

Personal allowances are also explained in Departmental Interpretation and Practice Notes ("DIPN") No 18 (Revised).

BASIC ALLOWANCE

¶3-0500 Eligibility and calculation

A basic allowance is deductible from a taxpayer's net assessable income (see ¶2-4900) provided that he or she has not been granted a married person's allowance (see ¶3-1000), and that his or her spouse has not claimed a married person's allowance (sec 28(2)).

The amount of the basic allowance for the 2012/13 year of assessment is \$120,000 (Sch 4, Item 1).

For the amount of the basic allowance available for previous assessment years, see ¶340.

Example — Deduction of basic allowance

Mr B is single, has no children, and earned \$200,000 in the 2012/13 year of assessment after the deduction of allowable outgoings and losses. Mr B also made approved charitable donations of \$2,000 in 2012/13. The following indicates how the basic allowance would be deducted from his income for 2012/13 for salaries tax purposes:

Net assessable income (assessable income less allowable deductions)	\$ 200,000
LESS	
Basic allowance	120,000
LESS	
Concessionary deductions (also deductible from net assessable income): Approved charitable donations	2,000
EQUALS	
Net chargeable income	78,000

MARRIED PERSON'S ALLOWANCE

¶3-1000 Eligibility and calculation

A married person's allowance is deductible from a taxpayer's net assessable income (see ¶2-4900) if the taxpayer is married and either:

- his or her spouse did not have assessable income in the year of assessment;

- joint assessment to salaries tax has been elected by the couple (see ¶2-7100); or
- the taxpayer has elected to be assessed by personal assessment (see ¶4-0200) (sec 29(1)).

The amount of the married person's allowance for the 2012/13 year of assessment is \$240,000 (Sch 4, Item 2).

For the amount of the married person's allowance available for previous assessment years, see ¶340.

Example — Deduction of married person's allowance

Mr and Mrs M are a married couple with no children who have elected to be jointly assessed to salaries tax. They earned a combined income of \$300,000 in the 2012/13 year of assessment after the deduction of allowable outgoings and losses. Mr and Mrs M also made approved donations of \$5,000 in 2012/13. The following indicates how the married person's allowance would be deducted from Mr and Mrs M's income for 2012/13 for salaries tax purposes:

Net assessable income (assessable income less allowable deductions)	\$ 300,000
LESS	
Married person's allowance	240,000
LESS	
Concessionary deductions (also deductible from net assessable income): Approved charitable donations	5,000
EQUALS	
Net chargeable income	55,000

When a taxpayer and his or her spouse have made an election to be jointly assessed, the married person's allowance is granted to the spouse who is chargeable to salaries tax on the aggregated net chargeable income (see ¶2-7150) (sec 29(2)).

¶3-1200 Proof of marriage

The Commissioner may require proof that a taxpayer is in fact a married person and therefore entitled to a married person's allowance. A copy of the taxpayer's marriage certificate may be required to be furnished with the taxpayer's claim for the allowance (*Case M43 (2003) HKRC ¶80-908 (D161/01)*).

Since October 1971, a marriage has not been regarded as valid unless performed in accordance with the Hong Kong *Marriage Reform Ordinance*. A

Chinese customary marriage carried out after this date is not a valid marriage for the purposes of the *Inland Revenue Ordinance* (D5/81 IRBRD Vol 1, 399). According to DIPN No. 18 (Revised) para 5, a same sex marriage is also not regarded as a valid marriage for purposes of the *Inland Revenue Ordinance*.

¶3-1400 Spouses living apart

When a husband and wife are living apart, the married person's allowance is only granted if the spouse who claims the allowance is maintaining or supporting the other (sec 29(4)). If the allowance is granted for spouses who live apart, they are treated as not living apart for the purposes of personal assessment (sec 29(5)). Any claim for an allowance in respect of spouses who live apart may be withdrawn by the claimant within the year of assessment in which it was made, or within six years after the end of that year (sec 29(6)).

However, in *Sit Kwok Keung v Commissioner of Inland Revenue* (2002) HKRC ¶90-113 and *Case L7* (2002) HKRC ¶80-808 (D144/00), both the Court of First Instance and the Board of Review held that a divorced taxpayer was not entitled to married person's allowance as he was not married at any time within the year of assessment, even though his ex-wife and their sons were maintained by him. The decision was upheld by the Court of Appeal (*Sit Kwok Keung v Commissioner of Inland Revenue* (2002) HKRC ¶90-121).

