



THE LAW SOCIETY'S SUBMISSIONS

STAMP DUTY (AMENDMENT) BILL 2013

1. Background

- 1.1 The Government introduced the 3rd round of special measures on Stamp Duty on 23 February 2013. The stated policy objective inter alia is the "*stable development of our property market and the stability of [our] financial system*".
- 1.2 These new measures cover both residential and non-residential properties as follows:
 - (a) increasing the costs of transactions by doubling across the board the rates of existing ad valorem stamp duty ("New AVD") with specific exemptions; and
 - (b) standardising the stamp duty regime by charging stamp duty on an agreement for sale and purchase on both residential and non-residential properties.
- 1.3 The Law Society made submissions to the Financial Services and Treasury Bureau ("FSTB") on its latest amendments to the Stamp Duty Ordinance ("SDO") on 2 April 2013¹.
- 1.4 The Stamp Duty (Amendment) Bill 2013 ("Bill") was published in the Gazette on 5 April 2013 and introduced into Legislative Council on 17 April 2013.
- 1.5 The Law Society's Property and Revenue Law Committees have reviewed the Bill. It is noted that whilst the FSTB has addressed some of the concerns raised in our previous submissions, many have not been addressed in the Bill.

¹ The Law Society's Submissions dated 2 April 2013 is available in its website www.hklawsoc.org.hk

2. Complicated Regime

- 2.1 The 1st round of special measures was introduced in November 2010. The 2nd and 3rd rounds of special measures were in short succession from 27 October 2012 to 23 February 2013. Practitioners now consider the stamp duty regime in Hong Kong to be complicated so much so that it is difficult for the general public to understand the full effect of such changes, and it is very difficult for lawyers to advise their clients because of the Administration's failure to adequately consider the cumulative impact of its piecemeal policies. The Bill fails to provide clarification, in particular, on the extent of exemptions and reliefs which remain unclear and uncertain.
- 2.2 We urge the Administration to clarify the extent of exemptions and reliefs to be available and ensure the integrity of the stamp duty regime is maintained otherwise the public may lose confidence especially in relation to the impact the new measures will have on title to properties going forward.**

We note the Transport and Housing Bureau ("THB") has provided a response to some of the issues of concern on the Stamp Duty (Amendment) Bill 2012 but consider there are still outstanding issues of concern which have not been adequately addressed or simply ignored.

3. Flexibility

3.1 Clause 22 (Section 63B)

This Financial Secretary will have authority to amend the value bands and rates of ad valorem stamp duty under head 1(1) and (1A) in the First Schedule to the Stamp Duty Ordinance by notice published in Gazette. We note the Administration's reasoning behind this provision as it provides flexibility in adjusting the applicable rates in accordance with changing market conditions.

- 3.2 The Financial Secretary should also be required to conduct "regular reviews" which will enable the Administration to fine tune its policies and conduct assessments on when these extraordinary measures should be discontinued.

- 3.3 However, given the Administration's assertions that these measures are extraordinary and special, THB has failed to explain its refusal to include "sunset clauses" in the Bill. In our view, if sunset clauses are included in the legislation the Administration will be required to review the success or otherwise of these measures.

- 3.4 We submit the Administration should include sunset clauses in the legislation which will impose a statutory duty to conduct regular reviews of the success or otherwise of its policy otherwise these measures may remain in the SDO indefinitely and have unintended impact on the operation of the property market.**

4. Analytical Review of Special Stamp Duty (“SSD”)/Buyer’s Stamp Duty (“BSD”)/New AVD

4.1 The Law Society has invited the Administration to release its research papers/studies and/or analyses on the success or otherwise of the implementation of SSD/BSD and justification for New AVD. We note some data has been released by the Administration but it falls short of a detailed and thorough study on the subject matter.

4.2 The Administration’s representatives have indicated that they will “*closely monitor the private residential property market and consider withdrawing these measures after the demand-supply situation of the property market has regained its balance*² (emphasis added).”

4.2.1 This statement is quite meaningless. It is vague in the absence of any details/studies on the following:

- What is the current supply and demand situation?
- What is the anticipated local demand for private housing in the next few years?
- What is the estimated number of new private residential units to be available in the next 5 years?
- What does the Administration consider the optimal “balance” to be?
- Does it have an optimal price for private units in order to achieve such balance?
- What is the timeframe for achieving such “balance”?

4.3 We repeat our request for the Administration to provide:

- (a) An analytical review of the goals to be achieved by the three rounds of amendments to the Stamp Duty Ordinance;**
- (b) An analysis of the success or otherwise of BSD/SSD within a specified timeframe; and**
- (c) Justification for New AVD.**

5. Liability for Underpaid AVD

5.1 Clause 18 (Section 29DH)

We note this clause removes our previous concerns and confirms liability for any underpaid New AVD to buyers only where such underpayment has occurred as a result of a false statutory declaration by the buyer.

However, the Administration has failed to clarify a number of related issues arising therefrom:

² THB’s response to issues raised at a meeting of the Bills Committee on the Stamp Duty (Amendment) Bill 2012 held in 2013 – see response to Issue 18

- 5.1.1 Where a buyer defaults paying all or any part of the New AVD (which does not involve a false statutory declaration by such buyer), both the seller and buyer remain jointly and severally liable for payment of the New AVD. This is unfair as the seller is an innocent party.

We provide as an example the following during the transitional period:

A buyer still pays ad valorem stamp duty at the old rates and the difference between the new rates and old rates ("Additional AVD") is only payable within 30 days after the gazettal date of the amendment ordinance. By that time, the transaction may have been completed and any default by the buyer in paying the Additional AVD will catch the innocent seller.

