

General Notice No. 159 of 2019

CCM/DS/0030/5



Decision of the Competition Commission

CCM/DS/0030/5

Non-Confidential

**Application for Immunity made by SIK YUEN LIMITED
under the Competition Commission Amnesty
Programme for Resale Price Maintenance**

12 December 2018

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**Decision of the Commissioners of the Competition Commission
of 12 December 2018**

**relating to a proceeding under section 59(7) of the Competition Act 2007
further to a Report of the Executive Director on the matter referred to as
'INV042/RPM/006-Review of SIK YUEN LIMITED RPM Amnesty application'**

**(CCM/DS/0030/5-Application for Immunity made by SIK YUEN LIMITED under
the Competition Commission's Amnesty Programme for Resale Price
Maintenance)**

THE COMMISSION

Mr. C. Seebaluck - Commissioner (Chairperson),
Mrs. M. B. Rajabally - Commissioner,
Mrs. V. Bikhoo - Commissioner,

Having regard to the Competition Act 2007,

Having regard to paragraph 5.6A of CCM3 Guidelines on Collusive Agreements
regarding the Competition Commission's Amnesty Programme for Resale Price
Maintenance,

Having regard to the Competition Commission Rules of Procedure 2009,

Having regard to the undertakings offered by SIK YUEN LIMITED on 15th June 2018,

Having regard to a report of the Executive Director dated 29th June 2018,

WHEREAS:

I. Introduction

- 1.1 This Decision relates to applications for immunity dated 28th September 2017 and 04th October 2017 made by SIK YUEN LIMITED pursuant to the Competition Commission's Amnesty Programme for Resale Price Maintenance prescribed under paragraph 5.6A of CCM3 Guidelines on Collusive Agreements (the 'Application'). As part of the conditions set out thereunder, undertakings have been offered to the Commission by SIK YUEN LIMITED on 15th June 2018 ('the Undertakings').
- 1.2 Having taken cognizance of a report of the Executive Director dated 29th June 2018 on the matter, the Commission has determined the present matter on the basis of the provisions of section 59(7) of the Act, the conditions prescribed under paragraph 5.6A of CCM3 Guidelines on

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Collusive Agreements and considering in particular, the Undertakings offered pursuant to section 63(3) of the Competition Act 2007 (the 'Act').

II. Background

I. Competition Commission's RPM Amnesty Programme

1.3 Pursuant to section 59 of the Competition Act 2007 (the 'Act'), the Commission may grant immunity or leniency to any person in such circumstances as may be prescribed. Effective from 05th June 2017 until 20th October 2017 inclusively¹, the Commission put in place a one-off, time-limited amnesty programme for any enterprise involved in resale price maintenance by waiving the restriction at paragraph 5.3 of CCM3 Guidelines on Collusive Agreements, viz., that only RPM which facilitates a cartel can benefit from leniency and the associated footnote 3 thereof and subject to the applicant-enterprise fulfilling the conditions prescribed under paragraph 5.6A (b) of the said Guidelines (the 'RPM Amnesty Programme').

1.4 The conditions prescribed under the RPM Amnesty Programme for providing immunity from financial penalties to any enterprise applying for RPM Amnesty are that the applicant -

- i. admits its participation in an agreement involving RPM,
- ii. provides the Competition Commission (CCM) with all the information, documents and evidence available to it regarding the RPM, and as required by the CCM,
- iii. maintains continuous and complete co-operation until the conclusion of any action by the CCM in relation to the matter, and
- iv. offers undertakings that satisfactorily address the competition concerns of the CCM.

II. The Applicant and the Application

1.5 SIK YUEN LIMITED operates as a supplier in the wholesale sector for food items as well as an independent retailer under the Way Franchise, as Sik Yuen Way, in the retail sector for both food and non-food items and bears the Business Registration Number C07001411.

1.6 SIK YUEN LIMITED has made an application, in its capacity as both supplier and reseller, in writing, to the CCM, through its authorised signatory on the 28th September 2017 and 04th October 2017. The

¹The Commission had extended the validity of the RPM Amnesty (CCM 3 Guidelines - Amended 3rd October 2017) from 05th October 2017 to 20th October 2017.

