

**President's ruling on the Committee stage amendments
proposed by Hon Kenneth LEUNG and Hon James TO to
the Stamp Duty (Amendment) Bill 2013**

Hon Kenneth LEUNG and Hon James TO have given notice to move Committee stage amendments ("CSAs") to the Stamp Duty (Amendment) Bill 2013 ("the Bill"), if the motion on the Second Reading of the Bill is passed at the Legislative Council ("LegCo") meeting of 9 July 2014. In considering the admissibility of the CSAs under the Rules of Procedure, I invited the Administration to comment on the CSAs and Hon Kenneth LEUNG and Hon James TO to respond to the Administration's comments.

The Bill

2. According to the Explanatory Memorandum of the Bill, the main object of the Bill is to amend the Stamp Duty Ordinance ("SDO") (Cap. 117) to increase the stamp duty on certain instruments dealing with immovable property, and to make agreements for sale of non-residential property chargeable with stamp duty.

3. One of the proposals in the Bill is to adjust the ad valorem stamp duty ("AVD") rates by doubling across the board the AVD rates applicable to both residential and non-residential properties. The Bill provides for exceptions for application of the new AVD rates ("doubled AVD") to residential property acquired by Hong Kong Permanent Residents ("HKPRs") under specified conditions. The Bill also provides for partial refund of AVD on disposal of residential property in certain specified circumstances and acquisition of property for the purpose of redevelopment. According to the LegCo Brief, the new measures proposed in the Bill aim to further address the overheated property market.

Hon Kenneth LEUNG's proposed CSAs

4. Hon Kenneth LEUNG's proposed CSAs seek to amend clause 18 of the Bill to provide partial refund of AVD for transaction of non-residential property subject to doubled AVD if some specified conditions are satisfied. These conditions are (a) the non-residential property is acquired by a Hong Kong incorporated company or a HKPR ("the applicant"); (b) the applicant has continuously used the non-residential

property solely for the purpose of carrying on the applicant's trade, profession or business in Hong Kong for not less than three years from the date of acquisition ("the Relevant Period"); and (c) an application for refund is made by the applicant not later than two years after the expiry date of the Relevant Period. If the Collector of Stamp Revenue ("the Collector") is satisfied that the specified conditions are met, the Collector may refund an amount equal to the difference between AVD and doubled AVD to the applicant.

5. The expressions of "trade" and "business" are defined in the proposed CSAs. The effect is to include every trade and manufacture, every adventure and concern in the nature of trade, every type of business and a trade or business carried on by any charitable institution or trust of a public character which is exempt from tax under section 88 of the Inland Revenues Ordinance (Cap. 112), but excluding the letting or sub-letting to any person of any premises or portion thereof, and the sub-letting of any premises or portion of any premises held under a lease or tenancy.

The Administration's views

6. The Administration submits that the proposed CSAs, if implemented, will have a charging effect within the meaning of Rule 57(6) of the Rules of Procedure.

7. In the Administration's view, there is no prevailing policy for AVD refund under the existing Cap. 117. The refund mechanism proposed in the Bill is confined to the limited circumstances of HKPRs acquiring a new residential property before disposing of their original one. The refund mechanism under Hon Kenneth LEUNG's proposed CSAs is applicable to non-residential properties across the board and additional to what has been proposed in the Bill. Therefore, the CSAs impose a statutory duty which is beyond Inland Revenue Department ("IRD")'s current duties and functions and those arising from the proposals in the Bill.

8. The Administration further submits that to discharge the new and distinct function, IRD would need to deploy additional staff and resources to verify the relevant facts of each application in order to ascertain whether the refund conditions are satisfied. In 2013-2014, about 23 000 non-residential property transactions involved buyers who are Hong Kong identity card holders or Hong Kong companies, and 34% of the non-residential properties were resold within three years after

acquisition. With reference to these figures, the Administration estimates that about 15 000 cases will be entitled to refund each year and seven additional assessor grade staff and four additional clerical grade staff will be needed for processing the refund cases, incurring additional staff cost of about \$6 million a year.

