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Paper for the House Committee meeting on 6 June 2003

**Report of the Bills Committee on
Stamp Duty (Amendment) Bill 2002**

Purpose

This paper reports on the deliberations of the Bills Committee on the Stamp Duty (Amendment) Bill 2002 (the Bills Committee).

Background

2. The Stamp Duty Ordinance (SDO) provides that every instrument chargeable with stamp duty shall be presented to the Collector of Stamp Revenue (the Collector) for stamping and, upon payment of the requisite stamp duty, the Collector shall stamp such instrument or cause it to be stamped by means of a franking machine or an approved stamp. The stamping is largely a manual process. Under the current requirements, all documents presented to the Collector for stamping must be original instruments.

3. For leases and contract notes, the Stamp Office examines the original instrument and calculates the amount of stamp duty payable. Upon payment of the duty, the instrument is stamped.

4. The same applies to the stamping of an agreement for the sale of a residential property and a conveyance on the sale of both residential and non-residential property in Hong Kong. For such transactions, the solicitor handling the transaction is required to complete and submit a questionnaire that contains an abstract of the particulars of the instrument and other information to facilitate the computation of the stamp duty payable. This questionnaire is passed to the Rating and Valuation Department for post-stamping valuation review to ascertain the adequacy of the consideration.

5. In line with the e-government policy and to streamline the present process, the Administration plans to introduce an alternative system of stamping which will remove the need to handle the original instruments as far as possible. Under the proposed system, applications for stamping may be made without presenting the original instruments to the Stamp Office and stamp certificates may be issued by the Collector on line.

The Bill

6. The Stamp Duty (Amendment) Bill 2002 was introduced into the Legislative Council on 11 December 2002. The principal object of the Bill is to amend SDO to implement the alternative stamping system mentioned in paragraph 5 above. As the proposed new system is only an alternative system, the conventional stamping system will continue to apply.

The Bills Committee

7. At the House Committee meeting on 14 December 2002, Members formed a Bills Committee to study the Bill. The Bills Committee was activated in 2003 and held its first meeting on 27 February 2003. The membership list of the Bills Committee, which is chaired by the Hon. SIN Chung-kai, is in Appendix I. The Bills Committee has held a total of five meetings. At the invitation of the Bills Committee, the organizations listed in Appendix II submitted written representations to the Bills Committee; only the Hong Kong Real Estate Agencies General Association sent its representatives to make representation to the Bills Committee at its third meeting.

Deliberations of the Bills Committee

8. The Bills Committee notes that all the organizations that have submitted their views to the Bills Committee support the proposed alternative stamping system. However, some of them have expressed certain concerns about the proposed system which members have taken up with the Administration. The Bills Committee's deliberations are recorded in the following paragraphs.

Access to the proposed system

9. The Bills Committee understands from the Administration that people and firms such as solicitor firms, property agencies etc. which use the stamping service frequently may register with the Stamp Office as Registered Users to use the proposed system. They are provided with passwords with which to access the system. User registration is free of charge. Those who use the stamping service only occasionally may access the system by using either digital certificates or the passwords of their Taxpayers' Identification Numbers provided by the Inland Revenue Department (IRD). For security reasons, access to the proposed system will be logged for audit trail.

Need to restrict access to the proposed system to verify stamp certificates

10. Ms Miriam LAU queries the need to restrict access to the system for the purpose of verifying stamp certificates. The Administration explains that as stamp certificates contain privacy information which should be protected, verification should only be made after certain data such as the number of the stamp certificate in question have been input into the system. In response to members' suggestion that only information that is regarded as essential be included in the stamp certificate, the Administration explains that a stamp certificate ought to contain sufficient information to link it up with the related instrument. The Administration's plan is to show the date and nature of the instrument in question, the name and capacity of the parties concerned, the address of the property, the solicitor's name etc. in the stamp certificate. If only information on stamp duty, for example, amount of consideration and stamp duty paid, is shown on the stamp certificate, the certificate may be attached to any instrument and cannot serve as prima facie evidence of stamping for a particular instrument.

Payment by credit card

11. On the suggestion of the Bills Committee, the Administration has undertaken to consider different modes of paying stamp duty under the proposed system, including payment by credit card. However, factors such as the need to pay transaction charges will be taken into consideration.

Validity of stamp certificates for which stamp duty has been paid by cheques

12. Mr Henry WU draws attention to the Note at the bottom of the draft stamp certificate saying that "in the case of payment made by cheque, the cheque should be honoured on the first presentation to the drawee bank. Otherwise, this certificate is invalid." and expresses concern that a person seeking to verify a stamp certificate on line will have no way of knowing whether the certificate is valid or otherwise. The Administration explains that if a cheque for paying stamp duty is bounced, IRD will notify the duty payer or his representative immediately and it is in his interest to rectify the matter as soon as possible. As it takes several days or even longer for banks to notify IRD of any dishonoured cheques, waiting for clearance of all the cheques received before issuing stamp certificates will defeat the purpose of the proposed system which is to shorten the stamping and processing time.

