

Our ref. : [2013] HKIEA P1(b)

5 April 2013

Chairman and Members,  
Bills Committee on the Stamp Duty (Amendment) Bill 2012,  
Legislative Council Complex,  
1 Legislative Council Road,  
Hong Kong.

By email : [bc\\_01\\_12@legco.gov.hk](mailto:bc_01_12@legco.gov.hk)

Dear Chairman and Members,

**Re : Further reply to the Administration's reply on the Buyer Stamp Duty ('BSD')**

1. Thank you for your email of 25 March 2013 forwarding us the Administration's reply (LC Paper No. CB(1)770/12-13(02)) to our letter of 15 March 2013.
2. Hot on the heels of the 'milk powder' fiasco, detailed scrutiny by the legislature of the Administration's recent package of anti-property bubble measures (including BSD and the rest under the broad '*Hong Kong Property for Hong Kong People* (**'HKPHKP')** 「港人港地」 umbrella, collectively referred to as **Property Initiatives** below), has become all the more important. The central question should be - is there any rational basis to devise measures that would only benefit '*Hong Kong People*' meaning HKPR only, instead of '*Hong Kong residents*' which according to Basic Law Article 25 should mean both **HKPR** and **non-HKPR**? For ease of future reference we have numbered the paragraphs and added headings.
3. It is plain from the reply that the Administration has acknowledged that the BSD does discriminate against non-HKPRs in breach of the Basic Law, only that an attempt was then made to justify the infringement on certain grounds (akin to the ***fair balance test*** mentioned in our submissions dated 5 February 2013 - LC Paper No. CB(1)536/12-13(10), namely that :
  - (a) the BSD pursues a legitimate aim - to meet '*the housing needs of HKPRs who have a close connection with Hong Kong*', and/or to prevent the property bubble burst ('the **Professed Aim**');
  - (b) the exemption is rationally connected to the Professed Aim - there is '*a genuine need to treat HKPRs differently from other Hong Kong residents*';
  - (c) the interference is no more than is necessary.

#### **Fair Balance Test I - Legitimate Aim**

4. We wish to reiterate at the outset that we in broad agreement with Government over the Property Initiatives. We are mainly concerned with just one issue - the disparity in treatment between HKPRs and non-HKPRs in breach of the Basic Law. We therefore agree that the Professed Aim does pursue a legitimate aim and that the first limb of the *fair balance test* is satisfied.

#### **Fair Balance Test II - Rational connection with the Professed Aim**

5. Any infringement of *Basic Law* rights is a serious matter, and it is incumbent upon the legislature to ensure that Hong Kong residents' rights are not sacrificed for executive expediency. The Administration has made a ***bare assertion*** that the BSD is rationally connected to the Professed Aim without giving supporting reasons. We do not agree with the assertion. We shall begin by finding out who are the 'non-HKPRs' who would bear the brunt of the BSD (and the Property Initiatives).
6. We understand, from what our limited means can gather from open sources, that non-HKPRs mainly comprise the following groups of residents :
  - (a) one-way permit ('OWP') holders under the '150 daily' quota agreed with the Mainland authorities;
  - (b) Mainland talents and professionals - for elitists like the renowned pianist Lang Lang or Olympiad medalists;
  - (c) work permit holders and their dependents from the Mainland and other places - for professionals, academics and chefs etc.;
  - (d) investors (though landed property investment is now excluded).

#### **One-way permit ('OWP') holders**

7. In reply to a question from the Hon Mr. Sin Chung-kai, the Acting Secretary for Security made the following statement to Legco on 20 March 2013:

*... According to the announcement of the Mainland authorities, Mainland residents under one of the following situations may apply for OWP to come to settle in Hong Kong:*

- (1) his/her **spouse is settled in Hong Kong**; may bring along children aged under 18.
- (2) he/she is aged above 18 and under 60 and need to come to Hong Kong to **take care of his/her parents settled in Hong Kong** both of who are aged above 60 and have no children in Hong Kong.
- (3) he/she is aged above 60 and has no children in the Mainland, and has to **depend on his/her children aged above 18 settled in Hong Kong**.
- (4) he/she is aged under 18 and has to depend on his/her parents settled in Hong Kong.
- (5) he/she is a child of Hong Kong permanent residents and holds a Certificate of Entitlement.