In *Sit Kwok Keung v Commissioner of Inland Revenue* (2005) HKRC ¶90-145, the taxpayer's application to the Court of Appeal for leave to apply for judicial review was dismissed. The relief sought was an order that the Commissioner be ordered to take the maintenance payments paid by the taxpayer to his ex-wife as her taxable income and to exclude such sums from his taxable income. The Court considered that the application for leave to apply for judicial review of the order of the Court of Appeal was misconceived and the appeal must be dismissed on this ground alone. In addition, the Court considered that there was no merit in the appeal. The argument that sec 8(2)(i) of the *Inland Revenue Ordinance* contravened Art 25 of the *Basic Law* did not assist the taxpayer as the taxpayer was not the recipient but the payer of the maintenance for the purpose of sec 8(2)(i).

DEPENDENT PARENT ALLOWANCE

¶3-2000 Eligibility and calculation

A taxpayer is eligible for a dependent parent allowance, which is deductible from his or her net assessable income (see ¶2-4900), if, in the relevant year of assessment:

- the taxpayer maintained a parent or a parent of his or her spouse; or
- the taxpayer's spouse, from whom the taxpayer was not living apart, maintained a dependent parent (sec 30(1); see further ¶3-2200).

Note that a taxpayer will not be eligible for a dependent parent allowance for a parent if he or she has been granted a concessionary deduction for elderly residential care expenses under sec 26D in respect of the same parent (sec 30(5)). (See ¶2-6550 for more on the elderly residential care deduction.)

The amount of the dependent parent allowance for the 2012/13 year of assessment is \$38,000 (Sch 4, Item 3(a)). The parent for whom the allowance is claimed must also have been at least 60 years of age or, if under 60 years of age, eligible to claim an allowance under the Government's Disability Allowance Scheme (sec 30(1)).

If a parent aged over 60 for whom a taxpayer is entitled to claim a dependent parent allowance continuously resided with the taxpayer throughout the year of assessment at no charge the taxpayer is entitled to an additional allowance of \$38,000 (sec 30(3); Sch 4, Item 3(b)).

For each dependent parent aged 55 to 59 maintained by the taxpayer or his or her spouse an allowance of \$19,000 will be granted. An additional allowance of \$19,000 would also be granted for each dependent parent aged 55 to 59 who resides with the taxpayer (sec 30(3A), Sch 4, Items 3(c) and 3(d)).

When more than one parent has been maintained in any year of assessment, the taxpayer is entitled to an allowance for each parent (sec 30(2)). A taxpayer was entitled to dependent parent allowances in respect of both his natural mother (his father's concubine) and his father's lawful wife in *Case A140* (1991) 1 HKRC ¶80-140 (D107/89 IRBRD Vol 6, 400).

In cases where two or more taxpayers are eligible to claim the same allowance, they should agree among themselves as to who will claim the allowance. Even where the allowance has been granted to a taxpayer but another taxpayer lodges a claim within six months thereof, the Commissioner is entitled to re-open the case and request the taxpayers to agree who should receive the allowance (*Case K58* (2001) HKRC ¶80-789 (D100/00)). The issue in *Case O68* (2005) HKRC ¶81-124 (D31/05) was whether the Commissioner was justified in accepting that both the taxpayer and the taxpayer's nephew, Mr J, were equally qualified to claim the allowances in question resulting in neither party being granted the same. The Board found for the taxpayer as there were doubts as to the genuineness of the claim by Mr J.

A taxpayer's parent must have been ordinarily resident in Hong Kong, at any time in the relevant year of assessment, for the taxpayer to be eligible for a dependent parent allowance for him or her. A permanent right of abode or the holding of a Hong Kong identity card does not make a person a resident of Hong Kong. To be a resident a person must be physically present in Hong Kong and the duration of any absences from Hong Kong should only have been temporary (*Case M89* (2003) HKRC ¶80-954 (D57/02); *Case J28* (2000) HKRC ¶80-696 (D116/99); *Case A57* (1991) 1 HKRC ¶80-057 (D13/90 IRBRD Vol 5, 124); D57/87 IRBRD Vol 3, 8). "Residency" is discussed further in ¶4-1200.