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reported RPM conducts, as submitted in the application, make reference to;

- a. SIK YUEN LIMITED, as a supplier, has circulated price lists with pre-determined resale prices for its products to resellers without the mention of 'recommended price'; and
- b. SIK YUEN LIMITED, as a retailer under the WAY franchise, has:
 - i. accepted price lists with resale prices pre-determined without the words "recommended price" from its suppliers;
 - ii. accepted products from its suppliers, with resale price affixed on price labels without the mention of 'recommended price' appearing next to the resale prices; and
 - iii. entered into contractual agreements with its suppliers in its own name or through WAY GUILD (MTIUS) LTD, which contain clauses on the resale prices of the products.

III. The Investigation

- 1.7 Upon receipt of the Application and pursuant to section 51 of the Act, the Executive Director proceeded to investigate whether the reported conducts may amount to an RPM within the ambit of section 43 of the Act.
- 1.8 Upon completion of his investigation, the Executive Director submitted a report on the matter to the Commission on 29th June 2018. The Report contains the findings of the Executive Director, his assessment of whether the proposed Undertakings address all the concerns identified by him, and his recommendations in respect of the Application (the 'Report').
- 1.9 The Executive Director's findings are that the application satisfies the conditions i, ii and iii set out under paragraph 5.6A(b) of CCM3 Guidelines for RPM amnesty. The Executive Director is satisfied that SIK YUEN LIMITED has admitted its participation in conduct falling within the ambit of RPM under section 43 of the Act, as supported by the documentary evidence submitted and has maintained continuous and complete co-operation from the time of its Application to the issuance of the Executive Director's Report.
- 1.10 Further to his assessment of Application, the Executive Director, in his Report, takes the view that SIK YUEN LIMITED in its capacity as both supplier of food items and reseller of food and non-food items, has engaged in a conduct that raises competition concerns under section 43 of the Act.

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1.11 The Executive Director views that:

- a) the provision of price lists, by SIK YUEN LIMITED in his capacity as a supplier, whereby there has been the establishment of pre-determined resale prices of products without the words 'Recommended price' in relation to promotion price as well as retail prices, shows the existence of agreements it has concluded with its retailers;
- b) The acceptance of price lists from suppliers without the terms 'recommended price' by SIK YUEN LIMITED in his capacity as a retailer, may constitute an agreement, taking into consideration the tacit or implicit acquiescence of SIK YUEN LIMITED to accept a pricing policy, even if the pricing policy has been imposed unilaterally by the suppliers. The price lists, therefore, demonstrate the concurrence of wills between SIK YUEN LIMITED and the suppliers to adopt RPM with respect to the supply of the specific food and non-food items provided by the suppliers;
- c) the practice of SIK YUEN LIMITED, as retailer under the WAY franchise, accepting products with pre-determined prices affixed on the products, without the words 'recommended price' from its suppliers as being an RPM by acquiescence. The practice of SIK YUEN LIMITED accepting the products of the said suppliers may constitute acquiescence on the part of the applicant to the policy of the suppliers to affix the resale prices of the products as determined by themselves on the product, which may in turn amount to an agreement; and
- d) the contractual agreements which are binding in nature, contain explicit clauses with clear mention of the obligations to be adhered to by SIK YUEN LIMITED as well as provide for direct and indirect price determinations. These trade agreements qualify as agreements demonstrating concurrence of wills between SIK YUEN LIMITED in his capacity as a reseller, and its suppliers, to adopt RPM with respect to the supply of food and non-food items.

1.12 The Executive Director has further assessed the Undertakings offered by SIK YUEN LIMITED. The Executive Director takes the view that the proposed Undertakings satisfactorily addresses the concerns identified in the Report for the following reasons –

- a) Where SIK YUEN LIMITED, in his capacity as a supplier, issues a price list to retailers which contains a resale price as determined by SIK YUEN LIMITED, it shall state clearly that the resale price is a recommended price, and shall include a clause clearly stating that the recommended price is not binding on the retailers and the retailers are free to determine their own resale prices;

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- b) SIK YUEN LIMITED, in his capacity as a retailer, has undertaken to inform its suppliers that it is no longer party to the restrictive clause constituting RPM and shall either modify the agreement or enter into a new agreement which does not contain RPM clauses with the suppliers;
- c) SIK YUEN LIMITED, in his capacity as a retailer, has undertaken not to, in any manner whatsoever, enter into or otherwise facilitate, either explicitly or implicitly, the implementation of any agreement with the above-mentioned suppliers and/or any other supplier that involves resale price maintenance;
- d) SIK YUEN LIMITED, in his capacity as a reseller, has undertaken, where any of its suppliers and/or any other supplier recommend a minimum resale price for its goods and the resale price appears on the goods, inform the supplier, in writing, that it shall make sure that the words 'recommended price' appear next to the resale price, and shall not accept/offer for sales such products; and
- e) The behavioural measures undertaken by SIK YUEN LIMITED shall be disseminated to its internal management and commercial employees engaged in the sales and marketing of its products as well as purchase and/or resale of the suppliers' products, thereby minimizing risks of RPM conduct being promoted by employees and ensuring that commercial dealings with the suppliers are in compliance with the Act.

