



Inland Revenue Department

The Government of the Hong Kong Special Administrative Region
of the People's Republic of China

DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES

NO. 18 (REVISED)

ASSESSMENT OF INDIVIDUALS

UNDER SALARIES TAX AND PERSONAL ASSESSMENT

These notes are issued for the information of taxpayers and their representatives. They contain the Department's interpretation and practices in relation to the law as it stood at the date of publication. Taxpayers are reminded that their right of objection against the assessment and their right of appeal to the Commissioner, the Board of Review or the Courts are not affected by the application of these notes.

These notes replace those issued in January 2005.

WONG Kuen-fai
Commissioner of Inland Revenue

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INTRODUCTION

Separate taxation

Salaries tax is charged on a person in respect of the person's income derived from an office or employment, or a pension. If both spouses of a married couple are subject to salaries tax, they will be separately assessed unless they elect for joint assessment.

Separate personal assessment

2. For years of assessment up to 2017/18, if both spouses of a married couple had income assessable under the Inland Revenue Ordinance (the Ordinance) and were eligible to elect for personal assessment, an election for personal assessment had to be made by them together. From the year of assessment 2018/19 onwards, married couples are given the option to elect for personal assessment separately as a result of the enactment of the Inland Revenue (Amendment) (No. 9) Ordinance 2018.

Aggregation of all incomes

3. In a personal assessment, the net assessable income under salaries tax, the assessable profits under profits tax and the net assessable value under property tax of a person are aggregated to form the total income. The balance of the aggregated income after deducting the allowances, deductions and losses, if any, will be taxed at the same rates as those applicable under salaries tax. If the total tax liabilities of a person can be reduced, the person if eligible may elect for personal assessment.

MARRIED COUPLE

Meaning of marriage

4. "Marriage" is defined in section 2(1) of the Ordinance to mean:

- (a) any marriage recognized by the law of Hong Kong; or

- (b) any marriage, whether or not so recognized, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so,

but shall not, in the case of a marriage which is both potentially and actually polygamous, include marriage between a man and any wife other than the principal wife.

5. Marriages solemnized in Hong Kong are recognized under paragraph (a) of the definition when they have been celebrated in accordance with the Marriage Ordinance (Cap. 181). Recognition also extends to customary marriages celebrated in accordance with Chinese law and custom prior to 7 October 1971, which have been declared to be valid by the Marriage Reform Ordinance (Cap. 178).

6. There is no legislation in Hong Kong which specifically validates foreign marriages the validity of which are governed by private international law. A foreign marriage is recognized under paragraph (b) of the definition if the foreign marriage has been contracted in accordance with the law of the place where the marriage took place between persons having the capacity to do so. In cases where the foreign law permits polygamous marriages, the recognition extends to marriages that are only potentially polygamous because the person has not married more than one spouse. In any circumstance where a marriage is both potentially and actually polygamous (i.e. the person has more than one spouse), only the marriage between the person and the principal spouse is recognized. Any other forms of marriage existing concurrently are not accepted for the purposes of the Ordinance.

Same-sex marriage

7. In section 2(1) of the Ordinance, “spouse” is defined to mean a husband or wife whereas “husband” and “wife” refer to a married man and married woman respectively. Based on the above definitions, “marriage” was in the past construed as a heterosexual marriage between a man and a woman and parties in a same-sex marriage would be incapable of having a “spouse”.

8. In *Leung Chun Kwong v Secretary for the Civil Service* (2019) 22 HKCFAR 127, the Court of Final Appeal (CFA) recognized that the protection

of the institution of marriage in Hong Kong, being heterosexual and monogamous, was a legitimate aim. However, the differential treatment under the Ordinance between a person in a heterosexual marriage and a person in a same-sex marriage entered into outside Hong Kong was not rationally connected to the legitimate aim and was not justified. As a relief, the CFA considered that a remedial interpretation of the Ordinance was appropriate and ordered the following declaration:

- (a) The existing limb (b) of the term “marriage” in section 2 of the Ordinance shall be read as:

“any marriage, whether or not so recognized, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so, provided where the persons are of the same sex and such a marriage between them would have been a marriage under this Ordinance but for the fact only that they are persons of the same sex, they shall be deemed for the purposes of such a marriage to have the capacity to do so”; and

- (b) For the purposes of the Ordinance, references to:
 - (i) “a husband and wife” shall be read as “a married person and his or her spouse”;
 - (ii) “not being a wife living apart from her husband” shall be read as “not being a spouse living apart from the married person”; and
 - (iii) “either the husband or wife” shall be read as “either the married person or his or her spouse”.

Married person living apart from spouse

9. Section 2(3) of the Ordinance prescribes the following three situations in which the spouses of a married couple are deemed to be living apart from each other:

- (a) under a decree or order of a competent court in or outside Hong Kong;

- (b) under a duly executed deed of separation or any instrument of similar effect; or
- (c) in such circumstances that the Commissioner is of the opinion that the separation is likely to be permanent.

