香港特別行政區政府
The Government of the Hong Kong Special Administrative Region

政府總部
運輸及房屋局
香港九龍何文田佛光街 33 號

Government Secretariat
Transport and Housing Bureau
33 Fat Kwong Street, Ho Man Tin, Kowloon, Hong Kong

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電話 Tel. : 2761 5117
傳真 Fax.: 2761 7444

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Ms Vanessa CHENG
Assistant Legal Adviser
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms CHENG,

Rating (Amendment) Bill 2019

Thank you for your letters of 8 November 2019 and 13 May 2020 on the captioned. Our response to the issues raised in the letters is set out at **Annex**.

Yours sincerely,

(Joyce KOK)
for Secretary for Transport and Housing

c.c.	Department of Justice	(Attn: Ms Rayne CHAI)	(Fax: 3918 4613)
		(Attn: Mr Patrick YEUNG)	(Fax: 3918 4520)
		(Attn: Mr Gary LI)	(Fax: 3918 4613)
		(Attn: Miss Blondie POON)	(Fax: 3918 4520)
	Rating and Valuation Department	(Attn: Mr IP Pak-keung)	(Fax: 2152 0188)

Annex

Rating (Amendment) Bill 2019

Government's response to the issues raised in the letters from the Assistant Legal Adviser dated 8 November 2019 and 13 May 2020

Implications for the right of disposal of private property and proportionality test

Special Rates is a kind of tax. In *Weson Investment Ltd v Commissioner of Inland Revenue* [2007] 2 Hong Kong Law Reports & Digest 567 (CA), the Court of Appeal has clearly established that Article 105 of the Basic law (BL 105) has no application to tax legislation. The Court observed that taxation is governed by a separate provision in the Basic Law, i.e. Article 108 (BL 108). BL 108 provides that the Hong Kong Special Administrative Region (HKSAR) shall practise an independent taxation system; and HKSAR shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.

2. As explained in the above court case, BL 105 and BL 108 are mutually exclusive. When the Government imposes tax on the individual, of necessity it deprives the individual of his property without any right to compensation. In a similar vein, the argument that tax legislation must satisfy a proportionality test under BL 105 was rejected. Unless the taxation scheme cannot be regarded as genuine, but is in fact a disguised expropriation of property, BL 105 has no application.

3. In view of the above and the fact that Special Rates is a tax, the Government considers that the proposed Special Rates regime would unlikely engage BL 105 and therefore would not trigger the proportionality test in this context.

Related party of first-owner who is an individual

4. According to the proposed new section 49B under Clause 4 of the Rating (Amendment) Bill (the Bill), if a first-owner assigns a specified tenement to its related party on or after 29 June 2018 (i.e. the date of the announcement of the proposed Special Rates), the related party will become the first-owner of the specified tenement. Such person will then be liable to submit annual returns to the Commissioner of Rating and Valuation (CRV) and pay Special Rates (if applicable). This arrangement aims to guard against avoidance of the Special Rates through transactions between related parties. In determining the scope of related party and the definition of "immediate family member" under the proposed new section 49A, we have made reference to the Residential Properties (First-hand Sales) Ordinance (Cap. 621) (the Ordinance).

5. According to section 10(1) of the Ordinance, the Ordinance applies to any residential property in a development situated in Hong Kong in respect of which (a) neither a preliminary agreement for sale and purchase (PASP) nor an agreement for sale and purchase (ASP) has ever been entered into; and (b) no assignment has ever been made. In other words, if a PASP/ASP or assignment has been entered into/made in respect of a residential property, such property is not regarded as a first-hand property and the Ordinance does not apply. Nevertheless, as provided under section 11 of the Ordinance, if the PASP/ASP is entered into between an individual and an immediate family member[1] of the individual, or that the assignment is made by an individual to an immediate family member of the individual, then such PASP/ASP or assignment is not to be regarded as having been entered into/made for the purposes of section 10(1). In such circumstances, the Ordinance continues to apply, meaning that a developer (who is an individual) cannot avoid the requirements of the Ordinance by selling the first-hand residential properties to his immediate family members.

6. Given that both the Bill and the Ordinance target at first-hand residential properties, we consider it appropriate and relevant to draw reference from the Ordinance, and adopts a reference to "immediate

[1] According to section 2 of the Ordinance, "immediate family member", in relation to an individual, means a spouse, parent, child, sibling, grandparent or grandchild of the individual.

family members", in determining the related party in relation to a first-owner who is an individual.

