



立法會 LEGISLATIVE COUNCIL

石禮謙 議員 Hon Abraham Shek Lai-Him J.P.

24 June 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

Starry,

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)1288/12-13(01) relating to the above subject tabled at the last Bills Committee meeting and to which I would now give my response.

As I would not be able to attend the Bills Committee on the 28th June 2013, I would like to request your kind permission to have this paper tabled for discussion at the meeting after 28th June so as to give members more time for deliberation.

Yours sincerely,

Abraham SHEK Lai Him



Attachment

Background

1. The Administration has produced a Paper to the Bills Committee providing examples to illustrate possible loopholes and operational difficulties arising from the abuse of a self-declaration mechanism if companies whose shareholders are Hong Kong Permanent Residents (“HKPR”) are exempted from Buyers Stamp Duty (“BSD”).

Stamp duty – general principles on enforcement

2. In examining the examples given by the Administration, the Bills Committee would no doubt bear in mind the following general principles which apply to the stamp duty regime :-

(a) The regime adopts a potent form of enforcement in that unless a document has been duly stamped, it is not admissible in evidence. Further, a document which is not duly stamped cannot be acted upon, filed or registered by any public officer or body corporate. Accordingly, such a document cannot be produced in court, or registered in the Land Registry or in the register of shareholders of a company.

(b) If a person wishes to exercise or enforce his rights under the document, he would need to cause it to be duly stamped. 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 huge price to pay for getting the unstamped document duly stamped.

(c) Save for minor exemptions, all the parties to the document, and every person who uses the document, are liable, or jointly and severally liable, to the Collector of Stamp Revenue for the stamp duty and any penalty for late stamping.



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(d) Any person who practises 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 commits an offence, and is liable to a fine at level 6 and imprisonment for 1 year .

3. Accordingly, if a person enters into an arrangement to evade stamp duty in circumstances where no document is executed or the document is not duly stamped, he runs the following risks:-

(a) He will not be able to exercise or enforce his rights under the document without paying the stamp duty and a penalty of up to 10 times the stamp duty.

(b) Civil action by the Collector for recovery of the stamp duty and penalty.

(c) Criminal prosecution for defrauding the Government, a fine at level 6 and imprisonment for 1 year.

4. Generally, evasion of stamp duty is rare for the above reasons. The Collector is invited to produce statistics of evasion cases to the Bills Committee.

Example 1 – Nomination / Declaration of Trust / Power of Attorney

5. In this example, after Company X has acquired the BSD exemption, Mr A then transfers or confers to Mr B, a non-HKPR, the beneficial or controlling interest of all his shares in Company X and executes a nominee agreement, a declaration of trust or a power of attorney (“Relevant Document”).

6. The Inland Revenue Department (“IRD”) will no doubt maintain a list of the companies for which BSD exemption is granted. Once Company X has acquired the BSD exemption the IRD would be aware and have a record of this fact.

7. When Mr A transfers his beneficial interest by way of sale to Mr B, each of Mr A and Mr B must execute a Contract Note (on which the name of



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Company X will appear) within 2 days, and submit the Contract Notes to the IRD for stamping. The same applies even where the transfer is not by way of sale (for example, where the transfer is by way of gift), so that a Relevant Document, to the extent that it transfers a beneficial ownership, must be stamped as if it were a Contract Note .

8. Once the Contract Notes are submitted to the IRD for stamping, the IRD will immediately become aware that the shares of Company X are being disposed of, since the name of Company X appears in the Contract Notes and the IRD has a record that Company X has previously acquired the BSD exemption. Company X, Mr A and Mr B can be made jointly and severally liable for payment of the BSD.

9. An Instrument of Transfer will need to be submitted to the IRD for stamping or endorsement if Mr B wishes to be registered as the legal owner of the shares. Likewise, the IRD will then become aware of the disposal of the shares to a non-HKPR.

10. There is therefore sufficient deterrent and little incentive for evasion. The risks of evasion and operational difficulties are similar to those applicable to stamping of documents for transactions relating to Hong Kong stock and should be acceptable.

Example 2 – Premeditated transfer by Relevant Document

11. Example 2 is a variation of Example 1, except that the subsequent transfer by the Relevant Document is premeditated.

12. The reasons given under Example 1 equally apply to Example 2.

Example 3 – Allotment of new shares

13. The legislation can provide for a denial of the exemption if new shares are allotted, unless the Collector is satisfied that the allotment is made to a HKPR.



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14. The legislation can provide that when Company X acquires the BSD exemption, the fact of exemption will 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. The ASP and the Assignment will be registered in the Land Registry. Any person dealing with the property will be concerned to see whether the conditions for the continual exemption of BSD have been fulfilled. If one of the conditions is that no new shares can be allotted unless the Collector is satisfied with the HKPR status of the allottee, the title will be bad if Company X, as the vendor, cannot prove that the condition has been satisfied.

15. The solicitor acting for a purchaser from Company X would be under a duty to check that the conditions for the continual exemption of BSD have been fulfilled. This can be done by a company search to see if there is any allotment of shares and calling for Company X to produce evidence that the Collector is satisfied with the HKPR status of the allottee. Effectively Company X cannot sell the property without satisfying the purchaser that the conditions for continual exemption are satisfied.

Example 4 – Re-classification of shares and issue of shares

16. In this example, an ordinary share is allotted to Mr D, a non-HKPR, and the ordinary shares held by Mr A in Company X are re-classified by converting the same to non-voting deferred shares.

17. On allotment of the ordinary share to Mr D, please see the response to Example 3.

18. On re-classification, the simple solution is to provide 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.

19. As in Example 3, the solicitor acting for a purchaser from Company X would be under a duty to check that the conditions for the continual exemption of BSD have been fulfilled. This can be done by a company search to see if



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there is any reclassification of shares and calling for Company X to produce evidence that the Collector is satisfied with the HKPR status of the allottee. Effectively Company X cannot sell the property without satisfying the purchaser that the conditions for continual exemption are satisfied.