized that it has always handled cases in accordance with the law and to the same standards. It further claimed that as tourist guides are freelance service providers unaffiliated to any specific travel agency facts may not be what it seems at first glance. Bureau T promised that it would step up its inspection of popular tourist spots and travel agencies to break up unlawful operations, and would foster promotion to tourists and co-ordinate with relevant local departments, the tourism industry and its Mainland counterparts to tackle and clear up illegal operations that might compromise the image of Macao tourism, so as to maintain the normal operations of the market.

III. Handling of illegal lodging house cases

1. As to the CCAC's opinion, Bureau T personnel were found misapplying the *Commercial Regime of Hotel and Similar Facilities* per Article 65 of Decree Law no. 16/96/M concerning penalty suspensions, and being inconsistent in their approach

to similar cases within a short period of time, Bureau T claimed that the 3 cases concerned quoted in the Recommendation Report by the CCAC were rather different in fact and thus qualified for different decisions. Bureau T insisted that in 2 of the cases penalty suspensions were applied based on sufficient documented evidence that the offenders satisfied the requirements for suspensions. The third case did not qualify for penalty exemption since the documents presented by the offender were inadequate to conclude a suspension – she was unable to prove that her husband was in poor health (the doctor's report indicated nothing abnormal) or that she was in reduced financial circumstances.

2. Bureau T claimed in its analysis of the cases of illegal lodgings that it not only considered whether rents were paid on a daily or monthly basis but took into account whether the partitions of the house had been changed, particularly whether rooms were provided with exclusive toilets, and whether the landlord and tenant had entered into a tenancy contract with rental declared to the Financial Services Bureau, etc.

3. While Bureau T agreed that the provision of hotel related services such as cleaning and laundry services was an essential aspect in judging whether a lodging house operation was involved, it also pointed out that most illegal lodging operation cases did not provide such services because of the very low rates they offered customers.

4. Bureau T also commented that most of the illegal lodging house cases were first detected and handled by the Public Security Police Force. By the time the bureau was committed to the investigation, much of the original evidence or clues first collected by the police no longer existed.

5. Bureau T also pointed out that in several law suits on illegal lodging houses operation the administrative court ruled against the bureau because the court considered that the activities involved were not subject to the provisions of Decree Law no. 16/96/M. As of now, no specific law is in place for regulating such behaviour. The stance of the courts has encouraged the private sector to be unscrupulous and a vicious circle has evolved. Bureau T claimed that it was necessary to solve the problem through the amendment of the law. The bureau is studying the possibility of revising Decree Law no. 16/96/M and Directive no. 83/96/M but such amendment might also lead to the revision the *Civil Code* and other relevant regulations.

6. In conclusion, Bureau T indicated that it would assign a pre-examiner to handle each case in rotation.

In respect to the CCAC analysis we found part of the response by Bureau T lack justification per the following:

Handling of unlicensed tourist guide cases

1. The 2 cases Bureau T mentioned above refer to Case File no. 24/2004 (person involved: unlicensed tourist guide Leong; travel agency involved: Travel Agency H) and Case File no. 52/2004 (person involved: unlicensed tourist guide Lei; travel agency involved: Travel Agency C).

2. The information provided by Bureau T does not lend convincing weight to its response. The two cases mentioned above are very similar: In particular, the unlicensed tourist guides involved were both discovered by the Bureau T inspector "at the scene" while they were guiding a tour group; they both denied that they had been engaged by the respective travel agencies to service their tour groups; both the originally engaged licensed tourist guides claimed that they had enlisted the services of unlicensed tourist guides without the travel agencies' knowledge; the travel agencies claimed ignorance of the licensed tourist guides appointing third parties to serve the tourists (See Comparison & Analysis in Appendices 1 & 2).

3. However, Bureau T treated the 2 cases mentioned above in entirely different ways. In Case File no. 24/2004, in view of the fact that the travel agency had claimed that they asked the licensed tourist guide, Chan, to arrange an assistant ("helper") as requested by a Mainland China travel agency, the pre-examiner decided that the travel agency was aware that the assistant was an unlicensed tourist guide named Leong and therefore suggested that Travel Agency H be penalised. However, the Deputy Director of Bureau T challenged this assessment. He subsequently ordered the pre-examiner to hold another hearing with the licensed tourist guide, Chan (the licensed tourist guide originally scheduled by the travel agency), who re-iterated in the second hearing that Travel Agency H realised that the assistant was an unlicensed tourist guide only after the incident occurred. Consequently, the pre-examiner adopted such explanations and concluded in his following reports that Travel Agency H was innocent and recommended that the case be closed, which was approved by the Deputy Director.

4. In Case File no. 52/2004, the pre-examiner inferred that Travel Agency C should have known the tour group was guided by the unlicensed tourist guide because otherwise "Lei - the unlicensed tourist guide who was neither an employee of the travel agency nor known to the licensed tourist guide (Chio) - could not have got on the tour bus and guided the group arranged by that travel agency without the approval of the travel agency", and therefore recommended that the travel agency be penalised. The Deputy Director raised no objection made, and no instruction for second hearing with Chio (the licensed tourist guide originally scheduled by the travel agency). The Deputy Director endorsed the proposed penalty immediately.

