

APPENDIX I

Paragraphs 9 and 10 of Law no. 10/2000 of 14th August (*Organic Law of the Commission Against Corruption of Macao SAR*) stipulate that:

“The Commission Against Corruption is entitled to:

(...)

9) With regard to any shortcomings it finds in any legal provisions, specially those which may affect rights, freedoms, safeguards or any legitimate interests of the individuals, formulate recommendations or suggestions concerning their interpretation, amendment or repeal, or make suggestions for new legislation. When, however, the Legislative Assembly is the competent entity to legislate, it shall merely inform the Chief Executive in writing on its position;

10) Propose to the Chief Executive the enacting of normative acts which may improve the work of the public institutions and enhance the respect for legality in the administration, particularly by eliminating factors which may facilitate corruption and illicit practice or ethically reproachable practice;

(...)”

In 2011, the CCAC submitted a number of commentary reports to the Chief Executive, with the aim to enhance system building and administrative efficiency, exerting the Commission’s functions in implementing the policy plan. It also provides useful reference for decision-making departments. The following are some of the commentary reports submitted by the CCAC:

1. Legal analysis on the eligibility of a certain type of retirees to obtain housing subsidy under Law no. 2/2011 of 28th March
2. Some legal issues regarding the Chief Executive-elect before sworn in (particularly the rights and obligations; applicable to the principal officials to be appointed as well)
3. Legal opinion and report regarding the part about integrity and honesty of the “Proposal for the awarding of contract for the construction of the memorial hall of Zheng Guanying’s former residence”

4. Legal opinion and report on the part about integrity and honesty of the “Contract for reclamation of land and construction of the dike of the new development zone – amendment of evaluation criteria”
5. Legal opinion and report on the part about integrity and honesty of the “Contract for construction of the walking system at Estrada da Baía de Nossa Senhora da Esperança – report of bid evaluation”
6. Preliminary legal opinion on the evaluation criteria of a particular construction work
7. Brief report concerning the resumption of a plot of land
8. Legal opinion on the “Flow chart for handling untapped land granted”
9. Legal opinion on the legality of the “Award of open tender of the supply and installation of large display screen facilities in the Traffic Control Centre” conducted by the Transport Bureau
10. Opinion concerning the “Discussion Paper on the Reform of Law Courses in Chinese Language and the Management of Teaching Staff of the University of Macau”
11. Preliminary opinion on the system of public disclosure of income and property interests of the Executive Council members to be regulated by Administrative Regulation or by law
12. Brief analysis regarding the issue of video recording and photograph taking during protests or demonstrations

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Among the aforementioned reports, we chose to publish one of them for the knowledge of the public due to the fact that the contents of that report is with greater social impact and will draw great attention among the population.

Legal analysis on the eligibility of a certain type of retirees to obtain housing subsidy under Law no. 2/2011 of 28th March

Part I - Introduction

1. On 8th August 2011, the Commission Against Corruption (CCAC) received an official letter (07684/GCE/2011) from the Cabinet of the Chief Executive, which was enclosed with an order by the Chief Executive with the following content: The CCAC is requested to render legal opinion on the issue brought out by the Association of Retirees and Pensioners of Macao (APOMAC) for reference.
2. The case originated with a letter sent from the APOMAC to the Chief Executive on 5th August 2011, which indicated their dissatisfaction over the Financial Services Bureau (DSF), that had denied the eligibility of a certain group of retirees (referring to the public servants who retired before the establishment of Macao SAR and transferred their pensions to the “General Pension Fund” of Portugal) to obtain housing allowance. They thought that the DSF had incorrectly interpreted the law and treated the retired public servants unreasonably, and thus requested the Chief Executive to pay attention to and solve the problem.
3. Other documents sent to the CCAC included:
 - (1) Correspondence from the APOMAC;
 - (2) Four attachments (legal documents);
 - (3) A copy of official letter no. 32/DTJ dated 11th February 2002 from the Public Administration and Civil Service Bureau (SAFP);
 - (4) A copy of the guidelines issued by the Secretary for Administration and Justice on 29th January 2002;
 - (5) A copy of official letter no. 1105120001/DIR dated 12th May 2011 from the SAFP;

- (6) A copy of official letter no. 1106010005/DIR dated 1st June 2011 from the SAFP;
 - (7) Report no. 052/DDP/2011 dated 20th July 2011 and an official letter from the DSF.
4. The main problem that leads to dispute:

Can the retirees who transferred their pensions to the “General Pension Fund” of Portugal (CGA) before 20th December 1999 (establishment of Macao SAR) pursuant to Decree Law no. 14/94/M of 23rd February **be granted housing subsidies by the DSF of Macao according to Law no. 2/2011 of 28th March (Regime of Seniority Bonus and Housing and Family Subsidies), which was promulgated and entered into force recently?**

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Part II: Analysis and legal basis

- 1) Paragraph 9 of Article 4 of the *Organic Law of the Commission Against Corruption of Macao SAR*, approved by Law no. 10/2000 of 14th August, states:

“Powers

The Commission Against Corruption is entitled to:

(...)

9) *With regard to any shortcomings it finds in any legal provisions, namely those involving rights, freedoms, safeguards or any legitimate interests of the individuals, formulate recommendations or suggestions concerning their interpretation, amendment or repeal, or make suggestions for new legislation. When, however, the matter falls within the powers of the Legislative Assembly, it shall merely inform the Chief Executive in writing of its position;*

(...)”.

The case involves complaint as well as interpretation of regulations, therefore the CCAC has the power to intervene into the case. Let us view the old and new legal regimes of housing subsidy first.

