

**Written Submissions**

**By**

**THE HONG KONG CONVEYANCING &  
PROPERTY LAW ASSOCIATION LIMITED**

**on**

**Stamp Duty (Amendment) Bill 2013  
("2013 Bill")**

**3 June 2013**

## **Submissions on**

### **Stamp Duty (Amendment) Bill 2013 ('2013 Bill')**

1. Our Association notes the further measures in the 2013 Bill to address the overheated property market, namely, to double the rates for ad valorem stamp duty (AVD) on transactions both for residential and non-residential properties (in fact, about 300 times increase for properties up to HK\$2,000,000); to advance the charging of AVD on non-residential property transactions from the conveyance on sale to the agreement for sale, to tally with the existing arrangement for residential properties; and to empower the Financial Secretary (FS) to adjust the value bands and existing and proposed AVD rates by way of subsidiary legislation subject to negative vetting by the LegCo (**“2013 measures”**).
2. We had the benefit of reading the submissions dated 30 April 2013 of The Law Society of Hong Kong on the 2013 Bill. It well represents the major concerns of the legal profession in relation to the 2013 Bill to which we are in full support and agreement.
3. We are also in agreement with advancing the charging of AVD on non-residential property transactions from the conveyance on sale to the agreement for sale, to tally with the existing arrangement for residential properties.
4. We also find no problem with empowering the Financial Secretary

(FS) to adjust the value bands and existing and proposed AVD rates by way of subsidiary legislation subject to negative vetting by the LegCo.

5. In this paper, we have the following submissions on the 2013 measures under the 2013 Bill, mainly on doubling the AVD rates.

### **Justifications**

6. We note the Government's stated prevailing policy of according priority to the housing need of HKPRs and that the proposed increase in AVD rates under the 2013 Bill are not intended to be revenue-generating measures.
7. However, we note that the **enhanced Special Stamp Duty (SSD) and Buyer's Stamp Duty (BSD) ("2012 measures")** were only announced on 27 October 2012, and **were only introduced into LegCo on 9 January 2013** under the **Stamp Duty (Amendment) Bill 2012 ("2012 Bill")**.
8. Within a very short span of about 6 weeks from 9 January 2013, the Government suddenly introduced the 2013 measures on 23 February 2013.
9. From the **Legislative Council Brief (File Ref.: TsyB R 183/700-6/5/0 (C) ) ("2013 LegCo Brief")**, we do not find a good analysis of the effectiveness of the 2012 measures apart from a claim that *'the two measures have effectively reduced short-term resale by speculators and the purchase of residential properties by buyers who are not HKPRs. The upward momentum in flat prices was*

*temporarily arrested and transactions plunged sharply in November and December 2012.’ However, it immediately followed with observations that ‘on entering 2013, there were renewed signs of exuberance in the residential property market ...(and) of overheating in the non-residential property market’.*

10. As such, were the 2012 measures effective after all? If so, why were there ‘*renewed signs of exuberance in the residential property market ...(and) of overheating in the non-residential property market*’ in such a short period? If not, were there sufficient justifications for retention of the 2012 measures? Further, were there sufficient justifications for introduction of yet further drastic 2013 measures, more particularly, doubling the AVD rates?
11. **Assuming the Government has valid justifications for the 2012 and 2013 measures in short succession, we request the Administration to clarify all these questions and to provide a proper analysis to enlighten the LegCo Bills Committee and the public of the same to enable all parties to properly consider the 2012 and 2013 Bills in totality. If these are not forthcoming, we are afraid that we will not be able to support and may instead have to object to the same.**

### **Too complicated regime**

12. Even if properly justified, the 2012 and 2013 measures introduced too complicated regimes in short succession.
13. Firstly, instead of a simple charging scheme, there are just too many

exemptions: HKPRs who are NOT owners of ANY other residential property in Hong Kong and who are acting on his/her own behalf, HKPRs who are minors and mentally incapacitated persons, acquisition and transfers between close relatives, nomination of close relatives (previously exempt from all AVD, now payable at the old AVD rates), and others (*2013 LegCo Brief paragraphs 9-14*). Some of these are exemptions from the new AVD rates, for which the old AVD rates apply, and some are exempt from all AVD.

14. In our submissions on the 2012 Bill (5 February 2013), we had already alerted to the difficulties for lawyers to ascertain whether or not an identity card is valid unless they write to the Commissioner of Registration for verification, and as to whether or not the client is purchasing the property on his /her own behalf or on behalf of another person.
15. As such, it is not easy for practitioners to ascertain who are exempt from the new AVD rates and can just pay at the old AVD rates, and who are exempt from all AVD without going into details of the personal relationships of their clients which many regard as their privacy.
16. The Administration repeatedly stresses that it does not consider that there will be an undue burden on the solicitors and the banks to verify the purchaser's residency status and his/her his / her capacity in a residential property transaction. (*Administration's response to our said submissions amongst others on the 2012 Bill, at page 20, Issue 24*). For instance, it says that 'the purchaser's residency status (i.e.