The objective of the dependent parent allowance was to encourage taxpayers to "maintain" their parents, either by contributing money towards the maintenance of the parent, or by residing continuously with the parent for not less than six months in a year of assessment without requiring the parent to pay "full valuable consideration" for such residence. Additional dependent parent allowance would be granted if the parent resided with the taxpayer continuously throughout the year of assessment at no charge. In *Case R18 (2008) HKRC ¶81-236 (D30/07)*, the Board rejected the taxpayer's holistic approach in interpreting the section, especially in relation to the term "resided with", which entailed an examination of the overall relationship between the parent and the taxpayer, such as how much they shared their daily living activities, how much they cared for each other, to what extent did they support each other in their lives and the closeness of their relationship. The Board held that the taxpayer should not be eligible for additional dependent parent allowance simply because they did not reside with each other. The Board viewed that the words "resided with" should be construed as meaning that the parent shared the same residence or dwelling with the taxpayer, or in other words, shared a common place of residence. In addition, this common residence or dwelling shared by the parent and the taxpayer must be one for which the parent would have no prior right to reside in.

For the amounts of the dependent parent and additional dependent parent allowances granted for previous assessment years see ¶370.

Example — Deduction of dependent parent allowance

Mr D earned \$500,000 in the 2012/13 year of assessment after the deduction of allowable outgoings. Mr D also made approved charitable donations of \$2,000. Mr D and his wife have no dependent children. However, Mrs D's father, Mr C, lives with them continuously. Mr C is 65 years old and pays nothing to Mr and Mrs D for residence in their home. Mrs D did not have any assessable income in the 2012/13 year of assessment. The following indicates how personal allowances would be deducted from Mr D's income for 2012/13 for salaries tax purposes:

	\$
Net assessable income (assessable income less allowable deductions)	500,000
<i>LESS</i>	
Married person's allowance (see ¶3-1000)	— 240,000
<i>LESS</i>	
Dependent parent allowance	— 38,000

LESS

Additional dependent parent allowance (Mr D eligible since Mr C resided with him and his wife continuously throughout the year of assessment and paid no consideration)	— 38,000
---	----------

LESS

Concessory deductions (also deductible from net assessable income): Approved charitable donations	— 2,000
---	---------

EQUALS

Net chargeable income	= 182,000
-----------------------	-----------

¶3-2200 Maintained parent

A dependent parent allowance is granted to a taxpayer for a parent whom he or she (or his or her spouse) has maintained throughout a year of assessment who is either:

- a parent of whose marriage the taxpayer or his or her spouse is the child;
- a parent by whom the taxpayer or his or her spouse was adopted ("adopted" meaning adopted in any manner recognised by the laws of Hong Kong (sec 27(3));
- a step-parent of the taxpayer or of his or her spouse;
- the natural father or mother of the taxpayer or of his or her spouse; or
- in the case of a deceased spouse, a person who would have been the parent of the taxpayer's spouse if he or she had not died (sec 2(1)).

A parent is regarded as having been maintained by a taxpayer, or by his or her spouse, in two situations:

- (a) *Residence with taxpayer.* When the parent has resided with the taxpayer and his or her spouse for a continuous period of at least six months in the relevant year of assessment, without paying any consideration (sec 30(4)(a)(i)); or
- (b) *Minimum maintenance contribution.* When the taxpayer, or his or her spouse, has contributed at least \$12,000 towards the maintenance of the parent in the relevant year (sec 30(4)(a)(ii); Sch 4, Item 3(c)). (Before the 1998/99 year of assessment the minimum maintenance contribution was only \$1,200.)

The provision of non-monetary consideration by a dependent parent to the benefit of a taxpayer (for example, the performance of household duties or child minding) is unlikely to preclude the taxpayer from entitlement to an allowance for that parent.

As another measure, specifically to protect international aircraft and shipping operators from double tax charges, Hong Kong has concluded:

- double tax relief arrangements with various countries which prevent the double taxation of international shipping income (see ¶8-2000); and
- air services agreements with various countries which include provisions to prevent the double taxation of income arising from international air traffic operations (see ¶8-3500).

Under British rule, taxation relief was available when a taxpayer who was liable for Hong Kong tax was also liable for income tax in another Commonwealth country. With the handover of sovereignty to China, Commonwealth tax relief is no longer available. The removal of the relief took effect from the 1998/99 year of assessment (see ¶8-8000).