Old regime

1. Regarding housing subsidy for employees of the Public Administration, Article 203 of the *Statute of Personnel of the Public Administration of Macao* (hereafter the *Statute*), approved by Decree Law no. 87/89/M of 21st December, states:

“ (Allocation)

*1. **The public servants and employees on service**, resigned from work awaiting retirement or retired, who reside in Macao and **receive salary and pension wholly or partly paid within the territory**, are entitled to receive the housing subsidies of which the amounts are indicated in Table 2. If the amount of the rental is less than that stated in Table 2, the housing subsidies they receive will be equal to the rental.*

2. The public servants and employees on service who reside in the same household and have kinship with each other are also entitled to housing subsidies.

3. The right prescribed by the previous paragraph shall extend to temporary employees on service who have actually and consecutively served the Administration for over six months.

4. Paragraph 1 is not applicable to the following staff:

a) Those who reside at the residences owned by the public, autonomous entities or the Municipal Council;

b) Those who have their own residence, except those who still have to pay home mortgage.

(...).”

2. The article above clearly specifies the three conditions necessary for application for housing subsidy (positive conditions):

- (1) Public servants and employees who are on service, have resigned from work awaiting retirement or retired;
 - (2) Residing in Macao;
 - (3) Receiving all or part of salary, wage or pension paid by Macao government.
3. The following applicants who, although have fulfilled the above requirements, cannot enjoy housing subsidy (negative conditions):
- (1) Those who live in the residences owned by the government (directly or indirectly owned by administrative entities);
 - (2) Those who own a residence and does not have to pay home loans. (e.g. no need to pay home mortgage instalments)
4. Later, the legislature amended Paragraph 3 of Article 203 of the *Statute* by Decree Law no. 80/92/M of 21st December as:
- “3. The right prescribed by the previous paragraph shall extend to temporary employees on service who have actually and consecutively served the Administration for over six months.”*
5. Then the legislature amended Paragraphs 7 and 8 of Article 203 of the *Statute* by Decree Law no. 62/98/M of 28th December as:
- “7. In December every year, the staff who are granted housing subsidy shall submit the statement mentioned in Paragraph 5 and the receipt of rental or retribution for the previous month mentioned in Paragraph 6 to the relevant departments.*
- 8. The housing subsidy shall be reduced prorata when the rental of the house where the staffs live together is less than the total amount of the housing subsidy for all of them.”*
6. The content above reflects that the legislature did not make adjustment and amendment of the necessary conditions for applying and receiving housing subsidy when amending Article 203 of the *Statute*. However, when formulating Law no. 2/2011 of 28th March, the legislature seemed to make a clear and

obvious change in their thought. This point will be analysed later.

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New regime

7. Regarding housing subsidy for public servants, Article 10 of Law no. 2/2011 of 28th March states,

“Entitlement to Subsidy

1. Public service workers who are on service, have resigned awaiting retirement and have retired, including retired judicial officers, are entitled to housing subsidy every month pursuant to this law and so do those who have kinship and reside in the same houses.

2. The people mentioned above who reside in the residences owned by the Macao SAR or other public legal persons or receive rental subsidy or those of similar types every month are not entitled to housing subsidy.”

According to the above article, now the public servants only have to fulfil one requirement for receiving housing subsidy:

Those who are on service, have resigned awaiting retirement and have retired.

However, the legislature pointed out that the following people are not entitled to housing subsidy:

- (1) Those who live in the residences owned by the government;
 - (2) Those who receive monthly rental subsidy.
8. Comparing the new and old regimes, it is not difficult to find that the legislature removed two fundamental requirements:
- (1) Residing in Macao; and

- (2) Those who receive salary, wage or pension paid by Macao government.
9. Moreover, it is worth mentioning here that both the housing subsidy regimes provided by the *Statute* (revoked) or Law no. 2/2011 are **general regimes** (*regime geral*), regardless of some **special** and even **exceptional** regulations formulated by the legislature, such as the provisions that apply to the staff who had already retired and transferred their pension to the CGA of Portugal prior to the establishment of Macao SAR.
10. For the staff who transferred their pension to the CGA of Portugal before December 1999, **even if they reside in Macao, they cannot request the Macao SAR Government to pay them housing subsidy before Law no. 2/2011 of 28th March came into effect**, because they, whose pension is not paid by the Macao SAR Government, do not fulfil the requirement provided by Paragraph 1 of Article 203 of the *Statute*.

* * *

11. However, before the Macao SAR was established, did the legislature formulate some special provisions in relation to the general regime? In fact, before 1999, the legislature established **exceptional provisions** regarding the situation mentioned above, which is Decree Law no. 38/95/M of 7th August and Decree Law no. 96/99/M of 29th November. Article 3 of the former states:

“(Home rental)

1. The amount of the monthly home rental that the pensioners under the situation mentioned in Sub-paragraph b) of Paragraph 3 of Article 17 of Decree Law no. 14/94/M of 23rd February shall pay to the services or entities responsible for administration of the houses after the transference of their pensions is determined according to the law effective on the day the pension is transferred.

2. The pensioners who are entitled to housing subsidies under the Statute of Personnel of the Public Administration of Macao still have the entitlement after their pensions were transferred to the CGA of Portugal until 19th December 1999 if they are still residing in Macao, while the housing subsidy is to be distributed by the Financial Services Bureau.

