



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. 37 (REVISED)

CONCESSIONARY DEDUCTIONS: SECTION 26C

APPROVED CHARITABLE DONATIONS

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 September 2006.

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Commissioner of Inland Revenue

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INTRODUCTION

Background

The concessory deduction for approved charitable donations was first introduced by the Inland Revenue (Amendment) Ordinance 1970 under section 42(1). After the enactment of the Inland Revenue (Amendment) Ordinance 1998, the concessory deduction for approved charitable donations made in a year of assessment by a person subject to salaries tax or personal assessment is allowable under section 26C which is now contained in Division 2 of Part 4A of the Inland Revenue Ordinance (IRO).

APPROVED CHARITABLE DONATIONS

Conditions for deduction

2. Section 26C of the IRO allows a deduction for approved charitable donations made by a person during a year of assessment, subject to the fulfillment of the specified conditions. The conditions for deduction of approved charitable donations under salaries tax or personal assessment are:

- (a) the payment must be a donation;
- (b) the donation must be a donation of money;
- (c) the donation must be made to a charitable institution or trust of a public character which is exempt from tax under section 88 of the IRO, or to the Government;
- (d) the donation must be for charitable purposes;
- (e) the aggregate of the person's donations, including the donations of the person's spouse, not being a spouse living apart from the person, must not be less than \$100;
- (f) the allowable deduction in any year of assessment cannot exceed

35%¹ of the person's reduced assessable income or adjusted total income;

- (g) a deduction in respect of the same donation cannot be granted to more than one person; and
- (h) no deduction is allowed if the donation has been allowed under profits tax.

Donations

3. In its ordinary sense, the word “donation” means a gift. A “gift” is a transfer of property in a thing without any valuable consideration. To constitute a gift, the property transferred must be transferred voluntarily and not as a result of a contractual obligation to transfer it. Further, the transferor cannot receive any benefit or advantage of a material character by way of return: *Sanford Yung-tao Yung v Commissioner of Inland Revenue* [1979] HKLR 429. There is no provision in the IRO to permit payments to be apportioned into “charitable” and “material benefit” components. If the person making the payment received a material benefit, the whole of the payment falls outside of the ambit of a gift because the condition that no material advantage may accrue to the donor, is breached. Payments other than those which are strictly gifts are not donations for the purposes of section 26C.

4. Payments that fall outside the categorisation of donations include payments for grave spaces: see *D54/11* (2012-13) 27 IRBRD 117, purchases of raffle tickets, admission fees to charity film shows and the cost of tickets for charity balls and concerts etc. The receipt by the donor of a benefit which is minute in nature does not compromise the “materiality” requirement to preclude the payment from being a donation. Benefits received by donors which fall within the classification of “minute” include badges, flags and other similar token acknowledgements of a donation.

Donation of money

5. The term “approved charitable donation” is defined in section 2 of the IRO. It is a donation of money to:

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.

- (a) any charitable institution or trust of a public character that is exempt from tax under section 88 of the IRO; or
- (b) the Government,

for charitable purposes.

The donation must be one of money. Deductions under section 26C cannot be allowed for the monetary value of any property (e.g. landed property or works of art) gifted to a charitable institution or trust of a public character.

Tax-exempt charitable institution or trust of a public character

6. Voluntary and non-profit making organisations are not necessarily charities. There are many clubs and societies in Hong Kong operating on a voluntary, non-profit making basis for the benefit of their members. In some cases, section 24(1) of the IRO deems the clubs and similar institution not to be carrying on a business in Hong Kong. They are not subject to profits tax because they fulfill the conditions specified in section 24(1) rather than being exempted under section 88 from the payment of tax. Therefore, donations made to these organisations are not approved charitable donations within the meaning of the IRO and not tax deductible.

7. The Department is not responsible for registering charities in Hong Kong nor does the Department have any statutory power in the monitoring of their conducts. Nevertheless, a charity may request the Department to recognise its tax exemption status accorded by section 88 of the IRO. If a charity is tax exempted, donations made to it are, subject to the other qualifying conditions being satisfied, deductible to the donors for tax purposes.

