



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2761 7444)

20 February 2013

Mrs Vicki Kwok
Principal Assistant Secretary (Housing) (Private Housing)
Housing Department
Private Housing Sub-division
Housing Authority Headquarters
33 Fat Kwong Street
Ho Man Tin
Kowloon

Dear Mrs Kwok,

Stamp Duty (Amendment) Bill 2012

I enclose herewith some questions on the legal aspects of the Stamp Duty (Amendment) Bill 2012 and would be grateful if you could let me have your reply in bilingual form before 27 February 2013.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

Encl

c.c. LA
CCS(1)3

Stamp Duty (Amendment) Bill 2012

"Acting on his or her own behalf"

1. Proposed section 29CB(2) of the Bill provides that a chargeable agreement for sale is not chargeable with buyer's stamp duty ("BSD") if it is shown to the satisfaction of the Collector of Stamp Revenue ("the Collector") that the purchaser, or each of the purchasers, under the agreement is a Hong Kong permanent resident ("HKPR") "acting on his or her own behalf".
2. Please advise what evidence is required to be produced by a purchaser to show that he or she is acting on his or her own behalf.
3. Please also explain the application of the requirement of "acting on his or her own behalf" in other provisions of the Bill.

Trustee and guardian - definition

4. The effect of proposed section 29CB(8) seems to be that BSD will be exempted if a purchaser or vendor under a chargeable agreement for sale is acting as a trustee or guardian for a minor or mentally incapacitated person who is a HKPR. Similar exemption is provided in proposed section 29DB(9) in respect of a conveyance of sale. Please explain the meaning of a "trustee" or a "guardian" in these provisions.

The nature of trust

5. Under the Bill, what evidence is required to be produced by a purchaser or vendor to the Collector to show that -
 - (a) he is a trustee or guardian; and
 - (b) the other person is a mentally incapacitated person?
6. Does the Collector have power in each and every case where a trustee is involved to make enquiries and examine the exact nature and details of the relevant trust?
7. In law, a trust may be classified into at least the following categories -
 - (a) An express trust is created by the express intention of a settlor (whether in writing or not), provided that certain conditions are satisfied.

- (b) In some circumstances, an implied trust arises from the implied intention of the parties where equity infers that a person intended that a trust should come into existence.
 - (c) A resulting trust may also arise solely by operation of law, for example, where upon a purchase of real property, one person provides the purchase money and the conveyance is taken in the name of another, there is then a presumption of a resulting trust in favour of the person providing the money, unless from the relation between the two or from other circumstances, it appears that a gift was intended.
 - (d) There are also circumstances where the law, in order to achieve the ends of equity, constructs a trust where none existed before, no intention, express or implied, having been indicated by a settlor (constructive trust). A constructive trust is imposed by the law irrespective of the intention of the parties, and come into existence when the relevant circumstances arise.
8. A question as to the ownership of a real property commonly arises where the legal title has been conveyed into the name of a spouse or a family member and the other spouse or family members claim, quite often after the conveyance, to be the beneficial owner of the property, for example, as in the Court of Final Appeal cases of *Cheuk Shu Yin v. Yip So Wan & Anor*¹ and *Ling Wing Fai Billy & Others v. Ling Shui Fai & Others*². The issue is further complicated by the law of matrimonial property and/or financial arrangements of the down payment and mortgage repayments.
9. In the cases of *Cheuk Shu Yin* and *Ling Wing Fai Billy*, the Court of Final Appeal reiterated the well established legal principle that a resulting trust or constructive trust come into existence by operation of law *rather than by an intentional act*. In neither of these cases was there an express declaration of trust at the time of the purchase of the relevant properties. In fact, it was not until years later when the matters were respectively brought to court that the trust nature of the arrangements back in the 1980s and 1990s in these cases were confirmed or pronounced by the court.
10. In light of the Court of Final Appeal judgment, please explain the operation of the provisions of the Bill relating to firstly, the requirement of "acting on his or her own behalf", and secondly, trustees in the cases of constructive trust or resulting trust.

¹ FACV No.9 of 2011

² FACV No. 11 of 2011

Void or unlawful trust

11. One of the intended effects of proposed sections 29CB(8) and 29DB(9) seems to be that a chargeable agreement for sale will not be subject to BSD if the purchaser is acting in the transaction as a trustee for a HKPR who is either a minor or a mentally incapacitated person. However, if shortly after the transaction, the purported trust turns out to be void, voidable or unlawful from a legal point of view (which may or may not be due to any premeditated act or omission of the parties involved), what will be the position in respect of the BSD liability? Please explain and illustrate with examples (if possible).

Purchase of replacement property

12. Under proposed section 29CB(4), a non-HKPR purchaser under a chargeable agreement for sale will not be subject to BSD if he is acting on his own behalf and the residential property concerned is acquired to replace another residential property which was acquired by the Urban Renewal Authority, resumed under the Lands Resumption Ordinance (Cap. 124), or sold pursuant to the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545). Please clarify that, in order to enjoy the BSD exemption, whether there is any limit on the consideration for the purchase of the replacement property under the chargeable agreement for sale.