



STAMP DUTY (AMENDMENT) BILL 2012

THE LAW SOCIETY'S SUBMISSIONS

1. Background

The Government introduced Special Stamp Duty ("SSD") in November 2010 as one of its stated policy tools "*to curb speculation in residential properties*".

The Financial Secretary announced on 26 October 2012, the Administration's policy to launch another round of measures to "*help narrow the supply-demand gap and contribute to the stable development of our property market*" to include:

- (a) Increasing the rates of SSD and extending its restriction period from 2 years to 3 years; and
- (b) Introduction of Buyers' Stamp duty ("BSD") of 15% payable by non-Hong Kong permanent resident buyers of residential properties in addition to any existing stamp duty. BSD will not apply to Hong Kong permanent residents ("HKPRs"). However, there will be no exemptions for local and non-local companies which will have to pay BSD.

These measures came into effect on 27 October 2012. The Administration subsequently gazetted the Stamp Duty (Amendment) Bill 2012 ("Bill"), on 28 December 2012.

- (c) The Law Society published submissions (submissions) on the measures on 21 December 2012 and the Administration responded in early January 2013.
- (d) The Law Society notes the Bill has addressed some issues of concern but several areas remain unsatisfactory. In particular, we note the exemptions are complicated, inadequate and uncertain and create unfairness. This lack of clarity means solicitors face difficulties in providing advice to their clients.

2. Analytical Review of SSD/BSD

We note press reports that ‘hot money’ has moved to speculation in commercial properties such as car parks and shops, thus increasing rentals which affects society as a whole.

The Law Society invited the Administration to release its reports and/or analyses on the success or otherwise of SSD; it failed to provide a satisfactory response to the Law Society’s submissions dated 21 December 2011. This is noteworthy as the Administration has failed to make any reference in the Bill to “sunset clauses”.

We repeat our request that the Administration provide:

- (a) An analytical review of the goals to be achieved by BSD; and**
- (b) An analysis of the success or otherwise of BSD/SSD within a specified timeframe,**

3. Comments on BSD

The Law Society’s Revenue and Property Law Committees have reviewed the Bill and note the following issues require clarification:

A. Exemptions

1. Trusts - Stamp Duty Ordinance (SDO)

1.1 Definition of “purchaser” in the SDO

The definition includes anyone who contracts to purchase immovable property which means the trustee is a “purchaser” for SDO purposes. If the trustee is not a HKPR, BSD will apply unless it can come within one of the other exemptions.

- 1.2 The Law Society’s considers the current exemptions under the SDO applicable in relation to trusts (section 27(5) of the SDO should apply to BSD also as failure to do so will create confusion.

Specifically where there is a:

- (a) change of trustees with no change in the beneficial interest in the underlying residential property, BSD should not apply regardless of whether the incoming trustee is a HKPR, a non-HKPR, or a corporation. We note in such cases, there is in fact no real sale or purchase capable of affecting prices in the property market.
- (b) change of trustees with no change in the beneficial interest in the underlying residential property, BSD should not apply regardless of whether the beneficial

owner is a HKPR. In other words, if the non HKPR was already the beneficial owner of the property before the introduction of BSD, or pays BSD on acquiring the property through a trust, the fact that they change trusteeship is not a real sale of property.

- (c) distribution from trustee to beneficiary for no consideration, BSD should not apply regardless of the identity or residency of the beneficiary. Again, this is on the basis that there is no real sale of property.

In all three cases above, section 27(5) currently applies to exempt the transaction from stamp duty.