13. The Administration has undertaken to draw to the attention of users that a payment will not be considered as received if the payment is made by a cheque that is not honoured.

Feasibility of using the proposed stamping system to issue stamp certificates for instruments in respect of properties that are being transferred as gifts

14. Ms LAU enquires whether it is possible to apply for stamp certificates under the proposed system for instruments in respect of properties that are being transferred as gifts. The Administration's response is that section 27(3) of SDO provides that a conveyance or transfer operating as a voluntary disposition inter vivos shall not be duly stamped unless the Collector has adjudicated and stamped it under section 13(3)(b) of the same Ordinance. The current practice is for the Collector to examine the instrument in each and every adjudication case. As such, the duty payers concerned are still required to present the original instruments to the Stamp Office and wait for the valuation results. Therefore, to allow the submission of stamp applications for deed of gift cases and issuance of stamp certificates bearing a "pending adjudication" denotation electronically will not save users of the proposed system any time or efforts in the stamping process. On the other hand, to cover the service described above in the proposed stamping system will increase the development costs of the proposed system which may not be justifiable in view of the small number of gift transactions.

Power of Collector to inspect instrument of evidence

15. The Bills Committee notes that the proposed section 18I(1) in clause 9 provides that the Collector may, at any time after an application for stamping an instrument is made, require the presentation of the instrument or relevant evidence to the Collector for inspection for the purpose of SDO and under the proposed section 18I(2)(b) in clause 9, where a stamp certificate has been issued, the Collector shall cancel the stamp certificate if there is a failure to comply with section 18I(1). The Administration explains that the proposal to empower the Collector to request an instrument for inspection at any time after an application for stamping is made, either before or after the issuance of the stamp certificate, is put forward for revenue protection purpose. In case the Collector is doubtful about the contents of the instrument, for example, stated consideration, he needs to examine the instrument in order to ascertain the stamp duty liability. Under SDO, a duty payer may apply for stamping a chargeable instrument any time after its execution. The application may even be made after the statutory period for stamping, subject to payment of a penalty. It is therefore possible that applications for stamping are made after the 6-year statutory period for recovery of unpaid or underpaid stamp duty. Thus, it may not be practicable to set a time limit to the Collector's power to request inspection of the instrument. For the same reason, no time limit is set to the power of the Collector to call for an abstract of the relevant instrument and evidence in the conventional stamping system as provided under section 12 of the Ordinance. Similarly, there is also no time limit for the Collector to adjudicate an instrument under section 13 of the Ordinance.

16. However, members point out that section 4(5) of SDO says that no action shall be brought for the recovery of any stamp duty with respect to any instrument more than six years from the expiration of the time for stamping such instrument. They query whether the power of the Collector to request presentation of the instrument for inspection under the proposed section 18I in clause 9 should also be within six years of the expiration of the time for stamping such instrument. Members also advise the Administration that parties to certain instruments, for example, tenancy agreements, do not keep the agreements soon after their expiry or may have lost them. If no time limit is set to the Collector's power to request presentation of the original instruments, parties to agreements such as tenancy agreements may not be able to comply with the proposed section 18I. In view of members' concern, the Administration will move a Committee Stage Amendment (CSA) to limit the Collector's power of inspection under section 18I(1) with respect to cases where stamp certificates have been issued to six years from the expiration of the time for stamping the instruments. This is consistent with the time limit for recovering stamp duty under section 4(5) of SDO.

Definition of "error" in a stamp certificate

17. Ms LAU queries the circumstances that may result in an error in a stamp certificate. Specifically, she asks whether the term "error" includes the scenario in which the stamp duty paid in respect of an instrument is not sufficient but the information supplied in the application form for a stamp certificate in respect of that instrument corresponds with that contained in the instrument. The Administration explains that an "error" in a stamp certificate under the proposed section 18J(1)(c) may occur in any of the following circumstances :

- (a) when extracting information from the original instrument to fill in an application form, the applicant makes a mistake in completing the form; or
- (b) upon receipt of an application form in hard copy, the Stamp Office makes a mistake in inputting the data into the new system.

If the information supplied in the application form corresponds with that contained in the instrument and **the stamp certificate is subsequently issued with the same contents**, the new section 18J(1)(c) does not apply as there will be no "error" in the stamp certificate and the stamp certificate will not be cancelled. If the Collector is of the view that the stamp duty paid in respect of that instrument is not sufficient, he will adjudicate the instrument and issue an assessment under section 13 of SDO and take recovery action under section 4(5) of the Ordinance within six years from the expiration of the time for stamping such instrument. This is consistent with the way that cases of insufficient stamp duty are handled under the existing manual system.