...

From July 1, 1997 to December 31, 2012, **762,044** Mainland residents came to settle in Hong Kong on the strength of OWP. Among them, about **half reunited with their spouses** and **half reunited with their parents**, while a small number reunited with **their children**. **New arrivals on the strength of OWP are among the important sources of population growth in Hong Kong...**(emphasis added)

#### **'Close relatives' as a pre-condition for OWP**

8. Eligibility for OWP is ***dependent*** on having a ***close relative*** (spouse, parent or child) settled in Hong Kong. So for the purpose of our present discussion OWP holders are referred to as '**Dependent non-HKPR**'.
9. The HKSAR Government has no discretion to reject OWPs issued by Mainland authorities. Unlike the other groups of new arrivals who are granted resident status on the strength of their personal qualities like professional qualification, experience or achievement (referred to below as '**Independent non-HKPR**'), *Dependent non-HKPRs* are not required to renew their residence visa so once entered Hong Kong they **will progress to become HKPRs after 7 years**.
10. On the other hand, *Independent non-HKPRs* may lose their residence rights if their skills are no longer required or if they change employment etc. For them, HKPR status cannot be taken for granted.
11. The *dependence* on close relatives factor is significant for our discussion below.

12. Being no demographers ourselves and applying simple arithmetic, we estimate that of the 762,044 *Dependent non-HKPRs* admitted in the 15 1/2 years since reunification, only around 343,000 would remain non-HKPRs (i.e.  $762,000 \times 7/15.5$ ). They form only **4.8%** of the total Hong Kong population of **7.2 million**.
13. We have no statistics on the number of *Independent non-HKPRs*. But given that there is no '150 daily' quota, and that their admission and stay are subject to the discretion of the Director of Immigration and therefore may have to leave just after 6 months or one year, we surmise that they would number less than half as much as *Dependent non-HKPRs*, say only around **2%** of the total Hong Kong population. On this number, we are prepared to accept any reasonable counter-sum given by the Administration.

#### **Rational connection with the Professed Aim?**

14. It is common knowledge that it is mainly external factors like external hot money and low interest rates etc. that contribute to the overheated Hong Kong property market. Institutional buyers and visitors, who have no need for a home here, compete with Hong Kong residents for scarce residential properties for investment purposes thereby pushing up prices.
15. The Administration's reply says, at para. 3, '*the proposed exemption for HKPR buyers pursues the legitimate aim of meeting the housing needs of HKPRs who have a close connection with Hong Kong...*'.
16. This pro-HKPR assertion is flawed because :
- a. non-HKPRs (including *Dependent non-HKPRs* and *Independent non-HKPRs*) have as much **close connection** with Hong Kong as HKPRs by reason of their coming to join their close relatives already settled here, or having personal qualities that the Director of Immigration considers to be beneficial to Hong Kong thus worthy of an entry visa;
  - b. there is no suggestion that among *residents* of Hong Kong (meaning both HKPRs and non-HKPRs), only non-HKPRs have contributed to the bubble therefore only HKPRs should be exempted from BSD. If this is indeed the case the Administration should be able to work out some proof from the



tell-tale pre-fix of the purchasers' Hong Kong identity card number as recorded at the Land Registry or Stamp Duty Office.

17. Even assuming that non-HKPRs do contribute to the property bubble, it is difficult to see how burdening the 7% of the population (i.e. 4.8% *Dependent non-HKPRs* plus our estimated 2% *Independent non-HKPRs*) with BSD, in breach of the Basic Law, could help to dampen the property bubble to the benefit of the remaining 93% HKPRs. It might well be so if the reverse is the case, i.e. if non-HKPRs comprise 93% of the population instead!
18. The Administration has failed to establish any rational connection between BSD and the Professed Aim.