- 1.3 **The Administration is invited to confirm the views stated above and clarify its position on exemptions in relation to our understanding of the current exemptions under the SDO.**

2. New Trusts

- 2.1 There is also the need to clarify the position for new trusts, and the Law Society's view is that the proposed exemption for trusts for mentally incapacitated persons/minors is an arbitrary exemption. As we understand the Bill proposes that a:

- (a) HKPR who purchases as trustee for a corporation will be subject to BSD;
- (b) corporation which purchases as trustee for a HKPR will also be subject to BSD;
- (c) HKPR who purchases as a trustee for another HKPR will not be subject to BSD

- 2.2 In short, where the "purchaser" for SDO purpose is a HKPR, BSD will apply if the beneficial owner is not a HKPR. That is reasonable. However, where the 'purchaser' for SDO purpose is not a HKPR, BSD will also apply regardless of the beneficial ownership. That in our view is not correct as the stamp law consistently looks to beneficial ownership for all other purposes. A HKPR should not be disadvantaged for using legitimate asset protection arrangement to hold his property, where the arrangement is made transparent to the Stamp Office.

- 2.3 **If the arrangements and exemptions in relation to trusts become complicated this will be contrary to a stated government policy of wanting to attract trust work to Hong Kong. It is important for the Administration to advocate a consistent and predictable policy.**

3. Customary Chinese Trusts

3.1 “Tso” or “Tong”

Under “*Tso*” or “*Tong*”, managers are trustees and members of the “*Tso*” or “*Tong*” (i.e. male descendants of a focal ancestor) are beneficiaries, each of whom has a life interest. The number of beneficiaries will change from time to time depending on the birth of new members and death of existing members. Some beneficiaries might have migrated to other countries and lost their HKPR status while some new members born overseas may not have HKPR status.¹ Will the birth of a non-HKPR member create a transfer of beneficial interest in a residential property by operation of law? Conversely, death of an existing beneficiary may enlarge the interest of the surviving beneficiaries.

3.2 The New Territories Ordinance Cap.97² exempts certain clan, family or tong from registration under the Companies Ordinance upon satisfaction of certain criteria such as owning land on 28 October 1910 in respect of which a manager has been duly registered and so long as the land is certified by the Secretary for Home Affairs as being used for agricultural, religious, educational or charitable purposes or for dwelling house occupied by bona fide members of the tong, notwithstanding the number of members exceed 20.

3.3 **The Bill has failed to address the status of “*Tso*” and “*Tong*” and clarification from the Administration should be provided on:**

- (a) **Will the birth and deaths of members constitute a transfer subject to BSD?**
- (b) **If a “*Tso*” or “*Tong*” (whose beneficiaries consist of both HKPR members and non-HKPR members) acquires residential property, will such acquisition be subject to BSD?**
- (c) **Will a “*Tso*” or “*Tong*” be deemed to be a body corporate in nature and not eligible for any exemption for BSD?**

4. “Close relative” exemption

4.1 The scope of “close relatives” remain narrow in the Bill notwithstanding our submissions that transfers involving close relatives such as grandparents, grandchildren, sons-in-law and daughters-in-laws are very common and should to be covered by an exemption.

4.2 **We re-iterate our submission that the definition of “close relatives” be expanded to cover “grandparents, grandchildren, sons-in-law and daughters-in-laws”.**

¹ Leung Kit Yee Kitty v Registration of Persons Tribunal & another HCAL 103/2011

² Section 16 of New Territories Ordinance Cap.97

5. Distribution of Assets

- 5.1 The Bill fails to address Deeds of Family Arrangement. It appears that in order to obtain an exemption there must be a court order. This is unsatisfactory as it may result in a significant increase in the number of applications for court orders to sanction re-distribution of assets commonly covered by Deeds of Family Arrangements. This increases costs for the parties concerned and will also increase the court's workload unnecessarily.
- 5.2 **We re-iterate our submission that the legislation should provide an exemption for Deeds of Family Arrangements.**

6. Tenders

- 6.1 The Administration was invited to clarify its policy in relation to tenders which straddled the introduction of BSD on or after 27 October 2012. The Administration has confirmed such tenders will be liable for BSD.
- 6.2 The Law Society re-iterated its views that imposition of BSD without notice is unfair as there was no advanced warning of BSD. The imposition of extra stamp duty of 15% could well affect the commercial viability of such projects as this additional sum had not been factored into the tender.
- 6.3 **We invite the Administration to review its stance on tenders which straddled the announcement of BSD on 26/27 October 2013.**