10. Where the spouses are living apart from each other pursuant to paragraph 9(a) or (b), production of copies of the legal documentation specified will be sufficient evidence of the separation. When formal legal proceedings for separation have not been instituted or are not finalized, the spouses will be required to demonstrate that their separation is likely to be permanent. While the circumstances surrounding each situation will vary, each case will be reviewed on its own merits and evidence of separation proceedings in progress will generally be accepted. In the absence of any form of legal proceedings, a letter from each spouse confirming the date of separation and that it is likely to be permanent will likewise, in general, be acceptable.

SALARIES TAX

Separate taxation by default

11. Section 10(1) of the Ordinance provides that the spouses of a married couple, unless jointly electing to be assessed on their aggregated incomes under section 10(2), will be separately assessed on their respective incomes on the same basis as unmarried persons.

Joint assessment by election

12. The spouses of a married couple may pay more tax in total under separate taxation compared with joint assessment. This may occur where the aggregate of a spouse's deductions entitled under Part 4A and allowances entitled under Part 5 exceeds the spouse's net assessable income (i.e. unabsorbed deductions and allowances) while the other spouse continues to remain chargeable to salaries tax. An illustrative example is at Appendix 1.

13. To provide relief to the spouses of a married couple with unabsorbed deductions and allowances, joint assessment is available so that they can jointly

elect to have their incomes, concessionary deductions and allowances aggregated in a year of assessment in arriving at the net chargeable income.

14. Where joint assessment is elected under section 10(2)(a) because a spouse has unabsorbed deductions and allowances, the spouse who would have been liable to tax prior to the election will be liable to pay the tax charged under joint assessment. Where an election is made under section 10(2)(b) by the spouses of a married couple who are both individually chargeable, they must nominate one of them to be the person liable for the tax payable on their aggregated net chargeable income. The nomination of the chargeable spouse is an integral part of the election process and any variation in the nomination will constitute a withdrawal of the election.

15. An election for joint assessment must be made by the spouses of a married couple by jointly signing the tax return for individuals or the prescribed form issued by this Department. It may be made at any time during the year of assessment concerned or the following year of assessment, or before the expiration of one month after the date on which the assessment becomes final and conclusive under section 70 of the Ordinance, whichever is the later. In addition, the Commissioner may allow an extension of time for making an election in circumstances as he considers to be reasonable, including, for instance, when either spouse has been absent from Hong Kong for an extended time or a spouse has unabsorbed deductions and allowances agreed only after the expiration of the election period.

16. For joint assessment purposes, marriages which occur during a year of assessment are deemed to have taken place at the commencement of that year. Therefore, the total incomes which accrued to a married couple in the year of marriage, irrespective of whether before and after marriage, will be taken into account in ascertaining their combined net chargeable income. In the case of the death of a spouse, an executor has the same right of election for joint assessment as the deceased would have had.

17. Withdrawal of an election for joint assessment must be made in writing and jointly signed by the married couple. The time limit for withdrawing an election is the same as that for making an election. If a joint assessment election is withdrawn, the assessment position of each spouse will be restored to the position as if no election had been made. Once withdrawn,

an election cannot be made again for the same year of assessment. A withdrawal of an election is only considered to have occurred when a married couple give a jointly signed written notification to that effect. Where a married couple no longer qualify to elect joint assessment as a result of reassessment, any prior valid election which has not been formally withdrawn will be treated as having lapsed. If, as a consequence of a further assessment, the married couple again qualify for joint assessment the lapsed election will be reactivated.

Objections in respect of joint assessments

18. In general, the provisions for objection under section 64 of the Ordinance equally apply to separate taxation and joint assessment. However, where a married couple have made an election for joint assessment under sections 10(2)(a) and a spouse is chargeable under section 10(3)(a), a right of objection is provided under section 64(9) to the other spouse with unabsorbed deductions and allowances. This right is limited to matters relating to the quantification of the unabsorbed deductions and allowances only and cannot serve to reopen the chargeable spouse's assessment, in connection with issues unrelated to the joint assessment itself.

19. Once an objection has been made against a joint assessment by a spouse with unabsorbed deductions and allowances, the procedures provided by section 64(10), which are similar to the established procedures for settlement or determination of objections, will apply. Where a settlement cannot be agreed, the couple will jointly and severally have the right to appeal to the Board of Review.

Deductions from assessable income

20. Deductions of expenses, including expenses of self-education, and depreciation allowances are personal to the person who incurred them. In any year of assessment in which the aggregate of the outgoings, expenses and depreciation allowances deductible under section 12(1)(a) and (b) exceed the person's assessable income, the loss representing such excess will be carried forward to set off against the person's assessable income in subsequent years of assessment. However, where the spouses of a married couple elect to be jointly assessed, their net assessable incomes will in the first instance be computed individually but prior to either of them becoming entitled to carry forward their

loss to the subsequent year of assessment, any excess of expenses and depreciation allowances of a spouse must be set off as far as possible against the net assessable income of the other spouse.