RELIEF FOR INTERNATIONAL SHIPPING AND AIRCRAFT INCOME

¶8-2000 Shipping income — tax relief arrangement with various countries

Hong Kong has entered into agreements with various countries in respect of shipping income. These provisions have been specified as double taxation arrangements for the purposes of sec 49 of the *Inland Revenue Ordinance*. Under the agreement with the United States, gross income derived from international operation of ships by taxpayers who are residents of Hong Kong (other than United States citizens) is exempt from income tax in the United States, and vice versa. Under the agreements with various other countries, generally income or profits derived from the operation of ships in international traffic by an enterprise of one country is taxable only in that country. The exemption applies to profits tax in Hong Kong for all agreements and also extends to salaries tax under some agreements such as those with The Netherlands, Singapore and Sri Lanka agreements.

The arrangements were respectively declared effective in the following:

- *Double Taxation Relief (Income from Shipping Operations) (United States of America) Order*;
- *Specification of Arrangements (Government of the United Kingdom of Great Britain and Northern Ireland) (Avoidance of Double Taxation on Shipping Income) Order*;
- *Specification of Arrangements (Government of the Kingdom of the Netherlands) (Avoidance of Double Taxation on Shipping Income) Order*;
- *Specification of Arrangements (Government of the Kingdom of Norway) (Avoidance of Double Taxation on Income from Shipping Operation) Order*;
- *Specification of Arrangements (Government of the Federal Republic of Germany) (Avoidance of Double Taxation on Shipping Income) Order*;

¶8-2000

- *Specification of Arrangements (Government of the Republic of Singapore) (Avoidance of Double Taxation on Income from Shipping or Aircraft Operations) Order*;
- *Specification of Arrangements (Government of the Democratic Socialist Republic of Sri Lanka) (Avoidance of Double Taxation on Income from Shipping and Air Transport) Order*; and
- *Specification of Arrangements (Government of the Kingdom of Denmark) (Avoidance of Double Taxation on Income from Shipping Operation) Order*.

The relief from income tax of these contracting countries given under the agreements is only available to residents of Hong Kong who are not at the same time residents of these contracting countries. In the case of corporations, those which are controlled and managed in Hong Kong, and are not incorporated or managed in these contracting countries, are eligible for relief.

For relief from United States income tax, a corporation must also meet one of the following requirements in order to qualify:

- the corporation's stock must be primarily and regularly traded on a securities market in either Hong Kong, another country to which an equivalent exemption applies, or the United States; or
- more than 50% of its stock must be owned by: individuals resident in either Hong Kong or another country which grants a similar exemption; a corporation organised in a country which grants a similar exemption to United States corporations; another country which grants an equivalent exemption to United States corporations; or the United States (cl 2 of Agreement).

International shipping income

The income to which the exemption applies is specified under each agreement and varies from one agreement to another. Generally, all income derived from the international operation of ships are included, such as:

- income from the rental of ships used in international transport on a full (time or voyage) or bare boat basis;
- income from the rental of containers and related equipment used in international transport which is incidental to income from the international operation of ships;
- income from the participation in marine transport pools which engage in international operation of ships; and
- gains from the sale, disposal or other alienation of ships by a person primarily engaged in international operation, lease or rental of ships.

For those of the Netherlands, Germany, Singapore, Sri Lanka and Denmark, interest income on funds directly connected with that operation is also included. For that of the Netherlands, remuneration of an employment exercised aboard a ship operated in international traffic is further included

(when documentary evidence is produced that tax has been paid in the other contracting country).

¶8-3500 Aircraft income — tax relief arrangements with various countries

Hong Kong has entered into air services agreements with various countries. A number of these agreements include specific provisions to prevent the double taxation of international air traffic income. These provisions have been specified as double taxation arrangements for the purposes of sec 49 of the *Inland Revenue Ordinance*.

Under the respective double taxation arrangements, income or profits, which are derived from the operation of aircraft in international traffic by an airline of one country, and which are subject to tax in that country, are exempt from income tax, profits tax and all other taxes on revenues, receipts, income or profits in the other country on a reciprocal basis.

The exemption generally applies to income, profits, revenues or gross receipts derived from the operation of aircraft for the carriage of persons, livestock, goods, mail or merchandise. Income from ticket sales, or from the provision of services connected with the carriage of persons, livestock, goods, etc, are also included.

