



Hong Kong Tax Newsflash: Equal treatment for spouses in same-sex marriages

Following a 6 June 2019 ruling of the Court of Final Appeal (CFA) judgement in *Leung Chun Kwong v Secretary for the Civil Service (2019) 22 HKCFAR 127*, same-sex marriage now is recognized for the purposes of the Inland Revenue Ordinance (IRO). In February 2020, the Inland Revenue Department (IRD) issued updated Departmental Interpretation and Practice Notes (DIPNs) reflecting the amended interpretation of the term "marriage" and certain related terms.

Background

Prior to the CFA's ruling, "marriage" was defined in section 2(1) of the IRO as any marriage:

- (a) Recognized by the law of Hong Kong; or
- (b) Whether or not recognized under Hong Kong law, 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.

In the IRO, "spouse" meant a husband or wife, and "husband" and "wife" referred to a married man and a married woman, respectively. In other words, marriage was defined in terms of a traditional heterosexual marriage between a man and a woman, and a same-sex marriage was disregarded for the purposes of the IRO.

Ruling of the CFA

The CFA allowed the appellant – Leung Chun Kwong's appeal in respect of his eligibility to elect for joint assessment of salaries tax

with his same-sex partner under section 10 of the IRO. The court considered that a remedial interpretation (in italic below) of the IRO was appropriate, and ordered that the term marriage in section 2 of the IRO 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."

As a consequence:,

- (i) "Husband and wife" are to 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".

Implications for taxpayers

A same-sex marriage now is regarded as a valid marriage for the purposes of the IRO, and a married person now covers both a partner in a heterosexual marriage and a partner in a same-sex marriage. As such, a partner in a same-sex marriage is entitled to:

- Elect for joint assessment, personal assessment jointly with their spouse;
- Claim allowances or deductions under the IRO in respect of their spouse, including
 - The married person's allowance where their spouse derives no income chargeable to salaries tax during the year;
 - Nomination of their spouse to claim home loan interest where the spouse has no income chargeable to salaries tax, profits tax, and property tax during the year;
 - Residential care home expenses incurred for their spouse's parent(s) and/or grandparent(s); and
 - Any approved charitable donation made but not claimed by their spouse.

The IRD has, therefore, updated the following DIPNs to reflect the remedial interpretation of the term marriage and related terms in the IRO:

- **DIPN 18 (Revised)**: Assessment of individuals under salaries tax and personal assessment;

- [DIPN 35 \(Revised\)](#): Concessionary deductions: Section 26 E and 26F, home loan interest;
- [DIPN 36 \(Revised\)](#): Concessionary deductions: Section 26D, elderly residential care expenses;
- [DIPN 37 \(Revised\)](#): Concessionary deductions: Section 26C, approved charitable donations;
- [DIPN 56 \(Revised\)](#): Concessionary deductions: Section 26H to 26M, health insurance premiums; and
- [DIPN 57 \(Revised\)](#): Concessionary deductions: Section 26N to 2U, annuity premiums and MPF voluntary contributions.

Comments

The interpretation is described as a "remedial" one by the court and the IRD. Nevertheless, given that the court case and the revised DIPNs are released during the year of assessment 2019/20, we believe the effective date of the above changes may start from the year of assessment 2019/20. Further clarification would be required from the IRD.

The changes and guidance are welcome since they give more flexibility to taxpayers. Taxpayers should review their personal situation and ensure that they make the relevant claims and deductions on their individual tax returns.

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