- a) – The article above is a transitional provision which was effective only until the establishment of Macao SAR on 20th December 1999.
 - b) – Another feature of the article is that one of the main requirements in the general regime has been revised. **That is, even the pension is not paid by the Macao government,** they are still entitled to housing subsidy (paid by the Macao government) **as long as they are residing in Macao.**
 - c) – Another modification is that the legislature no longer requires the Pension Fund to pay housing subsidies since it no longer needs to pay pension to this type of retirees, thus **the responsibility has been transferred to the Financial Services Bureau (DSF).**
12. Later, less than one month before the establishment of Macao SAR, the then Portuguese government in Macao formulated Decree Law no. 96/99/M (29th November) and repealed Paragraph 2 of Article 3 of Decree Law no. 38/95/M cited above – see Article 3 of Decree Law no. 96/99/M of 29th November.

In the preamble of Decree Law no. 96/99/M of 29th November, the legislature states that:

“(…)

However, a majority of the pensioners mentioned above intend to continue to reside in Macao after 19th December 1999, hoping to remain as tenants of residences in the territory or continue to receive housing subsidy.

Therefore, the Macao government cannot neglect the fact that many of them are seniors, the difficulties they face in finding alternative residences with the pensions they receive, and the humanist and social issues concerning the abandonment of the residences they have lived in for a long time and the surrounding environment they are familiar with.

In this sense, the law aims to ensure that the retirees who have transferred the responsibility for payment of their pensions to the CGA of Portugal will maintain the right.

(…).”

A question may be brought out here: What is the purpose of implementing Decree

Law no. 96/99/M by the legislature in less than one month before the establishment of Macao SAR? For enforcing it until December 1999? Of course not.

Let us focus on these retirees who had retired and transferred their pensions to the CGA of Portugal before 1999.

* * *

2) **The stance of the Financial Services Bureau and the Public Administration and Civil Service Bureau**

1. The DSF stated in its official letter dated 20th July 2011 that:

“Subject: Housing subsidy

Dear Sir/Madam,

Regarding the statement you have submitted recently for the purpose of being granted housing subsidy under Law no. 2/2011, after analysing the relevant information, we have discovered that you have already received the transport subsidy to go back to settle in Portugal, therefore, your case does not meet the requirement provided by Decree Law no. 96/99/M.

For the reason above, it is not possible to offer you the housing subsidy provided by the Statute and Law no. 2/2011. Should you have any queries, please contact Mr. C at xxxxxxxx or Mr. S at xxxxxxxx.

Yours sincerely.”

2. Moreover, the DSF pointed out in its proposal no. 052/DDP/2011 (20th July 2011) that:

“(…)

2. *After collecting the data of the people mentioned above, we can divide them into three groups:*

- 1) **Those who have transferred their pensions to the CGA of Portugal but have not yet received the transport allowance for**

settlement in Portugal;

- 2) Those who have already transferred their pensions to the CGA of Portugal as well as received the transport allowance for settlement in Portugal; and
 - 3) Those who receive pensions from the CGA of Portugal.
3. Before the entry into force of Law no. 2/2011, the DSF, pursuant to Decree Law no. 96/99/M and the Statute approved by Decree Law no. 87/89/M, distributed housing subsidy amounting up to MOP1,000 to the people in group 1 who did not live in the residences owned by the Macao SAR Government but in rented homes, or in homes owned by themselves but are still subject to home mortgage payment.

(...).”

According to the letter, the DSF considered that: even though Law no. 2/2011 of 29th March is effective, Decree Law no. 96/99/M of 29th November is still applicable. Therefore, one of the negative requirements for entitlement to housing subsidy considered by the DSF is: **the applicant shall have never applied for transport allowance for settlement in Portugal.** Otherwise, s/he is not qualified for receiving housing subsidy.

3. The aforementioned interpretation is based on the letter issued by the SAFP on 1st June 2011, which indicated that:

“(...)

3. *Questões relacionadas com o pessoal que transferiu as suas pensões para a CGA*

3.1 Ao abrigo do n.º 2 do artigo 3.º do Decreto-Lei n.º 38/95/M, com a epígrafe “Renda”, “Os pensionistas que têm direito ao subsídio de residência, nos termos do Estatuto dos Trabalhadores da Administração Pública de Macau, após a transferência da respectiva pensão para a CGA, mantêm esse direito, até 19 de Dezembro de 1999, enquanto residirem no território de Macau, sendo o pagamento efectuado pela Direcção dos Serviços de Finanças.”

3.2 Deste normativo resulta, assim, que foi intenção do legislador continuar a manter até 19 de Dezembro de 1999 e enquanto residirem em Macau, o direito ao subsídio de residência aos pensionistas que têm direito ao subsídio de residência nos termos do ETAPM.

3.3 E, nesse sentido, porque nos termos do ETAPM só os aposentados que preencham os requisitos do subsídio de residência é que têm direito a receber o subsídio de residência, significa isso que a manutenção consagrada no n.º 2 do artigo 3.º do Decreto-Lei n.º 38/95/M, do direito ao subsídio de residência até 19 de Dezembro de 1999, apenas contempla os pensionistas da aposentação que estejam a residir em Macau e que têm direito ao subsídio de residência nos termos do ETAPM, estando claramente de fora de seu âmbito os pensionistas de sobrevivência.

3.4 Posteriormente, com o Decreto-Lei n.º 96/99/M, veio este normativo a ser revogado (cfr. artigo 3.º), vindo-se agora estabelecer na alínea b) do artigo 1.º, o seguinte:

“Artigo 1º

(Direitos)

Ao pessoal a quem seja autorizada a transferência das respectivas pensões para a Caixa Geral de Aposentações é mantido o direito a:

a) ...;

b) Subsídio de residência nos termos do Estatuto dos Trabalhadores da Administração Pública de Macau, sendo o pagamento efectuado pela Direcção dos Serviços de Finanças.”

3.5 Com este preceito legal, visou o legislador garantir a manutenção do direito para além de 19 de Dezembro de 1999, a quem tenciona continuar a residir em Macau, o que deixou explícito no preâmbulo do Decreto-lei n.º 96/99/M: “...parte significa destes aposentados e pensionistas tencionam continuar a residir em Macau para além de 19 de Dezembro de 1999, mantendo a condição de arrendatários de moradias do Território, bem como o acesso ao subsídio de residência”,

“Neste sentido o presente diploma visa garantir aos aposentados e pensionistas que transferiram a responsabilidade pelo pagamento das suas pensões para a CGA, a manutenção dos referidos direitos”.

3.6 Contudo, se a intenção do legislador, de condicionar a continuidade de residência em Macau como requisito de manutenção do subsídio de residência, cabe no corpo e espírito da norma em questão, uma vez que intrinsecamente à atribuição do subsídio de residência estava a necessidade de o aposentado residir em Macau, o mesmo já não acontece com a intenção de alargar a manutenção aos pensionistas de sobrevivência.

3.7 Com efeito, se atentarmos à letra deste normativo, em especial à expressão “é mantido o direito”, resulta claro que não se vem conferir um direito novo mas apenas manter o direito ao subsídio de residência a quem o tem nos termos do ETAPM, no caso, os pensionistas da aposentação e, assim, continuando-se a não abranger, uma vez mais, no âmbito desta manutenção os pensionistas de sobrevivência que transferiram as suas pensões para a CGA.

3.8 Pelo que, manifesto se torna concluir serem, então, dois os pressupostos decorrentes do Decreto-Lei n.º 96/99/M para que seja mantido o direito ao subsídio de residência nos termos do ETAPM e, deste 1 de Abril de 2011, nos termos da Lei n.º 2/2011:

- *Tratar-se de pensionista de aposentação a quem foi autorizada a transferência da sua pensão para a CGA de Portugal; e*
- *Continuar a residir em Macau.*

3.9 O facto de ser ter retirado o requisito de residência em Macau da Lei n.º 2/2011, em nada vem alterar, pois, os pressupostos decorrentes do Decreto-Lei n.º 96/99/M, porquanto relevante para essa manutenção é a continuidade da residência em Macau para este pessoal.

3.10 E, isto porque, como vimos já, a razão de ser das normas em causa [isto é, o n.º 2 do artigo 3.º do Decreto-Lei n.º 38/95/M e, mais recente, a alínea b) do artigo 1.º do

Decreto-Lei n.º 96/99/M] ou, se quisermos, o fim visado pelo legislador ao ter garantida, sucessivamente, nestas normas aplicáveis, a manutenção do direito ao subsídio de residência, foi precisamente a circunstância de existir pensionistas da aposentação que optaram por continuar a residir em Macau, para além de 19 de Dezembro de 1999, justificando-se, assim, que lhes seja mantido o direito ao subsídio enquanto permanecerem, sem qualquer interrupção, nessa situação.

3.11 Ora, deixar de permanecer nessa situação o pensionista da aposentação que fixe a sua residência em Portugal. E ainda que venha a regressar a Macau, a nova fixação de residência já não configura uma situação de continuidade de residência em Macau, para efeitos do Decreto-Lei n.º 96/99/M.

3.12 Por isso, estando o exercício do direito ao transporte por conta da RAEM condicionado à decisão de fixação de residência em Portugal, conforme o disposto no n.º 4 do artigo 17.º do Decreto-Lei n.º 14/94/M, somos do entendimento que o pessoal que tenha exercido o direito ao transporte por conta da RAEM regulado na alínea a) do n.º 3 do artigo 17.º do Decreto-Lei n.º 14/94/M, deixa de reunir o pressuposto decorrente do Decreto-Lei n.º 96/99/M e, em consequência, deixa de poder manter o direito ao subsídio de residência nos termos do ETAPM e, desde 1 de Abril de 2011, nos termos da Lei n.º 2/2011.

3.13 Pelo exposto e em resposta às questões colocadas temos que:

3.13.1 Relativamente à questão “Aqueles que recebem pensão de sobrevivência têm direito ao subsídio de residência?”, porque nos termos do artigo 203.º do ETAPM, os pensionistas de sobrevivência não tinham direito a receber o subsídio de residência, somos do entendimento que não se pode atribuir ao pessoal que transferiu a sua pensão de sobrevivência para a CGA de Portugal, o subsídio de residência ao abrigo da Lei n.º 2/2011;

3.13.2 Em face desta conclusão, desnecessário se torna

analisar as questões: “Um trabalhador aposentado que se encontra também a receber pensão de sobrevivência tem direito, por esta razão, a dois subsídios de residência” e “Se a pensão de sobrevivência for repartida em partes iguais entre duas pessoas, o subsídio de residência deverá ser repartido também em duas partes? Ou cada um recebe um subsídio de residência”;

3.13.3 Relativamente às questões “Aqueles que tiveram direito ao transporte e regressaram a Portugal têm direito ao subsídio de residência? (Não está previsto na lei vigente o requisito de ter residência em Macau); e “O exercício do direito a transporte para Portugal, referido na alínea a) do n.º 3 e n.º 4 do artigo 17.º do Decreto-Lei n.º 14/94/M, implicou o afastamento da manutenção do direito ao subsídio de residência?”, estando o exercício do direito ao transporte por conta da RAEM condicionado á decisão de fixação de residência em Portugal, conforme o disposto no n.º 4 do artigo 17.º do Decreto Lei n.º 14/94/M, somos do entendimento que o pessoal que exerça o direito ao transporte por conta da RAEM regulado na alínea a) do n.º 3 do artigo 17.º do Decreto-Lei n.º 14/94/M, deixa de reunir pressuposto decorrente do Decreto-Lei n.º 96/99/M e, em consequência, deixa de poder manter o direito ao subsídio de residência do ETAPM e, desde 1 de Abril de 2011, da Lei n.º 2/2011;

3.13.4 Relativamente à questão “O pensionista da aposentação que venha a fixar novamente residência em Macau pode voltar a manter o direito ao subsídio de residência?”, somos do entendimento tal não ser possível pois a nova fixação de residência já não configura uma situação de continuidade de residência em Macau, para efeitos do Decreto-Lei n.º 96/99/M.

(...)”

[English meaning]

“(…)”

3. Problems concerning the personnel who have transferred their pensions to the CGA of Portugal

3.1 According to Paragraph 2 of Article 3 of Decree Law no. 38/95/M entitled ‘Home Rental’, ‘The pensioners who are entitled to housing subsidies under the Statute of Personnel of the Public Administration of Macao still have the entitlement after their pensions were transferred to the CGA of Portugal until 19th December 1999 if they are still residing in Macao, while the housing subsidy is to be distributed by the Financial Services Bureau.’

3.2 Under this provision, the legislature’s intention was to let the pensioners entitled to housing subsidy according to the Statute remain the entitlement when they were residing in Macao until 19th December 1999.

3.3 In this sense, since only the retirees qualified for housing subsidy under the Statute are entitled to housing subsidy, this means that the right to remain entitled to housing subsidy until 19th December 1999 was only granted to the retired pensioners who were still residing in Macao and were qualified for housing subsidy under the Statute. Obviously these did not include non-retirement pension receivers.

3.4 Later the provision was revoked by Decree Law no. 96/99/M (see Article 3), of which Paragraph b) of Article 1 states:

‘Article 1

(Rights)

The people who are allowed to transferred their pensions to the CGA remain entitled to:

a) ...;

b) Receive housing subsidy under the Statute of Personnel of the Public Administration of Macao from the Financial Services Bureau.’

3.5 Under this provision, the legislature aimed to ensure that those who continued to reside in Macao after 19th December 1999 would maintain this right, which was clearly specified in the preamble of Decree Law no. 96/99/M, "...a majority of the pensioners mentioned above intend to continue to reside in Macao after 19th December 1999, hoping to remain as tenants of houses in the territory or continue to receive housing subsidy." "In this sense, the law aims to ensure that the retirees who have transferred the responsibility for payment of their pensions to the CGA of Portugal will maintain the right."

3.6 However, if the legislature's purpose was to maintain continuing residency in Macao as a main requirement for continuing to receive housing subsidy, they should have placed the relevant content in the body and abstract of the relevant law. Since the legislature only required that the retirees entitled to housing subsidy should be those who resided in Macao, this reflects that they did not have the intention to extend the maintenance of the right to the non-retirement pensioners.

3.7 In fact, if we look at the literal meaning of this article, especially the expression "maintain the right", it is clear that this is not to confer a new right but to merely maintain the right enjoyed by the people entitled to housing subsidy under the Statute. In this case, these people refer to the retirement pensioners. Therefore, this article does not cover the non-retirement pensioners who have transferred their pensions to the CGA.

3.8 To conclude, the people who remain entitled to housing subsidy under the Statute and Law no. 2/2011 effective since 1st April 2011 shall meet the two requirements provided by Decree Law no. 96/99/M:

- The retirement pensioners who are allowed to transfer their pensions to the CGA of Portugal, and
- Continue to reside in Macao.

3.9 The fact that Law no. 2/2011 has removed the requirement of residency in Macao did not cause any change in Decree Law no. 96/99/M because the latter still maintains the requirement that relevant staff should continue to reside in Macao.

3.10 Therefore, as mentioned above, the purpose of establishment of relevant provisions (Paragraph 2 of Article 3 of Decree Law no. 38/95/M and Paragraph b of Article 1 of Decree Law no. 96/99/M), or from the perspective of the legislature in the beginning, the purpose is to ensure the right to receive housing subsidy. Since some retirement pensioners chose to continue to reside in Macao after 19th December 1999, it is necessary to formulate the provision in order to ensure that their entitlement to housing subsidy is maintained when they are living in Macao.

3.11 Nevertheless, for the retirement pensioners who no longer meet the above requirements and have chosen to settle in Portugal, if they settle in Macao again, they still do not meet the requirement of consecutive residency in Macao provide by Decree Law no. 96/99/M.

3.12 Therefore, according to Paragraph 4 of Article 17 of Decree Law no. 14/99/M, they are entitled to the transport allowance paid by the Macao SAR only when they choose to settle in Portugal. We think that they have already exercised the right to obtain transport allowance to Portugal paid by the Macao SAR provided by Paragraph 3a) of Article 17 of Decree Law no. 14/94/M and thus they no longer meet the requirement under Decree Law no. 96/99/M. In this sense, they can no longer maintain their eligibility to receive housing subsidy under the Statute and Law no. 2/2011 effective since 1st April 2011.

3.13 To conclude, we would like to give the following response to the questions:

3.13.1 As to the question “Are those non-retirement pensioners entitled to housing subsidy?”, according to Article 203 of the Statute, non-retirement pensioners are not entitled to housing subsidy. Therefore, we think that the non-retierment

pensioners who have transferred their pensions to the CGA of Portugal shall not receive housing subsidy under Law no. 2/2011.

3.13.2 *Based on the above conclusion, it is not necessary to analyse the following questions: “Can a retired staff who is also entitled to non-retirement pension receives double housing subsidies?” and “If the non-retirement pension is divided equally between two people, shall the housing subsidy be divided into two as well? Or Shall each of them receive a full housing subsidy?”*

3.13.3 *As to the questions “Are those who are entitled to transport allowance and have gone back to Portugal entitled to housing subsidy? (Currently, there are no provisions that require the recipients should reside in Macao)” and “Does exercise of the right to transport to Portugal prescribed by Paragraph 3a) of Article 17 of Decree Law no. 14/94/M lead to abandonment of maintenance of the eligibility to receive housing subsidy?”, according to Paragraph 4 of Article 17 of Decree Law no. 14/94/M, **they are entitled to the transport allowance paid by the Macao SAR only when they reside in Portugal. We think that: The people who are entitled to the transport allowance to Portugal paid by the Macao SAR no longer meet the requirement provided by Decree Law no. 96/99/M. Therefore, they shall not remain entitled to housing subsidy provided by the Statute and Law no. 2/2011 effective since 1st April 2011.***

3.13.4 *With regard to the question “Are the retirement pensioners who settle in Macao again entitled to housing subsidy?” We think that it is impossible **because this is not the case prescribed by Decree Law no. 96/99/M – consecutive residency.***

(...)”

4. Having the above opinion presented by the SAFP, the DSF should handle the applications for housing subsidy by this type of retirees based on this stance.

5. However, we are reserved about the above opinion raised by the SAFF because:
 - (1) The relation between the norm of application (*norma remetente*) and the norm of applicability (*norma remetida*) and their natures, that is, Decree Law no. 96/99/M and Article 203 of the *Statute*, was not analysed and specified;
 - (2) There is no analysis of the change in the nature of housing subsidy by Law no. 2/2011;
 - (3) The letter indicated that Law no. 2/2011 does not provide any new rights for certain people but maintains the rights they have already had. In fact, this interpretation is incorrect because, for instance, the public servants who retired before or after 1999 and have been residing abroad (or in Mainland China) are not qualified for housing subsidy according to Article 203 of the *Statute* since they are not residing in Macao. However, now they are entitled to housing subsidy under Article 10 of Law no. 2/2011.
 - (4) The SAFF has committed a logical mistake when interpreting the law: it continued to relate Article 203 of the *Statute*, which has already been revoked, to Decree Law no. 96/99/M and totally neglected Article 10 of the currently effective Law no. 2/2011, which revokes Article 203 of the *Statute*.
 - (5) In this commentary report, the SAFF purposefully made reference to the preamble of Decree Law no. 96/99/M of 29th November – to ensure that the retirees who are still residing in Macao after they transferred the responsibility to pay for their pension to Portugal are still entitled to housing subsidy. In this sense, it should have taken care of the cases of this group of people more carefully when formulating Law no. 2/2011 of 28th March. Special or transitional provisions should have been provided, but it did not do so in reality.
 - (6) The interpretation by the SAFF is an ideal one, i.e. an interpretation that should be done. Honestly speaking, it is a complementary interpretation. However, it is necessary to emphasize here that this interpretation is not applicable to all situations, especially

when the legal thought and criteria for interpretation is not allowed. Otherwise, it will contradict the intent of law. Article 8 of the *Civil Code* states:

“(Interpretation of the law)”

*1. Interpretation of the law shall not be restricted to literal meaning only. **The legal thought is reconstructed** from the text especially given the unity of the legal regime, the circumstances in which the law is formulated and the specific cases in which the law is applied.*

*2. However, **the interpreter can only consider the meaning which have a minimum of literal correspondence in legal sense, even if the expression is not perfect.***

3. When determining the meaning and scope of the law, the interpreter shall assume that the solution established by the legislature is the most pertinent and the legislature know how to express their thought with appropriate terms. ”

In this sense, we only partly agree with the stance adopted in the above opinion because it does not take into account other situations and problems.

Here we are analysing some key issues.

* * *

3) **Is Decree Law no. 96/99/M still applicable to the requests for housing subsidy currently?**

Article 1 states:

“(Rights)”

*The people who are allowed to transferred their pensions to the CGA **remain entitled to:***

a) Continue to live in the local housing by paying the rental to the services or

entities responsible for administration of the housing when they are residing in Macao;

b) Receive housing subsidy paid by the Financial Services Bureau under the Statute of Personnel of the Public Administration of Macao.

As mentioned above, before Decree Law no. 96/99/M of 29th November was implemented, in 1995, the then Portuguese government in Macao established a provision, Decree Law no. 38/95/M of 7th August, for the same matter. Article 3 of Decree Law no. 38/95/M states:

“(Home rental)

1. The amount of the monthly home rental that the pensioners under the situation mentioned in Sub-paragraph b) of Paragraph 3 of Article 17 of Decree Law no. 14/94/M of 23rd February shall pay to the services or entities responsible for administration of the houses after the transference of their pension is determined according to the law effective on the day the pension is transferred.

2. The pensioners who are entitled to housing subsidies under the Statute of Personnel of the Public Administration of Macao still have the entitlement after their pensions were transferred to the CGA of Portugal until 19th December 1999 if they are still residing in Macao, while the housing subsidy is paid by the Financial Services Bureau.”

1. Later, on 29th November 1999 when less than one month before the establishment of Macao SAR, the government implemented Decree Law no. 16/99/M, in which there was an additional article about housing subsidy and some essential points in Decree Law no. 38/95/M of 1995 were removed. Hence the new Decree Law did not mention “effective until 19th December 1999” and “residing in Macao”.
2. According to the content and nature of Decree Law no. 96/99/M of 29th November, we understand that:
 - (1) Article 1 of Decree Law no. 96/99/M is not for the purpose to create a new regime;
 - (2) Paragraph 2 of Article 3 of Decree Law no. 38/95/M of 7th August reflects that the legislature neither showed its stance nor added new contents

regarding the regime of housing subsidy but it merely quoted the regime of housing subsidy (general regime) provided by the *Statute*;

- (3) According to the then effective Article 203 of the *Statute*, one of the requirement might not exist, which was that those who receive all or part of their retirement pensions paid by Macao government cannot receive the subsidy because the responsibility to distribute their pensions has been transferred to Portugal.