The double taxation arrangements may also provide the following reciprocal exemptions:

- capital and assets of an airline of one country are exempt from taxes imposed by the other country on a reciprocal basis;
- gains from the alienation of aircraft operated in international traffic and movable property pertaining to the operation of such aircraft which are received by an airline of one country are exempt from tax in the other country;
- the operation of aircraft in international traffic carried on by an airline of one country is exempt from value-added tax and any similar tax imposed by the other country on a reciprocal basis; and
- property of a designated airline of one country relating to the operation of aircraft in the area of the other country is exempt from all taxes by the other country.

For the purposes of the double tax arrangements, "international traffic" generally means transport or carriage by an aircraft operated by an airline of a contracting party where the aircraft is not operated solely between places in the area of the other contracting party.

The double tax arrangements are contained in:

- the *Specification of Arrangements (Government of Canada Concerning Air Services) (Double Taxation) Order*;

- the *Specification of Arrangements (Government of the Republic of Korea Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of New Zealand Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the Kingdom of the Netherlands Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the Federal Republic of Germany Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the State of Israel Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the Republic of Mauritius Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the Russian Federation Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the Kingdom of Norway Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the Kingdom of Denmark Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the Kingdom of Sweden Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the People's Republic of Bangladesh Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the Republic of Estonia Concerning Air Services) (Double Taxation) Order*;
- the *Specification of Arrangements (Government of the Republic of Croatia Concerning Air Services) (Avoidance of Double Taxation) Order*;
- *Specification of Arrangements (Government of the Macao Special Administrative Region) (Avoidance of Double Taxation on Income from Aircraft Operation) Order*;
- *Specification of Arrangements (Government of the Republic of Singapore) (Avoidance of Double Taxation on Income from Shipping or Aircraft Operations) Order*;
- *Specification of Arrangements (Government of the Democratic Socialist Republic of Sri Lanka) (Avoidance of Double Taxation on Income from Shipping and Air Transport) Order*;
- *Specification of Arrangements (Government of Hashemite Kingdom of Jordan) (Avoidance of Double Taxation on Income from Aircraft Operation) Order*;
- *Specification of Arrangements (Government of the Republic of Iceland) (Avoidance of Double Taxation on Income from Aircraft Operation) Order*;

- Specification of Arrangements (Government of the Republic of Kenya) (Avoidance of Double Taxation on Income from Aircraft Operation) Order;
- Specification of Arrangements (Government of the State of Kuwait) (Avoidance of Double Taxation on Income from Aircraft Operation) Order;
- Specification of Arrangements (Swiss Federal Council) (Avoidance of Double Taxation on Income from Aircraft Operation) Order;
- Inland Revenue (Double Taxation Relief on Income from Aircraft Operations) (United Mexican States) Order;
- Inland Revenue (Double Taxation Relief on Income from Aircraft Operations) (Republic of Finland) Order;
- Inland Revenue (Double Taxation Relief on Income from Aircraft Operations) (Federal Democratic Republic of Ethiopia) Order;
- Inland Revenue (Double Taxation Relief on Income from Aircraft Operations) (Republic of Maldives) Order;
- Inland Revenue (Double Taxation Relief on Income from Aircraft Operations) (The Lao People's Democratic Republic) Order; and
- Inland Revenue (Double Taxation Relief on Income from Aircraft Operations) (The Republic of the Fiji Islands) Order.

Preventing Hong Kong residents from escaping tax

The *Inland Revenue Ordinance* contains provisions to prevent Hong Kong resident aircraft owners from escaping tax completely.

It is specifically provided under the Ordinance that income from international air traffic earned by Hong Kong aircraft owners in territories outside Hong Kong with whom Hong Kong has concluded air service agreements ("arrangement territories") will be taxable in Hong Kong if it is not taxable in the territory in which it is earned (sec 23C(2A)-(2D); see further ¶6-798).

TAX TREATIES

¶8-5000 Comprehensive tax treaties

The comprehensive agreement for the avoidance of double taxation signed between the Hong Kong Special Administrative Region Government and Belgium on 10 December 2003 represents an important milestone for Hong Kong. This agreement is the first comprehensive agreement for the avoidance of double taxation concluded by the government with another economy. In line with the government's objective to continue its discussions with countries outside the region and to start negotiations with some of Hong Kong's major regional partners, Hong Kong has signed a series of comprehensive double tax treaties with other countries. Please refer to the tax treaty table below for further details.

