

Stamp Duty (Amendment) Bill 2013

The Government's response to the draft Committee Stage Amendments proposed by the Hon Kenneth LEUNG and Hon James TO

This paper sets out the Government's response to the draft Committee Stage Amendments ("CSAs") proposed by the Hon Kenneth LEUNG and Hon James TO (LC Paper Nos. CB(1)1496/13-14(02) and (03) respectively), as enclosed to the letter of 26 May 2014 from the Legislative Council Secretariat.

CSAs proposed by the Hon Kenneth LEUNG

2. The CSAs proposed by the Hon Kenneth LEUNG seek to provide a refund mechanism for a Hong Kong incorporated company ("Hong Kong company") or a Hong Kong permanent resident ("HKPR") for acquisition of non-residential properties. According to the proposed refund mechanism, provided that the Hong Kong company or the HKPR has continuously used the concerned non-residential property solely for the purpose of carrying on the trade, profession or business (but excludes the letting or sub-letting or the sub-letting of the premises held under a lease or tenancy) of the company or the HKPR in Hong Kong for not less than 2 years from the date of acquisition ("the relevant period") and applies to the Inland Revenue Department ("IRD") for refund not later than 2 years after the date of expiry of the relevant period, IRD will refund the difference in the ad valorem stamp duty ("AVD") payment between the old and new rates in respect of the newly acquired non-residential property. In addition, the proposed mechanism stipulates that if the applicant ceases to carry on a trade, profession or business at the concerned non-residential property before the expiry of 6 months after the date of the application, the applicant is liable to repay to IRD, within 30 days after the date of the cessation, the amount so refunded.

Policy objectives

3. The Government's policy objective of introducing demand-side management measures is to cool down the residential and non-residential property market immediately by way of managing demand, thereby reversing the market expectation that property prices could only go up. In order to achieve the instant cooling effect, we need to double the AVD rates having regard to the prevailing situation in the property market and the adjustments are

applicable to both residential and non-residential properties.

4. Besides, we propose to advance the timing for charging AVD for non-residential property transactions from the conveyance on sale to the agreement for sale. This proposed change is meant to be a permanent measure with an aim to tally with the existing arrangement for residential properties. The proposed increase in AVD rates and the advancement of the timing for charging AVD in respect of non-residential property transactions are complementary measures, which could hopefully forestall the shifting of rampant speculation or investment demand from the residential property market to the non-residential property market, thereby achieving the immediate cooling effect on the non-residential market.

5. As reflected by statistics, the prices of office and flatted factory space increased by an average of 0.3% and 0.1% respectively per month during March 2013 to March 2014, a notable deceleration from the monthly average increases of 2.6% and 4.1% respectively in the first two months of 2013. The prices of retail space between March 2013 and March 2014 showed virtually no change further to the monthly average increase of 1.9% in the first two months of 2013. During the same period, the monthly average increase of rental prices of retail, office and flatted factory space continued to decelerate. For example, in the case of retail space, the increase was reduced to 0.4% from 0.7%, with an obvious drop when compared with the monthly average increase of 1.0% in 2012.

6. The Hon Kenneth LEUNG's CSAs are inconsistent with the Government's policy objective. If the CSAs were to be adopted to the effect that there would be AVD refund after the relevant period (be it two years as proposed or any other specified period), it will disseminate to the market a message that the non-residential properties concerned will "defrost" upon expiration of the specified period, thus stimulating market demand for non-residential properties and affecting the effectiveness of the measures. Also, if stamp duty refund were to be provided to "company", it will create loopholes that are very difficult to plug. This is because any person can by way of transfer of shares acquire all the shares of a Hong Kong company, take over the ownership of the non-residential property owned by the company and get refund after the relevant period, thus undermining the effectiveness of the measures.

7. The proposal requires that a Hong Kong company or HKPR must continuously use the concerned non-residential property solely for the purpose of carrying on the trade, profession or business of the company or HKPR in Hong Kong during the specified period. From the policy angle, we consider that the proposed arrangement will bring about fundamental changes to the stamp duty regime since we have been charging stamp duty on the basis of

instrument effecting transfer of properties, irrespective of their usage. Furthermore, in order to process the refund applications, IRD needs to verify the relevant facts of each and every case to ascertain if they fulfill the refund conditions before making refunds. As a result, IRD needs to deploy additional resources to cope with the administrative requirements. Although the proposed mechanism requires that the applicant is liable to repay to IRD the amount refunded if he or she ceases to carry on a trade, profession or business at the non-residential property concerned within the specified period, there will be enormous implementation difficulties to ensure effective recovery of the duty refunded. Practically speaking, IRD could hardly monitor continuously if the applicant carries on a trade, profession or business at the concerned non-residential property within six months upon receipt of each and every refund application. In other words, the proposal will serve no real purpose.

