

庫務局的信頭

Letterhead of FINANCE BUREAU

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5 June 1999

Ms Bernice Wong
Assistant Legal Adviser
Legislative Council Secretariat
Legal Service Division
Legislative Council Building
8 Jackson Road
Hong Kong

Dear Ms Wong,

Revenue Bill 1999

I refer to your letter of 29 May. Our response to the queries raised in your letter is set out below in the same order of paragraph numbering of your letter.

Paragraph 2

Deferment of stamp duty payment for sub-sale agreements

Paragraph 10 of Annex A of our response to Members' concerns raised on 13 May 1999 refers to the situation where the third agreement has already been stamped. In the example quoted in paragraph 9 of the paper, the treatment of the three agreements in respect of the deferment of stamp duty payment is the same. If the first agreement is not stamped (and for which security has not been provided), the second purchaser (i.e. Company B) would not be able to apply for deferment of the stamp duty payable on the second agreement. Similarly, for the third purchaser (i.e. Individual C), if the first and second agreements are not stamped (and for which securities have not been provided), he would not be able to apply for deferment of the stamp duty payable on the third agreement. Under such circumstances, Individual C may either -

- (i) request Company A and Company B to stamp their respective agreements or provide securities in lieu; or
- (ii) not to apply for deferment and simply pay the stamp duty payable on the third agreement accordingly.

If Individual C chooses option (ii), section 29D(2)(a) will then come into play by enabling the conveyance on sale executed in conformity with the third agreement to be stamped at the fixed stamp duty of \$100 after which the conveyance can be registered at the Land Registry. Thus, it can be seen that section 29D(2)(a) merely provides a practical and expeditious way to enable a purchaser (or an ultimate purchaser) who has paid the stamp duty on his own agreement to execute a conveyance on sale in conformity with that agreement which can be registered by being stamped with a nominal duty. In other words, section 29D(2)(a) would still be applicable in favour of a purchaser who cannot apply for deferment of stamp duty under section 29C(12).

Paragraph 3

Sub-sale of property while agreement is in the course of registration

2. An agreement which has been endorsed by the Inland Revenue Department (IRD) under the new section 29C(13) and is in the course of registration while a sub-sale occurs will still be required to be stamped seven days after the date of the sub-sale. The treatment to such an agreement is the same as sub-sales which occur in other situations. As a standing practice, stamp duty can be paid to IRD in the absence of the relevant instrument and IRD will issue a certificate of payment accordingly. In the case of late stamping, a penalty under section 9 of the Stamp Duty Ordinance will be imposed subject to IRD's power of remission in appropriate cases. The same arrangement will apply to a body corporate as the banker's undertaking which the body corporate has provided is given to secure payment of the stamp duty but not for payment of penalty. Finally, since no special treatment is given to the cases we have just deliberated, no further express provisions in the Bill are necessary.

Paragraph 4

Obligation to ensure that all other agreements are stamped before proceeding with the conveyancing

3. In the quoted case of *Town Bright Industries Ltd v. Bermuda Trust (Hong Kong) Ltd & Another*, the judge ruled that “[a] failure to ensure that an instrument chargeable with stamp duty is duly stamped does not go to title” (paragraph H on page 457). It therefore follows that a conveyance solicitor, when checking all the transaction documents of the property concerned to ensure that a good title could be passed, does not have to ensure that all such documents are stamped before proceeding with the conveyancing. The case therefore supports our argument that there is a need for us to require banker’s guarantee. We are aware of the usual conveyancing practice for solicitors to insist on stamping of the agreements from which their clients derive title to the property. However, that is founded on a duty of care or contractual duty owed to clients which are subject to varied or contrary instructions by clients, especially in a seller’s market. Even with the deferment of stamp duty payment, the instrument chargeable with stamp duty will be denoted [under the proposed section 29C(13)] instead of stamped before it is registered with the Land Registry. We therefore consider that with the proposal to allow deferment of stamp duty payment, there is a need to institute some requirement which is more definite and legally enforceable in order to protect Government revenue. The proposed banker’s undertaking would precisely provide for this legislative certainty.

Paragraph 5

Agreement for sale and deed of title

4. The observation that a purchaser is entitled to require the production of an agreement for sale for proof of title is agreed. But the question remains that a failure to ensure that an agreement for sale is duly stamped does not go to title (see paragraph 3 above). Besides, under the Conveyancing and Property Ordinance (Cap. 219), the conveyance solicitor’s right to require production of title documents only apply to the period of 15 years prior to the transaction (section 13, *ibid*). Thus, there is the possibility that an unstamped agreement executed outside the 15-year period may not be noticed by the conveyance solicitor.

Paragraph 6***Further comments to the reply to the Assistant Legal Adviser's letter of 16 April 1999***

5. Our comments on the further enquiries are as follows -

Item 7(c) - "Normal circumstances" mean the majority of the cases, which include those with an expected completion date of more than one year from the date of the agreement for sale. In cases where the expected completion date is shorter than one year, IRD may accept an undertaking of a shorter validity period which is sufficient to cover the time required by IRD to recover the stamp duty after the completion date.

Item 7(e) - We do not consider it appropriate to specify in the Bill the time within which IRD will process the application as such time will vary depending on prevailing circumstances such as workload, staffing and other considerations. However, in line with setting a performance pledge on the stamping of documents for property transactions, IRD would consider making a performance pledge on the processing time for application for deferment of stamp duty payment.

The conditions for making an application for deferment of stamp duty payment are clearly and exhaustively stated in the proposed section 29C(12). Accordingly, IRD will only be able to refuse an application upon the non-fulfilment of any of such conditions. We therefore do not consider that the Bill has to provide that the reasons for refusal has to be set out in the notice of decision. In practice, as explained in our response in May 1999, IRD would inform the applicant of the reasons for refusal. Various existing provisions in the Stamp Duty Ordinance empower IRD to refuse claims or applications without requiring it to state the reasons therefor, e.g. a claim for intra-group relief under section 45, or an

application for refund of misused stamps under section 49 or for unwanted adhesive stamps under section 50. In practice, IRD always give the reasons of its refusal.

Item 7(f) - IRD is exercising its discretion to remit the penalty under section 9(2) of the Stamp Duty Ordinance when it allows at least seven days for the applicant to arrange for payment of the stamp duty after the issue of a rejection notice where the statutory time for payment has elapsed. However, we do not consider it appropriate to amend section 9 of the Ordinance to provide for penalty remission in respect of deferment of stamp duty payment because -

- (i) the granting of the seven-day period for payment is a concession which should not be abused by applicants who habitually submit the applications at a very late stage;
- (ii) the grace period may be varied in appropriate cases, e.g. where a bulk application is refused, IRD would allow a longer time for payment; and
- (iii) at present, there are many circumstances where IRD exercises the remission discretion, e.g. a period of at least seven days is being allowed where the stamping of an agreement for sale or a conveyance on sale is rejected on technical grounds. Such circumstances should not be exhaustively listed in the law otherwise it would be too rigid.

Your sincerely,

(Miss Amy Tse)

for Secretary for the Treasury

c.c. CIR (Attn: Mr Wong Ho-sang)
D of J (Attn: Ms Sherman Chan)