8. For an institution or a trust to be a charity, the purposes for which the institution or trust of a public character is established must be exclusively charitable. It is not permissible for an institution or a trust of a public character to have mixed purposes, some of which are charitable and others which are non-charitable. The decision of Lord MacNaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 summarises the purposes which are charitable as:

- (a) the relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion; or
- (d) any other purposes of a charitable nature beneficial to the community not falling under any of the preceding categories.

Any institution or trust of a public character whose purposes fall outside of these parameters cannot be a charitable institution or trust of a public character for the purposes of section 88.

9. A purpose is not charitable unless it is for public benefit. That is, there must be an identifiable benefit or benefits and the benefits must be to the public in general, or to a sufficient section of the public. In general, an organisation cannot be classified as charitable if, in principle, it is established for the benefit of specific individuals. It is not possible to lay down a precise rule as to what constitutes a sufficient section of the public. Over the years, the Courts have considered various situations where charitable status was claimed. Example of the Court decisions are summarised below.

- (a) The following purposes are held to be charitable:
 - (i) relief of poor people;
 - (ii) relief of victims of a particular disaster;
 - (iii) relief of sickness;
 - (iv) relief of physically and mentally disabled;
 - (v) establishment or maintenance of non-profit-making schools;
 - (vi) provision of scholarships;
 - (vii) diffusion of knowledge of particular academic subjects;

- (viii) establishment or maintenance of a church;
- (ix) establishment of religious institutions of a public character;
- (x) prevention of cruelty to animals;
- (xi) protection and safeguarding of the environment or countryside;
- (xii) promotion of health.

(b) The following purposes are not accepted to be charitable:

- (i) attainment of a political object;
- (ii) promotion of the benefits of the founders or subscribers;
- (iii) encouragement of a particular sport such as football or cycling;
- (iv) provision of a playing field, recreation ground or scholarship fund for employees of a particular company.

10. To facilitate members of the public in checking whether their donations to an organisation will qualify for tax deduction, with the consent of the organisations concerned, a list of charitable institutions and trusts of a public character recognised by the Department as exempt from tax under section 88 of the IRO is uploaded to the Department's website and accessible at www.ird.gov.hk/eng/tax/ach_index.htm. It must be emphasised that the list does not constitute a formal register of charities. Donors should check with donee organisations concerned if their names do not appear on the list.

Minimum aggregate amount of donations

Not less than \$100

11. Section 26C(1) prescribes that a deduction for approved charitable donations may only be allowed where the aggregate amount of the donations made is not less than \$100. The "aggregate" is the total amount of all approved charitable donations made by the person and the person's spouse in the year of assessment.

It is not necessary for every donation made by the person and the person's spouse to be not less than \$100. It is sufficient that the total of all approved charitable donations made in the year of assessment is not less than \$100.

Donations made by spouse

12. 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".

13. 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, a person, whether in a heterosexual marriage or same-sex marriage, is entitled to claim deduction in respect of the donations made by the person’s spouse subject to the satisfaction of other conditions.

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. The person can only claim for deduction of the donations made by the person and the person’s principal spouse.

Maximum deduction

15. For any person chargeable to salaries tax, the maximum deduction that may be allowed for approved charitable donations in any year of assessment commencing on or after 1 April 2008 cannot exceed 35% of the person’s assessable income as reduced by his or her deductions for outgoings and expenses allowable under section 12(1)(a), and depreciation allowances on machinery and plant granted under section 12(1)(b) (referred to as “reduced assessable income” hereafter).

Example 1

In the year of assessment 2018/19, Mr. A derived an income of \$500,000 from his employment. He incurred expenses of \$7,000 in the production of his chargeable income. Since Mr. A had to use plant and machinery in performing his duties, he was entitled to claim depreciation allowance of \$3,000. During the year of assessment 2018/19, Mr. A made charitable donations of \$210,000 and claim for deduction of self-education expense of \$20,000.

The approved charitable donations of \$210,000 made by Mr. A during the year of assessment 2018/19 exceeded 35% of the reduced assessable income. In computing the reduced assessable income for ascertaining the maximum amount of allowable approved charitable donations, the self-education expenses were not required to be deducted from the assessable income. The maximum amount of allowable approved charitable donations for the year of assessment 2018/19 would be computed as follows:

	\$	\$
Mr. A's salary income		500,000
<u>Less:</u> Deductible expenses - section 12(1)(a)	7,000	
Depreciation allowances - section 12(1)(b)	<u>3,000</u>	<u>10,000</u>
Reduced assessable income		<u>490,000</u>
Allowable approved charitable donations (i.e. reduced assessable income × 35%)		<u>171,500</u>

16. If a married couple have elected under section 10(2) to be jointly assessed, the deduction for charitable donations cannot exceed 35% of their total reduced assessable income.