### **The *Independent non-HKPR* vs *Dependent non-HKPR* divide**

#### **BSD and New AVD**

19. The Administration's case is even more flawed if one takes a closer look at the Property Initiatives. Two of them (the Kai Tak site issue will be discussed later) are summarized in the annexed stamp duty chart (teaching aid for our Property Practice Training Course) of which **Box 5** (BSD) and **Box 8** (the proposed New *ad valorem* stamp duty ('**New AVD**'), common called **Double Stamp Duty**) are particularly relevant.
20. Ad valorem stamp duty ('AVD') is a long standing stamp duty payable on any property transaction but shortly after proposing BSD in October 2012 the Administration further introduced the **New AVD** in February 2013 to run in parallel with the existing scheme ('**Old AVD**').
21. Let us illustrate with the case of a non-HKPR who does not own any residential property in Hong Kong and who wishes to buy a modest \$5 million home as sole owner. He has to pay **15% BSD**.
22. He is also charged the **New AVD** at **6%** (for a property in the \$5 million bracket).

#### **The Close Relatives Exemption**

23. However, he may be exempted from the 15% BSD if he co-owns it with a close relative HKPR : (IRD BSD Q&A : <http://www.ird.gov.hk/eng/faq/bsd.htm#a1> )

10. Q: *If a residential property is acquired jointly by a HKPR and his/her spouse who is not a HKPR, will any BSD be payable?*

A: *Acquisition of residential properties by a HKPR jointly with a **close relative** (i.e. **spouse, parent, child, brother and sister**) who is not a HKPR and each of them is acting on his/her own behalf is not chargeable with BSD.*

24. Not only that, if he co-owns it with a close relative HKPR the 6% New AVD will also be exempted. He only has to pay the **Old AVD** at the lower rate of **3%** : (IRD AVD Q&A : <http://www.ird.gov.hk/eng/faq/avd.htm#a1> )

12. Q: *Under what circumstances will the New AVD be not applicable?*

A: *It is proposed that the New AVD, subject to legislation, will not be applicable under the following circumstances ...*

(iii) *acquisition of a residential property by a HKPR jointly as a co-owner or joint owner with a **close relative** or close relatives (i.e. **spouse, parents, children, brothers and sisters**) who is/are not HKPR and each of the purchasers is acting on his/her own behalf and does not own any other residential property in Hong Kong at the time of acquisition;*

25. So the non-HKPR buyer has two options :

(a) he can buy it as sole owner and pay \$15% BSD and 6% New AVD - a total of 21% stamp duties; or

(b) he can give 1% interest of the property to a HKPR close relative who does not own any residential property, then co-owns it (as tenants-in-common 99:1) with that close relative. BSD is totally exempted and only the Old AVD at 3% is payable. The cost for him will be the 3% Old AVD plus the 1% land interest gift to the close relative (totaling **4%**) , but the benefit will be a **17%** savings in stamp duties (off the **21%** for Option (a)).

The gift could be *bona fide* involving no trust relationship and therefore no law or Government policy is breached. No title problem will arise as no *deed*

*of gift* or nomination is involved. An appropriate power of attorney from the close relative would take care of any future sales formalities.

If the close relative wants to enjoy the Old AVD when he buys his own property in the future he can just dispose of the 1% back to the non-HKPR co-owner openly and lawfully (incurring negligible stamp duty) as suggested by the AVD Q&A Question 25 :

*'if a HKPR has disposed of all of his existing residential properties before acquiring a new one, the old AVD rates will apply to the acquisition. '*

### **Who among non-HKPRs can escape from the double BSD/New AVD burden?**

26. Certainly Option (b) is viable and the preferred option for the 4.8% *Dependent non-HKPRs*. Mainland authorities issue them the OWP **only because** they have close relatives (parent, spouse or child) settled in Hong Kong. Any professional advisor owing a duty to promote client interests would proffer Option (b) to the client which is perfectly lawful advice. We therefore doubt if BSD (and for the matter the New AVD) will ever catch the 4.8% *Dependent non-HKPRs*.
27. Unfortunately Option (b) may not be viable for the *Independent non-HKPRs*. They are much less likely to find a close relative here to help to 'co-own' the property and therefore cannot enjoy the exemptions. So of the 7.2 million Hong Kong residents, may be this small group of 2% *Independent non-HKPRs* alone will actually suffer the double burden of BSD and New AVD in breach of their *Basic Law* rights (Article 6 - right to property ownership; Article 25 - all Hong Kong residents shall be equal before the law).