Loss

21. Loss will be carried forward in the name of the person who incurred it and set off against the person's future net assessable income. However, in any year of assessment where joint assessment is elected, the loss will firstly be set off against the married person's assessable income and then that of the married person's spouse. The balance of the loss so not set off is carried forward to the subsequent year of assessment. In the subsequent year of assessment, if joint assessment is again elected, inter-spouse set off of loss will take place for that year.

Calculation of net chargeable income

22. A person's net chargeable income is computed by deducting from the person's net assessable income the person's concessionary deductions entitled under Part 4A and allowances under Part 5. The concessionary deductions under Part 4A include:

- (a) approved charitable donations;
- (b) elderly residential care expenses;
- (c) home loan interest;
- (d) mandatory contributions to Mandatory Provident Fund Scheme or Recognized Occupational Retirement Scheme;
- (e) qualifying health insurance premiums (from the year of assessment 2019/20 onwards); and
- (f) qualifying annuity premiums and tax deductible Mandatory Provident Fund Scheme voluntary contributions (from the year of assessment 2019/20 onwards).

23. When joint assessment has been elected, the net assessable incomes

of a married couple are aggregated into a single sum from which those concessionary deductions and allowances are deducted to arrive at an aggregated net chargeable income.

Allowable charitable donations

24. A person is permitted to deduct approved charitable donations made by the person or the person's spouse. The aggregate of the donations must not be less than \$100 and the maximum deduction cannot exceed 35%¹ of the assessable income as reduced by the outgoings, expenses and depreciation allowances deductible under sections 12(1)(a) and (b), which is referred to as "the reduced assessable income". For married couples, no restriction is imposed on the transfer of unutilized donations between spouses provided that there is no duplication of claims. In the case of joint assessment, the maximum deduction that may be allowed for charitable donations cannot exceed 35% of the aggregate of the reduced assessable incomes.

25. Where a deduction for the same charitable donations is claimed by, or has been allowed to, more than one person then the persons must agree amongst themselves which of them will claim the deduction. The necessary reassessments will be made once the persons have reached an agreement. If the claimants are unable to agree amongst themselves as to which of them will claim the donation, the Commissioner is empowered to allow the deduction on such basis as it appears to be just in the circumstances, having regard to the information in his possession at that time.

Calculation of salaries tax

26. Salaries tax is charged at the rates specified in Schedule 2 to the Ordinance on the person's net chargeable income and is not to exceed the tax payable at the standard rate specified in Schedule 1 on the person's net assessable income as reduced by such concessionary deductions as allowable to the person under Part 4A. When joint assessment is elected, the tax charged is not to exceed the tax payable at the standard rate on the aggregate of the net assessable incomes of a married couple as reduced by the concessionary deductions allowable to them.

¹ 10% for years of assessment up to the year of assessment 2002/03 and 25% for the years of assessment from 2003/04 to 2007/08 inclusive.

Provisional salaries tax

27. Any person chargeable to salaries tax in respect of any year of assessment is liable to pay provisional salaries tax for that year. Under separate taxation, a spouse will be individually charged provisional tax in respect of the spouse's own income. When joint assessment is elected, the provisional tax for the following year of assessment will be charged on a joint assessment basis in the name of the spouse chargeable under section 10(3).

PERSONAL ASSESSMENT

Election for personal assessment

28. A person, who is an individual of or over the age of 18, may elect to be personally assessed under Part 7 of the Ordinance if the person is ordinarily resident in Hong Kong (or was a "permanent resident" for years of assessment up to 2017/18) or a temporary resident. An individual is ordinarily resident in Hong Kong if he resides in Hong Kong voluntarily and for a settled purpose (e.g. education, business, employment or family) with a sufficient degree of continuity. A "temporary resident" is an individual who stays in Hong Kong, whether continuously or otherwise, for more than 180 days in the year of assessment to which the election relates or 300 days in two consecutive years of assessment, one of which must be the year to which the election relates.

29. The term "ordinarily resident" was elucidated by Hunter J in the Hong Kong Court of Appeal case *Director of Immigration v Ng Shun-loi* [1987] HKLR 798:

"The words 'ordinarily resident' mean that the person must be habitually and normally resident here apart from temporary or occasional absences of long or short duration." (Levene v IRC [1928] AC 217 applied)

"A person is resident where he resides. ... When is he ordinarily resident? I think that is when he resides there in the ordinary way. That must be the meaning of the adverb. The expression is therefore contemplating residence for the purposes of everyday life. It is residence in the place where

a person lives and conducts his daily life in circumstances which lead to the conclusion that he is living there as an ordinary member of the community would live for all the purposes of his daily life.” (R v Barnet London Borough Council, ex parte Nilish Shah [1983] 2 AC 309 applied)

30. The term “ordinarily resided” should be interpreted according to its natural and ordinary meaning. It refers to a person, to a certain degree, habitually and normally resides at a place, apart from temporary or occasional absences of long or short duration. Further, it refers to a person’s abode in a particular place or country which the person has adopted voluntarily and for settled purposes as part of the regular order of the person’s life for the time being, such purposes could be of long or short term. In determining whether a person ordinarily resides at a particular place, the person’s subjective intention is of very limited probative value, and is only relevant in determining whether the person is voluntary or for other purposes. Whether a person ordinarily resides at a place is a question of fact, and the issue depends on the particular circumstances of each case. There must be sufficient connection with the purpose of residing at a place in order for that purpose to be regarded as a settled purpose.

