

**The Government's response to the issues raised by  
the Hon Abraham SHEK in his letter of 8 July 2013**

This paper serves to respond to the issues set out in the letter from the Hon Abraham SHEK of 8 July 2013 (LC Paper No. CB(1)1475/12-13(01) refers).

2. In response to Members' request, the Government has, based on the experience of the Inland Revenue Department in handling stamp duty cases, provided concrete examples in LC Paper No. CB(1)1288/12-13(01) and LC Paper No. CB(1)1460/12-13(01) to illustrate possible loopholes and enforcement difficulties in addressing potential abuse of the proposed self-declaration mechanism for the purpose of exempting companies owned by Hong Kong permanent residents (HKPRs) from the Buyer's Stamp Duty (BSD). As we have repeatedly emphasised, the Government is not assuming that all companies / shareholders would abuse the self-declaration mechanism concerned to circumvent the BSD. However, under the present extraordinary situation where supply remains tight and the property market remains exuberant, as a responsible Government, we cannot simply ignore the obvious loopholes that may be created by exempting companies from the BSD, which would undermine the effectiveness of the measure in cooling down the property market and according priority to addressing the home ownership needs of HKPRs.

3. As a matter of fact, the BSD rate is obviously higher than the rates of the ad valorem stamp duty and the stamp duty for share transfer. Besides, while transfers of beneficial interests in company shares in various ways are subject to stamp duty under the Stamp Duty Ordinance (Cap.117), if parties concerned do not submit the relevant documents for stamping, it would be extremely difficult for the Stamp Office (SO) to uncover such an incident, identify the relevant documents and recoup the BSD. As such, the risk of BSD evasion arising from the relevant loopholes should not be underestimated.

4. The Government's response to the Hon Shek's views regarding the specific examples, as mentioned in his letter of 8 July, is set out below.

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

5. As we have explained in LC Paper No. CB(1)1460/12-13(01), as far as nomination / declaration of trust / power of attorney (relevant documents) is concerned, in the absence of voluntary disclosure by the duty payers, the SO can hardly uncover such an incident, identify the relevant documents and recoup the BSD, as the relevant documents are not required to be registered in the company's share register or be filed with the Companies Registry. Besides, under the current Stamp Duty Ordinance, the rate of the proposed BSD (i.e. 15% of the value of the residential property transaction concerned) is much higher than the duty rate applicable to a Contract Note that concerns a transfer of beneficial interests in company shares (i.e. 0.2% of the value of the transfer concerned). As such, as explained in paragraph 3 above, the risk of BSD evasion arising from the relevant loopholes should not be underestimated. In view of the level of risk as well as the importance of the measure in cooling down the property market and according priority to addressing the home ownership needs of HKPRs, 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<sup>1</sup> in order to effectively plug the loopholes. 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 the BSD which is an extraordinary measure introduced under exceptional circumstances.

### **Examples 3 and 4 – Allotment of new shares and reclassification of issued shares**

6. We have explained in LC Paper No. CB(1)1460/12-13(01) that the exemption mechanism proposed by the Hon Shek fails to deal with abuse cases where the property concerned is still held by a company, but the beneficial interests in the shares of the company have been transferred through execution

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<sup>1</sup> In order to make transfers of beneficial interests in company shares more transparent for inspection purposes, it may be necessary to amend the Companies Ordinance (Cap. 32) to introduce certain new registration and reporting requirements for such transfers.

of the relevant documents / allotment of new shares / reclassification of issued shares. Under the Hon Shek's proposal, while the company concerned will breach the BSD exemption condition when it takes actions such as allotment of new shares, according to case law, failure to ensure that an instrument chargeable with stamp duty is duly stamped does not affect the title<sup>2</sup>. Therefore, in law, allotment of new shares does not affect the company's ownership of the residential property. As such, even with the exemption mechanism suggested by the Hon Shek, corporate buyers who wish to circumvent the BSD may transfer the beneficial interests in the shares of the company concerned to non-HKPRs through the above-mentioned ways, in order to transfer the ownership of the residential property in question to non-HKPRs indirectly so that it would not need to pay the BSD. This loophole will undermine the effectiveness of the BSD in cooling down the property market and in according priority to addressing the home ownership needs of HKPRs.

7. We have also mentioned in LC Paper No. CB(1)1460/12-13(01) that even if a residential property-holding company disposes of the residential property concerned by way of a sale and purchase agreement several years after the acquisition, and is then found to have transferred the beneficial interests in the shares of the company through ways such as allotment of new shares, it would be difficult to take actions against the relevant parties as the disposal may take place many years after acquisition of the property concerned, and the beneficial interests in shares of the company may have been transferred for many times during that period.

8. Under the existing system, solicitors are not required to determine the amount of duty payable on a conveyancing instrument or to determine whether the instrument has been adequately stamped. Instead, it is the responsibility of the SO to determine the correct amount of stamp duty payable on the instrument. As we have explained above, shareholders of a company may transfer beneficial interests in company shares in various ways. While such transfers will not affect the title, they contravene the condition for the BSD exemption as proposed by the Hon Shek. 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 interests 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. The Government considers that such changes,

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<sup>2</sup> Town Bright Industries Ltd v Bermuda Trust (Hong Kong) Ltd (1999) CACV 137/1998

which will lead to far-reaching implications, should not be made for the sake of the BSD which is an extraordinary measure introduced under exceptional circumstances.

**Transport and Housing Bureau**  
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