18. While the Administration considers that how "error" should be constructed in the Bill is adequately clear, it agrees with members that the term may be further clarified to avoid any doubt. The Administration will therefore move a CSA to clarify the meaning of "error" by excluding insufficiently stamped cases, ie, cases under section 13(4) of SDO.

Cancellation of Stamp Certificates

19. The Bills Committee notes that apart from the power of the Collector to cancel a stamp certificate under the proposed section 18I(2)(b) in clause 9 because of a person's failure to comply with the proposed section 18I(1) (see paragraph 15 above), the Collector will also have the power to cancel a stamp certificate if it is subsequently

found to contain any error (see paragraph 18 above). The Bills Committee is concerned that the Collector may cancel a stamp certificate issued under the new Part IIA any time as no time limit is stipulated in the Bill. Members of the Bills Committee query, if a transaction takes place after a stamp certificate is issued and before the Collector cancels the stamp certificate and if a subsequent purchaser of the same property has relied on the stamp certificate as evidence that stamp duty has been paid for the instrument in question, whether the Collector would take into account such circumstances before making his decision to cancel the stamp certificate. Members also query whether subsequent purchasers will be liable for the payment of the undercharged stamp duty if the persons liable for paying stamp duty of the relevant instrument cannot be located when the stamp certificate is cancelled.

20. The Administration explains that before exercising the authority to cancel a stamp certificate, the Collector will consider all relevant circumstances of the case. The fact that a subsequent purchaser has relied on a stamp certificate as evidence of stamp duty paid is one of the factors to be considered by the Collector, but not a conclusive one. If the stamp certificate has been wrongly issued because of material error, e.g. incorrect address of property, in the previous application form for stamping, the original instrument is in fact not properly stamped because the contents of the stamp certificate and those of the original instrument do not match. The stamp certificate should be cancelled and replaced by a new one upon due payment of the correct amount of stamp duty.

21. If a stamp certificate in relation to an instrument were cancelled, the instrument would not have been stamped under the new definition of "stamped" in section 2(1) of SDO. All the persons set out in section 4(3) of SDO shall then be liable, or jointly and severally be liable, civilly to the Collector for the payment of the stamp duty concerned. A subsequent purchaser, not being a party to the instrument, shall not be liable unless he uses such instrument, in which case he becomes one of the liable persons by virtue of section 4(3) of SDO. A similar situation may also arise under the conventional system where an instrument has been stamped and returned to the applicant and the cheque for payment of stamp duty is dishonoured. Although the stamp is not available for cancellation physically, it is in fact invalid and the instrument is regarded as not having been stamped.

22. To address members' concern about the cancellation of stamp certificates under the proposed section 18I(2)(b) in clause 9 without the relevant parties' knowledge, the Administration will move a CSA to amend this section in order to delete the sanction of cancellation of the stamp certificate in section 18I(1) for non-compliance cases. However, to ensure compliance of the requirement about submission of original instruments or evidence for inspection, which is very important under the electronic stamping system, the Administration proposes to impose a Level 2

penalty (currently \$5,000) instead. This penalty shall be recoverable by the Collector as a civil debt due to the Government.

23. On members' suggestion, the Administration will provide for 'without reasonable excuse' as an element for non-compliance of new section 18I(1). Members also suggest that the CSA should also include a channel for appeal. The Administration is of the view that there are already sufficient avenues for duty payers to challenge the Collector's decision under the current proposal and an additional special appeal mechanism is not recommended. If a person is aggrieved by the Collector's decision to impose penalty, he may either apply for judicial review against her decision or dispute the liability (on the ground of having a reasonable excuse) to pay such penalty in any civil proceedings instituted by the Collector for the recovery thereof. While Ms LAU is of the view that the scope of judicial review is very narrow and aggrieved parties may be reluctant to apply for such review for a penalty of only \$5,000, she and other members accept that no appeal channel need be introduced for this purpose.