7. With regard to the example quoted in the incoming letter, i.e. the definition of "member of the family" under the Employees' Compensation Ordinance (Cap. 282) (ECO), we note that ECO aims to provide for the payment of compensation to employees who are injured in the course of their employment; and it is stated in the ECO that where death results from the injury, the compensation shall be payable only to eligible members of the family. In other words, the reference to "member of the family" under ECO is more relevant to identifying persons who may be eligible for the statutory compensation. As the purpose and nature of ECO is very different from those of the Bill, we consider that it may not be appropriate to adopt the reference to "member of the family" under ECO for the purposes of the Bill.

Related party of first-owner that is a body corporate

8. In determining the scope of related party of a first-owner that is a body corporate, we have also made reference to the Ordinance. As provided under sections 10 and 11 of the Ordinance, if a developer (who is a corporation) sells its first-hand residential property to (a) its subsidiary, (b) its holding company or (c) a subsidiary of its holding company, the relevant PASP/ASP/assignment is not to be regarded as having been entered into/made for the purposes of section 10(1) of the Ordinance, and the Ordinance will continue to apply to the relevant property.

9. Under the proposed new section 49A, "related party", in relation to a person that is a body corporate, means an associated company of the person. The term "associated company" is in turn defined as having the meaning given by section 2(1) of the Companies Ordinance (Cap. 622), i.e., in relation to a body corporate, (a) a subsidiary of the body corporate; (b) a holding company of the body corporate; or (c) a subsidiary of such a holding company.

10. Interpretation provisions on the terms "holding company" and "subsidiary" are contained in Division 4 of Part 1 of the Companies Ordinance. In gist, a body corporate is a holding company of another body corporate if (a) it controls the composition of that other body corporate's board of directors; (b) it controls more than half of the voting rights in that other body corporate; or (c) it holds more than half of that other body corporate's issued share capital; and a body corporate is a subsidiary of another body corporate if that other body corporate is a holding company of it.

11. The mere fact that two companies have identical directors and/or shareholders does not necessarily mean that the two companies are associated companies within section 2(1) of the Companies Ordinance. Accordingly, the mere fact that a company has director(s) and/or shareholder(s) identical to those of a first-owner that is a body corporate does not necessarily mean that the company is a related party of the first-owner under the proposed new section 49A. It would be necessary in each case to analyse the particular factual scenario with reference to the definitions of "holding company", "subsidiary" and "associated company" in the Companies Ordinance.

Amendment to Schedule 2 by way of negative vetting

12. The Bill proposes that the Secretary for Transport and Housing may, by notice published in the Gazette, amend the rate of Special Rates specified in the proposed new Schedule 2, i.e. by subsidiary legislation subject to negative vetting procedure of the Legislative Council (LegCo). Under the negative vetting procedure, LegCo may amend the relevant subsidiary legislation by a resolution passed at a Council meeting during the vetting period. We consider such arrangement appropriate as it allows the Government to make timely adjustment to the rate in response to changes in market situation while ensuring that any proposed adjustment is still subject to LegCo's scrutiny.

Meaning of first-owner

13. The Official Receiver or trustee(s) appointed under the Bankruptcy Ordinance (Cap.6) of the property (which is a specified tenement as defined under the Bill) of a bankrupted first-owner will not be regarded as a first owner of the specified tenement under the proposed Special Rates regime for the following reasons –

(a) Under the proposed new section 49B(1), a first-owner of a specified tenement is a person who holds the specified tenement on the day on which the occupation permit for the specified tenement is issued. According to the proposed new section 49A(2), a reference to a person holding a specified tenement is a reference to a person whose name appears as the owner of the specified tenement in the records of the Land Registry. As the name of the Official Receiver or trustee(s) appointed under the Bankruptcy Ordinance will not appear as the owner of the specified tenement in the records of the Land Registry even if a memorial of a bankruptcy order is lodged for registration in the Land Registry, the Official Receiver or trustee will not be regarded as a first-owner by virtue of the proposed new section 49B(1) for the purposes of the proposed new Part XA.

(b) According to the proposed new section 49B(2), a person deriving title of the specified tenement directly or indirectly from the original first-owner becomes a first owner of the specified tenement if that person is a related party of the original first-owner. As the Official Receiver or trustee(s) is not a related party (as defined in the Bill) of the bankrupted first-owner, it will not be regarded as a first-owner by virtue of the proposed new section 49B(2) for the purposes of the proposed new Part XA.

