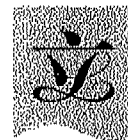




中華人民共和國香港特別行政區  
Hong Kong Special Administrative Region of the People's Republic of China

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(English version only)



立法會 LEGISLATIVE COUNCIL  
石禮謙 議員 Hon Abraham Shek Lai-Him J.P.

12 September 2013

Ms Starry LEE  
Chairman of Bills Committee on Stamp Duty (Amendment) Bill 2012  
Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Hong Kong

Dear

**Concrete examples to illustrate possible loopholes and operational difficulties arising from abuse of a self-declaration mechanism for the purpose of exempting companies whose shareholders are HKPRs from the BSD**

I refer to the Administration paper (LC Paper No.CB(1)1617/12-13 (01)) and the previous correspondences between the Administration and I about the highlighted subject.

It is disappointing that the Administration has yet to face up to the concerns that I have reiterated many times. This, I believe, facilitates neither the deliberation of the Bill nor the LegCo-Government relationship.

It is always my wish that every legitimate concern of Members of the Bills Committee be properly dealt with, or the very function of this Council as the gatekeeper of legislative proposals would be unduly impaired.

Yours sincerely,

Abraham SHEK Lai Him



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**Response to my letter dated 8 July 2013 (LC Paper No. CB(1) 1475/12-13(01))**

1. The Administration responded to my letter dated 8 July 2013 by issuing LC Paper No.CB(1)1617/12-13 (01).

**General observations**

2. The Administration's response is disappointing in that :-

Ignoring general principles of enforcement

- (a) The Administration appears to have ignored the general principles on enforcement under the Stamp Duty Ordinance whereby :-

*Unstamped document not admissible in evidence*

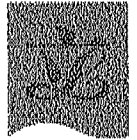
- (i) Unless a document has been duly stamped, it is not admissible in evidence and cannot be acted upon, filed or registered by any public officer or body corporate.

*Penalty at 10 times of stamp duty payable to make document admissible*

- (ii) If a person wishes to exercise or enforce its rights under the document, he would need to cause it to be duly stamped and, in so doing, he is liable to a penalty of up to 10 times the stamp duty payable for late stamping (in addition to the stamp duty payable). The person therefore cannot protect his legal and property rights by relying on an unstamped document, and there is a high price to be paid for getting the unstamped document duly stamped.

*All parties to and every person who uses document are liable*

- (iii) Save for minor exemptions, all parties to the document and every person who uses the document are liable, or jointly and severally



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liable, to the Collector of Stamp Revenue for the stamp duty and penalty.

*Evasion is a criminal offence*

- (iv) Any person who practices or is concerned in any fraudulent act, contrivance or device, not specifically provided for by law, with intent to defraud the Government of any stamp duty payable, commits an offence and is liable to a fine at level 6 and imprisonment for one year.

Administration effectively assumes evasion inevitable

- (b) The Administration on the one hand says that the Government is not assuming that companies and shareholders would abuse the self-declaration mechanism to circumvent the BSD<sup>1</sup> but, on the other hand, contradicts itself by saying that because the BSD is much higher (at 15%) than the stamp duty on the Contract Notes (at 0.2%) the risk of evasion cannot be underestimated<sup>2</sup>, and then stands firm in refusing to allow exemption for HKPR-owned companies.
- (c) In effect, the Administration is saying that because BSD is set at 15%, there is a much higher risk of evasion and therefore the Government would have to assume that evasion is inevitable. In so doing, the Government is assuming that :-
- (i) Because of the amount of BSD involved, there is a high likelihood of the parties committing a criminal offence in order to evade the BSD.
- (ii) The criminal penalty of a fine at level 6 and imprisonment for one year (or a higher penalty if considered appropriate) would be insufficient deterrent.

<sup>1</sup> See §2 of the latest LC Paper.

<sup>2</sup> See §5 of the latest LC Paper.



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- (iii) Likewise, a penalty at 10 times the BSD (which translates to 1.5 times of the *value of the property*), which a transferee would have to pay if it becomes necessary for him to exercise, enforce or protect his rights under the transfer, is also insufficient deterrent.

Administration's statement on effect of unstamped document on title misleading

- (d) The Administration's statement that "*failure to ensure that an instrument chargeable with stamp duty is duly stamped does not affect the title*" is misleading.
  - (i) There is no dispute that an unstamped document is effective to pass title.
  - (ii) However, a vendor cannot show a good and marketable title unless all the title deeds and documents of his property, if stampable, are duly stamped. This is because a document which is not duly stamped cannot be used in evidence.
  - (iii) It is beyond question that a solicitor acting in the purchase of a property must take steps to check that all title deeds and documents chargeable with stamp duty have in fact been duly stamped. It is not to the point that an unstamped document is still valid to pass title.