7. Redevelopments

- 7.1 It is proposed that developers will be required to pay BSD during the acquisition process but this will be reviewed and there may be refunds after completion of the re-development within a prescribed period of time. We note this mechanism may impose financial burden/risk on developers:
- 7.2 It may take years for a developer to acquire all units in a building for re-development and whether such acquisition will be successful remains uncertain. Developers face the risk that no refund can be obtained if the acquisition is unsuccessful for any reason whatsoever.
- 7.3 The financial burden is particularly high for small developers if the acquisition project fails with the prospect of no refund of BSD.

- 7.4 We note the acquisition of all units in a building for re-development may constitute “*a series of transactions*” subject to a higher rate of ad valorem stamp duty, the maximum of which is 4.25%. If a developer is required to pay an additional 15% as BSD at the time of acquisition, the aggregated rate could be almost 20%.
- 7.5 If Developer A acquires, say 30% of the units in a building, pays BSD on such acquisition and then sells this portion to Developer B, who holds, say 70% of the said building, thus enabling Developer B to re-develop such building, under the proposed mechanism, Developer A will not be entitled to a refund of the BSD paid. Developer A will factor this into the sale price to Developer B. Clearly, this has an adverse effect of increasing Developer B’s acquisition costs which will be recouped through the final sale price of units in the completed development. The introduction of BSD will have a general impact on the property market. It will not be confined to non-HKPR purchasers. Property prices will continue to inflate.
- 7.6 It is conceivable that this will have an impact on smaller developers with the undesirable side effect that “*the small developers become smaller while the big developers become bigger*”.
- 7.7 **We invite the Administration to reconsider its policy in order to minimize any disruption to redevelopment activities. We suggest an exemption for BSD where a developer has acquired up to 30% of the undivided shares in a residential lot³ which is of not less than 30 years old.**

8. Deed of Exchange

- 8.1 “*Exchanges*” and “*partitions*” are dealt with under sections 25(7) and 29C(10) of the SDO. In our view, they should also be dealt with together under the Bill for BSD, otherwise, the status of “*partitions*” becomes uncertain.
- 8.2 **The Bill should clarify whether a “*partition*” is liable to BSD**
- 8.3 In respect of “*exchange*”, we note:

Clauses 29CC(1) and (2) of the Bill involve:

“*exchange of a residential property for non-residential property*” and “*exchange of a residential property for any other residential property*” respectively.

There has been no provision for the following situation:

³ Definition of ‘lot’ in the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545)

“exchange of a residential property for a non-residential property PLUS a residential property”.

- 8.4 **The Administration should clarify this complicated situation in order to remove uncertainty and confusion.**
- 8.5 Under Clause 29CC(1) of the Bill where there is an *“exchange of a residential property for non-residential property”*, BSD is imposed on the value of the residential property. However, under Clause 29CC(2) where there is an *“exchange of a residential property for any other residential property”*, BSD is imposed on the consideration for equality.
- 8.6 The same comments are made *mutatis mutandi* in relation to clauses 29DC(1)(a)(ii) and 29DC(2)(ii) of the Bill.
- 8.7 **The Administration should clarify the legal basis for such distinction which appears to be artificial.**

9. Chargeable Agreements

- 9.1 It is the practice of the Stamp Office⁴ not to treat what might be called a *“usual mortgage (or charge)”* on residential property (not executed in favour of a financial institution registered under section 2 Inland Revenue Ordinance) as an agreement for sale chargeable for stamp duty.
- 9.2 **The Administration should clarify whether such *“usual mortgage”*, which confers no immediate or automatic right of sale of the property, (noting that the rights/power of sale conferred under the mortgage arises only upon default by the mortgagor as security for the money advanced, subject to the mortgagor's equity of redemption) will be chargeable with BSD.**