*whether he / she is a HKPR) and his / her capacity in a residential property transaction (i.e. whether he / she acts on his / her own behalf or as trustee for other(s)) are key determinant of whether the transaction is subject to the BSD. The residency status and capacity of a person are to a certain extent matters within his personal knowledge, the Administration proposes to require all HKPR buyers who act in the transactions on their own behalf, or all trustees and guardians acting for minors or mentally incapacitated persons, to declare the same by way of statutory declarations. This proposal strikes the right balance between the efficiency of the stamping system and the proposed statutory requirement that the Collector has to be satisfied with the purchaser's residency status and acting capacity before accepting the property transaction as not subject to the BSD.'* (*Administration's response to our said submissions amongst others on the 2012 Bill, at page 18, Issue 22*)

17. However, we consider that there are various problems with the Administration's proposal to require all HKPR buyers to make statutory declarations in order to claim exemption.

### **Problems with statutory declarations**

18. Under the **Law Society Professional Guide** on administration of oaths and declarations (*Volume 1, paragraph 13.09*), solicitors **cannot** take declarations in both contentious and non-contentious matters in which he or his firm is acting for any of the parties, or is other interested. Please refer to the attached extract of the Guide

which is also available at this link:  
[http://www.hklawsoc.org.hk/pub\\_e/professionalguide/volume1/default.asp?cap=13.1.9](http://www.hklawsoc.org.hk/pub_e/professionalguide/volume1/default.asp?cap=13.1.9).

19. The Administration has not addressed to our submissions that thousands of HKPR who has bought residential properties in the interim period will have to make arrangements to make the requisite statutory declarations within the short period of 30 days after the Amendment Ordinance is published in the Gazette so as to satisfy the statutory requirements.
20. As a result, solicitors will have to arrange with other firms for taking such declarations for their clients within a very short period of time. Most solicitors are prepared to take declarations for our professional brethren at no charge out of professional courtesy, but if it increases to more than a few in short periods, some may feel being exploited.
21. The Administration also said nothing in response to our submissions that 'Title deeds of the relevant transactions already delivered to the purchasers or mortgagees for safe custody in the meantime may have to be retrieved for BSD stamping purpose. All these procedure will incur unnecessary wastage of time and costs.'
22. The same problems and difficulties will arise from the 2013 measures.
23. There are further problems as to whether or not such statutory declarations form part of the title deeds, whether or not these have to be produced by the vendors to the purchasers, how the purchasers' solicitors can verify that the Collector has been satisfied that a

transaction is not subject to BSD and/or new AVD rates without production of the relevant statutory declarations, how an owner can prove to his subsequent purchaser that he had been properly exempted from BSD and/or new AVD without production of the relevant statutory declarations, and whether or not such non-production can affect title to the properties.

24. **We therefore urge the Administration to properly address and provide a workable solution for all these problems with statutory declarations for consideration by all parties.**
25. **Without prejudice to our position** against a complicated charge regime with numerous exemptions for HKPRs, **if certain exemptions are inevitable, we tentatively propose to require ALL purchasers, including non-HKPRs, to declare in the body of the transaction documents (whether agreement for sale, conveyance on sale or others), the facts in relation to whether or not there is a liability to pay BSD, new AVD rates and enhanced SSD on the relevant transactions.** This will be somewhat similar to the certificates for such documents under say **Sections 29 and 29G of Stamp Duty Ordinance (Cap.117).** Corresponding stamps, perhaps of different designs, on a deed will enable solicitors to ascertain from the deed itself as to whether or not a particular transaction is properly exempted and/or paid for any of the new stamp duties, and if so, on what basis.



**HKPRs cannot have more than one property without incurring additional stamp duty**

26. We note that the exemption for a HKPR from the new AVD rates is conditional upon his purchasing residential property on his/her own behalf, AND he/she is NOT a beneficial owner of ANY OTHER residential property.
27. In Hong Kong, many people may wish to own more than one property for various reasons, say to live in one and keep another one for long-term investment purposes or for retirement.
28. We also note that the younger generations cannot afford acquiring their own properties in view of the high market prices. Some parents may help in various ways, including teaming up as joint owners with their child /children. We are not concerned as to whether or not such practice is correct or is to be encouraged or discouraged. The fact that such practice exists means that there is a need for families to have such arrangements for the future. It would not be right to expect or ask the parents just to offer financial assistance without safe-guarding their interests by putting their names as owners of their second and other properties.
29. This conditional exemption seriously prevents HKPRs to have long-term plans for the future which may result in a corresponding increase in the public's reliance on the Government in other areas. It also seriously prevents parents from helping their children, and/or other close relatives, to acquire a home, since a second or other property in the name of the parents, whether jointly with their

children, and/or other close relatives, will attract the new AVD rates.