8. Overall, the demand-side management measures introduced by the Government have addressed the overheating situation in the property market effectively, which is in line with our policy objective. Despite the preliminary results, uncertainty still prevails in the market and the supply of properties remains tight. Hence, we consider it necessary to maintain the measures. To ensure the effectiveness of the measures and prevent the spread of overheating situation to the non-residential property market, the Government does not intend to provide any form of exemption for non-residential property transactions.

9. We understand the measures will cause inconvenience to the business community. The measures are extraordinary ones introduced under exceptional circumstances with an aim to prevent the macroeconomic and financial stability from being affected by wide fluctuations in the property market. It is essential for the Government to manage demand so as to address the exuberance in the non-residential property market and to minimise the possible risk to financial stability. We believe that local and foreign companies running operations in Hong Kong will ultimately benefit from a stable business environment with steady development in the property market. Accordingly, the Government does not agree to the proposed CSAs.

CSAs proposed by the Hon James TO

10. The Hon James TO's proposed CSAs are summarised below -

- (a) amending clause 9 of the Stamp Duty (Amendment) Bill 2013 ("the Bill") to specify that a trustee or guardian for a minor must be the close relative of the minor or a person appointed by the court while the trustee or guardian for a mentally incapacitated person must be appointed pursuant to the Mental Health Ordinance ("MHO") (Cap.

136) or by the court; and

(b) exempting charitable bodies from the doubled AVD.

Trustee or guardian for a minor or mentally incapacitated person

11. In view of the fact that a HKPR minor or mentally incapacitated person cannot enter into legally binding agreements owing to lack of capacity and in practice requires another person to act on his or her own behalf in acquisition of residential properties, the Bill proposes that a purchaser or transferee who is acting as a trustee or guardian for a HKPR minor or a mentally incapacitated person in the transaction will be liable to AVD at the old rates, provided that the minor or the mentally incapacitated person for whom the trustee or guardian is acting on behalf is not the beneficial owner of any other residential property in Hong Kong.

12. To handle applications for exemption from the doubled AVD, IRD will request a buyer who claims to be acting on behalf of a HKPR minor or mentally incapacitated person to produce written evidence. The concerned buyer should provide relevant documentary evidence such as the birth certificate, an instrument to appoint a guardian pursuant to the Guardianship of Minors Ordinance (Cap. 13), a valid and legally binding trust instrument, or a court order or guardianship order pursuant to the MHO to prove his/her capacity as a guardian or trustee in the transaction under consideration. Depending on the circumstances, IRD will require that buyer or the claimed beneficiary to submit documentary evidence (e.g. to prove the source of funds for purchasing the property) and other documents showing the identities of that buyer or the claimed beneficiary in the relevant transaction to ascertain whether the claimed beneficiary is the beneficial owner of the property.

13. The Hon James TO's CSAs will cause inconvenience to certain mentally incapacitated persons. For example, the natural guardians for mentally incapacitated persons (such as the parents for minors) can act on the latter's behalf in acquisition of residential properties and will not be subject to the doubled AVD under the Bill. However, under the Hon James TO's CSAs, the relevant person(s) must first be appointed pursuant to the MHO or through other means appointed by the court in order to be exempted from the doubled AVD.

14. Overall, we consider that the exemption arrangements provided for minors and mentally incapacitated persons under the Bill are appropriate. Hence, we do not agree to the proposed CSAs.

Exemption for charitable bodies

15. As the Government has explained at the meetings of the Bills Committee on Stamp Duty (Amendment) Bill 2012, section 88 of the Inland Revenue Ordinance (“IRO”) stipulates that only the profits from primary purpose trading carried out by a charitable body (i.e. trading in the course of the actual carrying out of its expressed charitable objects or trading that is mainly carried out by the beneficiaries of the charity) are exempted from profits tax. The IRO does not prohibit charitable bodies from engaging in activities other than those carried out in pursuit of their charitable objects, but the profits generated from such activities will be subject to profits tax. With reference to the present AVD, Special Stamp Duty and Buyer’s Stamp Duty arrangements, and having considered the policy intent of the introduction of the doubled AVD, we do not propose exempting charitable bodies from the doubled AVD in acquisition of properties under the Bill.

Conclusion

16. As reiterated on various occasions, the Government will continue to monitor closely the property market conditions and changes in the external factors, and take appropriate measures, including making timely adjustment to the measures, with a view to safeguarding the healthy and stable development of the property market. In this regard, the Government undertakes to conduct a review within a year after passage of the Bill and report to the Legislative Council.

Financial Services and the Treasury Bureau
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