Hon Kenneth LEUNG's response

9. Hon Kenneth LEUNG does not agree with the Administration's views.

10. Hon Kenneth LEUNG contends that under the existing stamp duty regime under Cap 117, a number of refund/remission provisions have existed, including section 29DD on refund of buyer's stamp duty ("BSD") in case of redevelopment, and section 52 on remission of stamp duty. The proposed sections 29DE and 29DF in clause 18 of the Bill also provide for refund mechanisms. Mr LEUNG considers that the administration of refund is neither novel nor cumbersome to IRD.

11. Hon Kenneth LEUNG further submits that the refund under his proposed CSAs will not be granted lightly. In applying for refund, applicants have to prove the fulfillment of the conditions as stipulated in the CSAs to satisfy the Collector. In his view, IRD over-estimates the number of cases entitled to refund each year, as 66% of non-residential property which is not resold within three years after acquisition does not represent the actual figure for refund applications, given the proposed exclusion of non-residential property which is let or sublet wholly or partly under his CSAs. The additional public expenditure incurred is expected to be insignificant.

12. Hon Mr Kenneth LEUNG also argues that the word "object" used in Rule 57(6) of the Rules of Procedure must be construed as the main object and not as an ancillary purpose. The object of his proposed CSAs is not to dispose of or charge any part of the revenue or other public moneys of Hong Kong but to promote the trade and business of Hong Kong and establish a stamp duty refund mechanism for entrepreneurs operating a genuine trade or business in Hong Kong. Any insignificant increase in the Administration's manpower to administer the proposed refund mechanism will be offset by an increase in revenue which the mechanism will bring by attracting more business to Hong Kong.

Hon James TO's proposed CSAs

13. Hon James TO proposed a number of CSAs to the Bill which seek, among other things, to:

- (a) amend the proposed section 29AD in clause 9 to expand the meaning of closely related persons to cover “specified in-law” which means the spouse of a person’s child or the parent of a person’s spouse, insofar as exemptions from stamp duty on immovable property for closely related persons are concerned; and
- (b) amend the proposed section 29AJ and add section 29AJA in clause 10, and amend the proposed section 29BB and add section 29BBA in clause 13 to restrict exemption from doubled AVD to only one residential property (with or without a car parking space) in the event that a HKPR, who acts on his or her own behalf and is not a beneficial owner of any other residential property in Hong Kong, acquires more than one residential property under a single instrument, and to make the restricted exemption applicable to acquisitions jointly by one, or more than one, HKPR and one, or more than one, non-HKPR who are closely related.

The Administration's views

14. The Administration submits that Hon James TO's CSAs, if implemented, will have a charging effect within the meaning of Rule 57(6) of the Rules of Procedure.

Hon James TO's proposed CSAs to section 29AD

15. The Administration contends that currently, residential property transactions involving “specified in-laws” are subject to AVD, Special Stamp Duty (“SSD”) and BSD. Exemption from SSD and BSD is available only for closely related persons covering parent, spouse, child, brother or sister. Hon James TO's CSAs will have the effect of exempting residential property transactions involving “specified in-laws” from all kinds of stamp duty on immovable property.

16. The Administration finds it difficult to come up with an exact estimate of revenue loss resulting from the implementation of the CSAs, as IRD does not have a statistical breakdown of residential property transactions by the family relationship among the transaction parties. Its assessment is that the revenue loss would be material and not nominal, with reference to the average amount of stamp duty collected from each residential property transaction since the introduction of doubled AVD on 23 February 2013. From that day to 31 March 2014, the number of residential property transactions subject to AVD and carried out by individuals was 51 251, and the average amount of AVD collected from each of these transactions was \$169,264.

Hon James TO's proposed CSAs concerning sections 29AJ, 29AJA, 29BB and 29BBA

17. The Administration submits that under Cap. 117, stamp duty is chargeable on an instrument basis. For an instrument involving residential properties only, the concerned properties are regarded as a single transaction, irrespective of the number of the properties covered therein. There is no prevailing policy and statutory requirement for IRD to verify the number of residential properties involved as declared by the applicants in the stamping requests in the event that an instrument involves more than one residential property. In the Administration's view, Hon James TO's proposed CSAs require the verification of the number of residential properties involved for the purpose of restricting the exemption from doubled AVD to only one residential property in an instrument, and therefore have the effect of imposing a new and distinct function on IRD which is beyond its current duties and functions.

