The Government's response to the
Hon Abraham SHEK's letter of 12 September 2013

This paper serves to respond to the issues raised in the Hon Abraham SHEK's letter of 12 September 2013 (LC Paper No. CB(1)1784/12-13(01) refers).

2. In his letter of 12 September 2013, the Hon Shek sets out his further views on the examples which the Administration previously provided to illustrate possible loopholes and operational difficulties arising from exempting companies owned by Hong Kong permanent residents (HKPRs) from paying the Buyer's Stamp Duty (BSD).

3. As explained at the meetings of the Bills Committee, the Government does not consider exempting companies owned by HKPRs from BSD to be appropriate. Apart from disseminating the wrong message to the market that the Government is less than determined to stabilise the property market, the exemption proposed by Members contravenes the policy objective of the BSD to accord priority to the home ownership needs of HKPRs, and will create loopholes that are very difficult to plug. Moreover, the exemption proposed will also affect the level playing field among companies by allowing certain companies to benefit from exemptions and not others. This is arbitrary and not in line with the Government's clear policy objective.

Sanctions of non-stamping or evasion

4. The Government is not suggesting that the sanctions imposed by the Stamp Duty Ordinance (Cap. 117) against non-stamping of instrument or evasion of stamp duty have no deterrent effect or that HKPRs shareholders would likely evade the BSD even if such an evasion were made a criminal offence. The crux of the matter is that, in the absence of a corresponding enhancement of the registration requirements for company share transfers and the absence of effective means to discover and to collect evidence on the non-stamping and evasion, the Government cannot underestimate the risk of BSD evasion and simply rely on the sanctions to safeguard against the relevant risk. This is particularly so as according to the Inland Revenue Department's (IRD) past experience, there have been instances where some parties involved in the transfer of beneficial interest in company shares did not submit the related transfer instruments for stamping in accordance with the Stamp Duty Ordinance. We have already explained this in LC Paper No. CB(1)1460/12-13(01).

5. The major difficulty in uncovering any transfer of beneficial interest in company shares by nominee shareholder agreement / declaration of trust / power of attorney (Relevant Documents) is that such documents are not required to be entered on the company's register of members or registered with the Companies Registry[1]. To resolve this difficulty, fundamental changes to the registration requirements for company share transfers involving Relevant Documents will be required. Since BSD is an extraordinary measure introduced under exceptional circumstances, the Government considers that such changes, which will have far-reaching implications for the existing effective taxation and company regimes, should not be made for the sake of this measure.

Title problem

6. In LC Paper No. CB(1)1617/12-13(01), we cited case law to suggest that failure to ensure an instrument chargeable with stamp duty is duly stamped does not affect the property title, with a view to clarifying that the property title will not be bad for not stamping the applicable instrument with BSD. This statement is meant to respond to the views of the Hon Shek that the title of the property will be bad unless BSD is paid (with penalty, where applicable)[2]. In this connection, while we agree that the solicitors handling the conveyancing will verify the ownership of the property concerned, and that they should try their best to ensure (by conducting company search and inspecting company's register etc) that the BSD exemption conditions are met, given the difficulties as mentioned before in detecting concealed transfers of company's ownership, the solicitors will certainly not be in a better position than the IRD to unearth them. To implement the proposed exemption mechanism will inevitably impose an onerous duty on solicitors to investigate into whether the instrument is properly stamped for BSD purposes. This will bring about a radical change in the solicitors' role and duty in conveyancing which, as previously mentioned, is disproportionate for the implementation of an extraordinary measure like BSD.

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[1] Section 101 of the Companies Ordinance (Cap. 32) ("CO") (or section 634 of the new Companies Ordinance (Ordinance 28 of 2012) estimated to commence operation in 2014) provides that no notice of any trust (expressed, implied or constructive) shall be entered on the register of members, or receivable by the Registrar of Companies.

[2] Paragraph 8(b) of LC Paper No. CB(1)1475/12-13(01).

Non-admissibility of unstamped documents

7. It is stipulated in the Stamp Duty Ordinance that if the Relevant Documents are not duly stamped, they cannot be received in evidence in court proceedings. It is however worth noting that IRD has previously handled cases where parties involved in the transfer of beneficial interest in company shares by Relevant Documents failed to submit the documents for stamping in accordance with the Stamp Duty Ordinance. A non-HKPR can effectively control a company (which, on the face of it, is owned by a HKPR) by various means. This can be done by requiring the HKPR to sign a blank instrument of transfer, surrender all company seals, and appoint the non-HKPR as the director and authorized signatory of the company's bank accounts. This could be made even more straightforward if the company has only one shareholder and one director. In view of the significant amount of BSD at stake, we should not underestimate the risk of BSD evasion arising from the aforesaid loopholes and simply rely on the sanctions presently provided under the Stamp Duty Ordinance to safeguard against the relevant risk.

Associated Bodies Corporate

8. The Hon Shek has asked why declarations made by bodies corporate under section 45 of the Stamp Duty Ordinance are acceptable but not the proposed self-declarations for the purpose of exempting HKPR-owned companies from BSD. As previously explained in LC Paper No CB(1)893/12-13(01), the stamp duty relief provided under section 45 of the Stamp Duty Ordinance is applicable to the transfer of property between associated bodies corporate only. In order to be eligible for such relief, the relevant bodies corporate have to be associated with each other, i.e. one is beneficial owner of not less than 90% of the issued share capital of the other, or a third such body is beneficial owner of not less than 90% of the issued share capital of each. As a body corporate is required under the relevant company law and accounting standard to disclose in its audited financial statements the interests it holds in respect of its subsidiaries[3], the IRD can rely on such financial statements to verify the associated relationship between two bodies corporate. However, for the proposed BSD exemption for HKPR-owned companies, even if the proposed self-declaration mechanism were adopted, individual shareholders could still be able to conceal share transfers by Relevant

[3] In Hong Kong, the relevant requirements are in section 128 of the CO, Hong Kong Accounting Standard 27 (2011) and Hong Kong Financial Reporting Standard 12.

Documents, the registration of which with the Companies Registry is not required. As such, the IRD would have no means to enforce compliance.

Transport and Housing Bureau
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