### **Rational connection not proven**

28. Is there any rational connection between the Property Initiatives and the Professed Aim? We do not see any rational connection because :
- a. imposing BSD etc. on **non-residents** (visitors or people who do not even land in Hong Kong) and institutions is rationally connected with the Professes Aim and have apparently worked as recent statistics suggest;

- b. even at the superficial level, it defies logic to suggest that imposing BSD etc. on the estimated 7% non-HKPRs can bring any significant benefit to the 93% HKPR in terms of dampening the demand for properties;
- c. the *close relatives* exemption will actually defeat the Professed Aim, by allowing the majority of those who are supposed to be caught by it - the 4.8% *Dependent non-HKPR* - an opportunity to escape. Therefore BSD etc. can only catch the even smaller minority of estimated 2% *Independent non-HKPRs*, weakening further the Professed Aim;
- d. they do not follow the CE's own guiding principle on housing policy, namely that '*home ownership is crucial to social stability*', and also contradict his express housing objective to '*assist the public to choose accommodation according to their affordability and personal circumstances, and encourage those who can afford it to buy their own homes*'.

### **Fair Balance Test III - Interference that is no more than is necessary**

- 29. As a resident subject to and be protected by the Basic Law, non-HKPRs owe as much duty as HKPRs, such as the duty to pay tax. What housing benefits or rights do they enjoy?
- 30. Public rental housing is out of the question as only HKPR can apply. The Court has held that discrimination in allocation of public rental housing may not be unconstitutional. The Basic Law property rights are not absolute and the Administration enjoys certain discretion in the allocation of scarce public resources, and therefore may lawfully impose a 7-year waiting period. We do not argue with that.
- 31. But just because the 7-year wait is rational and proportionate for the purposes of allocation of scarce public rental housing does not necessarily mean that it is also rational and proportionate when it deters a non-HKPR from exercising his Basic Law right to buy property with his own money without any help from Government.
- 32. Let us consider the cumulative effect on a non-HKPR of the various measures under the Property Initiatives, namely BSD, New AVD and HKPHKP.



**(i) BSD**

33. A non-HKPR purchaser wishing to buy a home will first of all face 15% BSD. As discussed above the BSD burden may on the face of it affect an estimated 7% of the total 7.2 million population. But as *Dependent non-HKPRs* may escape from the BSD by exploiting the close relatives exemptions, only the estimated 2% *Independent non-HKPRs* need suffer the BSD.

**(ii) New AVD**

34. The BSD is followed by the New AVD which ranges from a low of 1.5% to a high of 8.5%. Again those who can exploit the close relatives exemptions, meaning in effect the *Dependent non-HKPRs*, can escape the New AVD and enjoy the Old AVD which ranges from a low of \$100 to 4.25% which is only about half of the New AVD. Independent non-HKPRs have to pay double AVD.

**(iii) Hong Kong Property for Hong Kong People ('HKPHKP')**

35. Then the Kai Tak sites herald in a new era of restrictive ownership for Government land. The Lands Department press release of 19 March 2013 says for the first 30 years properties on land under the HKPHKP Scheme can only be sold to :

- HKPRs; and
- in case of flat sale to joint purchasers comprising HKPR(s) and non-HKPR(s), the purchasers must be close relatives, i.e. parents, spouse, child, brothers and sisters of each other.

**Cumulative effect of the Property Initiatives**

36. A non-HKPR first of all cannot enjoy public rental housing. But if he wants to buy a property and is among the estimated 2% *Independent non-HKPRs*, worse is still to come. He has to pay 15% BSD, plus a maximum New AVD of 8.5% instead of the maximum 4.25% under Old AVD. And Government sites such as those at Kai Tak will be out of his reach for 30 years.