Country	CDTA signed by Hong Kong	Signatory Date	Effective Date	Tax on dividends	Tax on interest	Tax on royalties
Austria	11 th	25/5/2010	1/4/2012	<ul style="list-style-type: none"> • 0% if the beneficial owner is a company which holds directly at least 10% of the capital of the company paying the dividends • 10% in all other cases 	<ul style="list-style-type: none"> • 0% 	<ul style="list-style-type: none"> • 3%
Belgium	1 st	10/12/2003	1/4/2004	<ul style="list-style-type: none"> • 0% if the beneficial owner is a company which, at the time of the payment of dividends, holds at least 25% of the capital of the company paying the dividends for an uninterrupted period of at least 12 months • 5% if the beneficial owner is a company which holds directly at least 10% of the company paying the dividends • 15% in all other cases 	<ul style="list-style-type: none"> • 0% for a government institution • 10% in all other cases 	<ul style="list-style-type: none"> • 5%
Brunei	6 th	20/3/2010	1/4/2011	<ul style="list-style-type: none"> • 0% 	<ul style="list-style-type: none"> • 0% for interest payments to government institutions • 5% for interest payments to banks or financial institutions • 10% in all other cases 	<ul style="list-style-type: none"> • 5%

Documents are stamped either with a franking machine or with adhesive stamps when it is presented to the Collector. Where an instrument is an instrument to which Pt IIA of the *Stamp Duty Ordinance* applies, the Collector may issue a stamp certificate in respect of the instrument instead. Various conditions apply to the stamping procedure. In particular, time limits are set out in the Ordinance within which instruments must be stamped (see ¶14-5190). Penalties apply for late stamping (see ¶14-5270).

It is an offence under the *Stamp Duty Ordinance* to evade stamp duty through the falsification or destruction of documents or any book of account, or to defraud the Government out of stamp duty. These, and other offences specified under the Ordinance, attract fines and in some cases imprisonment for the offender (see ¶14-7700).

The *Stamp Duty Ordinance* is administered by the Collector of Stamp Revenue. The Collector is empowered to:

- make stamp duty assessments;
- collect stamp duty;
- adjudicate stamp duty matters; and
- impose and recover penalties under the Ordinance.

The Ordinance also provides the Collector with inspection powers for stamp duty purposes (see ¶14-8500).

CHARGEABLE INSTRUMENTS

¶14-0180 Chargeable instruments

Instruments which are chargeable with stamp duty are specified in the First Schedule of the Ordinance (sec 4(1)). They are:

- instruments for the conveyance on sale, or lease, of immovable property in Hong Kong (First Schedule, Head 1(1) and (2); see ¶14-0400ff);
- agreements for the sale of immovable residential property (First Schedule, Head 1(1A); see ¶14-1080ff);
- instruments for the sale, purchase or other transfer of Hong Kong stock (First Schedule, Head 2; see ¶14-1550ff);
- Hong Kong bearer instruments (First Schedule, Head 3; see ¶14-2700); and
- the duplicates and counterparts of instruments chargeable with stamp duty (First Schedule, Head 4; see ¶14-2900).

Stamp duty is only payable on instruments. Consequently, if a transaction is conducted orally, without documentation, no stamp duty is levied.

When considering whether an instrument is liable to duty, and under which Head of the First Schedule it is chargeable, the nature of the transaction effected by the instrument is the determining factor. The substance, rather than the form of the instrument must be considered. The real and true meaning of the instrument must be ascertained. The description given in the instrument by the parties is immaterial (*Limmer Asphalt Paving Co v IRC* (1872) LR 7 Ex 211).

The duty payable on an instrument is either fixed, or calculated *ad valorem*, that is, according to the value of the transaction to which the instrument relates. The amount, or calculation basis, of the stamp duty payable on an instrument, and the person or persons liable for the duty, are set out in the First Schedule (see ¶14-3180ff). The time limits for stamping the respective instruments are also specified in that Schedule (see ¶14-5190).

INSTRUMENTS FOR THE TRANSFER OF IMMOVABLE PROPERTY

¶14-0400 Basic charge

Stamp duty is chargeable on any instrument which transfers immovable property by means of a conveyance on sale, or a lease (First Schedule, Head 1(1) and (2)).

“Immovable property” is not defined in the Ordinance. However, it is defined in the *Interpretation and General Clauses Ordinance* as consisting of:

- land, whether covered by water or not;
- any estate, right, interest, or easement in or over any land; and
- things attached to land or permanently fastened to anything attached to land.