10. Residential Properties and Car Parks

- 10.1 The Administration's response to the Law Society's queries on whether a car park forms part of a residential area remain vague, for example, it is a common condition in the land grant that car parks in a development shall only be sold to buyers of a flat. A developer may therefore sell the flat and car park together to one buyer. In such circumstances will the car park be treated as part of the flat and attract BSD?
- 10.2 **We repeat our call for clear guidelines should be provided by the Inland Revenue Department (“IRD”).**

⁴ Stamp Office Interpretation and practice Note 1

11. Clarification of the status of hotels

- 11.1 We note the classification of hotels under the SDO remains unclear. The Stamp Office has recognized hotel as non-residential property in the past but this policy decision has not been clearly stated in either the SDO or the Bill.
- 11.2 **We recommend the Administration use this opportunity to clarify its policy that the sale and purchase of a property which is restricted for use as a hotel⁵ under the New Grant/Government Lease, Occupation Permit, Deed of Mutual Covenant or other relevant instruments will not be treated as residential property for the purpose of any stamp duty, including BSD.**

12. Companies

- 12.1 It is a common practice in Hong Kong for investment purchasers to own properties through a corporate entity in order to maximise tax advantages.
- 12.2 **We invite the Administration to consider an exemption for corporate entities which invest in property where all the shareholders are HKPRs acting on his/her own behalf which maintain only one class of shares.**

13. Replacement Properties

- 13.1 Under Clauses 29CB(4) - (6), exemptions will be available to a non-HKPR buyer of residential property if it is acquired to replace another residential property owned by him/her alone or jointly with any other person(s) and that has been purchased or acquired by the Urban Renewal Authority (URA), resumed/purchased under the Lands Resumption Ordinance Cap.124 or sold pursuant to an order for sale made by the Lands Tribunal under the Land (Compulsory Sale for Redevelopment) Ordinance Cap.545, as the case may be, as set out in Clauses 29CB(4)(i), (ii) or (iii). However, the lists of circumstances appear not to be exhaustive. For example, in addition to the Land Resumption Ordinance Cap. 124, there are other ordinances that cater for resumption such as MTR (Land Resumption and Related Provisions) Ordinance Cap.276, Roads (Works use and Compensation Ordinance) Cap.370 and Railways Ordinance Cap.519.
- 13.2 In respect of orders for sale, only orders made pursuant to section 4(1)(b)(i) of the Land (Compulsory Sale for Redevelopment) Ordinance, Cap.545 is cited in Clause 29CB(4)(i) of the Bill. We note small scale developers or indeed co-owners rely on other legislation to obtain an order for sale but these ordinances have not been covered by the Bill e.g. an order for sale under the Partition Ordinance, Cap.352.

⁵ Definition of hotel in Hotel and Guesthouse Accommodation Ordinance may be used as a guideline.

- 13.3 The Administration is invited to clarify the exemptions by providing an exhaustive list to include MTR (Land Resumption and Related Provisions) Ordinance Cap.276, Roads (Works use and Compensation Ordinance) Cap.370, Railways Ordinance Cap.519 and Partition Ordinance, Cap.352.

B. Sanctions

The Law Society noted the proposal of 1.5 times the property value as a penalty for failing to pay BSD is very harsh and disproportionate. The penalty can be regarded as confiscatory and a penalty. The Administration simply noted the Collector of Stamp Duty has discretion depending on the facts of each case. There is no commitment to provide any guidelines to the Collector on the exercise of such discretion. The system lacks transparency.

C. Statutory Declaration - “Buyers’ Stamp Duty” – Sample Statutory Declaration For Owner Buyer” and “Buyers’ Stamp Duty” – Sample Statutory Declaration For Trustee Buyer”

- 1.1 The IRD circulated two sample statutory declarations which are required to be declared by the buyer before a solicitor. The draft statutory declarations will apply to transactions after the passage of the Bill, but not to transactions during the transitional period.
- 1.2 We note the Administration’s intention is to exclude HKPRs from the scheme and that HKPR status can be lost by non-Chinese nationals. The Immigration Department’s website⁶ states the following:

If you are a permanent resident of the HKSAR but not of Chinese nationality, (emphasis added) you will lose your permanent resident status under the following circumstances.