37. He may be slightly better off if he is a *Dependent non-HKPR*. We long to hear from

the Administration how these measures can be considered 'proportionate' to the Professed Aim.

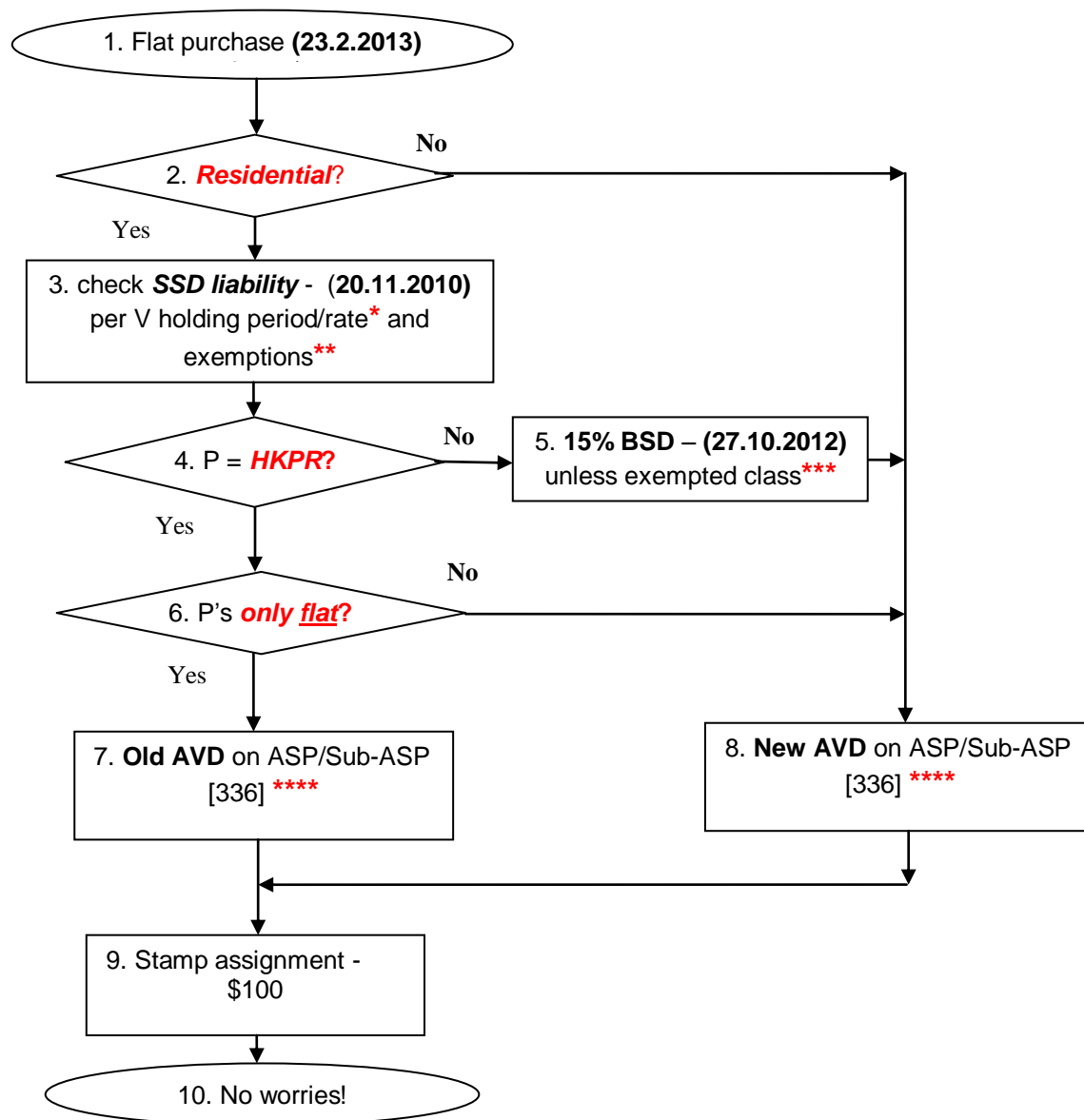
### Conclusion

38. The Basic Law says all Hong Kong **residents**, including HKPR and non-HKPR, are equal before the law. It further guarantees all **residents** the right to property ownership.
39. The Property Initiatives including BSD deprive non-HKPRs of their Basic Law rights. While the Property Initiatives do pursue a legitimate aim, the deprivation bears **no rational relationship** to the Professed Aim as non-HKPRs form only a small minority of the Hong Kong population. Further a significant proportion of them can escape the Property Initiatives by exploiting the close relatives exemption - **the Administration give with their right hand what they take with the left.**
40. The Property Initiatives go well beyond what is necessary to achieve the Professed Aim and are therefore **not proportionate**. Therefore the **fair balance test** is not satisfied as to justify infringement of the Basic Law.
41. The Property Initiatives not only drives a wedge between HKPRs and non-HKPRs, but also creates tension between *Independent non-HKPRs* and *Dependent non-HKPRs*. They run counter to what the Chief Executive says in his policy address, namely that '**home ownership by the middle class is crucial to social stability**'. **All that one can hear about upholding the Basic Law is but hot air!**
42. As there is no justification to differentiate between HKPR and non-HKPR, any reference to HKPR in the Property Initiatives should be replaced by 'Hong Kong residents'. Further the close relatives exemption should be abolished as they only serve to defeat the Professed Aim by allowing **OWP non-HKPR** to escape from the Property Initiatives. **Indirect race discrimination** against **non-Chinese non-HKPR**?