1.13 The Executive Director recommends that the Commission accept the Undertakings and grant immunity from fines to the Applicant for its participation in the reported RPM conduct.

III. Legal Framework

1.14 Section 43 of the Act prohibits and renders void 'any vertical agreement between enterprises to the extent that it involves resale price maintenance'. RPM is in turn defined at under section 2 of the Act as 'an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to his customers'.

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1.15 Having regard to the conditions prescribed under the RPM Amnesty Programme, an enterprise will benefit from immunity from financial penalty if it is involved in a conduct(s) that falls within the scope of section 43 of the Act and satisfies the conditions of the said programme.

1.16 In addition to admitting having participated in one or more RPM agreement(s), the applicant-enterprise is required to provide full and complete disclosure of all information, evidence and records available to it that relate to the reported RPM conduct. The enterprise is also required to maintain continuous and complete co-operation from the time of its application until the conclusion of any action by the CCM on the matter, including by securing the cooperation of its directors, officers and employees in view of effectively and expeditiously concluding the assessment process.

1.17 Pursuant to section 63(3) of the Act, the threshold for the acceptance of undertakings under section 63(3) is that the Commission must be satisfied that the undertakings address *"all the concerns it has about any prevention, restriction [or] distortion (...) of competition"* which may arise from the matter at hand.

IV. Determination under sections 59(7) and 63 of the Act

1.18 Having regard to the Application submitted by SIK YUEN LIMITED, the concerns which have been identified by the Executive Director in his Report, and the Undertakings offered by the Applicant, the Commission determines that –

- 1) SIK YUEN LIMITED has, in its Application, admitted its participation in one or more RPM agreement(s) viz
 - i. the provision of price lists by SIK YUEN LIMITED, in his capacity as a supplier, without the terms 'Recommended Price' to its resellers;
 - ii. the acceptance of price lists without the mention of 'Recommended Price' from suppliers by SIK YUEN LIMITED in his capacity as a reseller;
 - iii. the acceptance of products with resale prices affixed on the products, without the words 'Recommended Price' from suppliers by SIK YUEN LIMITED in his capacity as a reseller; and

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- iv. the acceptance, by SIK YUEN LIMITED in his capacity as reseller, of vertical price restriction in suppliers' contracts that includes price determination of the products.
- 2) SIK YUEN LIMITED has complied with requirements (ii) and (iii) of paragraph 5.6A(b) of the CCM 3 Guidelines, as stated in the Report; and
- 3) The Undertakings submitted by the SIK YUEN LIMITED satisfactorily address the Commission's concerns in so far as --
 - a. It will ensure that SIK YUEN LIMITED ceases its participation in/terminates all RPM agreements to which it was a party; and
 - b. SIK YUEN LIMITED has undertaken to put in place other measures as stated in section 1.12 of this document that would guarantee compliance with the Act.

V. Decision

NOW THEREFORE,

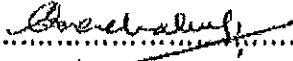
For the reasons set out in this Decision, the Commission decides as follows:

- 1) We accept that the Application made by SIK YUEN LIMITED satisfies the conditions prescribed under the RPM Amnesty Programme as set out in paragraph 5.6A of the CCM 3 Guidelines on Collusive Agreements;
- 2) We accept the Undertakings offered by SIK YUEN LIMITED, which are being published as per section 63(4) of the Act (see Annex);
- 3) The Undertakings shall be effective as from the date of this decision; and
- 4) We grant immunity from financial penalty to SIK YUEN LIMITED pursuant to section 59(7) of the Act for the Reported RPM conduct.

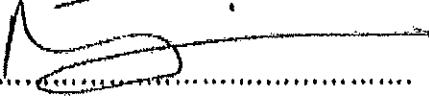
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Done at Port-Louis this 12 December 2018.