18. The Administration further submits that to discharge the new and distinct function, it is expected that an additional staff cost of more than \$4 million a year will be incurred for examining about 38 000 cases each year to verify whether the relevant instruments contain only one residential property and for handling disputes from applicants.

Hon James TO's response

19. Hon James TO contends that his proposed CSAs to include "specified in-law" in the definition of "closely related persons" under section 29AD will not result in loss of the Government revenue. The reasons are that the definition does not apply to SSD and BSD and the proposed doubled AVD has yet to be implemented.

20. Hon James TO also contends that his CSAs on restricting exemption from doubled AVD to only one residential property in a single instrument do not impose a new and distinct function on IRD. The Administration has proposed to add new sections 29AJA and 29BBA to clauses 10 and 13 respectively under which IRD has to check the number of residential properties involved in each instrument. Moreover, under the proposed section 29AL concerning property acquired in replacement of property disposed of under the specified ordinances, the purchaser of the replacement property is exempt from doubled AVD. In these cases, IRD has the duties to ascertain the number of properties transferred or purchased in the relevant instrument because only one replacement property is allowed for one property disposed of. Hon James TO therefore contends that his CSAs will not impose a new and distinct function on the Administration.

21. On the estimated number of cases to be handled by IRD, Hon James TO submits that according to the Administration's response to his enquiries at the Bills Committee on Stamp Duty (Amendment) Bill 2013¹, the number of transactions involving multiple residential properties covered by a single instrument were 5 511, 6 622 and 3 448 in the 2011-2012, 2012-2013 and 2013-2014 financial years respectively. Accordingly, he expects that the actual number of such cases that IRD needs to handle should be far less than the IRD's estimate of 38,000 cases per year.

My opinion

22. Under Rule 57(6) of the Rules of Procedure, an amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed by, among others, a Member if the Chief Executive consents in writing to the proposal.

23. A clear principle has been established in past rulings that a CSA will have a charging effect within the meaning of Rule 57(6) of the Rules of Procedure if it imposes a new and distinct function on the Administration, i.e. a statutory function which is not provided in the existing law, and the President is satisfied that the performance of the new and distinct function will require the spending of an amount of public

¹ LC Paper No. CB(1)1338/13-14(01)

money that is not nominal or negligible. A CSA will also have a charging effect if it forgoes revenue which may be collected under statutory authority.

Hon Kenneth LEUNG's proposed CSAs

24. I share Hon Kenneth LEUNG's observation that a refund mechanism exists in Cap. 117 and the Bill. Section 29DD in Cap. 117 provides for refund of BSD for acquisition of property in case of redevelopment. The proposed sections 29DE and 29DF in the Bill provides for partial refund of AVD in case of redevelopment and disposal of residential property in certain circumstances if the stipulated conditions have been satisfied.

25. Under the proposed section 29DE in the Bill, a developer could apply for refund of an amount equal to the difference between AVD and doubled AVD if the stipulated conditions have been satisfied. The conditions are: (a) all buildings existing on the immovable property have been demolished and approval of building plans in respect of building works to be carried out on the immovable property has been obtained from the Building authority; or (b) consent to commence foundation work on the immovable property has been obtained. Partial refund of AVD is also provided in the proposed section 29DF on disposal of residential property, provided that the person who has acquired another residential property and car parking space has, within a stipulated period, disposed of the residential property and car parking space that the person originally owned.

26. In my view, the nature of the refund mechanism under Hon Kenneth LEUNG's proposed CSAs is largely the same as that under the proposed sections 29DE and 29DF, as both concern the refund of an amount equal to the difference between AVD and doubled AVD if certain stipulated conditions have been satisfied, and the conditions to be satisfied are objective facts. I am convinced that Hon Kenneth LEUNG's proposed CSAs do not impose a new and distinct function beyond the current duties and functions of IRD and those arising from the proposals in the Bill. His CSAs may therefore be moved.

27. I consider it not necessary to deal with other submissions made by the Administration and Hon Kenneth LEUNG. When making a ruling on the admissibility of amendments proposed by a Member under the Rules of Procedure, I should not consider points of merits or possible notional setting off of expenditure by revenue that may be collected.

