



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. 36 (REVISED)

CONCESSIONARY DEDUCTIONS: SECTION 26D

ELDERLY RESIDENTIAL CARE EXPENSES

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

These notes replace those issued in January 2000.

WONG Kuen-fai
Commissioner of Inland Revenue

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INTRODUCTION

Summary of legal framework

With effect from the year of assessment 1998/99, a person chargeable to salaries tax or electing for personal assessment may claim a deduction for elderly residential care expenses paid by the person or the person's spouse to a residential care home in respect of a parent or grandparent. Subject to meeting the entitlement criteria for the deduction, a person chargeable to tax at standard rate is also allowed to claim a deduction for elderly residential care expenses in computing the tax payable. The deduction was first introduced by the Inland Revenue (Amendment) Ordinance 1998. The relevant legislation is contained in section 26D of the Inland Revenue Ordinance (IRO).

ELDERLY RESIDENTIAL CARE EXPENSES

Conditions for deduction

2. The conditions for deduction of elderly residential care expenses are:
 - (a) the care is residential care provided in a residential care home;
 - (b) the recipient of the residential care is a parent or grandparent of the person who made the deduction claim or that of the person's spouse;
 - (c) the parent or grandparent is 60 years old or above, or is entitled to claim an allowance under the Government's Disability Allowance Scheme;
 - (d) the payment for the care was made by the person or the person's spouse;
 - (e) the payment was made in the year of assessment;

- (f) the deduction allowable cannot exceed the maximum prescribed amount;
- (g) only one person can claim the deduction for each parent or grandparent;
- (h) the deduction is allowed in lieu of the granting of a dependent parent or dependent grandparent allowance.

Residential care expenses

3. The term “residential care expenses” is defined under section 26D(5) of the IRO to mean any expenses payable in respect of the residential care received at a residential care home and paid to that residential care home or any other person acting on its behalf. The deduction covers only the cost of care provided to qualifying parent or grandparent who is resident in a residential care home. The cost of care provided to a qualifying parent or grandparent attending homes where care is provided on a non-residential basis, including an out-patient basis, is not deductible as residential care expenses because the “residential” requirement is not satisfied.

4. Section 26D does not limit the nature of expenses incurred by residential care homes that qualify for the deduction. Rather, it allows a person a deduction for fees paid to the home for providing the residential care. The amounts paid by a person must nevertheless be in respect of the provision of residential care. Residents’ private expenses initially met by the home on the residents’ behalf and then recovered from the persons responsible for the settlement of individual residents’ accounts are not residential care expenses. For example, cash advances made by homes to their residents to enable the residents to meet personal expenditure needs are not expenses in respect of residential care received at a residential care home. The amount of any such advances recovered by the residential care home from the family member of the resident is not deductible under section 26D as residential care expenses.

5. Residential care expenses may be paid either directly to the home providing the residential care or to a third party or agent specified by the home. When a residential care home appoints a management agent or collection agent to receive fees on its behalf, the amounts paid in accordance with the home’s

instructions are, subject to the other provisions of section 26D being satisfied, an allowable deduction.

Residential care homes

6. Under section 26D(5), residential care home means any premises:
 - (a) in respect of which a licence issued or renewed under the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459) (RCHEO) is for the time being in force;
 - (b) in respect of which a certificate of exemption issued or renewed under the RCHEO is for the time being in force;
 - (c) to which the RCHEO does not apply by virtue of section 3 of that Ordinance;
 - (d) which is a nursing home in respect of which any person has been registered under section 3 of the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap. 165) (HNMRO);
 - (e) in respect of which a licence issued or renewed under the Residential Care Homes (Persons with Disabilities) Ordinance (Cap. 613) (RCHPO) is for the time being in force; or
 - (f) in respect of which a certificate of exemption issued or renewed under the RCHPO is for the time being in force.

7. The majority of residential care homes hold a licence issued under the RCHEO. However, the RCHEO allows the Director of Social Welfare to exempt a residential care home from holding a licence under certain circumstances. The RCHEO does not apply to any residential care home maintained and controlled by the Government or the Housing Authority; or any residential care home used or intended for use solely for the purpose of medical treatment; or any residential care home or type or description of residential care home excluded by the Director of Social Welfare by order published in the Gazette.

8. Under the HNMRO, any person who intends to operate a health care institution in the form of a private hospital, maternity home or nursing home must obtain prior approval from the Director of Health and should be duly registered. Any nursing home registered under the HNMRO is a residential care home for the purposes of the elderly residential care expenses deduction. The HNMRO will be repealed after the coming into effect of section 148 of the Private Healthcare Facilities Ordinance (Cap. 633) (PHFO) on 1 January 2021. Nursing house previously registered under the HNMRO will be replaced by scheduled nursing home within the meaning of the PHFO.