¶14-0480 Conveyance on sale

A “conveyance on sale” is an instrument, decree or Court order by which immovable property, after sale, is transferred to or vested in a purchaser, or in any other person on his or her behalf or by his or her direction (sec 2(1)). Foreclosure orders are included in this definition. Only conveyances *on sale* are chargeable to stamp duty.

The following definition of “sale” was approved in *Littlewoods Mail Order Stores Ltd v IRC* (1963) AC 135:

“[A sale] is a transfer of the absolute or general property in a thing for a price in money. Hence it follows that, to constitute a valid sale, there

There must be concurrence of the following elements, viz: (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised (Benjamin on Sale)."

For stamp duty purposes, it is not necessary for consideration to have been in the form of money although a conveyance in consideration of marriage or for services performed is not normally regarded as a chargeable conveyance on sale.

In *Chan Li Chai Medical Factory (Hong Kong) Ltd v Collector of Stamp Revenue* (2001) HKRC ¶90-111, the Court of Appeal held that assignment of properties from executors and administrators of the deceased trustees were conveyances on sale chargeable with stamp duty.

The two properties, which were the subjects of the two assignments in question, were purchased in the 1920s by a Chinese partnership, Chan Li Chai. The partnership was formed for the benefit of the male descendants of two Chinese family tongs, namely the Chan and Li families. The two properties were used for the Chan Li Chai partnership's shop and office premises. Following the death of each family's representative, the shares in the properties were held by subsequent representatives as trustees for the sole benefit and interest of the Chan Li Chai partnership.

The plaintiff, Chan Li Chai Medical Factory (Hong Kong) Ltd, was registered in 1973. Its managing director made a declaration which stated that in May 1975, the representatives of the Chan and Li families decided that the business and assets of the previous Chan Li Chai partnership should be taken over by the plaintiff. This was affirmed by a resolution made by the plaintiff's shareholders at an extraordinary general meeting on 23 May 1975. Several years later, the representative trustees of the Chan and Li families passed away. On 12 April 1995, the plaintiff, executors and administrators of the deceased trustees and the beneficiaries entered into a deed of settlement. One of the recitals stated that the plaintiff had taken over the entire business and assets of the previous Chan Li Chai partnership (including the interest in the two properties) as its successor. In addition, there were ex-gratia payments totalling over \$5 million from the plaintiff to the beneficiaries, and they relinquished their rights and interests of and in the two properties. By way of two assignments dated 15 September 1995, the two properties were assigned to the plaintiff.

The Collector of Stamp Revenue charged stamp duty on the two assignments made in 1995. The plaintiff sought a declaration in the Court of First Instance that no duty was chargeable on the assignments. The Court of First Instance found for the Collector. The plaintiff appealed to the Court of Appeal.

The plaintiff argued that the stamp duty should not be chargeable as the properties had been held in trust for itself and the assignments were of these

beneficial interests. It also argued that since the executors and administrators were trustees, they could not give the beneficial interest in the properties to the plaintiff by virtue of the assignments.

The Court held that the assignments dated 15 September 1995 were, on their face, assignments of the legal title in the shares in the two properties. In addition, the beneficial interests passed with the legal estates on the assignments. The Court found that there were no facts or circumstances contained in the assignments, nor did any of the evidence support the contention that the beneficial interest shares in the properties had been held in trust for the plaintiff. As for the argument that the executors and administrators of the deceased family representatives could not give beneficial interests in the properties as they were the trustees, the Court found that they had waived any claim to any beneficial interest in the properties.

¶14-0560 Sale of equitable estate or interest

A contract or agreement for the sale of an *equitable estate or interest* in immovable property is chargeable with stamp duty as if it were an actual conveyance on the sale of the estate or interest (sec 26(1)). This is provided that a change of beneficial ownership occurs since a transfer which does not give rise to a change in beneficial ownership is not subject to stamp duty.

This issue is particularly relevant in cases of uncompleted contracts in which the vendors become trustees of property for the purchasers. The question then arises whether there is a transfer of an equitable interest in the property which would be subject to stamp duty.

In the case of *Peter Bone Ltd v IRC* (1995) BTC 8,050, the vendors, by a deed of agreement, agreed to sell their farming business (comprising land and other assets) to a company which was incorporated for that purpose. The vendors were constituted as nominees of the company and were obliged to execute assignments, transfers or conveyances of the property as required by the company. According to the judgment of Vinelott J, the company and its advisers thought that by leaving the land in the hands of the vendors (as constructive trustees of an uncompleted contract), the stamp duty would be deferred. They intended that a transfer of legal title would not be entered into as the legal estate would remain vested in the beneficial owners as nominees for the company.

