

**The Administration's response to the issues  
raised at the meetings of the Bills Committee on  
the Stamp Duty (Amendment) Bill 2012 held on 28 October 2013**

This paper serves as a response to the issues set out in the letter dated 1 November 2013 from the Legislative Council Secretariat (LC Paper No. CB(1)291/13-14(01) refers).

**Issues in relation to “guardians” and “trustee”**

2. As explained in LC Paper No. CB(1)133/13-14(02), our policy intent is that the home ownership needs of all Hong Kong permanent residents (HKPRs) should be accorded priority under the current tight housing supply situation. As such, all HKPRs who can satisfy the relevant requirements as set out in the Stamp Duty (Amendment) Bill 2012 (the Bill), regardless of whether they are minors or mentally incapacitated persons, should be entitled to the same exemption from the Buyer's Stamp Duty (BSD). That said, as HKPR minors / mentally incapacitated persons lack the capacity to enter into legally binding agreements, if they are to acquire a residential property, in practice they must rely on another person to act on his or her behalf. To cater for the needs of this special group of HKPRs, the Bill proposes that if a residential property is acquired on behalf of a HKPR minor or a mentally incapacitated person by his/her guardian or trustee, the relevant transaction should also be exempted from the BSD. The beneficial interest of the residential property so acquired rest with the HKPR minor/mentally incapacitated person concerned.

3. As previously explained in LC Paper No. CB(1)692/12-13(02), the terms “trustee” and “guardian” in the above-mentioned context are not defined under the Bill and their ordinary meanings will be taken. According to Black's Law Dictionary, “trustee” is “one who stands in a fiduciary or confidential relation to another; especially one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary”. “Guardian” is “one who has the legal authority and duty to care for another person or property, especially because of the other's infancy, incapacity, or disability”.

4. Under our intended mechanism, anyone who claims exemption from the BSD in the capacity as the guardian/trustee of a HKPR minor or mentally incapacitated person has to produce documentary evidence to the Inland Revenue Department (IRD) to substantiate the claim. It is the claimant's duty to satisfy the IRD that he or she is acting on behalf of the minor / mentally incapacitated person concerned. Specifically, if a buyer claims that he/she is

acting on behalf of a HKPR minor or a HKPR mentally incapacitated person as his/her trustee, he/she should provide documentary evidence such as a valid and legally binding trust instrument. Depending on the actual circumstances, the IRD can request the claimant to produce further evidence, such as documents to certify the relationship between the trustee and the minor or the mentally incapacitated person, etc. In the case of guardians, documentary evidence to prove the legal authority of the claimant as the guardian of the minor or a mentally incapacitated persons should be produced, such as the birth certificate to certify the parental relationship; the guardianship order granted by court or the Guardianship Board, etc. According to the above-mentioned meaning, guardianships granted by the relevant authorities recognised in other jurisdictions would also be covered, while guardians without legal authority (such as de facto guardians) will not be entitled to the exemption. The administrative measures being contemplated serve to ensure that the BSD exemption will only be granted to claimants falling under the above-mentioned meaning of “guardian” or “trustee” in the context of the provisions to prevent abuse. These measures will not narrow down the scope of exemptions and are lawful and essential for the IRD to safeguard the effectiveness of the BSD regime.

### **Whether a HKPR is acting on his / her own behalf**

5. We note Members’ concern that an acquisition of a residential property may involve provision of funds by persons other than the buyer, which may create resulting or constructive trusts. As we have explained in LC Paper No. CB(1)1288/12-13(01), in an acquisition involving funds provided by persons other than the buyer, such contribution may either be provided by way of a gift, a loan or an entrustment. The buyer (who is in full cognizance of the facts and circumstances surrounding the contribution) is in the best position to determine the nature of such contribution and to state whether he or she acts on his/her own behalf in the acquisition. The requirement to make a declaration could prompt the purchaser to make a conscious determination of the true nature of the contribution before the declaration is made. We believe the matter will be straightforward in most cases. Where the purpose of the contribution is not clearly communicated by the contributor to the purchaser; or where the purchaser, for whatever reason, is not sure about the true nature of such contribution, it will not be difficult for him/her to ascertain from or to establish the true nature of such contribution with the contributor before execution of the declaration.

### **Joint acquisition of a residential property by a HKPR and a non-HKPR**

6. For a joint acquisition of a residential property by a HKPR and a non-HKPR, if the relevant agreement for sale does not meet the conditions of any of the proposed BSD exemptions, the instrument will be chargeable with the BSD. There will be no apportionment. The proposed section 29CB (10) of the Bill is set out below –

“To avoid doubt, a chargeable agreement for sale that is chargeable with buyer’s stamp duty under head 1(1C) in the First Schedule is chargeable with that duty by reference to the full amount or value of the consideration for the agreement.”

7. This provision is essentially an anti-tax avoidance provision. The reason for charging the BSD on the full amount is to prevent situations where a non-HKPR acquires a residential property jointly with a HKPR with a view to reducing the amount of BSD payable while in fact the acquisition is funded by the non-HKPR. Similar treatment with regard to conveyance on sale is also proposed under section 29DB(11) of the Bill.

### **Issues in relation to the BSD exemption for acquisitions of a replacement property under specified situations by non-HKPR**

8. To address the need of a non-HKPR property owner who has been made to sell his/her residential property not of his/her own volition, the Government has proposed in the Bill that the replacement purchase made by a non-HKPR property owner affected under specified scenarios will be exempted from the BSD. Such scenarios include, among others, acquisitions by the Urban Renewal Authority (URA), compulsory sale pursuant to an order for sale made under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap.545), etc.

9. The terms “replace” and “replacement property” are used to allow sufficient flexibility to handle different exemption situations and their ordinary meaning will be taken. According to the Oxford Reference Dictionary, “replace” means “find or provide a substitute for”. In the context of the Bill, it means to find or provide a substitute for the original residential property, which is an appropriate word to use. For an acquisition to be regarded as a replacement purchase meeting the criteria for BSD exemption under the Bill, the buyer has to prove that the original residential property to be replaced has been acquired / resumed / sold under any of the specified scenarios. For instance, a flat owner whose original property is acquired by the URA may present the

provisional sale and purchase agreement signed with the URA when applying for the BSD exemption for his/her replacement purchase. There is no restriction as to the size and value of the replacement property as well as the timeframe for the replacement purchase to allow the affected non-HKPRs to make the replacement purchase in a flexible manner. Separately, to address the possible need of flats owners affected in the specified scenarios for split households when their original properties are disposed of, if the property replaced is jointly owned by two or more persons, each of them may make one replacement purchase.

10. As regards Members' enquiry on the case of resumption of underground strata, while underground strata might be resumed for works such as railway developments, such a resumption will not affect the ownership of the flat on the land concerned, and there is no case for the affected owner to acquire a "replacement flat". In reality it is also unlikely for the affected flat owner to acquire replacement underground strata. As such, the stamp duty payable for the replacement purchase should not be an issue. Separately, the BSD exemption for replacement purchase would only apply when the original property acquired / resumed / sold is a residential property for the purpose of the Stamp Duty Ordinance (Cap.117). The IRD would make reference to the existing conditions under the relevant instruments, such as the Government lease, to determine whether an immovable property should be regarded as a residential property.

**Transport and Housing Bureau  
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