Liability for Special Rates

14. The proposed new section 49J provides for the liability for Special Rates. According to the proposed new section 49J(6), if a first-

owner holds a specified tenement jointly (whether as joint tenants or tenants in common) with another person who does not hold the specified tenement as a first-owner, the first-owner is liable for the special rates for the whole of the specified tenement. To illustrate, assuming that a specified tenement (with a rateable value of $180,000 as at the reference date) is jointly held by Person A (a first owner of the specified tenement) and Person B (not a first-owner) as joint tenants on the last day of a reporting period; and that none of the circumstances specified in the proposed new section 49J(2) exists. Then, in accordance with the proposed new sections 49J(4) and 49J(6), Person A is liable to CRV for the special rates for the whole of the specified tenement, i.e. $360,000 in such case.

15. In accordance with the proposed new section 49J(1) and 49J(2)(c), if an agreement for sale and purchase of the specified tenement entered into by the first-owner as vendor (however called) with another person (other than a related party of the first-owner) as purchaser (however called) is in force on the last day of the reporting period, the proposed new section 49J does not apply. Under such circumstances, the first-owner of the specified tenement concerned is not liable for Special Rates for the relevant reporting period. As provided for under the proposed new section 49A, the term "agreement for sale and purchase", in relation to a specified tenement, means an instrument –

(a) entered into between 2 or more parties with a view to transferring the ownership of the specified tenement to the purchaser (however called); and

(b) delivered into the Land Registry with a memorial –

  (i) for registration of the specified tenement; and

  (ii) to which a memorial number is assigned by the Land Registry,

but does not include a preliminary agreement entered into by the parties with a view to making an agreement for the sale and purchase of the specified tenement.

16. Provided that an agreement that effects an exchange of two specified tenements between two first-owners falls within the definition of "agreement for sale and purchase" under the proposed new section 49A and remains in force on the last day of the reporting period, and that the first-owners entering into the agreement are not related

parties, the circumstances specified in the proposed new section 49J(2)(c) may be regarded as fulfilled. It should however be noted that, in accordance with the proposed new section 49I, if the agreement is subsequently cancelled or terminated, the first-owners must notify CRV in writing within 28 days immediately after the date of the event and the subject agreement will be regarded as not having been entered into. Depending on the circumstances, the first-owners may need to make back payment of Special Rates in respect of one or more reporting periods. We consider that this should help guard against potential abuse.

17. In practice, exchange of properties is not common, especially concerning first-hand residential properties. It may not be easy to identify owners that are interested in each other's properties. Besides, such exchange involves certain costs and complications. For example, the amount of equality money reflecting the difference in value of the two properties is subject to payment of stamp duty. The stamp duty rate is 30% if both parties involved are companies. Also, if the parties involved are developers and the properties concerned are first-hand residential properties, there may be complications in selling or letting these properties in future. For example, consumers may have doubts in buying a residential property built by Developer A and yet being sold and marketed by Developer B.

Refund of Special Rates

18. The proposed new section 49N provides for refund of Special Rates. We consider it clear from the context that the term "excess amount" under the proposed section 49N refers to any amount paid by the person that is in excess of the amount he/she is liable to pay under the Special Rates regime. Hence, for the scenario that the person who paid the Special Rates and additional charge was not liable to make the payment, the excess amount to be refunded would be the whole sum of Special Rates and additional charge paid. We do not consider it necessary to amend the proposed new section 49N.

Offences

19. Under the Special Rates regime, the return submitted by a first-owner is an important source of information for CRV to determine whether the first-owner is liable for Special Rates. Hence, factual accuracy of the information provided in the returns is of vital importance in maintaining the effectiveness of the Special Rates regime and guarding against abuse. We therefore propose to specify in the Bill certain offences and penalties in relation to providing information to CRV under the proposed new Part XA. Amongst, the proposed new section 49Q states that a person who, without reasonable excuse, provides CRV with any incorrect information commits an offence and is liable on conviction to a fine at level 5 (i.e. $50,000).