31. For the years of assessment up to 2017/18, where a spouse who had income assessable under the Ordinance was not living apart from the other spouse, the spouse could not elect to be personally assessed unless the other spouse also did so. A spouse who was neither a temporary resident nor a permanent resident could make an election if the person’s spouse was. Where married person’s allowance was granted to a married couple who were living apart, they were to be treated as not living apart from each other for the purposes of personal assessment and joint election for personal assessment was required.

32. From the year of assessment 2018/19 onwards, a spouse, if eligible to elect for personal assessment, can elect to be personally assessed individually, except where the spouse and the other spouse are assessed under joint assessment. If a spouse is not living apart from the other spouse and both of them have income assessable under the Ordinance, they can jointly elect for personal assessment provided that either one or both of them are eligible to make the election under the Ordinance. Where married person’s allowance is granted to a married couple who are living apart, the couple are to be treated as not living apart from each other for the purposes of personal assessment.

33. Election for personal assessment must be made within two years after the end of the year of assessment in respect of which the election is made or within one month after an assessment of the income or profits forming part of the person's total income for such year of assessment becomes final and conclusive under section 70 of the Ordinance, whichever is the later. If the election has been made by a married couple jointly, the election may only be withdrawn by them jointly. A withdrawal must be effected by giving a notice in writing to the Commissioner within six months after the date on which an assessment is issued or within such further period that the Commissioner considers reasonable. A person who has withdrawn an election for a particular year of assessment cannot make an election for the same year of assessment again unless the Commissioner considers it appropriate to allow a re-election.

Calculation of total income

34. Under personal assessment, incomes (including net assessable income, assessable profits and net assessable value) of a person chargeable to salaries tax, profits tax and property tax are aggregated and the interest payable on the money borrowed for the acquisition of the property let is deducted to arrive at the total income of the person. The total income may further be reduced by:

- (a) such deductions as allowable to the person under Part 4A; and
- (b) business losses incurred by the person under Part 4 in the year of assessment.

Interest deduction

35. The proviso to section 42(1) allows the deduction for interest payable on money borrowed for the purpose of producing that part of the total taxable property income (i.e. the net assessable value) which has been included for personal assessment. The proviso does not allow a global deduction for interest payable against total taxable property income. The amount of interest deductible has to be restricted to the net assessable value of the property concerned. Thus, where there are more than one property producing net assessable value, the computation of allowable interest would involve a two-step process:

- (a) ascertain the interest payable in respect of the loan(s) for acquiring each of the properties which produced the net assessable value; and
- (b) compare the individual loan interest amount with the net assessable value of that particular property of which the loan interest was incurred to determine the amount deductible.

36. For a married couple who have elected for personal assessment jointly, their reduced total incomes (i.e. the total incomes reduced by concessionary deductions and losses from business), are in the first instance computed individually. Their reduced total incomes will then be aggregated. For the purposes of computing the couple's joint income, a person and the person's spouse who married during the year of assessment are deemed to have married each other at the commencement of that year of assessment.

Loss

37. Where the aggregate amount of the concessionary deductions under Part 4A of the Ordinance and the business losses of a person under Part 4 exceeds the person's total income, only that part of the excess representing business losses under Part 4 will be carried forward to set off against the total income of the person for future years of assessment. In general, prior years' loss brought forward under personal assessment will only be set off against the total income of the person when personal assessment is elected. Where personal assessment is not elected, incomes of the person will be assessed under the respective heads of charge and the loss will be carried forward for set off in the subsequent year when an election is made.

38. Losses incurred by a married couple will be computed individually. However, in any year of assessment where personal assessment is elected jointly by a married couple, the loss incurred by a spouse will be set off against the total income of the spouse and the other spouse before any balance of loss can be carried forward. In any year of assessment in which a spouse with a loss brought forward does not elect to be personally assessed because the spouse has no assessable income, and the other spouse elects for personal assessment individually, section 42(6) provides that the loss will be used to set off against the chargeable income of the spouse who elects for personal assessment for that

year of assessment. The balance of loss will be carried forward to the subsequent year of assessment in the name of the spouse who incurred it. Examples illustrating the operation of section 42(6) are at Appendix 2.

