中華人民共和國香港特別行政區政府總部食物及衞生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

**Our Ref.：** *FH/CR/3822/13*
**Your Ref.：** *LS/B/15/17-18*

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Dear Mr LOO,

**Inland Revenue (Amendment) (No. 4) Bill 2018**

I refer to your letters dated 18 and 21 May 2018 on the definition of "specified relative" under the proposed section 26J and the Chinese text of the Inland Revenue (Amendment) (No. 4) Bill 2018 ("the Bill") respectively. Our response is set out in the ensuing paragraphs.

(a) Definition of "specified relative"

The proposed section 26K(1) of the Bill provides that a deduction in respect of qualifying premiums paid for an insured person under a VHIS policy is allowable to a taxpayer for a year of assessment, if the qualifying premiums are paid by the taxpayer or the taxpayer's spouse (not being a spouse living apart from the taxpayer) during the year of assessment as the policy holder of the policy, and that the insured person, in addition to satisfying the requirement of nexus to Hong Kong as proposed in section

26K(1)(c) of the Bill, is either the taxpayer himself or herself, or a "specified relative" of the taxpayer.

Clause 8 of the Bill adds a new section 26J which defines a "specified relative" to mean, among others, the taxpayer's "spouse", and the grandparents, parents and siblings of his or her "spouse". "Spouse" is not defined under the Bill and the definition of "spouse" as set out under section 2(1) of the Inland Revenue Ordinance (Cap. 112) ("IRO") applies[1].

The position of the Commissioner of Inland Revenue as set out in the "Departmental Interpretation and Practice Notes No.18 (Revised)" is that parties in a same-sex marriage cannot be a "husband" or "wife" and are incapable of having a "spouse" within the meaning of the IRO, including for the purposes of the Bill. In *Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue* [2017] 2 HKLRD 1132, Mr Justice Chow upheld the Commissioner of Inland Revenue's decision that, in light of the definitions of "marriage", "husband", "wife" and "spouse" in section 2(1) of the IRO, a same-sex marriage is not a "marriage" for the purposes of the IRO as a matter of construction. Leung appealed on this point, and the Court of Appeal, in its judgment dated 1 June 2018[2], upheld the Court of First Instance's ruling on the construction of "marriage" in section 2(1) of the IRO, and further held that restricting the right to elect joint assessment under section 10 to a husband and wife in a heterosexual marriage only does not unlawfully discriminate against couples in a same-sex marriage.

You have asked, insofar as the Inland Revenue Department's interpretation of the terms "marriage" and "spouse" would allow a taxpayer in a heterosexual marriage (but not one in a same-sex marriage entered into outside Hong Kong according to law of the place where it was entered into)

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[1] Section 2(1) of the IRO has defined the following terms relevant to the Bill:
(i) "spouse" means "*a husband or wife*";
(ii) "husband"/ "wife" means "*a married [man/ woman] whose marriage is a marriage within the meaning of [section 2 of the IRO]*"; and
(iii) "marriage" means "*(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, and married (結婚) shall be construed accordingly*".

[2] *Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue* [2018] HKCA 318

to claim concessionary deductions in respect of qualifying premiums paid by the taxpayer for his or her "spouse" or certain relatives of the "spouse", under the VHIS, whether this would contravene the right to equality guaranteed by Article 25 of the Basic Law and/or Article 22 of the Hong Kong Bill of Rights ("BOR"); and, if not, why not.

The right to equality is not absolute and may be subject to permissible limitations. There would not be any unlawful discrimination if the difference in treatment can be justified in accordance with the following four step proportionality test laid down by the Court of Final Appeal in *Secretary for Justice v Yau Yuk Lung Zigo* (2007) 10 HKCFAR 335 and *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372:

(i) the difference in treatment pursues a legitimate aim;

(ii) the difference in treatment is rationally connected to the legitimate aim;

(iii) the difference in treatment is no more than is necessary to accomplish the legitimate aim; and

(iv) a reasonable balance has been struck between the general societal interest and the individual rights intruded upon by the measure.

Under the Bill, the difference in treatment is based on a person's marital status, i.e. whether the person is married or unmarried.

Marriage is an institution which carries with it a special legal and social status and a host of rights and obligations for the married couple.

It is considered that the right to claim deductions in respect of qualifying premiums paid for the taxpayer's "spouse" or the grandparents, parents and siblings of his or her "spouse" is based on the special and unique nature of a marital relationship. The situations of married and unmarried couples are not comparable and they do not need to be accorded identical treatment under the Bill.

The difference in treatment follows the prevailing marriage laws of Hong Kong and gives effect only to a marital status that is recognized as such under the laws of Hong Kong. It pursues the legitimate aims of protecting the concept of traditional marriage and not undermining the integrity of the institution of marriage as understood in Hong Kong, as well as ensuring certainty and administrative workability. It is also rationally connected to, and is no more than is necessary to accomplish, these legitimate aims. Moreover, the Government is entitled to a wide margin of discretion in relation to the formulation of tax policies which involve socio-economic considerations. It is therefore considered that there is no contravention of Article 25 of the Basic Law and Article 22 of the BOR.

(b) Chinese definition of "VHIS policy" (自願醫保計劃保單)

Regarding the Chinese definition of "VHIS policy" under the proposed section 26I(1), you enquired whether the word "屬" is missing between "該保單即" and "自願醫保計劃保單". According to *國語活用辭典* (3rd Edition), "即" means "是，就是", while "屬" means "係" (which is equivalent to "是"). As such, the proposed expression "即屬" neither adds to nor alters the meaning of "即". In gist, the current expression "即" bears the same meaning as the proposed expression "即屬".

Unless the use of disyllabic characters (雙音節詞) is preferred based on language intuition, it is considered that no amendment is required.

(c) Chinese definition of "sibling" (兄弟姊妹)

In the proposed section 26J(4), "sibling" is defined to include "an adopted sibling of the person or of the person's spouse", which is rendered in the Chinese text as "該人的或其配偶的父母的領養子女". You enquired if the taxpayer or the taxpayer's spouse is himself or herself an adopted child, whether or not "sibling" in relation to the taxpayer is intended to include the taxpayer's (or the spouse's) adoptive parents' natural children and, if so, whether the Chinese rendition of "sibling" should be amended.

In relation to a taxpayer, "adopted sibling" means an individual who is adopted by the taxpayer's (or the spouse's) parents. It is not

intended to include the taxpayer's (or the spouse's) adoptive parents' natural children where the taxpayer (or the spouse) is himself or herself an adopted child. As we have mentioned in the Legislative Council Brief (File Ref: FH CR 1/3822/13), it is the policy intent that the types of familial relationships covered by the Bill should be the same as the relationships covered by the existing dependant allowances in the IRO. The definition of "sibling" in the proposed section 26J(4) is in line with the existing definition of "brother or sister or brother or sister of the spouse" (兄弟姊妹或配偶的兄弟姊妹) in section 30B of the IRO in relation to the granting of dependent brother or dependent sister allowance. In our view, the Chinese rendition of "sibling" duly reflects the legislative intent and hence no amendment is required.

Yours sincerely,

( Bill LI )
for Secretary for Food and Health

c.c. Inland Revenue Department
(Attn: Mr K.K. CHIU, Deputy Commissioner (Technical))

Department of Justice
(Attn: Mr Salvador TSANG, Government Counsel)