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**FINANCIAL SERVICES AND
THE TREASURY BUREAU
(The Treasury Branch)**

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27 May 2014

Dear Mr Kau,

Stamp Duty (Amendment) Bill 2013

Thank you for your letter dated 21 May 2014, setting out your observations on the draft Committee Stage Amendments (“CSAs”) proposed by the Administration. We are grateful for the opportunity to go through the issues with you at the meeting held on 26 May 2014. We will actively take on board your suggestions/comments which are not inconsistent with the Government’s policy intent and will make refinements to the drafting of the CSAs, as appropriate.

Our initial responses are set out at **Annex** for reference.

Yours sincerely,

(Lau Wai Ming)

for Secretary for Financial Services
and the Treasury

C.C.

Secretary for Transport and Housing
Commissioner of Inland Revenue
Department of Justice

(Attn: Mrs Vicki KWOK)

(Attn: Mr TAM Tai-pang)

(Attn: Mr Allen LAI

Mr Manuel NG

Mr CHEUNG Man-yiu)

**The Administration's responses to the issues raised by
the Legal Service Division of the Legislative Council Secretariat**

Issues	The Administration's Responses
<p>1. <u>Proposed section 29AM(2)</u></p> <p>(a) The provision has assumed that every assignment of lease is a conveyance on sale. Please consider whether this assumption is valid and provide legal authorities in support of the view.</p>	<p>“Conveyance” is defined in section 2(1) of the Stamp Duty Ordinance (Cap. 117) (“SDO”) to mean “every instrument (including a surrender) and every decree or order of any court whereby any immovable property is transferred to or vested in any person”. A lease is an estate, interest or right in land which, by virtue of section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), is “immovable property”. Accordingly, we are of the view that an assignment (or a transfer) of lease (an immovable property) falls squarely within the definition of “conveyance”.</p> <p>Under section 2(1) of the SDO, “conveyance on sale” is defined to mean “every conveyance whereby any immovable property, upon the sale thereof, is transferred to or vested in a purchaser or any other person on his behalf or by his direction, and includes a foreclosure order.” We are of the view that an assignment of lease in return for a money consideration is a "conveyance on sale" chargeable with duty under head 1(1) of the First Schedule [see the Encyclopaedia of Hong Kong Taxation Stamp Duty 1(II[3772]). The meaning of “on sale” is "A sale involves a transfer of the absolute or general property in a thing for a price in money with</p>

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	<p>the presence of the following elements: (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised." (Halsbury's Laws of Hong Kong para. 370.371)</p>
<p>(b) Please consider if the lease, to which the proposed section 29AM(2) is applicable, should be limited in its term.</p>	<p>In the Committee Stage Amendments ("CSAs"), an assignment of lease will be exempted from the doubled ad valorem stamp duty ("DSD") only if the original lease was not a government lease and was or would have been stamped or chargeable with stamp duty under head 1(2) in the First Schedule to the SDO. Head 1(2) specifically provides for assessing stamp duty on lease. In the case of assignment of lease, only the unexpired lease term could be assigned. We consider that the tenant may have the genuine need to assign the unexpired lease to another tenant. Taking into account that the assignment of lease does not effect a transfer of ownership interest in the property, an express provision needs to be added in the Bill to exempt the assignment of lease from the DSD.</p> <p>We incline not limiting the term of the leases concerned for the purpose of this technical CSA as any such change is disproportionate given that DSD is an exceptional measure.</p>
<p>(c) The observation in (b) above also applies to the proposed section 29AM(3).</p>	<p>Please refer to our comments on (b) above.</p>