In his decision, Vinelott J pointed out that the "distinction between a contract for the sale of land under which the vendor becomes a constructive trustee for the purchaser so long as the purchaser is entitled to specific performance of it and a contract for the sale of an equitable estate in land under which the vendor constitutes himself an express trustee of the land for the purchaser is a fine one" and cited the cases of *West London Syndicate Ltd v IR Commrs* (1898) 2 QB 507 and *Chesterfield Brewery Co v IR Commrs* (1899) 2 QB 7.

In the *Peter Bone* case, Vinelott J decided that, strictly, the agreement operated as a transfer of the equitable estate in the property and therefore attracted *ad valorem* stamp duty.

The vendors, as nominees of the company, did not have the right to require the company to accept a conveyance in specific performance of the agreement. They did not remain constructive trustees of an uncompleted contract which was capable of being specifically enforced but were obliged to convey the property as required by the company.

Section 26 does not apply to a contract or agreement for sale which already constitutes a chargeable agreement for sale (see ¶14-1160) or an unwritten sale agreement which would be a chargeable agreement if it were in the form of an instrument (sec 29E).

¶14-0640 Voluntary disposition *inter vivos*

Any conveyance of property which operates as a voluntary disposition *inter vivos* (between living persons), is also chargeable to stamp duty as a conveyance on sale (sec 27(1)). "Conveyance" in this context is defined to include any agreement for a lease or any release or renunciation of immovable property (sec 27(6)). Whenever a property is transferred at a consideration which is substantially below what would be considered an adequate amount, the transfer is deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos* and is therefore subject to stamp duty (sec 27(4)). Again, however, a voluntary disposition without a change of beneficial ownership does not attract a stamp duty charge.

¶14-0720 Lease

Any lease or agreement for the lease of immovable property is chargeable to stamp duty (First Schedule, Head 1(2)). Additionally, any instrument which increases the rent reserved by a chargeable, stamped lease is also chargeable to stamp duty in its own right, but only in relation to the additional rent which it makes payable (sec 17). A lease is not chargeable to stamp duty in relation to any penal rent which it imposes (sec 16). The term "lease" does not cover mortgage by demise (sec 2(1)).

¶14-0800 Duty payable and persons liable

For the amount of duty payable, person/s liable and the time limit for stamping conveyances on the sale and leases of immovable property, see ¶14-3180ff, ¶14-3740ff and ¶14-5190.

AGREEMENTS FOR THE SALE OF IMMOVABLE RESIDENTIAL PROPERTY

¶14-1080 Duty to execute agreement for sale

Each purchaser and vendor who enter into an agreement for the sale of immovable property are required to execute an agreement for sale containing certain specified information (sec 29B(1)). Only a purchaser who does not know that the agreement affects him or her is exempt from this requirement (sec 29B(2)). A detailed agreement for sale is required to be executed whether or not the relevant property is residential, and whether or not the agreement was made in writing. The following information must be set out in the instrument:

- the names and addresses of the purchaser and vendor;
- identification numbers of the purchaser and vendor, where applicable;
- business registration numbers of the purchaser and vendor, where applicable;
- description and location of property;
- statement as to whether property is residential;
- date on which agreement was made;
- if agreement was preceded by unwritten or other agreement, the date on which the initial agreement was made;
- statement as to whether date for conveyance has been fixed, and if so, the date;
- statement as to whether consideration has been agreed to and if so, amount of consideration;
- amount or value of any other consideration given to any other person, plus identification details of that person and a description of the benefit to which the consideration relates; and
- statement as to whether the purchaser knew that the agreement affected him or her (sec 29B(5)).

The definition of "agreement for sale" is broad in scope. Generally, any contractual agreements for the sale and purchase of land and buildings in Hong Kong will fall within its terms. Further, to prevent duty avoidance, the definition also includes various instruments involving rights to immovable property which might otherwise be used to circumvent the provisions (Stamp Office Interpretation and Practice Note No 1, para 8-9). Agreements which are not intended to create legal relations do not come within the definition; non-binding agreements are not intended to be caught (Stamp Office Practice Note No 1, para 13). An "agreement for sale" is defined in the Ordinance as including: