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5 February 2013

Clerk to the Bills Committee on the Stamp Duty (Amendment) Bill 2012,
Legislative Council Complex,
1 Legislative Council Road,
Central,
Hong Kong
(Attn. Ms Rita Yung)

By email : bc 01 12@legco.gov.hk

Dear Madam,

Re : The proposed enhanced Special Stamp Duty ('SSD') & Buyer Stamp Duty ('BSD')

Please see attached our submissions. We shall not attend the meeting on 18 February 2013. Thank you!

Yours sincerely,

Moran Zukerman
President

Submissions on the Stamp Duty (Amendment) Bill 2012

A. Introduction

1. As our principal mission is '*to promote fair estate agency practice for the benefit of the Hong Kong general public*', and our members and their clients come from all over the world to take Hong Kong as their home, we submit that certain features of the proposed amendment are discriminatory and unfair, despite our agreeing with the general aims and provisions of the enhanced special stamp duty ('SSD') and buyer stamp duty ('BSD').
2. Noting that the main pros and cons of the SSD and BSD have been canvassed fully by various sectors of the community over the past few months, our submissions will focus on just one issue, that the BSD infringes Hong Kong residents' right to property ownership by requiring residents who have not yet acquired permanent resident status to pay BSD.

B. Property Ownership and the Basic Law

3. Mr. Leung Chun Ying, Chief Executive, says in his Policy Address of 16 January 2013 the following regarding housing for Hong Kong residents :

Guiding Principle and Objectives of Housing Policy

57. *Some people believe home ownership is not the only way for meeting accommodation needs: it can be met just as well by rented flats. But I believe that **home ownership by the middle class is crucial to social stability**. The Government is therefore determined to uphold the principle of assisting grassroots families in moving into public housing and the middle-income families in buying their own homes.*

58. *Our policy objectives for housing are to (i) assist grassroots families to secure public housing to meet their basic housing needs; (ii) **assist the public to choose accommodation according to their affordability and personal circumstances, and encourage those who can afford it to buy their own homes**; (iii) provide subsidised home ownership flats on top of PRH so as to build a progressive housing ladder; and (iv) maintain the healthy and steady development of the private property market, with priority to be given to meet Hong Kong **permanent residents**' needs. (emphasis added)*

4. Property ownership is the cornerstone of a free, democratic and capitalist society, and is guaranteed under the *Basic Law* as follows :

- Article 6 - The Hong Kong SAR shall protect the right of private property ownership of property in accordance with law;
- Article 24 - Residents of the HKSAR shall include permanent residents and non-permanent residents (the latter is defined as persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the HKSAR but have no right of abode);
- Article 25 - All Hong Kong residents shall be equal before the law;
- Article 105 - The Hong Kong SAR shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

5. Given that :

- (a) *non-permanent residents* can acquire resident status mainly due to their close connection with Hong Kong, say due to family relationship, or their meeting the skills requirement for a work permit thus contributing to the multi-culturalism and prosperity of Hong Kong;
- (b) during the 7 years' residency that would qualify them for the permanent resident status, they need a home and, as the CE says, ***home ownership by the middle class is crucial to social stability***, and
- (c) Basic Law Article 6 says all Hong Kong residents, permanent or not, are equal before the law

we see no legitimate reason why *non-permanent residents* should not be exempted from the BSD the way that *permanent residents* are exempted.

6. By imposing a 15% BSD, Government is in effect forcing *non-permanent residents* to rent a home instead of owning a home for 7 years thus depriving them the right to property ownership, and further discriminate against them vis-à-vis

permanent residents in breach of Basic Law Article 25. We note that one authority on Hong Kong constitutional law has commented that :

'the Basic Law recognises that the right to private ownership of property is not an absolute right and that such right might, in appropriate circumstances and in accordance with clearly identified provisions, be lawfully taken away by Government'.¹

7. But such interference can only be justified if the *fair balance test* is satisfied, namely :

- (a) the interference must relate to a legitimate aim and an aim is only legitimate only if it corresponds to a pressing need;
- (b) the interference must be rationally connected with that aim; and
- (c) the interference must be proportionate to the aim served.²

8. Given the comparatively small proportion of *non-permanent residents* relative to *permanent residents* in the Hong Kong population, we do not see how the discriminatory BSD as applied to *non-permanent residents* could be rational and proportionate to Government's intended aim - to arrest property speculation. The legitimate target of BSD should be speculators having no connection whatsoever with Hong Kong thus no basis to own a residential home in Hong Kong. *Non-permanent residents* need to own a home as much as *permanent residents*.

C. Conclusion

9. *Non-permanent residents* and *permanent residents* are equal under the Basic Law, and both should be exempted from the BSD.

¹ Michael Wilkinson 'Land' in Chapter 12 *Law of the Hong Kong Constitution*, Johannes Chan (ed), Sweet & Maxwell 2011, p. 379

² *ibid* footnote 105, p. 383