9. The RCHPO provides for the control of residential care homes for persons with disabilities through a licensing system administered by the Director of Social Welfare. The RCHEO and the RCHPO are mutually exclusive. Any residential care home which falls into the definitions of a residential care home under the RCHEO and the RCHPO is only required to hold one valid licence under either of the two ordinances.

Qualifying parent or grandparent

Dependent parent or grandparent

10. A deduction for residential care expenses may be claimed in respect of a person who is a parent or a grandparent of the claimant. The deduction for residential care expenses is allowable in respect of each qualifying parent or grandparent receiving residential care in a residential care home. A person may be allowed a deduction in respect of more than one parent or grandparent for whom the person has paid residential care expenses subject to the maximum deduction as specified in Schedule 3C for each parent and grandparent.

Meaning of parent and grandparent

11. The term “parent or grandparent” has had its meaning in section 26D(5) extended to include not only the claimant’s parents and grandparents but also the parents and grandparents of the claimant’s spouse. The definitions of “parent” and “grandparent”, as they apply to both the person and the person’s spouse, are set out in section 2. These same definitions apply to dependent parent allowance and dependent grandparent allowance.

12. The scope of “parent” and “grandparent” is wide. It embraces not only a person’s natural parents and grandparents but also any adoptive and step parents and grandparents. In the case of a deceased spouse, the relationship of the deceased spouse’s parent or grandparent with the surviving spouse is preserved so that notwithstanding that the deceased spouse may have predeceased his or her parents or grandparents, a deduction for residential care expenses in respect of the deceased spouse’s parents and grandparents may be allowed to the surviving spouse if residential care expenses have been paid by that surviving spouse.

13. In section 2(1) of the IRO, “spouse” is defined to mean a husband or wife whereas “husband” and “wife” refer to a married man and married woman respectively. “Marriage” is also defined in the same section 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.

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”.

14. The definition of “marriage” shall not, in the case of a marriage which is both potentially and actually polygamous, include marriage between a person and any spouse other than the principal spouse. If a person has more than one legal spouse under the laws of other places which permit polygamous marriage, only the marriage between the person and the principal spouse is recognized for the purposes of the IRO.

15. 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 IRO 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 IRO was appropriate and ordered the following declaration:

- (a) the existing limb (b) of the term “marriage” in section 2 of the IRO 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 IRO, references to:
 - (i) “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”.

Therefore, for the purposes of the IRO, a parent or grandparent includes the parent or grandparent of a person’s spouse, whether in a heterosexual marriage or same-sex marriage.

Age of parent or grandparent

16. To qualify for the deduction for residential care expenses, the parent or grandparent in respect of whom the expenses are paid must be aged 60 years or more at any time in the year of assessment. In the year that a parent or grandparent attains the age of 60 years, the maximum deduction for residential care expenses set out in Schedule 3C is still allowable. It is not apportioned on a time basis by reference to the periods prior to, and after, the 60th birthday of a parent or grandparent. Provided that the parent or a grandparent was aged 60 or

more at any time within the year of assessment, subject to the amount of the maximum deduction not being exceeded, the full amount of the residential care expenses paid in that year is allowable as a deduction.

Example 1

Mr. A's mother started residing in a residential care home on 1 May 2018. The mother turned 60 years of age on 1 January 2019. Mr. A paid \$85,000 in residential care expenses to the home between 1 May 2018 and 31 March 2019.

Since his mother attained the age of 60 years during the year of assessment 2018/19, a deduction for \$85,000 (i.e. the full amount paid) would be allowable to Mr. A for the year of assessment 2018/19.

17. Special provisions apply to disabled parents and grandparents under 60 years of age. When such parents and grandparents are receiving residential care and are eligible to claim an allowance under the Government's Disability Allowance Scheme, a deduction for residential care expenses paid by the person or the person's spouse is allowable under section 26D(1).

Expenses paid by a person or the person's spouse

18. If a married couple are not living apart from each other, the entitlement to claim the deduction for residential care expenses is not restricted to the person responsible for making payment to the residential care home. A deduction may be claimed for payments made by a married person or the person's spouse. The only restriction on claiming the deduction is that, for any one parent or grandparent, the full entitlement must be claimed by one person. The deduction cannot be divided between a married couple such that each claims a part of the overall deduction allowable. In the case of a polygamous marriage, deduction is only allowed in respect of the elderly residential care expenses paid by a person and the person's principal spouse for their parent or grandparent.

19. When more than one parent or grandparent of a married couple is residing in a residential care home, each spouse may claim a deduction for the residential care expenses paid for a different parent or grandparent. Equally, there is no requirement, on an ongoing basis, for the same person to claim the

residential care expenses deduction in respect of the same parent or grandparent every year. Each year is viewed on a standalone basis and the persons who are eligible to claim the deduction are free, from year to year, to determine who will claim the deduction for that year.