5. As noted in the CCAC Recommendation Report, the inference made by the pre-examiner in Case File no. 52/2004 can also be applied to Case File no. 24/2004 (i.e. whether unlicensed tourist guide Leong could guide the tour group to a restaurant without the authorization of Travel Agency H), and on that basis concluded that Travel Agency H was aware that the unlicensed tourist guide Leong was representing it. However, the Deputy Director agreed, per the conclusion in Case File no. 52/2004, to penalise Travel Agency C. Yet, within the space of a fortnight, he disregarded the inference made in Case File no. 24/2004 and agreed to exempt Travel Agency H from punishment by accepting the statement made by the licensed tourist guide. Based on these facts, the CCAC concluded that Bureau T were guilty of adopting "inconsistent standards and approaches" in enforcing the law.

Handling of illegal lodging cases

1. The cases quoted by in the CCAC Recommendation Report indicate that Bureau T had incorrectly applied Article 65 of Decree Law no. 16/96/M concerning the penalty suspension, and been inconsistent in its approaches:

Date of decision made by Bureau T	Case	Reasons for penalty exemption for one year	
		Pre-examiner	Head of Bureau T
23/5/2005	Ms. Wong (Flat A, Floor 6, Tower 2, Building K)	(No recommendation made to suspend penalty)	Ms. Wong was a divorcee raising four children, but did not considered that she was a repeat offender, and owned several properties.
23/5/2005	Ms. Wong (Flat G, Floor 6, Tower 2, Building K)	(No recommendation made to suspend penalty)	Ms. Wong was a divorcee raising four children, but did not considered that she was a repeat offender, and owned several properties.
26/5/2005	Mr. Chong (Flat D, Floor 10, Building I)	Offender's first offence and unemployed. Lived on Social Welfare Bureau and Social Security Fund subsidies	Agreed with recommendation made by pre-examiner to suspend penalty
28/6/2005	Ms. Hong (Flat A, Floor 14, Building K)	First report: First offence. Poor financial condition, elderly and uneducated. Previous cases can be used as reference	No recommendation made
		Second report: No recommendation made to suspend penalty	Agreed to fine with immediate effect

2. Indeed, in the case in which Bureau T did not grant penalty exemption to the offender (Hong), the information provided by the offender was insufficient to substantiate the poor health of her husband and poor economic circumstances.

3. **However, it should be emphasized that the CCAC did not hold that the offender should have been granted suspension, but rather that Bureau T had incorrectly applied Article 65 of Decree Law no. 16/96/M to the case of Wong, and the approaches adopted were different to that of other cases.**

4. A simple comparison between the case of Chong and that of Wong, and an analysis of the reasons for which the offenders in the cases were granted penalty suspension, would suffice to indicate why the CCAC claimed that the bureau had incorrectly applied the law in the case of Wong.

5. First of all in the case of Chong, based on the information presented in the administrative offence file by Bureau T, the offender proved to be a first-offender, was unemployed and was receiving training allowance from the Social Security Fund. For these reasons Bureau T applied Article 65 of Decree Law no. 16/96/M to grant penalty suspension and raise no great disagreement.

6. In the case of Wong, however, although she had submitted her divorce certificate and relevant documents certifying that her three minor children were still attending school and that she had once sought employment, these documents proved only that she was a divorcee raising three children and had once sought employment.

7. **The fact that the offender was a divorcee raising three children and once sought employment did not necessarily mean that the offender was a first-offender or that she was in reduced financial circumstances** because a wealthy person can also be a divorcee, raise children and seek employment.

8. As pointed out in the CCAC's Recommendation Report, Wong was not a first offender as she was charged with operating an illegal lodging house and had been penalised by Bureau T in early 2001 (Bureau T also granted penalty suspension for 1 year). On this occasion – while facing multiple charges for operating illegal lodgings within this period of suspension. **It is worth noting that the pre-examiner did mention her previous cases in the report to the bureau chiefs. In order words, the acting head of Licensing and Inspection Department was aware of the facts mentioned above but nonetheless advised suspending the penalty applied to Wong**.

9. Furthermore, the CCAC clearly pointed out in the Recommendation Report that **according to the report written by the pre-examiner, Wong was the holder of eight apartments in Building K. However, the acting head of Licensing and Inspection Department did not analyse her financial status when recommending suspension. The CCAC noted that Wong was the owner of at least seven apartments in Building K between 2001 and 2005 (when Wong had divorced, raising her three**

children). The bureau's conclusion that Wong was in dire economic straits, without substantial proof, was clearly groundless.

10. In Wong's case, there was absolutely no discernable reason for exempting her from penalty. In Bureau T's response to the CCAC's Recommendation Report by, no further reasons were offered, although Bureau T insisted that Wong's case satisfied all requirements for suspension of penalty.

11. As regards the issue of how to correctly interpret and apply the stipulations of Decree Law no. 16/96/M, the CCAC has made an in-depth analysis in the Recommendation Report.

