

**The Government's response to the draft Committee Stage Amendments
proposed by the Hon Tommy CHEUNG Yu-yan**

This paper sets out the Government's response to the draft Committee Stage Amendments (CSAs) proposed by the Hon Tommy CHEUNG Yu-yan in his letter of 4 December 2013 to the Legislative Council Secretariat (LC Paper No. CB(1)474/13-14(01) refers).

2. The Hon Cheung's CSAs propose that the acquisitions of residential properties by companies owned by Hong Kong Permanent Residents (HKPRs) (hereafter referred to as "HKPR companies") should be exempted from the Buyer's Stamp Duty (BSD), subject to the following conditions –

- (a) the HKPR company is acting on its own behalf;
- (b) the members of the HKPR company are all HKPRs acting on their own behalf;
- (c) the directors of the HKPR company are all HKPRs not acting on behalf of persons who are not HKPRs;
- (d) the members undertake that they will not assign, transfer or part with possession of the legal and beneficial ownership of their shares in the HKPR company to a non-HKPR;
- (e) the members undertake that they will not appoint a director who is not a HKPR, or being a HKPR but acting on behalf of persons who are non-HKPRs; and
- (f) the members undertake that they will not allot and offer an option over the shares of that HKPR company to persons who are not HKPRs.

The Hon Cheung's CSAs also propose that the Special Stamp Duty (SSD) and the Buyers Stamp Duty (BSD) regimes would expire at midnight on 31 December 2014.

3. After thorough consideration, the Government considers that the Hon Cheung's CSAs will have serious implications for the policy objectives and the effectiveness of the BSD, and is thus unable to support the CSAs.

Implications for the policy objectives of the BSD

4. As we have repeatedly explained at the Bills Committee, granting BSD exemption to companies owned by HKPRs is contrary to the policy objectives to accord priority to HKPRs to address their home ownership needs in the midst of the tight housing supply situation and the market exuberance. The Hon Cheung's proposal allows upfront BSD exemption for HKPR companies and may provide incentive for non-HKPR buyers to acquire residential properties in the name of a HKPR company and enjoy the proposed exemption. The proposal concerned would stimulate an immediate demand for residential properties and would undermine the effectiveness of the BSD. While the residential property market has shown signs of cooling off since the introduction of the demand-side management measures, and the irrational expectation that property prices would only go up has been reversed, the risk of a property bubble should not be underestimated in view of the persistently low interest rate and abundant liquidity environment. The Government would need to ensure that the demand-side management measures are effective in addressing market exuberance and maintaining the stability of the macro economy and financial sector, and to safeguard the healthy and stable development of the property market.

5. The Hon Cheung's CSAs, if implemented, would create serious loopholes through which non-HKPRs could avoid the BSD through transfer of ownership of property-holding companies, which are practically impossible to plug. As we have explained before, the key problem in granting BSD exemptions to HKPR companies is that there are numerous means to transfer company shares and ownership. Under the current regime, the validity of the transfer of the ownership of the shares of a company will not be affected even if such transactions are not registered with the Companies Registry and the instruments involved (which might need to be stamped) are not presented to the Inland Revenue Department (IRD) for stamping. In other words, if HKPR-owned companies were exempted from the BSD, non-HKPRs could easily make use of various means (such as declaration of trust or power of attorney), which would be hard to uncover or trace, to acquire the beneficial interest of the shares of the company and gain control of the company in a concealed way¹. This would in effect allow non-HKPRs to gain control of the residential property owned by the company, and at the same time avoid the BSD and seriously undermine the effectiveness of the BSD.

¹ For example, through a company with only one HKPR as its shareholder and director who is asked to sign a blank instrument of transfer and surrender all seals of the company to the person from outside Hong Kong.