However, one thing is for sure: Sub-paragraph b) of Article 1 of Decree Law no. 96/99/M of 29th November does not mention “residing in Macao” (on the contrary, Paragraph a) does) but points out the general regime, which refers to Article 203 of the *Statute* at that time.

In fact, Article 203 clearly specified one of the requirements – residing in Macao.

However, this general regime is amended by Law no. 2/2011, which removes the requirement of “residing in Macao”.

Quid Juris? How to solve this problem by legal means?

3. Given the analysis above, we consider that:
 - (1) An exceptional rule cannot and shall not modify a general regime. That is, Decree Law no. 96/99/M of 29th November cannot modify the legal regime under Law no. 2/2011 of 28th March.
 - (2) When an exceptional rule makes reference to a general regime while the latter has been modified or revoked, the interpretation cannot accord with the revoked content.
 - (3) An exceptional rule under the old regime cannot be used to interpret an effective general regime since the current regime does not cover old contents. In this sense, Decree Law no. 96/99/M cannot be used to interpret the currently effective Law no. 2/2011.

We believe that interpretation indicated in the letter from the SAFP stems from the incorrect thought stated above.

Therefore, the Public Administration cannot assess the requests for housing subsidy merely based on Decree Law no. 96/99/M of 29th November.

* * *

4) **Did point 3.13.3 in the letter from the SAFP indicate a correct understanding of Decree Law no. 96/99/M of 29th November?**

- (a) The right to claim for the expense for transport to Portugal mentioned in Sub-paragraph a) of Paragraph 3 of Article 17 of Law no. 14/94/M is subject to Paragraph 4 of the same Article. That is, the claimers shall be those who intend to settle in Portugal;
- (b) Therefore, it is assumed that the retirees who have exercised the right to receive transport allowance do not reside in Macao and have returned to Portugal;
- (c) Whether the right provided by Decree Law no. 96/99/M is maintained depends on whether the retirees reside in Macao;
- (d) When this requirement disappears, the relevant right will also disappear.

Decree Law no. 96/99/M does not require that only the retirees residing in Macao are entitled to housing subsidy (but this requirement was provided by a previous law, Decree Law no. 38/95/M of 7th August). At that time, this requirement was not provided by Decree Law no. 96/99/M but Article 203 of the *Statute*, which, however, has been revoked by Law no. 2/2011.

Sub-paragraph a) of Article 1 of Decree Law no. 96/99/M clearly points out that if the retirees still stay in Macao, they remain entitled to live in “government housing” (which have already been allocated to them). Subparagraph b) states that, “*Receive housing subsidy paid by the Financial Services Bureau under the Statute of Personnel of the Public Administration of Macao*”.

The title of the above article does not mention the requirement of residency in Macao also. Therefore, the interpretation of Sub-paragraph b) of Article 1 of Decree Law no. 96/99/M, which is that receiving the transport allowance will

lead to termination of the entitlement to housing subsidy, is not correct, because the currently effective Law no. 2/2011 has revoked the second requirement – residency in Macao.

If the retirees return to Macao, they will meet the second requirement. In this case, their entitlement to housing subsidy will be resumed according to Decree Law no. 96/99/M and Article 10 of Law no. 2/2011 of 28th March.

As far as the nature of law is concerned, Decree Law no. 96/99/M of 29th November is an exceptional norm. Therefore, Article 10 of the *Civil Code* shall be observed:

“Exceptional norm shall not be applied by analogy, but broad interpretation is allowed.”

In addition, we have to remember that on 29th January 2002, the Secretary for Administration and Justice issued the following instruction:

“1. Under the legal regime provided by current applicable laws, the retirees who have transferred their pensions to the CGA of Portugal will not lose their identity as retirees in Macao for all legal purposes.”

* * *

5) Meaning and scope of the new regime

Two of the requirements provided by the Statute have been removed by the new housing subsidy system. As a result, the range of beneficiaries has been undoubtedly widened, because it no longer requires that the recipients shall be those who reside in Macao. The only one requirement is that they shall be retirees.

Therefore, it is possible to identify the following groups of people:

Group 1: The retirees who have never claimed for transport allowance and is now residing in a country that is not Portugal (e.g. Mainland China), regardless of whether they retired before the “integration” of public servants into the public service of Portugal or in the year of 1999, are entitled to housing subsidy under Article 10 of Law no. 2/2011 of 28th March .

Group 2: Why aren't the retirees who have been "integrated" but are now residing in Macao entitled to housing subsidy? Do discrimination and unfairness exist in this case?

We have to, according to currently effective law, determine whether the applicants meet the requirements for entitlement of housing subsidy under the current system.

* * *

Legislative policy

1. To sum up, the text of Article 10 of Law no. 2/2011 of 28th March is deficient, which is not thorough enough and thus has caused controversy.
2. As far as legislative policy is concerned, even though the nature of housing subsidy has been transformed from a kind of financial aid in the past to now a kind of general benefit (even those who own a home and do not have to pay home mortgage can enjoy it) by legislative means, it is necessary to take into account some situations in order to prevent controversy and injustice.
3. From a legislative point of view, beneficiaries should be those who have a certain connection or link with the system of Macao. For example, they reside in Macao or receive their pensions paid by Macao SAR Government. In this case, controversy will less likely occur.
4. It is hard to imagine that the people who do not have any connection with the legal regime of Macao are also entitled to housing subsidy. We are referring to the following extreme cases:
 - a) Those who retired before Macao SAR was established;
 - b) Those who have transferred their pensions to the CGA of Portugal;
 - c) Those who do not reside in Macao (may not reside in Portugal but in another country or Mainland China);
 - d) Macao SAR Resident Identity Card holders who claim that they are

residing in Macao and request for housing subsidy.

