

Our ref. : [2013] HKIEA P1(c)

29 May 2013

Chairman and Members,
Bills Committee on the Stamp Duty (Amendment) Bill 2012,
Legislative Council Complex,
1 Legislative Council Road,
Hong Kong.

By email : bc_01_12@legco.gov.hk

Dear Chairman and Members,

Re : Reply to the Administration's response of May 2013 (LC No. CB(1) 973/12-13(02))

1. The Administration has not addressed the key issue - that the BSD (and other Property Initiatives) infringe the Basic Law rights of non-HKPR.
2. We begin by reiterating our understanding of the Courts' interpretation of the relevant provisions of the Basic Law :
 - a. The Basic Law pronounces fundamental rights in terms of :
 - (i) **Hong Kong residents**, meaning both **HKPRs** and **non-HKPRs** (the latter meaning Hong Kong identity card holders with no right of abode); and
 - (ii) **Other persons**, ie people who do not hold HKID;
 - b. All **Hong Kong residents** (i.e. HKPRs and non-HKPRs) are equal before the law, therefore should enjoy equal rights to property ownership;
 - c. Basic Law fundamental rights cannot be interfered with except to the extent that the **fair balance test** is satisfied, meaning :
 - (i) the interference must relate to a **legitimate aim** and an aim is only legitimate only if it corresponds to a pressing need;
 - (ii) the interference must be **rationally connected** with that aim; and
 - (iii) the interference must be **proportionate to the aim** served.
3. We agree with the general direction of the BSD and the other Property Initiatives, as an over-heated property market does more harm than good to the society of Hong Kong. We only challenge one single issue – that the discrimination against non-HKPRs in favour of HKPRs fails to meet the fair balance test and is therefore unconstitutional.

4. The Administration has so far (and repeatedly) addressed the first limb of the fair balance test only. Such repetition is **totally unnecessary** as we have expressly stated that we agree with the first limb. What the Administration has failed to do is to establish the second and third limbs, i.e. rationality and proportionality.
5. The Administration said in paragraph 4 '*...The objective of BSD is to address the **home ownership needs of HKPRs** under the current exceptional circumstances*'. That is precisely the point - why is 'HKPR' singled out for favourable treatment when the Basic Law says **HKPRs and non-HKPRs are equal before the law** which ought to include the 'home ownership needs'. Is such treatment '*rationality connected*' and '*proportionate*' to the aim? Nothing has been said to justify why the Basic Law rights of non-HKPR should be infringed. The Administration has repeated a **bare assertion**.
6. Paragraph 5 says '*...by increasing the cost of acquisition of residential properties by non-HKPRs, we consider that BSD would reduce the demand of non-HKPRs for residential properties, thereby according priority to the home ownership needs of HKPRs under the current tight supply situation...*'. Well, that is **the result of, rather than the rationale for, discrimination against non-HKPR!**
7. The Administration introduced the term '**non-local buyer**' in the same paragraph. Are they *Mainland buyers*? How do they fit into the Basic Law scheme of things? The *Ming Pao Daily News* of 23.5.2013 carried an article (appended below) on the BSD giving figures similar to those given by the Administration. But the Ming Pao figures refer to purchases by **Mainland buyers**, ie non-residents or Basic Law '**other persons**', not non-HKPR.
8. The same ploy is repeated in paragraph 6. Figures what may prove the case against '**non-locals**', i.e. the Basic Law 'other persons', is superimposed on non-HKPRs. The phrase '*...In light of the increasing share of residential flat supply taken up by **non-local buyers**...*' (the third line from the bottom of page 2) was crafted to justify why the Administration should '**accord priority to HKPR buyers over non-HKPRs under the current tight supply situation**' (last sentence of paragraph 6). We do not see **why non-HKPRs should bear the consequences when Hong Kong residential flats were gobbled up by non-locals buyers**, i.e. Mainland buyers.

9. We do not object to the imposition of BSD against non-residents, be they visitors from the Mainland or, say, Iceland. They do not belong here. We only oppose the discrimination against non-HKPRs, and cannot help wondering what is the purpose behind the term 'non-local'. Does the new term help to establish rationality or proportionality or ease the understanding of the issues, or will it **serve to mislead readers into thinking that 'non-local' equals 'non-HKPR'?**
10. There are more red herrings in paragraph 7. In the first place **whether a buyer is a HKPR or not is irrelevant for the SSD** (see the chart at the Annex of our submissions dated 5 April 2013). It is the period of property holding that matters for SSD. For this reason the adoption of the SSD exemptions for the BSD may be questionable. Secondly, the term '**pubic**' is mentioned which we see as another attempt to shift focus. Our point on this matter is - why should the Administration introduce measures ostensibly to curb speculation then allow the majority of the target people (except perhaps non-HKPR) a hundred ways to escape which would defeat those very measures!
11. The Administration attempts to trample on the Basic Law rights of non-HKPRs. The statistics in our previous reply have established the flaws of the BSD and other Property Initiatives in this regard. The Administration has so far **produced not one shred of evidence** to rebut those statistics and our arguments. The logical conclusion can only be that the BSD, whatever its merits in relation to 'non-locals', is unconstitutional when applied to non-HKPRs.