6. In particular, the Hon Cheung's CSAs would result in enforcement difficulty for the IRD. According to the Hon Cheung's proposal, **upfront** BSD exemption to HKPR companies will be granted. This implies that once a HKPR company is exempted from the BSD, the IRD would have to monitor its shareholding **perpetually**. This would create insurmountable enforcement difficulty for the IRD and is simply not feasible. Furthermore, the Hon Cheung's CSAs propose that the burden to repay the BSD should rest upon the HKPR company (instead of the members / directors of the HKPR company). By the time non-compliance has been uncovered, the company might have already sold the residential property concerned and become untraceable or dissolved; and the members / directors of the company might have already absconded by the time of discovery. As a result of the above mentioned enforcement difficulties, the Hon Cheung's CSAs would result in **great risk** of BSD avoidance.

7. In addition, and in view of the substantial amount of the BSD at stake (i.e. 15% of the consideration of the relevant residential property), the difficulty in uncovering the non-compliance, coupled with the various means to transfer interest in company shares in a concealed manner, the Government considers that the proposed statutory declaration mechanism would not be effective to avoid abuse. The risk of avoiding the BSD arising from the aforesaid loopholes must not be underestimated.

8. Moreover, as mentioned in LC Papers Nos. CB(1)893/12-13(01) and CB(1)62/13-14(01), the Government is concerned about the impact of exempting companies from the BSD on the effectiveness of the various demand-side management measures introduced. The enhanced Special Stamp Duty, the introduction of the BSD and the increase in the ad valorem stamp duty rates (new AVD) target different demands from different buyers. If HKPR companies were to be exempted from the BSD, it would enable HKPRs who already own a residential property in their own names and who wish to acquire yet another residential property for investment or speculative purposes without paying the new AVD by purchasing further residential properties through a company. The effectiveness of the new AVD mechanism will thus be undermined substantially.

Definition of HKPR companies under the CSAs

9. Under the BSD exemption mechanism proposed by the Hon Cheung, only private companies limited by shares will be exempted from the BSD, subject to the HKPR status of and undertakings from its members and directors. The exemption will call into question as to whether the proposed measure is discriminatory against companies incorporated by other means (even though

their members and directors are HKPRs). In this regard, it will also call into question whether the long-existing level playing field among companies in Hong Kong can be maintained.

Calculation of BSD payable in case of breach of undertaking

10. The Hon Cheung's CSAs further propose that if any member or director of a HKPR company which has been exempted from the BSD breaches any of the undertaking, the HKPR company shall pay to the Government within 14 days by way of stamp duty an amount equal to the BSD which would be chargeable on the chargeable agreement for sale or conveyance on sale as if the same had been executed on the date on which the undertaking was breached under the proposed sections 29CB(2A)(B) and 29DB(2A)(B). However, by the time such breaches of undertaking are uncovered, the BSD measure (being an extraordinary measure at exceptional time only) might have been withdrawn. It is doubtful whether the HKPR company should still be required to pay the BSD.

Sunset Clause

11. The Hon Cheung's CSAs propose that the SSD and BSD will lapse by the midnight of 31 December 2014. As we have repeatedly reiterated, it is impossible for the Government to predict future market changes and various external factors, and come up with a date arbitrarily as to when the demand-side management measures should no longer be applicable. Therefore, any prescribed sunset clause may only disseminate erroneous messages to the market and fuel demand, thus undermining the effectiveness of these measures.

12. Moreover, the sunset clause so proposed in respect of the SSD specifies that sections 29CA, 29DA of and 1(1AA) and 1(1B) of the First Schedule to the Stamp Duty Ordinance (Cap.117) will expire by midnight of 31 December 2014. This clause, if enacted, will cause the entire SSD regime (i.e. both the existing SSD regime by virtue of the Stamp Duty Ordinance (Cap.117) and the enhanced SSD as proposed in the Bill) expire by the same date. As the purpose of the Stamp Duty (Amendment) Bill 2012 (the Bill) is limited to enhancing the SSD regime and imposing higher SSD rates for residential properties acquired on or after 27 October 2012 according to the length of period for which they had been held, this proposed amendment is beyond the scope of the Bill.

13. In conclusion, the CSAs proposed by the Hon Cheung will create loopholes which are practically impossible to plug, and will undermine the effectiveness of the BSD substantially, thereby affecting the BSD's policy objective to accord priority to the home ownership needs of HKPRs under the current tight housing supply situation.

**Transport and Housing Bureau
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