Lodgment of returns and assessment to tax

39. Any person, irrespective of whether single or married, electing for personal assessment is required to complete the relevant parts of the tax returns. A married couple intending to make joint election have to jointly sign the tax returns.

40. The reduced total income of the person after deduction of the allowances under Part 5 of the Ordinance is charged to tax at the rates specified in Schedule 2 and the amount of tax payable is not to exceed the tax payable calculated at the standard rate specified in Schedule 1 on the person's total reduced income or in case of joint election for personal assessment, the joint reduced total incomes of the person and the person's spouse.

41. Where a married couple jointly elect for personal assessment and are liable to tax, they will receive separate notices of assessment for the apportioned tax attributable to their respective incomes, computed by reference to the ratio that their respective reduced total incomes bears to their aggregate reduced total incomes.

ALLOWANCES UNDER PART 5

Allowances for salaries tax and personal assessment

42. The allowances for salaries tax and personal assessment are set out in Part 5 of the Ordinance as follows:

- (a) basic allowance under section 28;
- (b) personal disability allowance under section 28A (from the year of assessment 2018/19 onwards);
- (c) married person's allowance under section 29;

- (d) dependent parent allowance under section 30;
- (e) dependent grandparent allowance under section 30A;
- (f) dependent brother or dependent sister allowance under section 30B;
- (g) child allowance under section 31;
- (h) disabled dependant allowance under section 31A; and
- (i) single parent allowance under section 32.

The prescribed amount of allowance and the maximum entitlement to child allowance for each year of assessment are specified in Schedule 4 to the Ordinance.

Basic allowance

43. A person chargeable to tax under salaries tax under Part 3 or personal assessment under Part 7 of the Ordinance are entitled to basic allowance unless the person is:

- (a) assessable at the standard rate according to the provisions in section 13 or section 43 as the case may be; or
- (b) married at any time during the year of assessment and will be granted a married person's allowance.

Section 28(2) provides that no person may be granted:

- (a) both a basic allowance and a married person's allowance; or
- (b) a basic allowance where the person's spouse has claimed a married person's allowance.

Personal disability allowance

44. From the year of assessment 2018/19 onwards, personal disability allowance will be granted to a person who is eligible to claim an allowance under the Government's Disability Allowance Scheme in the year of assessment.

Married person's allowance

45. Married person's allowance will be granted to a person who was married at any time during the year of assessment and:

- (a) the person and the person's spouse have elected to be jointly assessed; or
- (b) for the years of assessment up to 2017/18:
 - (i) the person's spouse did not have any income chargeable to salaries tax; or
 - (ii) the person and the person's spouse who were not living apart from each other have elected for personal assessment jointly; or
- (c) from the year of assessment 2018/19 onwards:
 - (i) the person's spouse did not have any income chargeable to salaries tax and has not elected for personal assessment separately from the person; or
 - (ii) the person and the person's spouse who are not living apart from each other have elected for personal assessment jointly.

46. The full amount of married person's allowance may be granted in any year of marriage, separation, divorce or death, irrespective of the actual date in the year on which the event occurred.

47. Where a married person and the person's spouse are living apart from each other, married person's allowance can only be granted if the claimant is maintaining or supporting the other spouse. In *D5/09* (2009-10) 24 IRBRD 377, it was held that to qualify for the married person allowance, the financial support and the separation must happen simultaneously (i.e. the spouse claiming the allowance should have been maintaining or supporting the other spouse as long as they are living apart during the relevant year of assessment). When married person's allowance is granted in this circumstance, a married person and the person's spouse shall not be treated as living apart from each other. A claim for maintaining and supporting a spouse may, however, be revoked at any time during the year of assessment to which it applies or within the next six years.

48. The relationship of a married person and the person's spouse ceases from the date on which a divorce order becomes absolute. In *Sit Kwok Keung v. CIR* [2002] 3 HKLRD 286, the Court of Appeal ruled that the taxpayer was not entitled to married person's allowance in the years subsequent to the year of assessment in which the divorce became absolute, despite his periodic payments made to support the former spouse, because they were no longer married spouses and he was not married.

Dependent parent allowance

49. Dependent parent allowance may be granted where a parent of a person or that of the person's spouse, not being a spouse living apart from the person, at any time during that year of assessment, was:

- (a) ordinarily resident in Hong Kong; and
- (b) aged 60 or more; or was aged 55 or more but under 60; or was eligible to claim an allowance under the Government's Disability Allowance Scheme; and
- (c) maintained by the person or the person's spouse.

50. A parent shall be treated as having been maintained by a person or the person's spouse if the parent resided with the person and the person's spouse, otherwise than for full valuable consideration, for a continuous period of not less than 6 months; or the person or the person's spouse contributed not less than

\$12,000 in the year of assessment in money towards the parent's maintenance.

51. The term "parent" includes a natural, adoptive and step father or mother of the person or the person's living or deceased spouse.