24. As regards the Collector's power to cancel a stamp certificate if the stamp certificate is subsequently found to contain any error, the Administration points out that the power to rectify an error through cancelling and re-issue of a stamp certificate is not intended to extend the duty recovery period specified in section 4(5) of SDO, but to provide a means of rectifying the error for the benefits for duty payers. To address members' concern that stamp certificates may have been cancelled under the proposed section 18J(1)(c) in clause 9 without the knowledge of interested parties, the Administration will move a CSA to amend this section to the effect that the power of the Collector to cancel a stamp certificate for error cases could only be exercised **upon request**. As such, if a person finds that a stamp certificate contains an error, he may request the Collector to rectify the error on supporting evidence provided by him. If the Collector is satisfied that there is indeed an error, the Collector will cancel the original stamp certificate and issue a new one. However, if there is undercharge (but not undervaluation) of stamp duty, the Collector will inform the applicant. Until and unless the applicant pays the undercharged stamp duty, the Collector will not cancel the original certificate or issue a new one. In cases where the Collector identifies a possible error in the stamp certificate, he will seek clarification with the interested parties and invite them to make a request under section 18J(1)(c). The Collector will not cancel the stamp certificate if no request is received. If the Collector is of the opinion that stamp duty of the instrument has been insufficiently paid, he will adjudicate the instrument and recover the shortfall under the existing sections 4 and 13 of SDO.

Clause by clause examination of the bill

Clause 9

25. Clause 9 of the Bills introduces a new Part IIA "Stamping by Way of Stamp Certificates" for the purpose of implementing the proposed electronic stamping system. On the suggestion of the Bills Committee, the Administration will move CSAs to amend the proposed section 18I in clause 9 to limit, in respect of cases where stamp certificates have been issued, the time within which the power of the Collector to request the presentation of an original instrument for inspection may be exercised to no more than six years from the expiration of the time for stamping the instrument (paragraph 16 refers). Another CSA will be moved to amend the same new section to impose a Level 2 penalty for failure to comply with a request of the Collector for the presentation of an instrument for inspection but 'without reasonable excuse' will be introduced as an element for such failure (paragraphs 22 and 23 refer).

26. The Administration will move amendments to the proposed section 18J in clause 9 to the effect that the Collector will only cancel a stamp certificate on grounds of an error in the certificate **upon request** and also to spell out clearly that an error in a stamp certificate does not include cases of instruments assessed and found to have been insufficiently stamped by the Collector.

Clause 11

27. Although the Administration's intention is that it will consider the need for and merits of extending the proposed system of stamping to stock transactions in future, the Bill seeks to amend SDO to enable the proposed system to cover stock transactions. As the Administration has not consulted the securities industry on the proposed system, members request that the Administration consults the securities industry before deciding whether to extend the application of the proposed system to stock transactions and that the Secretary for Financial Services and the Treasury gives an undertaking to conduct such consultation in the resumed debate on the second reading of the Bill.

Clause 23

28. In response to members' query why, under the new section 49, the time limit to an application to cancel a stamp or a stamp certificate on grounds that the stamp has been inadvertently used or the stamp certificate has been inadvertently issued to only two years and whether the time limit may be lengthened, the Administration advises members that the time limit has been modelled on the repealed Stamp Duties Management Ordinance enacted in 1911, which in turn, was based on the Stamp Duties Management Act 1891 of the United Kingdom, which is still in force. The Administration considers it appropriate to maintain this time limit.

Committee Stage Amendments

29. The Bills Committee supports all the CSAs to be moved by the Administration as they have been proposed on the suggestion of members. The Bills Committee will not move any CSAs.

Undertaking by the Administration

30. The Administration undertakes to take the following actions :

- (a) The Secretary for Financial Services and the Treasury will give an undertaking in his speech to be made in the resumed debate on the second reading of the Bill that the Administration will consult the securities industry before deciding whether to extend the application of the proposed system to stock transactions.
- (b) The Administration will provide the Panel on Financial Affairs in due course with a list of instruments that Part IIA of the amended SDO will apply but applications for stamping cannot be made without presenting the relevant instruments. The Administration will also indicate clearly the instruments not to be covered by the new system when publicizing the new system.

Date of Resumption of Second Reading Debate of the Bill

31. The Bills Committee supports the resumption of the second reading debate on the Bill, subject to the amendments to be moved by the Administration. The Administration intends to give notice to bring the Bill back to the Council on 18 June 2003.

Council Business Division 1
Legislative Council Secretariat
3 June 2003

Bills Committee on Stamp Duty (Amendment) Bill 2002

Membership List

Chairman Hon SIN Chung-kai

Members Hon Eric LI Ka-cheung, JP
Hon CHAN Kam-lam, JP
Hon Howard YOUNG, JP
Hon Miriam LAU Kin-yee, JP
Hon Abraham SHEK Lai-him, JP
Hon Henry WU King-cheong, BBS, JP

Clerk Mr LAW Kam-sang

Legal Adviser Miss Monna LAI

Bills Committee on Stamp Duty (Amendment) Bill 2002

List of organizations submitted views on the Bill

1. Property Agencies Association Ltd
2. Estate Agents Authority
3. The Real Estate Developers Association of Hong Kong
4. Hong Kong Chamber of Professional Property Consultants Ltd
5. Hong Kong Real Estate Agencies General Association
6. The HK Law Society
7. The Taxation Institute of Hong Kong