**Examples 1 and 2 : Nominations/Declaration of Trust/Power of Attorney**

- 3. The point the Administration is making is simply that because BSD (at 15%) is high, when compared with the stamp duty on Contract Notes (at 0.2%), evasion is almost inevitable and difficult to detect, and for that reason exemption for HKPR-owned companies should not be allowed. As I have pointed out, in so doing, the Administration ignores the deterrent of criminal prosecution and the extremely high price (at 10 times the BSD) which a transferee would have to pay in order to exercise, enforce or protect his rights.



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4. In my letter dated 24 June 2013, I invited the Collector of Stamp Revenue to produce statistics of evasion of cases to the Bills Committee. Nevertheless, no such statistics have been produced.
5. The Administration also says that if HKPR-owned companies were to be exempted from the BSD, it would inevitably require introducing fundamental changes to the registration requirements for company share transfers and for this purpose it may be necessary to amend the Companies Ordinance<sup>3</sup>. The Administration has not explained why it is so and I am unable to see why this should inevitably be so.

**Examples 3 and 4 – Allotment of new shares and re-classification of issued shares**

6. My proposal is that the legislation can provide :-
- (a) *For allotment of new shares* - A denial of the exemption if new shares are allotted, unless the Collector of Stamp Revenue is satisfied that the allotment is made to a HKPR, and that when Company X acquires the BSD exemption, the fact of exemption must be recorded in the form of an endorsement on the Agreement for Sale and Purchase ("ASP") or Assignment of the property, otherwise the ASP or Assignment will not be duly stamped.
  - (b) *For re-classification of shares* - A condition that the exemption only applies if the company has only one class of ordinary shares, and for a denial of the exemption if there should be any re-classification.
7. I pointed out that the solicitor acting for a purchaser from Company X would be under a duty to check that the 2 conditions for continual exemption of BSD have been fulfilled, namely, the conditions of (i) no allotment of new shares except to HKPRs and (ii) no reclassification of new shares.
- (a) The check can be done by a company search to see if there has been any allotment or reclassification of shares and, in the case of an allotment, calling for Company X to produce evidence that the Collector of Stamp Revenue is satisfied with the HKPR status of the allottee.

<sup>3</sup> See §5 of the latest LC Paper and footnote 1 of Paper.



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- (b) The effect is that Company X cannot sell the property without satisfying the purchaser that the 2 conditions for the continual exemption of BSD are satisfied.

8. The response of the Administration is that “according to case law, failure to ensure that an instrument chargeable with stamp duty is duly stamped does not affect the title”. The Administration then cited the case of *Town Bright Industries Limited v. Bermuda Trust (Hong Kong) Limited* (1999) CACV 137/1998<sup>4</sup> in support.

- (a) The Administration’s statement is misleading. In *Town Bright*, one of the issues is whether a direction given by a beneficiary to a trustee to hold the property in trust for a newly incorporated company should be in writing and if so, whether good title has been shown in the absence of a duly stamped direction.
- (b) The purchaser objected to the title because the vendor failed to produce a duly stamped direction. The vendor’s solicitors gave an undertaking to submit the relevant document for stamping and, at the hearing of the case, counsel on behalf of the vendor also gave a formal undertaking to have the relevant documents stamped<sup>5</sup>.
- (c) It was not disputed that, following the decision of the Privy Council in *Lap Shun Textiles Industrial Company Limited v. Collector of Stamp Revenue*<sup>6</sup>, a document which is not duly stamped would still be effective to pass title.
- (d) But the passing of title under an unstamped document was not the issue. The issue was that a document which was not duly stamped cannot be received in evidence in legal proceedings unless the court so orders upon the personal undertaking of a solicitor to cause the instrument to be duly stamped

<sup>4</sup> See §6 of the latest LC Paper and footnote 2 of Paper.

<sup>5</sup> See §§48 and 49 of the Judgment of Hartmann J in the Court of First Instance, *Town Bright Industries Limited v. Bermuda Trust (Hong Kong) Limited* HCMP 3269/1997.

<sup>6</sup> [1976] AC 530.



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in respect of the stamp duty and any penalty payable. If the document was not duly stamped, the vendor would not be able to prove good title<sup>7</sup>.