12. Finally, as admitted by Bureau T, instances of illegal lodgings tend to be found first by the Public Security Police Force and that some traces or clues no longer exist when Bureau T follows up, it is advisable for Bureau T to take measures suggested by the CCAC to improve co-ordination and communication with the Public Security Police Force, so that the police know better how to collect "on-site" evidence that will help Bureau T in its follow-up work on illegal lodging operations.

The suggested issues raised by the CCAC on which Bureau T holds different views without plausible substantiation have been referred to the supervisory entity of the bureau – namely, the Secretary for Social Affairs and Culture - in the expectation that they will be seriously noted and followed up on.

Appendix Table 1
Tackling Unlicensed Tourist Guides Cases by Inspector of Bureau T

Case File no. 24/2004	Case File no. 52/2004
"On 10th March 2004 at 12:10, (Bureau T) personnel approached a tour bus (plate#: MX-XX-XX) parked in front of Restaurant X Un located at No. X, Rua da Fernandes. The outer carriage of the tour bus identified CH Travel Agency Ltd. A man was found guiding a tourist group. (Bureau T personnel) approached him and, after identifying themselves, asked Leong (the unlicensed tourist guide) to produce his tourist guide license, which he failed to do… He claimed that there were 34 tourists in his tourist group… which was organised by CH Travel Agency."	"On 25th June this year (2004), (Bureau T personnel) having been notified by the police, conducted a joint field check and arrived at Golden Lotus Square. The abovementioned (Bureau T) personnel stopped a passing tour bus MX-XX-XX, marked Agência de Viagens e Turismo XXX for an ad hoc check. They requested Lei, an unlicensed tour guide on the bus, to produce his tourist guide license, which he failed to do so. When asked which travel agency organised the tourist group, he said that it was organised by Travel Agency C."

Appendix Table 2
Statements by Various Parties Involved

Case File no. 24/2004	Case File no. 52/2004
"(Unlicensed tourist guide Leong) claimed that he 'was not an employee of any travel agency.' He further claimed that he was not guiding the tourist group on the day concerned. He was there to find the friend of a family member after learning that they were in the tourist group mentioned above. (Bureau T) Personnel asked the declarant Leong why he told the (Bureau T) personnel that the group was organised by CH Travel Agency, to which he answered that he actually had no idea about which travel agency had organised the group at that time, and he only said so because he saw the name printed on the tourist bus. Leong said that he knew Chan was the licensed tourist guide of the group since they were acquaintances." "Travel Agency H was totally ignorant of what happened on that day and the incident was only related to the tourist guide and him . . ."	"(Unlicensed tourist guide Lei) claimed that his friend, Chio, a licensed tourist guide (and staff member of Travel Agency C) called him on the day concerned and asked him to go to Kun Iam Statue located near Dynasty Plaza to guide a tourist group on her behalf (licensed tourist group guide Chio). She told him that the group was organised by Travel Agency C. As soon as he arrived at Kun Iam Statue, having taken over from Chio, he was apprehended while taking the group to Restaurant L." Lei claimed that "On the day concerned, I received a call from my friend Chio, who is a licensed tourist guide. She told me that she was unable to guide the tourist group due to an emergency and asked if I could guide the group on her behalf . . ."
"Declarant (licensed tourist guide, Chan) claimed that she was the tourist guide originally arranged by the company mentioned above for the tourist group. She privately asked a friend to guide the group since she had to return to the mainland, which arrangement was not known to the Travel gency H."	"(The licensed tourist guide, Chio) claimed she was a tourist guide of Travel Agency C…… she was really tired from receiving quite a few tourist groups around those days and wanted to take a rest, but she was not allowed to take a leave, so she called her friend, Mary to receive the tourist group mentioned above on her behalf once she received the tourist group mentioned above, however she had no idea about the appearance of the unlicensed tourist guide, Lei."; "(Licensed tourist guide, Chio) claimed that she had not informed the travel agency that she had found Mary to help guiding the tourist group on her behalf……"

Case File no. 24/2004	Case File no. 52/2004
The unlicensed tourist guide, Leong was not an employee of any travel agency and he was only a "helper" invited by the licensed tourist guide responsible for taking care of the tourist group. "We arranged a helper for the tourist guide in taking care of the tourists getting on and off the bus and going for the meals etc, as it was requested by the travel agency from Shanghai. We informed Chan, who was originally arranged to escort the tourist group. According to the licensed tourist guide, Chan, she then asked an unlicensed tourist guide, Leong to help her."; "We were totally ignorant of this matter."; "Leong was the unlicensed tourist guide arranged by Chan and she privately appointed the unlicensed tourist guide to guide the group without informing us."	"The company arranged three tourist buses and tourist guides (respectively Chio / Chan / Lei) to take care of tourist groups."; "After the unlicensed tourist guide was checked, Chio informed the travel agency and claimed that she asked her friend to go to the Golden Lotus Square and take the group on her behalf to Restaurant L, because she had other urgent things to attend and would return to the restaurant to resume her duty afterwards.";"They didn't know the unlicensed tourist guide, Lei and he was not the staff member of Travel Agency C."; "They were not given advanced notice by Chio that she has arranged the unlicensed guide, Lei to guide the tourist group and were informed only after the case was detected in an inspection."