⁶ Immigration Department website FAQs – Question 4
<http://www.gov.hk/en/residents/immigration/idcard/roa/faqroa.htm#/q4>

	<i>Permanent Resident Category (Non-Chinese Nationals)</i>	<i>Circumstances under which Residency Status will be Lost</i>
(1)	<i>A person not of Chinese nationality who has entered Hong Kong with a valid travel document, has ordinarily resided in Hong Kong for a continuous period of not less than 7 years and has taken Hong Kong as his or her place of permanent residence before or after the establishment of the HKSAR.</i>	<ul style="list-style-type: none"> o <i>If you have been absent from Hong Kong for a continuous period of not less than 36 months since you ceased to have ordinarily resided in Hong Kong.</i>

- 1.3 How can solicitors ascertain the validity of a client’s HKPR card when the client is a non-Chinese national when this category includes many overseas Chinese who hold a “permanent ID card” but in fact may have lost the HKPR status?
- 1.4 The definition of “*Hong Kong permanent resident*” in the Bill fails to address practical problems caused when non-Chinese nationals lose the HKPR status under Section 7 of Schedule 1 of the Immigration Ordinance (Cap115).
- 1.5 The Administration has failed to address the problem of verification of HKPR status, particularly, whether the presentation of a client’s permanent HKID card is sufficient proof of such status.
- 1.6 This area of law is very complicated. In our opinion, it is unfair to expect solicitors to, in effect, verify whether a person is a HKPR or entitled to HKPR status.
- 1.7 We note only the Director of Immigration can verify a person’s status under Section 2AB of the Immigration Ordinance. If the Director is satisfied that the applicant is a permanent resident of the HKSAR, a Certificate of Entitlement will be issued to the applicant⁷. It was noted the Commissioner of Registration also issues Certificates of Registered Particulars (Certificates) under the Registration of Persons Ordinance (Cap.177), but these Certificates fail to verify whether the subject persons are HKPRs.
- 1.8 In our view, anything short of official confirmation from the Immigration Department would be unreliable. However, these Certificates require up to 21 days to process and given the speed of conveyancing transactions in Hong Kong, the existing system cannot be used to verify the client’s HKPR status.

⁷ Section 2AB(6)(a) of the Immigration Ordinance Cap.117.

- 1.9 We note declarants may be unaware of Section 7 of Schedule 1 of the Immigration Ordinance (Cap.115), and thus the HKPR status when making the declaration.
- 1.10 **The Law Society invites the Administration to introduce a scheme to provide verification of HKPR status. As BSD will only be imposed on non-HKPR there should be publicity on the relevance of Section 7 of Schedule 1 of the Immigration Ordinance.**

D. 3rd Party Liabilities

- 1.1 Section 15 of the SDO provides that no instrument chargeable with stamp duty shall be received in evidence in any proceedings (save and except: (i) criminal proceedings and (ii) civil proceedings by the Collector to recover stamp duty and penalty) unless such instrument is duly stamped.
- 1.2 We note an issue may arise in relation to a transaction which had been exempted from BSD but it subsequently comes to light the buyer was liable for BSD thus all subsequent mortgagees/buyers may not be able to produce the relevant instrument (to which such buyer is a party) in court as evidence. This inability to produce the document may form a blot on title.
- 1.3 Moreover, if a buyer fails to pay BSD, then a seller will have to bear the BSD if he wants to produce the document in court.
- 1.4 **We recommend the legislation should exclude Section 15 of the SDO to accommodate sellers who need to present documentation in court proceedings.**

The Law Society of Hong Kong

5 February 2013

1172309