52. A parent was "ordinarily resident in Hong Kong" means that the parent must have normal and usual place of residence in Hong Kong. He or she was habitually and normally resident in Hong Kong or resident in Hong Kong for the purposes of everyday life during the relevant year of assessment. A person cannot be granted dependent parent allowance in respect of a dependent parent who is ordinarily resident outside Hong Kong solely by virtue of that parent holding a Hong Kong permanent identity card. For the purpose of dependent parent allowance, it is not relevant that the dependent parent also received income during the year of assessment in respect of which the claim is made.

53. Dependent parent allowance has two components – the standard allowance and the additional allowance. While the standard allowance will be granted for each qualifying dependent parent, the additional allowance will be granted only if the parent resided, otherwise than for full valuable consideration, with the person and the person's spouse continuously throughout the year of assessment. Dependent parent allowance shall not be granted (either claimed by the same person or by any other person) if a deduction of elderly residential care expenses has been allowed in respect of the same dependent parent.

Dependent grandparent allowance

54. Dependent grandparent allowance may be granted to a person who, during the year of assessment, maintained the person's grandparent or the grandparent of the person's spouse. Same as dependent parent allowance, dependent grandparent allowance has two components – the standard allowance and the additional allowance. The conditions required to be fulfilled for the granting of dependent grandparent allowance are the same as those relating to dependent parent allowance as set out in paragraphs 49 to 53 above.

55. The term "grandparent" includes a natural, adoptive and step grandfather or grandmother of a person or the person's living or deceased spouse. In respect of the same dependent grandparent, only one person shall be granted an allowance for tax purposes. The dependent grandparent allowance is

mutually exclusive with dependent parent allowance in respect of the same dependant who may be in a dual capacity. That means, in respect of a dependant having dual capacity as dependent parent of a person and dependent grandparent of another person, either dependent parent allowance or dependent grandparent allowance shall be granted. Similar to dependent parent allowance, no dependent grandparent allowance shall be granted if a deduction of elderly residential care expenses has been granted in respect of the same dependent grandparent.

Dependent brother or dependent sister allowance

56. A person may be granted a dependent brother or dependent sister allowance if the person or the person's spouse, not being a spouse living apart from the person, maintained in the year of assessment an unmarried brother or sister of whom the person or the person's spouse had the sole or predominant care. The term "brother or sister" means a full blood, half blood, adopted or step brother or sister of a person or the person's living or deceased spouse. If a person or the person's living or deceased spouse is adopted, brother and sister includes a natural child of an adoptive parent of either of them. "Adopted" means adopted in any manner recognized by the laws of Hong Kong. With effect from the implementation of the Adoption Ordinance (Cap. 290) on 1 January 1973, an adoption order validating the adoption must be made under that Ordinance while adoptions made under Chinese law and custom prior to 1 January 1973 are also recognized. For an overseas adoption, it would be considered in accordance with section 17 or 20F of the Adoption Ordinance, having regard to the individual circumstances of the case. To satisfy the requirement of having the predominant care, the amount of care provided by the person towards the dependent brother or sister must have supremacy or ascendancy over others; it must be the strongest prevailing one amongst others. See *D10/11 (2011-12) 26 IRBRD 207.*

57. Age restrictions are imposed on the brother or sister. At any time in the year of assessment the dependent brother or sister maintained by the person or the person's spouse must fulfill one of the following three conditions:

- (a) under the age of 18;
- (b) of or over the age of 18 but under the age of 25 and was

receiving full time education at a university, college, school or other similar educational establishment; or

- (c) of or over the age of 18 and was, by reason of physical or mental disability, incapacitated for work.

The allowance is mutually exclusive with child allowance in respect of the same dependant who may be in a dual capacity. That means, in respect of a dependant having dual capacity as dependent child of a person and dependent brother or sister of another person, either child allowance or dependent brother or dependent sister allowance shall be granted.

Child allowance

58. A person is entitled to claim a child allowance in respect of any unmarried child that the person was maintaining at any time during the year of assessment. From the year of assessment 2007/08 onwards, an increased allowance is granted in the year of assessment in which the child is born. The term “child” is defined in section 27 to mean any child of a person or the person’s spouse or former spouse, whether or not born in wedlock, and it includes the adopted or step child of either or both of them. The intention of the legislation is that any person providing care and support to a child to whom the person has lawful custody should be entitled to child allowance, subject to apportionment where more than one person, not being married couple, is entitled to claim the allowance.

59. The term “adopted” applies with equal validity to a child for the purposes of child allowance and single parent allowance as it does to the parent-child relationship specified for dependent parent allowance.

60. For the purposes of child allowance, age restriction similar to those on dependent brother and dependent sister allowance, are imposed on the child. At any time in the year of assessment, the child must be:

- (a) under the age of 18;
- (b) of or over the age of 18 but under the age of 25 and was receiving full-time education at a university, college, school or other similar educational establishment; or

- (c) of or over the age of 18 and was, by reason of physical or mental disability, incapacitated for work.