Mr. C. Seebaluck
(Commissioner)


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Mrs. M. B. Rajabally
(Commissioner)


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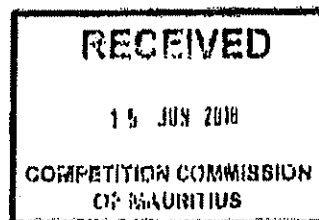
Mrs. V. Bikhoo
(Commissioner)


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Undertakings to the CCM

**Undertakings provided by SIK YUEN LIMITED to the Competition Commission
Pursuant to the Applications for Amnesty dated 28th September 2017 and 04th October 2017
In connection with the Competition Commission's Amnesty Programme for Resale Price
Maintenance**

(Date of Undertakings)



Definitions:

For the purpose of the present undertakings, the following terms shall have the following meanings:

SIK YUEN LIMITED (herein 'Sik Yuen'): Sik Yuen and includes its branches, subsidiaries, or affiliates;

Affiliate: any enterprise directly or indirectly controlled by Sik Yuen;

Act: the Competition Act 2007;

Commission: the Competition Commission established under section 4 of the Competition Act 2007;

Effective Date: the date on which the Commission delivers its decision to accept these undertakings;

Full Implementation Date: a maximum of three (3) months as from the effective date;

Resale price maintenance: means an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to his customers;

RPM: resale price maintenance.

2. Background:

(i) Sik Yuen has two main lines of business, firstly as an importer, distributor and wholesaler, herein after referred to in its capacity as supplier in the retail and wholesale food sectors and secondly as a retailer operating under the 'WAY' franchise in Mauritius in the retail sector for fast-moving consumer goods for both food and non-food items; herein after referred to in its capacity as retailer.

(ii) By its letters dated 28th September 2017 and 04th October 2017 addressed to the Competition Commission and pursuant to paragraph 5.6A of the 'CCM 3 Guidelines — Collusive Agreements' (amended June 2017), Sik Yuen has made applications for amnesty under the CCM Amnesty Programme for Resale Price Maintenance (RPM) (the 'Application').

(iii) The reported activity involves three practices whereby Sik Yuen has:

- (a) provided price lists with pre-determined resale prices for its products to its retail clients without the words "recommended price"; (the "Practice I");
- (b) accepted products with resale prices pre-determined and pre-labelled on the products by its suppliers without the words "recommended price" appearing next to the resale prices; (the "Practice II"); and
- (c) in its own name or through WAY GUILD (MTIUS) LTD (herein 'Way Guild'), entered into contractual agreements with suppliers, which contain clauses on the resale prices of products (the "Practice III").

3. The Practices

Practice I is in relation to the following retailers: (refer to Appendix A) The identified retailers for Practice I shall altogether herein after be referred to as 'the Retailers'.

Practice II is in relation to the following suppliers (refer to Appendix B).

The agreement with respect to Practice III is in relation to the following suppliers (see Appendix C)

The identified suppliers for Practice II and III listed in Appendix B and C shall altogether herein after be referred to as 'the Suppliers'.

Section 43 of the Act prohibits resale price maintenance and section 43(3) of the Act provides that 'where a supplier or producer has recommended a minimum resale price to a reseller of goods and the resale price appears on the goods, the words 'recommended price' shall appear next to the resale price.'

With reference to Practices I, II and III, Sik Yuen is given to understand that those may be in contravention of Section 43 of the Competition Act 2007 and may therefore pose as concerns which have arisen during an investigation in respect to the application.

Pursuant to the conditions laid down in the CCM 3 Guidelines (amended June 2017), for the purpose of obtaining RPM Amnesty, Sik Yuen is, by the present, providing undertakings related specifically to the impugned agreement and any restrictive effects they may have had on competition under section 63 of the Competition Act 2007 with a view to allaying any possible concerns of the Competition Commission in relation thereto and obtaining the requested amnesty.

4. Measures proposed as Undertakings

Pursuant to section 63 of the Act, Sik Yuen hereby undertakes to apply, by the full implementation date, the following measures in its commercial dealings with the above-mentioned suppliers, in the resale of their respective goods or services in Mauritius:

4.1. Behavioural Undertakings

(a) In its capacity as Supplier:

Where Sik Yuen issues a price list to retailers which contains a resale price as determined by Sik Yuen, it shall state clearly that the resale price is a recommended price and shall include a clause clearly stating that the recommended price is not binding on the retailers and the retailers are free to determine their own resale prices.