5. From a theoretical viewpoint, we also think that the above individuals' applications shall not be approved because there is no longer any connection between them and the regime of Macao SAR.
6. However, if the above stance is adopted, it should be backed by adequate reason and basis. The difficulty we are facing stems from defective legislation.
7. From another viewpoint, one thing is for sure: these people cannot expect that the Macao SAR Government (not Portuguese government) will offer them support for housing since they have already retired and transferred their pensions to the CGA of Portugal before the establishment of Macao SAR in 1999. If the Macao SAR Government offers housing subsidy to those who have no connection with Macao SAR, it will violate the principle of fairness because this is not a general benefit enjoy by every Macao citizen.
8. Therefore, theoretically these people should not be entitled to housing subsidy. However, it does not seem so under the current regime.
9. The interpretation made by the SAFP is an ideal solution. In other words, the current legal regime should provide such stipulation. However, given the current legislation, it is impossible to reach this ideal result.

* * *

Defects in current regime

1. Given the serious defects in the current regime, the best solution is to adopt legislative measure in order to plug the loopholes. The solution is simple. Just add a requirement in Article 10 of Law no. 2/2011 of 28th March. For example:

*"1. Public service workers on service, have resigned awaiting retirement and have retired, including retired judicial officers, **who receive salary and pension wholly or partly paid within the territory**⁶, are entitled to receive housing subsidy every month pursuant to this law and so does those who have kinship*

⁶ The requirement that the CCAC suggests adding.

and reside in the same house with each other.

2. The people mentioned above who reside in the residences owned by the Macao SAR or other public legal persons or receive rental subsidy or those of similar types every month are not entitled to receive housing subsidy.”

2. Certainly, revising the law will lead to another risk: the potential beneficiaries under the current version may raise an objection, arguing that it will infringe upon their interests. Although this argument lacks legal basis, it may have negative impact on the society. Therefore, careful consideration is needed.
3. About this issue, it is necessary to consider other related matters, such as the following instruction issued by the Secretary for Administration and Justice on 29th January 2002:

*“1. Under the legal regime provided by current applicable laws, the retirees who have transferred their pensions to the CGA of Portugal **will not lose their identity as retirees in Macao for all legal purposes.**”*

4. This instruction⁷ has both advantage and shortcomings:

Advantage: The public servants who have retired in Portugal but are carrying out public duties in Macao currently have to receive only half of their salaries just as other retired local public servants do.

Shortcomings: Once recognized as retired public servants, their entitlement to certain benefits should also be recognized, such as housing subsidy.

5. Another point worth consideration: Should the retirees be required to submit a statement of their residency in Macao in order to receive housing subsidy? If this requirement is established, it may give rise to another unfair situation:
 - a) For example, the retirees who are receiving pensions paid by the Macao SAR Government but residing in another country or Mainland China are entitled to housing subsidy pursuant to Law no. 2/2011 of 28th March.

⁷ The CCAC is sceptical of its legality. Can an administrative instruction indicate such stipulation? However, this issue is not our focus.

- b) If residency in Macao is not required, it is possible to only require that the qualified retirees shall be those who receive their pensions paid by the Macao SAR Government. However, this requirement is not clearly specified in Law no. 2/2011. Therefore, the interpreter cannot apply it. As a result, the same problem will appear.
6. In conclusion, This is all about going from one extreme to another. **It seems that Law no. 2/2011 of 28th March leaves the door open too much.**
7. Who will bear the consequences of the shortcomings of the legislation? We cannot answer this question, but we are sure that the decision is up to the Chief Executive, because Article 3 of Law no. 2/2011 of 28th March states, “*The power to carry out the acts provided by this law is possessed by the Chief Executive, unless there are any special stipulations.*”
8. **Therefore, the Chief Executive has two options:**
- (1) To leave the mistake uncorrected and make the best of it by recognizing these retirees’ entitlement to housing subsidy. The negative consequence is that the Macao SAR Government has to pay an extra expense every year, though the grievance will be redressed.
 - (2) To enforce the law strictly by revising the law immediately in order to redress the legal defects mentioned in this analysis. In this case, a lot of explanations and clarifications will be required and he will probably face the retirees’ objection.

* * *

Part III: Conclusion

1. Sub-paragraph b) of Article 1 of Decree Law no. 96/99/M is an exceptional provision which is only applicable to the retirees who have their pensions transferred to Portugal.
2. Therefore, the provision above cannot be adopted to interpret and complement a general regime – the *Statute* in the past and currently Law no. 2/2011 of 28th March.

3. Residency in Macao is no longer required for retirees' entitlement to housing subsidy under Law no. 2/2011.
4. Article 10 of Law no. 2/2011 of 28th March should not be interpreted by using a regulation which has already been revoked.
5. According to Article 10 of Law no. 2/2011 of 28th March, the retirees who have their pensions transferred to the CGA of Portugal are entitled to housing subsidy. Once such interpretation is considered inconsistent with the legislative intent, procedure of law revision should be commenced immediately in order to perfect the relevant law.

* * *

These are the CCAC's conclusion and suggestion about the relevant issues and only serve as reference for the Chief Executive.

* * *

Commission Against Corruption, 24th August 2011.

The Commissioner Against Corruption
Fong Man Chong

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