Example 2

Same facts as in Example 1 except that Mr. A elected for joint assessment with his spouse. Mr. A's spouse, who made charitable donation of \$30,000, had an assessable income of \$100,000.

The aggregate of the approved charitable donations of \$240,000 made by Mr. A and his spouse during the year of assessment 2018/19 exceeded 35% of their aggregate reduced assessable income. The maximum amount of allowable approved charitable donations for the year of assessment 2018/19 would be computed as follows:

	\$
Mr. A's reduced assessable income (see example 1)	490,000
Spouse's reduced assessable income	<u>100,000</u>
Total reduced assessable income	<u>590,000</u>
Allowable approved charitable donations (i.e. reduced assessable income × 35%)	<u>206,500</u>

17. If personal assessment is elected, a person with multiple sources of income (i.e. business profits, property rentals and salaries) cannot be allowed a deduction for approved charitable donations exceeding 35% of the person's adjusted total income. The adjusted total income of a person is the total income of the person computed in accordance with section 42, increased by:

- (a) the amount of the approved charitable donations allowed in the profits tax assessment under section 16D; and
- (b) self-education expenses allowed in the salaries tax assessment under section 12(1)(e).

The aggregate of the approved charitable donations allowed under section 26C and section 16D cannot exceed 35% of the person's total income, as adjusted, under personal assessment.

Example 3

Same facts as in Example 1 but Mr. A had assessable profits of \$97,000 which were arrived at after deducting charitable donations of \$3,000 under section 16D. Mr. A elected for personal assessment.

In computing the total adjusted income for ascertaining the maximum amount of allowable approved charitable donations, the self-education

expenses were not required to be deducted from the reduced assessable income; and the charitable donations allowed under profits tax were added back to the assessable profits. The maximum amount of allowable approved charitable donations under personal assessment of Mr. A for the year of assessment 2018/19 would be \$203,500 which was computed as follows:

	\$
Mr. A's reduced assessable income (see example 1)	490,000
Assessable profits	97,000
<u>Add: Charitable donations allowed under section 16D</u>	<u>3,000</u>
Total adjusted income	<u>590,000</u>
Maximum amount of allowable approved charitable donations (i.e. total adjusted income × 35%)	206,500
<u>Less: Charitable donations allowed under section 16D</u>	<u>3,000</u>
Allowable charitable donations under personal assessment	<u>203,500</u>

Same donation claimed by different persons

18. In general, an approved charitable donation made by a person can only be claimed by that person. The only exception relates to donations made by a married couple who are not living apart from each other. For a married couple not living apart from each other, a spouse may claim a deduction for approved charitable donation made by the other spouse. In no case can a deduction for the same donation be claimed by both of them.

19. Sections 33(2) and (3), dealing with allowances granted under Part 5 of the IRO, contain supplementary provisions to enable the Commissioner to resolve situations where two or more persons are claiming, or have been allowed, an allowance in respect of the same person, or it appears to the Commissioner that two or more persons are eligible to claim an allowance for the same person for that year. Section 26C(3)(b) provides that these supplementary provisions, suitably modified, also apply to deductions for approved charitable donations. Where more than one person is claiming, or has been allowed, a deduction for an approved charitable donation, the Commissioner will invite the claimants to agree amongst themselves as to which of them will claim the deduction. In the event that they are

unable to reach an agreement, the Commissioner will allow the deduction in a manner that, having regard to the information available to him, is just in the circumstances.

Donations allowable under different assessment types

20. If a person who made an approved charitable donation is assessed under both profits tax and salaries tax, the person can only claim the deduction under either section 16D or 26C. The same approved charitable donation cannot be claimed as a deduction under both profits tax and salaries tax.

Review of deduction claim

21. After the raising of a tax assessment, a person may be requested to provide documentary evidence, such as the receipt issued by a charity, to prove that the deduction claim for a charitable donation has been properly made.