

立法會
Legislative Council

LC Paper No. LS27/13-14

**Legal Service Division's Note on the Administration's paper:
"Future adjustments to the rates of the Special Stamp Duty and
the Buyer's Stamp Duty"**

On 14 February 2014, the Secretary for Transport and Housing announced that he would in his speech on the resumption of the Second Reading debate of the Stamp Duty (Amendment) Bill 2012 (the 2012 Bill) make a commitment that the Administration would adopt different legislative approaches for adjusting the rates of stamp duty. The Administration would introduce a new bill for any proposed increase in stamp duty but downward adjustment would remain to be effected by subsidiary legislation that would be subject to negative vetting. This commitment is referred to in the Administration's paper LC Paper No. CB(1)923/13-14(01) as a formal undertaking. The Chairman of the Bills Committee has instructed the Legal Service Division (LSD) to advise on the legal and drafting issues raised in the Administration's paper. This paper sets out the view of the LSD.

The Administration's undertaking

2. By clause 16 of the Bill, the Administration has proposed to add a proposed section 63A¹ to the Stamp Duty Ordinance (Cap. 117). The effect of the proposed section is to authorize the Financial Secretary (FS) to amend by notice published in the Gazette head 1(1AA), (1AAB), (1B) or (1C) in the First Schedule to Cap. 117. Head 1(1AA), (1AAB),

¹ The text of the proposed section 63A in the 2012 Bill: "The Financial Secretary may, by notice published in the Gazette, amend a percentage specified in the second column of head 1(1AA), (1AAB), (1B) or (1C) in the First Schedule."

(1B) and (1C) specify the rates of special stamp duty (SSD) and buyer's stamp duty (BSD) chargeable on a chargeable agreement for sale and a conveyance on sale respectively. The notice so made by FS would be subsidiary legislation subject to the scrutiny of the Legislative Council (LegCo) under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). The amended rates effected by such notice could come into effect immediately upon its gazettal, but subject to amendments or repeal by the LegCo. This procedure under which LegCo may amend or repeal the notice in question by resolution after the notice's having taken effect is what is commonly called the "negative vetting" procedure.

3. The proposed section 63A is an empowering provision. Following this provision's enactment, the Administration could amend the rates of SSD and the BSD, that is to increase or decrease the rates, by subsidiary legislation. Otherwise, any amendment to Cap. 117 must be effected by an amendment Bill. Neither Cap. 117 nor the 2012 Bill contains any provision that would compel the Administration to take a particular legislative approach to amend Cap. 117 to effect any change in the rates of SSD or BSD.

4. According to Article 64 of the Basic Law, the Government of HKSAR must abide by the law and be accountable to LegCo. The formal undertaking would be a statement of intention given by a designated official on behalf of the government pursuant to Article 62 of the Basic Law. It is not law and has no legal effect. Should there be a deviation from such undertaking, it would be unlikely to be justiciable in a court of law, but would be a matter for Members of LegCo to pursue through the political process

5. At common law, in the context of use of parliamentary papers as an aid for the interpretation of statutory provisions of obscure or ambiguous meaning, it has been held in the UK House of Lords' case of *Pepper v. Hart* [1993] A.C. 593 that references may be made to statements of a minister or other promoters of a Bill together, if necessary, with such other parliamentary material as is necessary to understand such

statements and their effect. However, since the meaning of the proposed section 63A is unambiguous, that rule has no application to the present situation.

The Honourable Martin LIAO's CSA

6. The proposed CSA by the Honourable Martin LIAO Cheung-kong would allow the rates of SSD and BSD to be amended by FS by notice published in the Gazette. Such amendment would take immediate effect. However, FS is required to move a motion to seek the approval of the notice by LegCo. If such a motion is not passed within six months of the date of publication of the notice in the Gazette or is negated by LegCo, the notice will cease to have effect. Upon such cessation, the pre-amendment rates would be restored and any excess of stamp duty paid must be refunded to the payer and any shortfall of stamp duty will have to be paid within 30 days of such cessation. The Administration has not raised any legal or drafting issues on the proposed CSA.

Prepared by

Legal Service Division
Legislative Council Secretariat
17 February 2014