Yours sincerely,



Stanley To
Honorary Researcher

IVE 高級講師麥耀強： 樓市倘急回落 應先撤 BSD

名人樓市論壇

自2008年美國量寬(QE)放水以來，香港樓市持續升溫，港府在2010年以來多次出招遏抑樓市，至近期一二手市場才見冷清。對於市場一直有聲音要求政府為辣招設立退市機制，香港專業教育學院(IVE)工商管理系高級講師麥耀強指出，多種印花稅等辣招已見成效，一旦樓價明顯回落，港府應要首先取消買家印花稅(BSD)。

明報記者 葉浩霖 攝影 黃志東

自2008年金融海嘯以來，美國推出QE放水，自此本港樓市轉為熾熱。回顧2008年至2009年初，中原城市領先指數CCL僅在60點水平樓下，至上周最新報118.58點，樓價升幅約一倍。

2010年11月，政府為打壓短炒，首度宣布開徵額外印花稅(SSD)，兩年內轉售物業要繳付5%至15%的稅款，到去年10月再推加強版額印，3年內轉售物最高稅率提升至20%，更針對非本地買家以及公司買家開徵買家印花稅(BSD)，劃一稅率15%。

直至今年2月，除非是首次置業者或者換樓客，否則在購買第二個或以上物業都要收取雙倍印花稅(DSD)，更涵蓋工商舖市場，連「摩售」炒賣活動都要即時徵稅，稅率最高為樓價8.5%。

印花稅屬間接稅 清晰容易徵收

IVE高級講師麥耀強指出，過去本港曾討論以直接稅方式去制止炒賣活動，如透過買賣物業獲利徵收利得稅(profit tax)等，

但如何定義是經營買賣物業的生意(trading)，買賣成本又如何計算等均存在爭議，爭論多年都未有定案；相比之下，印花稅則屬一種間接稅，按物業成交價格而定，清晰而容易徵收，他讚揚政府以印花稅方式出招是「唔錯，幾有勇氣」。

蝕讓還要徵 SSD 太過分

麥耀強認為，難以判定樓價要回落至哪個水平才要撤回各種稅項，但一旦樓市全面轉勢，市場出現大量恐慌性拋售，如果蝕讓個案還要徵收SSD，則是太過分。他指出，倘到退市的時機來臨，政府第一步應該是撤回BSD。

BSD自去年10月推出至今，非本地客及公司買家比例大幅減少，根據稅務局提供最新數字，今年首季全港共錄約18,700宗住宅物業成交，其中非本地客只佔1.4%，較去年全年的3.9%大幅減少，而公司客的比例跌幅更明顯，由去年的9.6%銳減至2.8%，對比2009年至2012年間約一成的公司比例，跌勢顯著。

為炒賣開公司 只佔小數

麥耀強續稱，以公司名義買賣物業一直是合法避稅的方式，亦是好正常的商業行為，除了印花稅較低外，以公司持有的物業，按揭貸款利息支出是認可的稅務支出外，一切與出租該物業有關，如租務合約印花稅、物業經紀佣金等均是認可的支出，可以扣稅。

不過，倘只是為了一般炒賣而開設公司仍屬小數，因為首先涉及開公司的成本，另外買家亦不一定願意配合買入公司，因為擔心有其他潛在負債的風險，每年必須聘請會計師為「公司」核數，動輒上萬元，又要為公司續牌等費心。至於市場曾經討論的空置稅，他則質疑其實成效，因為香港住宅物業空置率其實並不高，同時亦難以判斷何為「空置物業」，在執行上非常困難，相關成本亦非常高。



香港專業教育學院(IVE)工商管理系高級講師麥耀強指出，多種印花稅等辣招已見成效，一旦樓價明顯回落，港府應先取消買家印花稅(BSD)。(黃志東攝)

內地買家佔二手住宅註冊宗數的比率



資料來源：土地註冊處及美聯物業

明報製圖

二手私人住宅公司買家按季變化



明報製圖

資料來源：中原

*為臨時數字

開徵銷售稅 政治難度高

開徵銷售稅的議題，在梁錦松、唐英年擔任財政司長期間，均曾先後提出來討論。目的是擴寬稅基，增加政府收入，惟最後都是無疾而終，一般論調均是擔心稅項會嚴重打擊香港主要的零售業和服務業。麥耀強認為，從外國例子看到，開徵銷售稅是可行的，惟政治上而言，難度則太高。

有講法指本港樓價高企成因之一，是本港稅基太過狹窄，港府被迫推行高地價政策，透過賣地及物業成交相關印花稅取得豐裕

收入，以彌補其他稅收偏少的壓力，而開徵銷售稅，則是有效擴寬稅基的良策。

港推銷售稅 助穩定稅收

麥耀強指出，其實外國不同地區均有開徵銷售稅，稅率、徵收方式都有所不同，「有太多的成功例子」。

他個人認為在港推出銷售稅是可行做法，而一旦成功開徵，將可向政府提高穩定而巨額的稅收收入，惟談到推行新稅，勢必面對複雜的政治問題。