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(English version only)

Note on the proposed CSAs to be moved by The Hon Starry Lee Wai-king to add sunset clauses in the proposed new section 70 in clause 17 of the Stamp Duty (Amendment) Bill 2012

The Stamp Duty (Amendment) Bill 2012

The Stamp Duty (Amendment) Bill 2012 (the Bill) seeks to impose a higher rate of special stamp duty on certain agreements for sale and conveyances on sale of residential properties that are acquired on or after 27 October 2012 and are disposed of within 36 months of acquisition, and to impose a new duty, known as the buyer's stamp duty, on certain agreements for sale and conveyances on sale of residential properties executed after that date.

2. The special stamp duty is charged under head 1(1AA) and (1B) of the First Schedule to the Stamp Duty Ordinance (Cap.117). The Bill proposed to amend by clause 18 the head 1(1AA) and (1B) to increase the rates of special stamp duty (SSD) on certain agreement for sale and conveyance on sale of residential properties that are acquired after 27 October 2012 and disposed within 6 months, 12 months and 36 months to 20%, 15% and 10% respectively. This is effected by adding a Part 2 to head 1(1AA) and (1B) respectively. The existing SSD regime would become Part 1 and have effect only in respect of residential properties acquired on or after 20 November 2010 but before 27 October 2012.

3. There are provisions relating to the charge of the SSD in sections 29CA and 29DA of Cap. 117. As a result of the proposed amendments to head 1(1AA) and (1B), consequential amendments are required to be made to section 29CA(2) and (3) and section 29DA(2) and (3). Such amendments are contained in clauses 8 and 11 of the Bill respectively.

The Amendments proposed by Hon Starry LEE Wai-king

4. At the meeting of the Bills Committee on the Bill held on 20 December 2013, the members resolved, among others, to accept the CSAs proposed by the Hon Tommy CHEUNG Yu-yan and the Hon Andrew LEUNG Kwan-yuen to amend the new proposed section 70 in clause 17 of the Bill by adding provisions to stipulate an expiry date for sections 29CA and 29DA and head 1(1AA) and (1B) (the sunset clauses). The Hon Tommy CHEUNG stipulates 31 December 2014 as the expiry date and the Hon Andrew LEUNG 26

October 2015. It was resolved that the Chairman of the Bills Committee should move the CSAs on behalf of the Bills Committee

5. Section 27 of the Interpretation and General Clauses Ordinance (Cap. 1) provides, among others, that where an Ordinance expires or lapses, the provisions of section 23 shall apply as if the Ordinance had been repealed. Section 23 of Cap.1 provides that Where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect;
(b) affect the previous operation of any Ordinance so repealed or anything duly done or suffered under any Ordinance so repealed;
(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any Ordinance so repealed;
(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any Ordinance so repealed; or
(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Ordinance had not been passed.

6. Applying section 23 to provisions affected by the sunset clause, the effect is that despite the expiry of sections 29CA and 29DA and head 1(1AA) and (1B) (the relevant provisions) on 31 December 2014 or 26 October 2015 (as the case may be), the relevant provisions remain effective up to midnight of the expiry date.

The submissions by the Administration

7. The Administration expressed the view that the sunset clauses would have the effect of terminating the existing SSD regime if the proposed amendments in the Bill to enhance the SSD measures are not passed by LegCo. Since one of the objects of the Bill as stated in its long title is to impose higher rate of SSD, the terminating effect of the sunset clauses renders them outside scope.

The Analysis

The existing Special Stamp Duty regime

8. As stated in paragraph 2 above, the proposed amendments of the Bill has limited the application of the existing provisions imposing SSD in head 1(1AA) and (1B) of the First Schedule to Cap. 117 to residential property acquired during the period between 20 November 2010 and 26 October 2012 (both dates inclusive) (the first period). The sunset clauses have no effect on such amendments. They also do not affect the effectiveness of the provisions during the first period. By the provisions of the Bill, the application of the existing provisions imposing SSD is limited to the first period.

9. The sunset clauses would cause the provisions added by the Bill to head 1(1AA) and (1B) and sections 29CA and 29DA cease to have effect after the stipulated expiry dates. They only affect residential properties acquired after the respective expiry dates.

10. In the premises, the sunset clauses have no retrospective effect and could not be said to have negated the existing provisions imposing SSD or the enhancement provisions proposed in the Bill.

The long title of the Bill

11. The sunset clauses are not inconsistent with the long title of the Bill. As shown in the last paragraph, the sunset clauses do not affect the operation of the provisions imposing SSD but only restricting the application of those provisions in time. The long title does not state the time during which the SSD regime must remain valid. There is no presumption that the provisions of any Bill must remain in force indefinitely and their application could not be restricted in time. The sunset clauses do not have the effect of terminating the existing SSD regime if the proposed enhanced regime is not passed. Moreover, each of the sunset clauses has built-in provisions to allow the expiry date to be amended so that SSD provisions may be continued after the stated expiry date.

12. As to the argument of the Administration that the sunset clauses would have the effect of terminating the current SSD regime if the proposed amendments in the Bill in relation to SSD are not passed and are therefore outside scope. This argument is misconceived. The fact is that the proposed amendments in the Bill have imposed a date limiting the operation of the current SSD regime up to and include 26 October 2012 and simultaneously proposed an

enhanced regime to have effect from 27 October 2012. The sunset clause proposed no more than an end date for the SSD regime. If it is within scope for the Administration to impose an end date for the existing regime, it is equally within scope for the Members to propose a CSA to impose a different date.

13. If the Administration's argument is allowed to stand, it would practically mean that only the Administration could introduce amendments to existing provisions, Members are not allowed to propose CASs in respect of provisions amended by the Administration that would have an effect of changing such provisions unless that change is in accord with the Administration's proposal.

14. It must further be noted that the outside scope argument of the Administration is based on a contingency that may or may not materialize. The Administration's argument in fact admits that if the enhanced regime as drafted in clause 18 of the Bill is passed, the CSAs proposing the sunset clauses are not outside scope. It follows that even if the Administration's argument of outside scope is accepted, it is only valid when clause 18 of the Bill, i.e. the enhanced BSD regime, is not passed. Hence, at the very least, the CSAs proposing the sunset clauses should be allowed to proceed subject to the only condition that they be moved when clause 18 of the Bill has been passed by Members.

Concluding remarks

15. On the basis of the above analysis, it is submitted that the CSAs proposing the sunset clauses are not per se outside scope and should be allowed to proceed unconditionally or, at the very least, subject to the only condition that clause 18 of the Bill has been passed by Members.

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