Expenses paid in the year

20. The allowance of the concessionary deduction is based on payments made within the year of assessment. The deduction is allowed in the year of assessment in which payment is made and not, where the liability was incurred in an earlier year of assessment, the year of assessment in which liability for the expense actually arose. Where an expense is incurred in one year of assessment but not paid until the subsequent year, the deduction can only be allowed in the year of payment.

Example 2

Ms. B's grandfather, aged 80 years, was admitted into a residential care home on 1 February 2019. The monthly fee for his care and maintenance of \$8,000 was payable monthly in arrears. The fees for February 2019 and March 2019 were paid on 1 March 2019 and 1 April 2019 respectively.

Since \$8,000 was paid in the year of assessment 2018/19, only this amount could be claimed as a deduction by Ms. B in 2018/19.

Maximum deduction

21. Persons are only entitled to claim a deduction for the actual expenditure paid by them in the year of assessment for the residential care of qualifying parents or grandparents. The maximum deduction that may be allowed in any year in respect of each qualifying parent or grandparent is specified in Schedule 3C to the IRO.

Multiple claims in respect of the same parent or grandparent

22. Section 26D(4)(a) provided that in respect of any parent or grandparent, a residential care expenses deduction can only be allowed to one person in any

year of assessment. It is not possible, for example, for several brothers and sisters to apportion the deduction in respect of any one parent or grandparent amongst themselves as multiple claimants even though the amount claimed, in aggregate, does not exceed either the expenditure actually incurred or the maximum deduction. Where more than one person contributes to the payment of the residential care expenses of a parent or grandparent, it is necessary for the persons who have contributed to agree amongst themselves as to which of them will claim the residential care expenses for the year of assessment in question.

23. Two or more persons, other than a married couple not living apart from each other, may each partially contribute to the maintenance of a parent or grandparent by way of the payment of separate invoices issued by the residential care home. The person who claims the deduction for that year is only entitled to claim a deduction for the amount actually paid by that person and/or the person's spouse. The amounts paid to the residential care home by the other joint contributors other than the person making the claim and/or the person's spouse cannot be included in the person's claim. Where only a single invoice or account is issued by the residential care home to one person and one or more other persons also contribute to its payment, the person with obligation for the payment (i.e. the person named in the invoice or account) will be regarded as the person who made the payment. Subject to the maximum deduction not being exceeded, that person or that person's spouse will be entitled to claim a deduction for the total amount paid.

24. Sections 33(2) to (4) of the IRO enable the Commissioner to resolve situations where two or more persons are claiming, or have been allowed, an allowance under Part 5 of the IRO in respect of the same qualifying dependant, or it appears to the Commissioner that two or more persons are eligible to claim an allowance for the same qualifying dependant for that year. These provisions, suitably modified, also apply to the elderly residential care expenses deduction under section 26D(4)(b). Where two or more persons are claiming, or have been allowed, a deduction for residential care expenses of the same parent or grandparent, the Commissioner will invite those persons to agree amongst themselves as to which of them will claim the deduction. In the event that they are unable to agree, the Commissioner will consider the deduction in a manner that, having regard to the information available to him, is just in the circumstances. This may include withdrawing the deduction already granted until the matter has been resolved by the competing claimants.

Dependent parent allowance or dependent grandparent allowance and elderly residential care expenses

25. The deduction for elderly residential care expenses is allowed in respect of parents and grandparents who, with financial support provided by the family member, are unable to live independently or cannot be provided with care and support within a family environment. The deduction for residential care expenses is allowed as an alternative to the granting of a dependent parent allowance or a dependent grandparent allowance for the parent or grandparent concerned. The deduction for elderly residential care expenses takes precedence over the granting of an allowance under Part 5 of the IRO. Sections 30(5) and 30A(5) provide that when a deduction for elderly residential care expenses has been allowed in respect of a parent or grandparent, no person can be granted a dependent parent allowance or dependent grandparent allowance in respect of that parent or grandparent.

26. Situations may arise where a person's parent or grandparent is residing in a residential care home but the home's fees charged are fully met by that parent's or grandparent's allowance under the Comprehensive Social Security Assistance Scheme. The person has, however, still contributed money towards the maintenance of the parent or grandparent during the year. In such circumstances, the person is not entitled to a residential care expenses deduction because he or she has not paid for any such expenses. However, the person may claim dependent parent allowance or dependent grandparent allowance in respect of the parent or grandparent provided that all the relevant conditions are satisfied. This includes making a contribution of not less than \$12,000 in money during the year of assessment towards the maintenance of the parent or grandparent concerned.

Review of deduction claim

27. This Department may request a person to provide documentary evidence, such as the receipts issued by a residential care home, in support of the deduction claim. If necessary, this Department may obtain information from other Government departments to verify whether a person is entitled to claim for deduction of elderly residential care expenses, dependent parent allowance or dependent grandparent allowance in respect of a parent or grandparent.