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<p>(d) In the proposed section 29AM(3), whilst it is provided that a lease and an agreement for lease are to be stamped as conveyance on sale, only an agreement for lease is to be stamped according to Scale 2 of head 1(1) in the First Schedule.</p>	<p>We agree that section 29AM(3) should be revised by specifying that the “lease” should also be chargeable under Scale 2 of head 1(1) in the First Schedule for the sake of enhancing clarity.</p>
<p>2. <u>Proposed sections 29BJ</u></p> <p>(a) It is very doubtful that an agreement for the assignment of lease is a chargeable agreement for sale if it is not so provided in section 29C. The proposed section 29BJ is inconsistent with section 29C.</p>	<p>The proposed section 29BJ is to specify that an agreement for transferring leasehold interest in land including surrender of lease will be exempted from the DSD. Surrender of lease normally takes place when the landlord wishes to get back the property and the legal position is clear that a surrender of lease is a conveyance. Where the landlord pays a consideration as compensation to the tenant for the surrender of lease, the instrument effecting the surrender falls within the meaning of “conveyance on sale”.</p> <p>“Agreement for sale” is defined in section 29A(1)(e) of SDO to mean “an agreement which, if implemented, would be implemented by a conveyance on sale”. Where a consideration is payable for the surrender of lease and an agreement for the surrender is executed and subsequently implemented by a deed of surrender, the agreement for surrender of lease is an agreement for sale for the stamp duty purposes. Such agreement will be charged with AVD under head 1(1A) based on the consideration payable by the landlord to the tenant. Given that its nature is simply to allow the landlord to “take back” the possession of the property</p>

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		before the tenancy expires, and does not involve any transfer in ownership interest in a property, an express exemption needs to be added in the Bill to exempt the agreement for surrender of lease from the doubled AVD.
	(b) The observations on the proposed section 29AM(92) also apply to this provision.	Please see our comments on the proposed 29AM(2) above.
3.	<p><u>Proposed section 29BBA</u></p> <p>Please consider reformulating the proposed section 29BBA(1) so that the first main clause is as follows –</p> <p>“Scale 2 of head 1(1A) in the First Schedule applies to a chargeable agreement for sale if –”</p>	The proposed new section 29BBA is proposed to be added after section 29BB. Section 29BB is concerned with the exemption from DSD for certain agreements for sale of residential property. Since the exemption under the proposed new section 29BBA is also a similar exemption but is related to the acquisition of residential property together with car parking space, we consider that it is more appropriate for the new section 29BBA to follow the wording of section 29BB.
4.	<p><u>Proposed CSAs to section 29DF</u></p> <p>(a) Since the introduction of the residential property whether or not together with a car parking space would give rise to multiple scenarios, e.g. the original property does not include car parking space but the subject property does; the original property does not include car parking space but the</p>	Striking a balance between the prevailing stamp duty regime on property, addressing the home ownership needs of the public and safeguarding the effectiveness of the measures, we consider the need to uphold the spirit of providing the current exemption to residential properties and in doing so to cater along the need of those in acquiring a residential property and a car parking space by a single instrument by exempting the car parking space from the doubled AVD. The exemption shall be stringently drawn up with

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<p>subject property includes more than one car parking space, the original property includes one car parking space but the subject property includes more than one car parking space, please review whether the definition of specified amount should be accordingly modified to cater for different scenarios.</p>	<p>the following conditions:</p> <ul style="list-style-type: none">(a) the buyer is a HKPR who is acting on his or her behalf and is not a beneficial owner of any other residential property and car parking space in Hong Kong at the time of acquisition of the concerned residential property and car parking space;(b) the concerned exemption is restricted to one car parking space, irrespective of whether the car parking space is acquired for self-use or by a first-time buyer; and(c) the concerned car parking space must be acquired together with the residential property in a single instrument, irrespective of whether the car parking space is located in the same residential development. If the single instrument involves more than one car parking space, all the car parking spaces will not be exempted even if they are purchased jointly with the residential property. <p>For the scenarios where the original property does not include car parking space but the subject property includes more than one car parking space or the original property includes one car parking space but the subject property includes more than one car parking space, the refund of the difference between the DSD and existing AVD will only be applicable to the new residential property.</p>

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	<p>The CSAs are in draft form. In light of the suggestion, we will revisit the drafting and consider making refinements, as appropriate, to the definition of “specified amount” in the proposed section 29DF to cater for different scenarios.</p>
<p>(b) Please also consider whether the disposition of the original property should include divestment and transfer by way of gift inter vivos.</p>	<p>We are of the view that “disposition” (or disposal) should be general enough to cover whether consideration is involved. Therefore, it should cover “divest” and “gift inter vivos”.</p>
<p>(c) Please consider whether it would be more precise if the last part of the proposed section 29DF(5)(b) is reformulated as follows –</p> <p>“6 months after the date of the conveyance on sale of the subject property executed in conformity with that agreement.”</p>	<p>The CSAs are in draft form. In light of the suggestion, we will revisit the drafting and consider making refinements, as appropriate, to the drafting of the last part of the proposed section 29DF(5)(b).</p>