61. Subject to the requirement that a married person and the person's spouse who are not living apart from each other shall nominate one of them to claim child allowance, where more than one person is entitled to claim an allowance in respect of the same child for the same year of assessment, the allowance is to be apportioned by the Commissioner having regard to the contributions made by each individual to the maintenance and education of the child during that year. In the case of a married couple who are not living apart from each other, their total entitlement to child allowance may only be claimed en bloc by the spouse as the couple so nominate. The nomination of the spouse to claim child allowance may not be revoked without the consent of the Commissioner whose decision on the matter shall be final and not subject to objection or appeal. In general, consent to a change of a nomination will not be unreasonably withheld where the change will result in a reduction in the overall tax liability of the married couple.

Disabled dependant allowance

62. Disabled dependant allowance may be granted in respect of a disabled family member of whom a person is entitled to be granted married person's allowance, child allowance, dependent brother or dependent sister allowance, dependent parent allowance, dependent grandparent allowance or a deduction of elderly residential care expenses. The disabled dependant must be eligible to claim an allowance under the Government's Disability Allowance Scheme.

63. In the case of a disabled dependent child in respect of whom child allowance is apportioned and granted to more than one person for a year of assessment, disabled dependant allowance granted in respect of the same child for that year of assessment is also required to be apportioned among the persons on the same basis.

Single parent allowance

64. Single parent allowance may be claimed if, at any time during the year of assessment, a person had the sole or predominant care of a dependent child in respect of whom the person is entitled to claim a child allowance. The

allowance is of a prescribed amount and does not increase with the number of children concerned. The term “sole or predominant care” relates to custodial responsibility for the child, i.e. the actual day-to-day care, supervision, well-being and control of the child and the onus of proof lies with the person making the claim. To satisfy the requirement of having the predominant care, the amount of care provided by the person towards the child must have supremacy or ascendancy over others; it must be the strongest prevailing one amongst others. See *Sit Kwok Keung*.

65. The allowance cannot be granted, however, to a person if at any time during that year of assessment the person was married and not living apart from the person’s spouse, or the person only made contributions to the maintenance and education of the child during the year of assessment. In *Sit Kwok Keung*, it was held that while the provision of money was not completely irrelevant to maintenance, this alone could not be sufficient to show the sole or predominant care of the child. Where custody of a child is transferred at some point during the year, the allowance will normally be apportioned on a time basis.

Allowance on a dependant claimed by more than one person

66. Except under sections 31(2) and 31A(2) of the Ordinance where a child allowance and the corresponding disabled dependant allowance in respect of a child may be apportioned and granted to more than one person, allowance in respect of an individual as dependent parent, grandparent, brother, sister, child or disabled dependant will not be given to more than one person in the same year of assessment.

67. When it is found that, save as permitted by sections 31(2) and 31A(2), two or more persons are eligible to claim and have claimed an allowance in respect of the same dependant as their dependent parent, grandparent, brother, sister, child or disabled dependant for the same year of assessment, the claimants will be required to agree amongst themselves who will claim the allowance in respect of that dependant. As a practical measure, the Department will accept a written withdrawal of the claim from one claimant in favour of the other as sufficient evidence that the parties have reached agreement.

68. Except as permitted by sections 31(2) and 31A(2), where allowance in respect of the same dependent person has been granted to:

- (a) two or more persons;
- (b) a married person and the person's spouse not living apart from each other in the case of child allowance; or
- (c) a person and, within six months of such allowance being granted, another person appears to the Commissioner to be entitled to the allowance,

the claimants will be invited to agree which of them is to have the allowance. When the claimants are unable to reach an agreement within a reasonable time, additional assessments will be raised under section 60 in a manner which, on the basis of the information available at the time when they are raised, appears to the Commissioner to be just.

Appendix 1

Joint Assessment - Spouse with Unabsorbed Deductions and Allowances

Example 1

For the year of assessment 2018/19, Mr. A and Mrs. A had salary income of \$680,000 and \$100,000 respectively. Mr. A claimed deductions of contributions to recognized retirement schemes of \$18,000 and charitable donations of \$1,000. Mr. A also claimed dependent parent allowance in respect of a parent and child allowance in respect of a child. Mrs. A claimed deduction of contributions to recognized retirement schemes of \$500.