(b) In its capacity as Retailer

(i) Sik Yuen shall inform the above-mentioned suppliers that it is no longer party to the restrictive clause constituting RPM and shall either modify the agreement or enter into a new agreement which does not contain RPM clauses with the suppliers;

(ii) Sik Yuen shall not, in any manner whatsoever, enter into or otherwise facilitate, either explicitly or implicitly, the implementation of any agreement with the above-mentioned suppliers and/or any other supplier that involves resale price maintenance;

(iii) Sik Yuen shall, where any of the above-mentioned suppliers and/or any other supplier has recommended a minimum resale price for its goods and the resale price appears on the goods, inform the supplier, in writing, that, unless the words "recommended price" appear on the resale price, it shall not accept/offer for sales such products.

4.2 Information Dissemination

Sik Yuen shall take all appropriate measures to ensure that all its internal management, directors, and employees engaged in the purchase and/or resale of goods and/or services are fully aware of and actively implement the present undertakings when implementing Sik Yuen pricing policy, in line with the provisions of the Act.

4.3. Reporting

(i) Sik Yuen shall provide the Commission with a copy of any amended price lists governing its commercial relationship with each of the above-mentioned retailers as proof that Sik Yuen has irrevocably ceased the impugned resale price maintenance;

(ii) Sik Yuen shall immediately inform the Commission, in writing, of any attempt on the part of the above-mentioned suppliers to implement or otherwise coerce or induce the implementation of resale price maintenance to be observed by Sik Yuen reselling the supplier's goods and shall provide the Commission with all documents, information, and evidence available to it in support thereof;

(iii) Sik Yuen shall provide the Commission with a copy of any amended agreement governing its commercial relationship with each of the above-mentioned suppliers as proof that Sik Yuen has irrevocably ceased the impugned resale price maintenance.

(iv) Sik Yuen shall, as from the effective date, take all reasonable steps to ensure that all communications, negotiations, arrangements with the above-mentioned suppliers are properly documented and archived to demonstrate compliance with the present undertakings when reselling the above-mentioned suppliers' goods;

(v) Sik Yuen shall, by the full implementation date, submit a written report to the Commission detailing the implementation of this undertaking.

5. Entry into force

These undertakings shall be effective as from the date they are accepted by the Commission in the form of a decision of the Commission and shall be fully implemented by full implementation date.


[Signature of Director No1]

Name: YK T YEWNG SIK YUEN


Position: CEO

Duly authorised for and on behalf of:

SIK YUEN LIMITED



SIK YUEN LIMITED


[Signature of Director No2]

Name: JEAN MARC SIK YUEN

Position: DIRECTOR

Duly authorised for and on behalf of:

SIK YUEN LIMITED



SIK YUEN LIMITED

| | | |
|---------------------|-----|---------|
| SIN YUEN LIMITED | | Annex |
| WHOLESALE CUSTOMERS | | |
| NAME | ORN | ADDRESS |

Page 1 of 2

| NAME | Dist | ADDRESS |
|------------|------|---------|
| [REDACTED] | | |

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Suppliers determined through the Contractual Agreements:



SIK-YUEN LIMITED

ANNEX 4

LIST OF SUPPLIERS

PRICE AFFIXED ON PRODUCTS BY SUPPLIERS WITHOUT WORDING "RECOMMENDED PRICE"