Yours sincerely,



Moran Zukerman  
President



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## SSD RATE

Period held before disposal to P/donee/transferee

Date V/ex-owner acquired	<= 6 mon	> 6 to 12 mon	>12 to 24 mon	>24 to 36 mon
20.11.2010 - 26.10.2012	15%	10%	5%	-
since 27.10.2012	20%	15%	10%	10%

\*\* see FAQ at [www.hkiea.hk](http://www.hkiea.hk) > Practitioners > D Matters of Interest > 10/2011

\*\*\* see [www.hkiea.hk](http://www.hkiea.hk) > Practitioners > D Matters of Interest > 27.10.2012

\*\*\*\* IRD illustrative examples <http://www.ird.gov.hk/eng/faq/avdexample.htm>

A fool's (i.e. Stanley's) outline guide to Hong Kong stamp duty for estate agency work (3/2013)

## On Sale or Transfer of Immovable Property in Hong Kong

Consideration/value (whichever the higher)		<b>Old AVD rates</b> (wef 1.4.2010)
Exceeds	Does not exceed	
	\$2,000,000	\$100
\$2,000,000	\$2,351,760	\$100 + 10% of >\$2m
\$2,351,760	\$3,000,000	1.5%
\$3,000,000	\$3,290,320	\$45,000 + 10% of > \$3m
\$3,290,320	\$4,000,000	2.25%
\$4,000,000	\$4,428,570	\$90,000 + 10% of > \$m
\$4,428,570	\$6,000,000	3%
\$6,000,000	\$6,720,000	\$180,000 + 10% of > \$6m
\$6,720,000	\$20,000,000	3.75%
\$20,000,000	\$21,739,120	\$750,000 + 10% of > \$20m
\$21,739,120		4.25%

Consideration/value (whichever the higher)	<b>New AVD rates</b> <b>wef 23.2.2013</b>
Up to \$2,000,000	1.50%
\$2,000,001 to \$2,176,470	\$30,000+20% of > \$2m
\$2,176,471 to \$3,000,000	3.00%
\$3,000,001 to \$3,290,330	\$90,000+20% of > \$3m
\$3,290,331 to \$4,000,000	4.50%
\$4,000,001 to \$4,428,580	\$180,000+20% of > \$4m
\$4,428,581 to \$6,000,000	6.00%
\$6,000,001 to \$6,720,000	\$360,000+20% of > \$6m
\$6,720,001 to \$20,000,000	7.50%
\$20,000,001 to \$21,739,130	\$1,500,000+20% of > \$20m
\$21,739,131 and above	8.50%