- (e) The decision on this issue is set out in §§ 53 to 54 of the Judgment of Hartmann J in these terms :-

*"53. Certainly the ordinance [Stamp Duty Ordinance] lays down an obligation to ensure that stamp duty is charged and a failure to do so means that an instrument shall not be received in evidence or "be available for any other purpose whatsoever". But Section 15 [of the Stamp Duty Ordinance] gives a discretionary power to the court to receive such instrument in evidence subject to suitable undertakings; that is, undertakings of the kind given by Mr. Chan [counsel for the vendor]. If the proviso allows for such instruments to be used in evidence to prove good title, in my judgment, it must follow that they can be used outside court to prove good title subject, of course, to a similar undertaking. That undertaking was given by the vendor's solicitors.*

*54. In my view, therefore, the fact that the instruments passing equitable title from the Centre [the original beneficiary] to the Institute [the transferee of the beneficial interest] were unstamped did not prevent the vendor from proving good title subject to any undertaking necessary to ensure that the statutory obligation to stamp was observed and the purchaser protected from possible liability." (Emphasis added.)*

- (f) The Court of Appeal<sup>8</sup> upheld the decision of Hartman J and Godfrey JA said, at §22, the following :-

*"But a stamp objection relates to a matter of conveyance, not title. It is a good answer to such an objection for the vendor to undertake to have the document in question stamped before completion." (Emphasis added.)*

<sup>7</sup> See §§47 to 54 of Judgment of Hartmann J at first instance.

<sup>8</sup> *Town Bright Industries Limited v. Bermuda Trust (Hong Kong) Limited* (1999) CACV 137/1998



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- (g) *Town Bright*, cited by the Administration to support its contention, tells exactly the opposite of what is contended by the Administration.
- (i) In that case, the document which was chargeable to stamp duty (i.e., the direction of the beneficiary to the trustee to hold the beneficial interest in trust for the transferee) need not be stamped or registered to be effective.
- (ii) When the property was sold, the solicitor acting for the purchaser raised a requisition on the stamping of the document.
- (iii) It was not disputed that the solicitor was right in raising, or had the duty to raise, the requisition. The issue was whether an undertaking by the vendor, through its solicitors and counsel, to have the document duly stamped before completion was a sufficient answer to the requisition. It was held that it was a sufficient answer provided that the undertaking was sufficient to ensure that the statutory obligation to stamp would be observed and the purchaser protected from possible liability.

9. It can be seen that contrary to what the Administration suggests :-

- (a) A vendor, in order to show a good and marketable title, must demonstrate that all the title deeds and documents relating to his property, if stampable, have been duly stamped.
- (b) A solicitor acting for a purchaser has a duty to ensure that all such title deeds and documents have been duly stamped.
- (c) It is not to the point that an unstamped document is still valid to pass title. The crux of the matter is that the unstamped document cannot be received in evidence unless it is duly stamped and a vendor cannot show a good and marketable title unless either the document is duly stamped or an appropriate undertaking has been given to ensure that the document is duly stamped before completion.





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- (d) The law is that a solicitor acting for a purchaser can make a valid objection to an unstamped document but a good answer to such an objection is for the vendor to give an undertaking sufficient to ensure that the statutory obligation to stamp is observed and the purchaser protected from possible liability.

10. The Administration also made the following statement<sup>9</sup> :-

*"If the relevant solicitor is required to establish that the residential property-holding company has not contravened the BSD exemption condition, he/she has to check whether any transfer of beneficial interest in company shares has taken place. To impose such an additional responsibility on solicitors might bring about a major change to the solicitors' role and duty in conveyancing."*

11. My response to this statement is as follows :-

- (a) This response should have been made under examples 1 and 2 dealing with nomination/declaration of trust/power of attorney and not under examples 3 and 4 dealing with allotment of new shares and re-classification of issued shares. The Administration is confusing the issue.
- (b) It has never been my proposal that a solicitor acting for the purchaser should be required to check whether there has been any transfer of the beneficial interests in the shares of a vendor company.
- (c) It would be simple enough for the legislation to provide that any change in the beneficial ownership of a HKPR-owned company must be notified to the Collector of Stamp Revenue and failure to do so would be an offence. As I have pointed out in relation to examples 1 and 2, the Administration cannot assume that companies and shareholders would inevitably abuse the self-declaration mechanism to circumvent the BSD or that there are insufficient deterrents to prevent such abuses.
- (d) Under section 45 of the Stamp Duty Ordinance (relief from *ad valorem* duty for transfers between associated corporations), if stamp duty exemption has

<sup>9</sup> See §8 of the latest LC Paper.



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- (e) been granted for an intra-group transfer and if the transferor and the transferee cease to be associated within a period of two years, the exemption would be revoked and stamp duty would be payable. An obligation is imposed on the transferor and the transferee to report the cessation to the Collector of Stamp Revenue. The concern of the Administration would equally have applied to this situation, but it has not been suggested that there has been any problem with this regime. It is therefore difficult to see why the Administration should be so unduly concerned.