

**The Administration's response to the submission from
the Hon James To Kun-sun of 11 March 2013
(LC Paper No. CB(1)692/12-13(04) refers)**

This paper serves to respond to the submission dated 11 March 2013 from the Hon James To Kun-sun and referred to us by the LegCo Secretariat on 12 March 2013.

Exempting companies owned by Hong Kong permanent residents (HKPRs) from the Buyer's Stamp Duty (BSD)

2. We are aware that there are views that companies of which all shareholders are HKPRs should be exempted from the BSD. We would like to emphasise that such a proposal would create loopholes and seriously undermine the effectiveness of the BSD in achieving the policy objectives of cooling down the property market and according priority to HKPRs in addressing their home ownership needs. First of all, in law, a company is an entity independent of its shareholders. Under the legal framework of Hong Kong, we have all along distinguished companies by whether they are established locally or overseas, instead of making reference to the HKPR status of shareholders. To identify a company for the exemption from the BSD on the basis of the HKPR status of its shareholders will cause confusion to the fundamental legal principle under company law that "a company is an entity independent of its shareholders".

3. Besides, if companies are exempted from the BSD, it would lead to the problem that HKPR shareholders may circumvent the BSD through transferring property entitlement to non-HKPR shareholders by various means. Such ways include nomination, declaration of trust or authorisation, allotment of new shares, or issue of new class of shares, etc. Upon the completion of entitlement transfer, the original shareholders may appear to remain as shareholders of the company. In reality, however, the control of the company has been transferred to someone else. As there is no way for the Inland Revenue Department (IRD) to be informed of such transfer of entitlement, even if the self-declaration mechanism as proposed by some Members is in place, the IRD will not be able to carry out investigations to safeguard the mechanism from being abused.

4. We are not assuming that all companies would abuse the self-declaration mechanism proposed by some Members to circumvent the BSD. However, as a responsible Government, we cannot simply ignore the obvious loopholes that may be created by exempting companies from the BSD, which would undermine the effectiveness of the measure in cooling down the property market and according priority to HKPRs in addressing their home ownership needs.

5. We are also concerned about the impact of exempting companies from the BSD on the effectiveness of the various demand-side management measures which the Administration has introduced. The enhanced Special Stamp Duty, the introduction of the BSD and the increase in the ad valorem stamp duty rates (AVD) target at different demands of different buyers. These measures are interrelated and work collectively to achieve the objectives of combating speculations and managing demand. Under the AVD regime, in determining whether a HKPR has possessed more than one residential property and hence subject to AVD, the residential property(ies) held by that HKPR in the name of a company would not be taken into account. If companies of which all shareholders are HKPRs were to be exempted from the BSD, those who wish to possess more than one residential property might simply purchase a residential property in the name of a company without the need to pay the BSD, and at the same time can also circumvent the AVD. If so, this would seriously undermine the effectiveness of the AVD regime. These persons would be able to completely avoid the BSD and AVD, which would be inconsistent with the policies behind the series of demand-side management measures and seriously undermine the effectiveness of these measures in achieving their objectives.

6. Regarding the situation raised by the Hon James To under which the purchase of a residential property by a company formed by close relatives would still be subject to the BSD, we would like to point out that under the Stamp Duty (Amendment) Bill 2012 (the Bill), joint purchase of a residential property by close relatives has already been exempted from the BSD. However, for reasons set out above regarding our concern of exempting companies from BSD, if a residential property is purchased in the name of a company, the BSD would be chargeable regardless of whether the shareholders are all close relatives, or whether they include both HKPRs and non-HKPRs.

7. We would like to emphasise that the demand-side management measures, including the BSD, are extraordinary measures introduced in response to the present exceptional circumstances. We will continue to closely monitor the private residential property market and consider withdrawing these measures when the supply and demand regains balance.

Section 29CB(8) of the Bill

8. A buyer who applies for exemption from the BSD under the proposed section 29CB(8) of the Bill will be required to provide documentary evidence, such as a valid and legally binding trust instrument, a court order or guardianship order pursuant to the Mental Health Ordinance (Cap.136), a birth certificate (for minor cases), etc. to certify his/her capacity as a trustee or guardian in the transaction under concerned.

9. To prove that one is acting on behalf of a HKPR who is a minor or a mentally incapacitated person, the buyer will be required to make a statutory declaration to the effect that he/she is acting for that minor or mentally incapacitated person in the capacity of his/her trustee or guardian. If the circumstances warrant, the Collector of Stamp Revenue (the Collector) may require the buyer to provide further evidence, such as source of funds for payment of consideration, to substantiate that he/she is acting on behalf of a minor or a mentally incapacitated person in the transaction.

Section 29DB(15) of the Bill

10. The Stamp Duty Ordinance (Cap.117) does not define “spouse”, “parent”, “child”, “brother” or “sister”. For the purposes of BSD, the Collector will adopt the ordinary meaning and accept persons who are blood-related, half blood-related, and also persons who have adoption or step relationship, as parents, children, brothers or sisters as appropriate. Following the above principle, a HKPR couple and their child/step child will be exempted from the BSD if they jointly acquire a residential property. However, a parent-in-law and a son-in-law will not be accepted as parent and child. Hence, BSD will be chargeable if a HKPR purchases a residential property with his non-HKPR father-in-law.

Information on non-HKPR and company buyers

11. IRD does not have information on the nationality of the 166 individual buyers (as at January 2013) who were non-Hong Kong identity card holders and purchased residential properties after the BSD was announced. Among the 454 transactions involving purchase of residential properties by company buyers, 427 of them are Hong Kong companies whereas 27 of them are overseas companies. IRD also does not have information on the place of incorporation of the overseas companies.

Transactions involving share transfer of “property holding companies”

12. According to the Inland Revenue Ordinance (Cap 112), profits tax is charged on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong from such trade, profession or business (excluding profits arising from the sale of capital assets).

13. IRD does not maintain information on the total number of cases involving share transfer of “property holding companies”, nor does IRD have a breakdown of those cases by types of properties (i.e. residential vis-à-vis non-residential). This is because for the purpose of share transfer of companies (be it a “property holding company” or not), IRD only uses the total assets owned by the company as the base to assess the stamp duty payable. For stamp duty purposes, duty payers submitting the transfer instruments for stamping are not required to state the type of landed properties held by the company concerned. To ensure that profits derived from property speculations are duly taxed, IRD has started collecting statistics on suspected property speculation cases in the form of share transfer since April 2010. In deciding whether the transaction concerned is chargeable to profits tax, IRD will consider all relevant facts of the case, including the circumstances leading to the purchase and sale of shares, motive, financial arrangement, mode of operation, frequency of transactions, the period of holding, etc. In 2010-11 and 2011-12, IRD respectively charged 22 and 7 confirmed share dealing cases to profits tax. The rest of the share transfer cases mainly involved share transfers between associated companies and cases not of any trading nature, and thus are not chargeable to profits tax.

Special Stamp Duty cases involving resale within six months

14. As to the Hon James To's request for the detailed information regarding each of the SSD cases involving resale within six months, we consider that the particulars of individual cases would not help reflect the effectiveness of the SSD. We have all along been compiling overall statistics in respect of SSD cases for reviewing the effectiveness of the SSD. It is also our usual practice to inform the public of the review result instead of the particulars of individual SSD cases to avoid these cases being misinterpreted. In fact, we have already provided the overall statistics in respect of the SSD (Annex I to LC Paper CB(1)511/12-13(02) and Annex to LC Paper CB(1)715/12-13(01) refer) and evaluated the effectiveness of the SSD in combating short term speculative activities.

Transport and Housing Bureau
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