Separate taxation

	<u>Mr. A</u>	<u>Mrs. A</u>
	\$	\$
Salary income	680,000	100,000
<u>Less:</u> Contributions to recognized retirement schemes	18,000	500
Charitable donations	<u>1,000</u>	<u>-</u>
	661,000	99,500
<u>Less:</u> Basic allowance	132,000	132,000
Dependent parent allowance	50,000	-
Child allowance	<u>120,000</u>	<u>-</u>
Net chargeable income	<u>359,000</u>	<u>0</u>
 Tax Payable (after tax reduction)	<u>23,030</u>	<u>0</u>

Joint assessment

	<u>Mr. A and Mrs. A</u>
	\$
Aggregate assessable income	780,000
<u>Less:</u> Contributions to recognized retirement schemes	18,500
Charitable donations	<u>1,000</u>
	760,500
Married person's allowance	264,000
Dependent parent allowance	50,000
Child allowance	<u>120,000</u>
Net chargeable income	<u>326,500</u>
 Tax Payable (after tax reduction)	<u>17,505</u>

Appendix 2

Personal Assessment - Transfer of Loss between Spouses

Example 2

For the year of assessment 2017/18, Mr. B had salary income of \$350,000 and property income (i.e. net assessable value) of \$150,000 while Mrs. B had an adjusted loss of \$150,000 from her sole proprietorship business. They elected for personal assessment.

For the year of assessment 2018/19, Mr. B had salary income of \$350,000 and property income of \$150,000 while Mrs. B had an adjusted loss of \$800,000 from her sole proprietorship business. Mr. B and Mrs. B jointly elected for personal assessment under section 41(1A).

For the year of assessment 2019/20, Mr. B had salary income of \$100,000 and property income of \$150,000 while Mrs. B did not have any income. Mr. B elected to be personally assessed for the year.

Year of assessment 2017/18

	<u>Mr. B</u>	<u>Mrs. B</u>	<u>Total</u>
	\$	\$	\$
Salary income	350,000	-	350,000
Property income	<u>150,000</u>	-	<u>150,000</u>
	500,000	-	500,000
<u>Less:</u> Loss for the year	<u>-</u>	<u>150,000</u>	<u>150,000</u>
Net total income/ (net loss)	500,000	(150,000)	350,000
Net loss to (from) spouse	<u>(150,000)</u>	<u>150,000</u>	<u>0</u>
Reduced total income	<u>350,000</u>	<u>0</u>	350,000
<u>Less:</u> Married person's allowance			<u>264,000</u>
Net chargeable income			<u>86,000</u>
Tax Payable (after tax reduction)	<u>942</u>	<u>nil</u>	<u>942</u>

Year of assessment 2018/19

	<u>Mr. B</u>	<u>Mrs. B</u>	<u>Total</u>
	\$	\$	\$
Salary income	350,000	-	350,000
Property income	<u>150,000</u>	-	<u>150,000</u>
	500,000	-	500,000
<u>Less:</u> Loss for the year	-	800,000	<u>800,000</u>
Net total income/ (net loss)	500,000	(800,000)	(300,000)
Net loss to (from) spouse	<u>(500,000)</u>	<u>500,000</u>	
Reduced total income/(loss carried forward)	<u>0</u>	<u>(300,000)</u>	
<u>Less:</u> Married person's allowance			<u>264,000</u>
Net chargeable income			<u>0</u>

Statement of loss

Loss for the year	800,000
<u>Less:</u> Loss set off under section 42(6)	<u>500,000</u>
Loss carried forward	<u>300,000</u>

Year of assessment 2019/20

	<u>Mr. B</u>	<u>Mrs. B</u>
	\$	\$
Salary income	100,000	
Property income	<u>150,000</u>	
	250,000	
Net loss to (from) spouse	<u>(250,000)</u>	
Total income after loss set off	<u>0</u>	

Statement of loss

Loss brought forward	300,000
<u>Less:</u> Loss set off under section 42(6)	<u>250,000</u>
Loss carried forward	<u>50,000</u>

Example 3

For the year of assessment 2018/19, Mr. C had property income (i.e. net assessable value) of \$150,000 while Mrs. C had property income of \$200,000 and an adjusted loss of \$400,000 from her sole proprietorship business. Each of them elected to be personally assessed.

For the year of assessment 2019/20, Mr. C had salary income of \$30,000 and property income of \$150,000 while Mrs. C did not have any income for the year. Mr. C elected to be personally assessed for the year.

Year of assessment 2018/19

	<u>Mr. C</u>	<u>Mrs. C</u>
	\$	\$
Property income	150,000	200,000
<u>Less:</u> Loss for the year	<u>-</u>	<u>400,000</u>
Net total income/(net loss)	150,000	<u>(200,000)</u>
<u>Less:</u> Basic allowance	<u>132,000</u>	
Net chargeable income	<u>18,000</u>	

Statement of loss

Loss for the year	400,000
<u>Less:</u> Loss set off under section 42(2)	<u>200,000</u>
Loss carried forward	<u>200,000</u>

Year of assessment 2019/20

	<u>Mr. C</u>	<u>Mrs. C</u>
	\$	\$
Salary income	30,000	
Property income	<u>150,000</u>	
	180,000	
Net loss from spouse	<u>(180,000)</u>	
Net total income	<u>0</u>	

Statement of loss

Loss brought forward	200,000
<u>Less</u> : Loss set off under section 42(6)	<u>180,000</u>
Loss carried forward	<u>20,000</u>