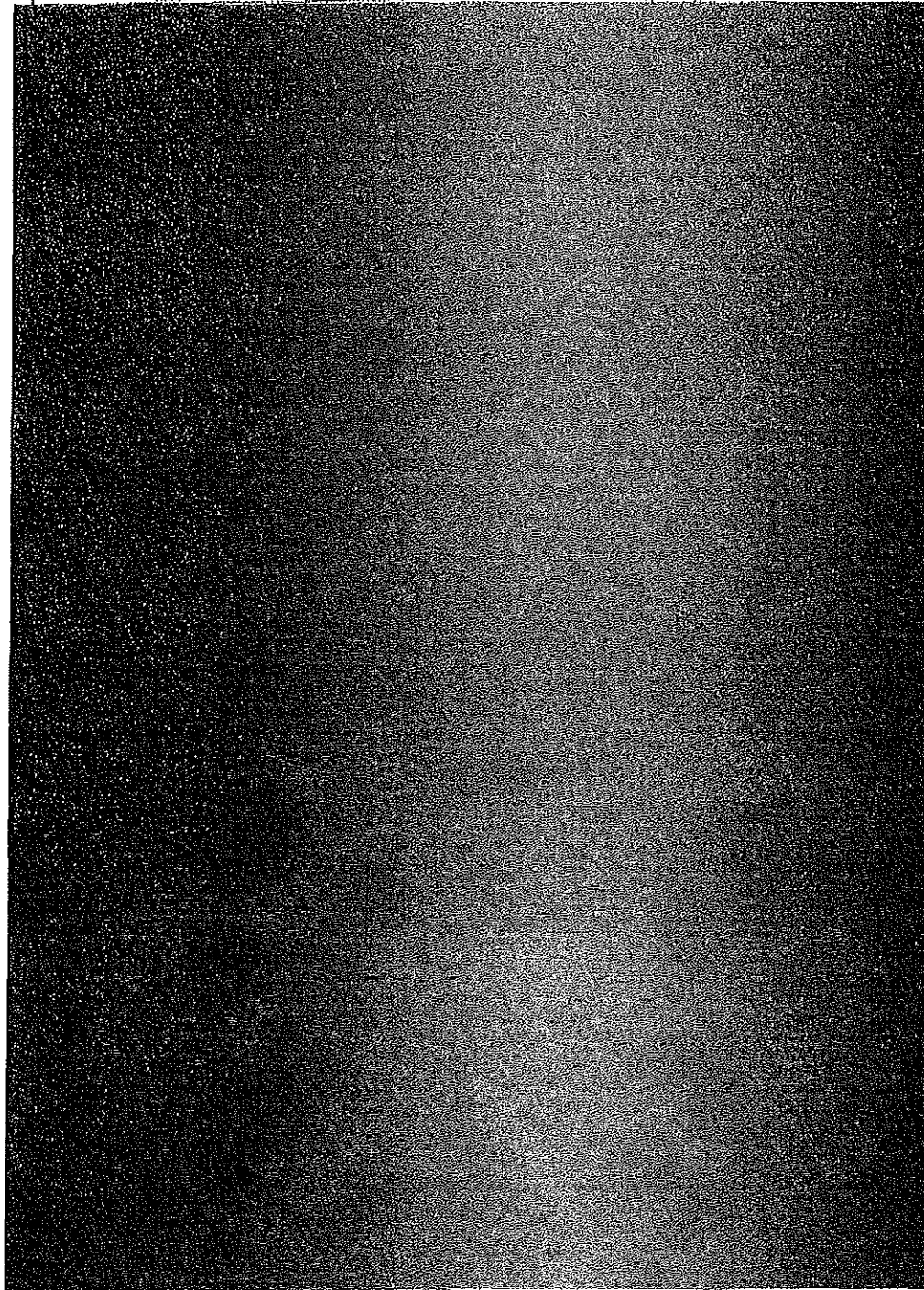
| NAME OF SUPPLIER | BRN | ADDRESS |
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| SIN YUEN LIMITED LIST OF SUPPLIERS | | APPROVAL | |
|---------------------------------------|-----------|-----------|--|
| NAME | ADDRESS 1 | ADDRESS 2 | |
| | | | |

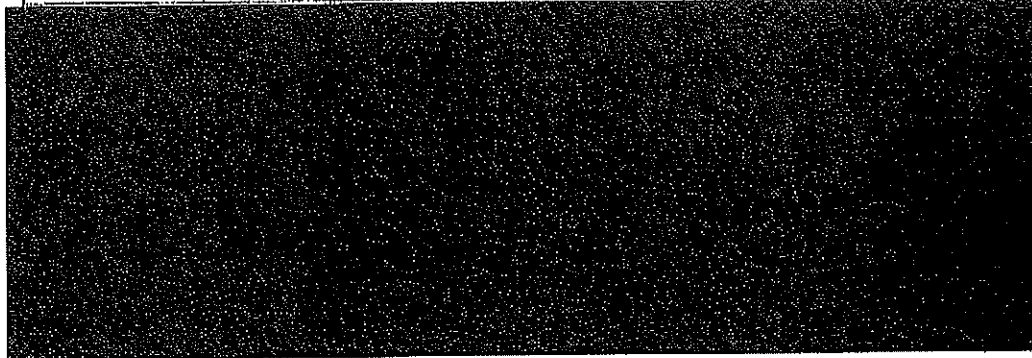
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| NAME | ADDRESS 1 | ADDRESS 2 |
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| NAME | Address 1 | Address 2 |
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| NAME | ADDRESS 1 | ADDRESS 2 |
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