Hon James TO's proposed CSAs

Proposed CSAs to section 29AD

28. I have examined the effect of the proposed CSAs on stamp duty collectible on residential property transactions involving closely related persons. Under the existing section 29A(1) of Cap. 117, a nomination or direction that transfers any benefit of the purchaser in respect of a property is not regarded as an agreement for sale chargeable to AVD if, among other things, it is made or given in favour of one, or more than one, person who is a spouse, child or parent of the purchaser. By virtue of the proposed sections 29AB and 29AD in the Bill, the nomination or direction in favour of the purchaser's brother or sister is also not regarded as an agreement for sale chargeable to AVD. Hon James TO's proposed CSAs to section 29AD further extends the range of nominations or directions to those in favour of a specified in-law of the purchaser. Should the proposed CSAs be passed, nomination or direction in favour of a specified in-law of the purchaser that is chargeable to AVD under the existing regime will not be so chargeable.

29. Based on the above analysis, I accept the Administration's contention that there will be loss of revenue on AVD collectible if Hon James TO's proposed CSAs are enacted. I am satisfied that the proposed CSAs will have a charging effect within the meaning of Rule 57(6) of the Rules of Procedure and require the consent in writing of the Chief Executive for them to be moved by the Member.

Proposed CSAs concerning sections 29AJ, 29AJA, 29BB and 29BBA

30. This set of proposed CSAs concerns AVD chargeable on an instrument transferring or purchasing more than one residential property. Under the proposed section 29AJ in the Bill, a conveyance on sale of residential property is chargeable on the current AVD rates when, among other conditions, the transferee on the day of acquisition of the residential property is not a beneficial owner of any residential property in Hong Kong. The current AVD rates are applicable irrespective of the number of residential properties transferred by the conveyance. Hon James TO's proposed CSAs provide that where more than one residential property is transferred by a conveyance on sale, for the purpose of AVD chargeable, each residential property is deemed to be transferred by a separate conveyance on sale and such conveyances on sale are deemed to have been executed in consecutive order. The effect of the CSAs is that only the conveyance of one residential property that comes first in a series of

conveyances will be chargeable at the current AVD rates because a condition for the exemption from doubled AVD is that on the date of the acquisition of the property, the transferee is not a beneficial owner of any residential property in Hong Kong.

31. The new section 29AJA proposed by Hon James TO has the same effect as described in paragraph 31 above in respect of conveyances on sale of residential property together with car parking space. CSAs with the same effect are also proposed by Hon James TO to sections 29BB and 29BBA, and the only difference is that the instrument concerned is an agreement for sale.

32. I share Hon James TO's view that the proposed CSAs do not impose new statutory duties on IRD beyond those arising from the Bill. Under the proposed sections 29AL and 29BD in the Bill, a conveyance on sale or agreement for sale of a property is chargeable at the current AVD rates if the property is acquired to replace another property that the purchaser originally owned but is disposed of under certain ordinances. In each of such cases, IRD must ascertain the number of properties transferred or purchased in the relevant instrument because the exemption from doubled AVD applies on the condition that only one replacement property is allowed for one property disposed of.

33. I note further that Hon James TO's CSAs do not prescribe what IRD must do in respect of an instrument transferring or purchasing more than one property. In its ordinary course of stamping a chargeable instrument, IRD has to know the number of property covered therein and assess the market value of each to ascertain whether any of them is under-valued for the purpose of stamping.

34. In the light of the above analysis, I am convinced that Hon James TO's CSAs will not impose any new and distinct function on IRD beyond its current duties and functions and those arising from the Bill.

My ruling

35. I rule that

- (a) the CSAs proposed by Hon Kenneth LEUNG's are admissible;

- (b) the CSAs to section 29 AD proposed by Hon James TO have a charging effect within the meaning of Rule 57(6) of the Rules of Procedure, and require the consent in writing of the Chief Executive for them to be moved; and
- (c) the CSAs concerning sections 29AJ, 29AJA, 29BB and 29BBA proposed by Hon James TO are admissible.



(Jasper TSANG Yok-sing)
President
Legislative Council

7 July 2014