30. The restriction that the HKPR must not own ANY OTHER residential property is unduly harsh on all HKPRs and the young generations, and may lead to further impatience with the Government and even other social problems.
31. In the cases above, the HKPRs acquiring second and other properties, even for those at the low end of the property market up to HK\$2,000,000, would attract stamp duty at new AVD rates of 1.5% of the property value, that is about 300 times increase from HK\$100 to HK\$30,000. This effectively put these properties beyond the reach of those HKPRs who may need them most.
32. **Having regard to the Government's stated prevailing policy of according priority to the housing needs of HKPRs, we would strongly urge that serious re-consideration be given to scrapping the totally unnecessary conditional requirement that the HKPRs must not own ANY OTHER residential property before enjoying the exemption.**

**Pursuant to a decree or court order**

33. **Under Section 29BE in the 2013 Bill, an agreement for sale is chargeable with stamp duty at the old AVD rate if it is shown to the satisfaction of the Collector that the agreement is made pursuant to a decree or order of any court.**
34. As shown in the **attached sample of a Consent Summons** filed in the Family Court of Hong Kong, for some cases the Family Court

makes an order for the transfer of real property in the form of an undertaking from one of the parties to Court (see (B) on page 3) rather than in the body of the Orders appearing after “IT IS ORDERED BY CONSENT that”. Although such Consent Summonses would be made an Order of the Court embodying the undertakings in due course, **we would request the Administration to clarify whether or not transfers of properties made pursuant to undertakings in a decree or order of any court, such as that made by the Respondent in the sample, could be regarded as made 'pursuant to a decree or order of any court'.**

#### **Sunset clauses required**

- 35. Even if the Government can justify the 2012 and 2013 measures introducing very complicated regimes in short succession, it can only support extraordinary measures in extraordinary times. We therefore urge the Government to include sunset clauses with statutory duties to conduct regular reviews on the effectiveness of the said measures instead of keeping them in the legislation without a time limit.**

We reserve the right to make further submissions on the Bill if necessary.

**The Hong Kong Conveyancing &  
Property Law Association Limited**

**June 2013**



## Guide to Professional Conduct Vol. 1

**CHAPTER 13 - RELATIONS WITH THIRD PARTIES****13.09 WHEN AN OATH MUST NOT BE ADMINISTERED**

A solicitor must not administer oaths and affirmations nor take declarations in proceedings or matters in which he or his firm is acting for any of the parties, or is otherwise interested. This principle does not apply where a solicitor is taking declarations in his capacity also as a China-Appointed Attesting Officer ("CAAO") for the purpose of such declarations being used in Mainland China or pursuant to the applicable laws regulations or administrative directions of any competent authority for purpose(s) connected with Mainland China, provided that a note stating such purpose of the declarations should be endorsed thereon.

**Commentary**

1. This principle applies to both contentious and non-contentious matters.
2. Because the administering of oaths and affirmations and the taking of declarations involve the discharge of a public office, this principle would, for example, prevent a solicitor from administering oaths and affirmations or taking declarations in the following circumstances:
  - (a) a solicitor must not take affidavits regarding proofs in bankruptcy when acting for a proving creditor or regarding the winding-up of an estate when acting for the personal representative of the testator;
  - (b) a solicitor who is employed part-time by another solicitor must not administer oaths for a client of such other solicitor;
  - (c) a solicitor who is in the full or part-time employment of a company must not administer oaths in matters in which the company is concerned.
3. This principle applies only to statutory declarations taken by a CAAO and not to oaths or affirmations.
4. See also Circulars 90-45 and 95-52.

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IN THE DISTRICT COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
MATRIMONIAL CAUSES NO. [REDACTED] OF [REDACTED]

BETWEEN

[REDACTED]

Petitioner

and

[REDACTED]

Respondent

CONSENT SUMMONS

LET ALL PARTIES CONCERNED attend before His/Her Honour  
Judge [REDACTED] in Chambers sitting at the Family Court, Wanchai  
Tower, No.12 Harbour Road, Hong Kong, on [REDACTED] day, the [REDACTED] day  
of [REDACTED] 2012 at [REDACTED] o'clock in the [REDACTED] noon on the hearing of  
a joint application of the Petitioner and the Respondent for an order BY CONSENT  
that :-

UPON the Petitioner and the Respondent acknowledging and agreeing :-

- (i) that Messrs. [REDACTED] only acts for the Petitioner and the  
Respondent has been advised to seek independent legal advice regarding

this suit, the custody and the question of ancillary relief;