20. According to the proposed new section 49Q, providing incorrect information to CRV would incur criminal liability. It would be for the court to decide whether the defendant has reasonable excuse having regard to the facts and circumstances of each individual case. In *HKSAR v Ho Loy* (2016) 19 HKCFAR 110, the Court of Final Appeal held that in considering the defence of reasonable excuse, the court would (a) identity the matters said to constitute a reasonable excuse; (b) examine whether the excuse was genuine; and (c) assess whether the excuse was reasonable. It was stated by the High Court of Australia in *Taikato v The Queen* (1996) 186 CLR 454 that, "what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of 'reasonable excuse' is an exception." Accordingly, what constitutes a reasonable excuse will depend not only upon the context of the case, but also the statutory context in which the offence appears. In *HKSAR v Ching Yeung Development Company Limited* [2001-2003] HKCLRT 343, the Court cited *Pascoe v The Nominal Defendant (Queensland) (No. 2)* [1964] QD 373 in holding that "reasonable excuse" meant "a cause which a reasonable man would regard as an excuse, a cause consistent with a reasonable standard of conduct". In other words, the test is objective rather than subjective.

21. The proposed new section 49P differs from the proposed new section 49Q in that it is not in every case where incorrect information has

been provided that the proposed new section 49P is engaged. To come under the proposed new section 49P, the information provided must be false or misleading in a material particular. To illustrate, false or misleading information which will affect a person's liability for Special Rates (e.g. falsely stating that a specified tenement was let to a person under a stamped tenancy agreement at a rent not less than the market rent for not less than 183 days during the reporting period) will likely be considered as information which is false or misleading in a material particular.

22. For more serious offences relating to fraud as set out under the proposed new sections 49O, 49P and 49R, we propose to impose an imprisonment penalty to enhance the deterrent effect. Having considered that a body corporate cannot be sentenced to imprisonment, we propose that if these offences are committed with the consent or connivance of, or is attributable to the neglect or omission of, an officer (e.g. director, company secretary, principal officer or manager) of the first-owner, then the officer concerned also commits the offence and is liable on conviction to a fine at level 6 and to imprisonment for one year. This explains why the proposed new section 49Q is not included under the proposed new section 49U(1).

Compounding of offences

23. Under the proposed new sections 49D(5), 49E(5), 49I(4) and 49ZE(5), a person who, without reasonable excuse, fails to (i) submit a first return or subsequent return to CRV; (ii) notify CRV of the cancellation or termination etc. of an ASP; or (iii) provide information or documents as required by CRV, commits an offence, and is liable on conviction to a fine at level 4 (i.e. $25,000). We consider these are relatively minor offences and propose to make reference to the Inland Revenue Ordinance to empower CRV, depending on the nature and/or the degree of culpability of the offence and at CRV's discretion, to consider instituting prosecution or compounding the offence. We are of view that such arrangement may help expedite the processing of minor offences.

Additional penalty

24. We have made reference to section 47 of the Rating Ordinance in drafting the proposed new section 49S. As set out in the proposed new section 49S(2), "undercharged amount" means the amount of Special Rates (a) that has been undercharged because of the offence; or (b) that would have been undercharged had the offence not been detected. Upon conviction of an offence under the proposed new Part XA and before sentencing, the amount of Special Rates undercharged and the basis of calculating it would be presented to the court. The court has the power to decide whether or not to impose an additional fine, and if so, the amount of the additional fine to be imposed (which is not to exceed three times of the amount of the Special Rates undercharged).

Excluded premises

25. According to section 2 of the Chinese Temples Ordinance (Cap. 153), Chinese temples (華人廟宇) includes –

(a) all Miu (廟, temples), Tsz (寺, Buddhist monasteries), Kun and To Yuen (觀及道院, Taoist monasteries) and Om (庵, nunneries); and

(b) every place where –

  (i) in accordance with the religious principles governing Miu, Tsz, Kun, To Yuen or Om, worship of gods or communication with spirits or fortune-telling is practised or is intended to be practised; and where

  (ii) fees, payments or rewards of any kind whatsoever are charged to or are accepted from any member of the public for the purpose of worship or communication with spirits or fortune-telling or any similar purpose, or in return for joss candles or incense sticks, or on any other account whatsoever.

26. While we are of view that places referred to in paragraph (a) of the definition of Chinese Temples should be excluded from the application of the Special Rates regime, we consider it not appropriate to exclude the places referred to in paragraph (b) of the definition, lest this would unnecessarily expand the scope of the excluded premises and reduce the effectiveness of the Special Rates regime.

27. The proposed new section 2(9) under the new Schedule 1 provides that premises built, and used wholly or mainly, for the purpose of (a) holding services or saying prayers by congregations loyal to a belief in accordance with the practice of religious principles or (b) a monastery or convent are excluded from the application of Special Rates regime. We consider that the relevant wordings should be wide enough to cover the places referred to in paragraph (a) of the definition of Chinese Temples under the Chinese Temples Ordinance.

Transport and Housing Bureau
June 2020