- (ii) that the parties are aware of their respective legal rights as to the disclosure and discoveries of their means and they have agreed to dispense with any disclosure and discovery as to the means of each other;
- (iii) save and except the entitlements specified herein, the parties have agreed to waive all the other claims the parties may have (save for the interest of the children of the family) against each other or his/her estate for maintenance pending suit, periodical payments, lump sum payment, transfer of property and variation of settlement orders including claims arising under the Matrimonial Causes Ordinance Cap.179, the Matrimonial Proceedings and Property Ordinance Cap.192, Married Person Status Ordinance Cap.182, Inheritance (Provision for Family and Dependents) Ordinance Cap.481 and all other relevant ordinances; and
- (iv) for avoidance of doubt and subject to any contrary provision contained herein, all investments and other assets which are presently in the party's sole names shall remain undisturbed and retained absolutely by the party concerned.

**AND UPON** the Petitioner and the Respondent agreeing with each other and undertaking to this Court that :-

- (A) the Respondent shall not make and cause to be made any charge or encumbrance against the Property situate at Flat [REDACTED], [REDACTED] Floor, Block [REDACTED] and Carpark No. [REDACTED] at Car Park [REDACTED]

[REDACTED] Hong Kong (hereinafter referred to as the "Property") and shall indemnify the Petitioner for any loss damages and/or liability arising out of any charge or encumbrance which may have been made or caused to be made by the Respondent in respect of the Property until the transfer of the Property in the manner hereinafter mentioned in Paragraph (B);

- (B) The Respondent do within 2 months from the date of this Consent Summons transfer all his estate right title benefit and interest of the Property free from any mortgage, charge or encumbrances to the Petitioner absolutely;
- (C) the Respondent do solely bear all stamp duty, legal costs and expenses of and incidental to the transfer of the Property hereinafter mentioned in Paragraph (B);
- (D) The Respondent shall within 1 month from the date hereof pay a lump sum of HK\$ [REDACTED] to the Petitioner.

**IT IS ORDERED BY CONSENT that:-**

1. The Petitioner be granted the custody, care and control of the children of family, namely, [REDACTED] a girl born on [REDACTED] and [REDACTED] a boy born on [REDACTED] (the "Children") with reasonable access given to the Respondent;

2. The Respondent do pay to the Petitioner periodical payment at the rate of HK\$[REDACTED] per month commencing from the date of the Order to be made and thereafter payable on the 1st day of each and every succeeding month during joint lives of the parties, or until Petitioner's remarriage, whichever is the shorter;
3. The Respondent do pay to the Petitioner for the benefit of the Children of the family at the rate of HK\$[REDACTED] per month each child and in total sum of HK\$[REDACTED] with effect from the date of the Order to be made and be payable on the 1st day of each and every succeeding month until he/she/they shall respectively attain the age of 18 years or shall cease to receive full-time education whichever shall be the later or until further Order of the Court;
4. Upon the fulfillment of the terms as contained herein, the Petitioner's and the Respondent's claims (if any) for property transfer orders and/or lump sum orders shall stand dismissed and neither the Petitioner nor the Respondent shall be entitled to make further application under the Matrimonial Proceedings and Property Ordinance;
5. The first appointment for all the question relating to ancillary relief of this suit on [REDACTED] at 11:00 a.m. be vacated;



6. This Consent Summons shall supersede the Consent Summons entered into between Messrs. [REDACTED] on behalf of the Petitioner and the Respondent acting in person dated 21<sup>st</sup> April 2012; and

7. There be no order as to costs in relation to this application and of this suit.

Dated this                      day of                      2012.

Registrar

We, the undersigned do hereby consent to this Consent Summons being made an order in term:

\_\_\_\_\_  
[REDACTED]  
The Petitioner

\_\_\_\_\_  
Messrs. [REDACTED]  
Solicitors for the Petitioner

\_\_\_\_\_  
[REDACTED]  
The Respondent

This Summons was taken out by [REDACTED] of [REDACTED]  
Building, [REDACTED] Queen's Road Central, Hong Kong, Solicitors for the Petitioner.

FCMC

/2012

IN THE DISTRICT COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
MATRIMONIAL CAUSES NO.        OF 2012

\_\_\_\_\_  
BETWEEN

\_\_\_\_\_

Petitioner

and

\_\_\_\_\_

Respondent

\*\*\*\*\*

CONSENT SUMMONS

\*\*\*\*\*

Filed on the                      day of                      2012.

Messrs. \_\_\_\_\_  
Solicitors for the Petitioner  
Room \_\_\_\_\_  
\_\_\_\_ Queen's Road Central,  
Hong Kong.  
Tel : \_\_\_\_\_  
Fax: \_\_\_\_\_

Ref. : \_\_\_\_\_