As New AVD is special measure in response to exceptional circumstances, a seller should not be liable for the default of the buyer if it is expressly stated in the agreement for sale and purchase that it shall be the buyer who bears all ad valorem stamp duty.

We query how this measure advances the Administration's policy?

- 5.1.2 Will any underpaid New AVD become an encumbrance on the subject property thereby affecting title?
- 5.1.3 Will bona fide mortgagees and subsequent buyers for valuable consideration be able to take the property free from such encumbrance, bearing in mind there is no immediate mechanism available for verifying the truthfulness of a buyer's statutory declaration? Can solicitors, mortgagees and subsequent buyers rely on the stamp certificate as conclusive evidence there is no underpaid New AVD? If not, this measure brings uncertainty into the whole system, especially in relation to future transactions.
- 5.1.4 We note there is no provision in the Bill requiring the buyer to supply the seller with a certified copy of the relevant statutory declaration filed with the Stamp Office for exemption from New AVD, hence, neither the seller nor his solicitor will have any idea of the buyer's liability to pay New AVD.
- 5.1.5 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.
- 5.1.6 We note an issue may arise in relation to a transaction which has been exempted from New AVD but it subsequently comes to light the buyer would have been liable for New AVD, thus all other persons, including the seller, may not be able to produce the relevant instrument, to which such buyer is a party, in court as evidence.

The failure to address this concern may form a blot on title. The Administration should address this concern otherwise it will have an adverse effect on the property market.

5.2 We request the Administration to amend the Bill to:

- (a) clarify that the stamp certificate issued by the Stamp Office shall be conclusive evidence of payment of all ad valorem stamp duties in favour of a third party and that any underpaid New AVD will not constitute an encumbrance thereby affecting title;**
- (b) require a buyer, who has filed a statutory declaration seeking exemption from New AVD (in such form to be prescribed by the Stamp Office), to provide the seller with a certified copy thereof; and**
- (c) exclude Section 15 of the SDO in order to assist parties to present documentation in court proceedings.**

6. Exemptions and Relief Measures

The Administration has provided limited clarification on the scope of some exemptions and relief measures but many areas remain unclear and have not been addressed in the Bill.

6.1 Residential Property and Car Park

6.1.1 Clause 13 (Section 29BB)

We note the Administration has failed to provide clarification on whether the following transaction will be liable for New ADV:

If a buyer purchases a flat, for HK\$25,000,000, with a car park for HK\$1,000,000 covered by one agreement for sale and purchase, this buyer (assuming a HKPR and not owning any other residential properties) will be exempted and will pay the old rate of AVD (i.e. 4.25%).

However, the exemption applies to acquisition of only residential property and it is unclear whether the old rate will apply to both the “flat” and “car park”, or the “flat” alone in the above example?

6.1.2 Under existing Stamp Office practice³, both the “flat” and “car park” in our example will be treated solely as residential property, therefore the old rate of 4.25% would be applied to both the “flat” and “car park”, not 4.25% for the flat and 8.5% for the car park.

6.1.3 We invite the Administration to clarify the situation in the example in paragraph 6.1.1 above.

³ Stamp Office Interpretation and Practice Note 1

6.2. “Closely Related Persons”

6.2.1 Clause 9 (Section 29AD)

Notwithstanding our previous submissions, the meaning of “*Closely Related Persons*” is still restricted to only: “parent, spouse, child, brother or sister”. The Administration is relying on “blood-related or half blood-related or adoption or step relationship”.

6.2.2 In our view, the exemption should also include the following close relatives:

- “Grandparents and grandchildren”
- “marriage relationship” which should include son-in-laws and daughter-in-laws.

The Administration has failed to provide an adequate explanation why the scope of this exemption is so narrow as transactions between such closely related relatives are a common practice in Hong Kong. In our opinion, extending the scope of the exemption does not create any loophole but strikes a balance between the genuine needs of the public and safeguarding of the effectiveness of New AVD.

6.2.3 We submit that Section 29AD should be expanded to include grandparents, grandchildren, son-in laws and daughter-in-laws.

6.3. Mortgagee

6.3.1 Clause 10 (Section 29AM(c))

This exempts transfers of a mortgaged property, residential or non-residential, to a mortgagee which is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap.112), or to a receiver appointed by such a mortgagee.

6.3.2 The Bill fails to cover:

- foreign banks
- mortgagees of genuine staff loans

6.3.3 To avoid different interpretation of the words “*a mortgagee*” in the 2nd line of Section 29AM(c), we invite the Administration to clarify whether “*a mortgagee*” refers to only “the mortgagee of the mortgaged property” or covers any person carrying on business of mortgagee and registered as financial institutions under the section 2 Inland Revenue Ordinance.

6.3.4 We submit that the:

(a) definition of mortgagee should be expanded to include foreign banks as well as genuine staff loan mortgagees.

(b) identity of the mortgagee in Clause 29AM(c) should be clarified as noted in paragraph 6.3.3 above.

6.4 Estates

6.4.1 Clause 9 (Section 29AC)

We invite the Administration to clarify the following situations:

- (a) If a beneficiary acquires a residential property pursuant to a Will or under the law of intestacy, will the beneficiary be subject to New AVD if he subsequently buys an additional residential property irrespective of the share under the estate e.g. 1/10th share in a property without any rights to occupation?
- (b) In case of renunciation by a beneficiary by way of a Deed of Family Arrangement, will such renunciation be subject to New AVD?
- (c) Will persons holding properties as trustee/personal representative be liable for New AVD?

6.4.2 The Administration must clarify this clause as soon as possible failing which lawyers cannot provide adequate legal advice on estate planning.

6.4.3 The Administration is invited to clarify the situations in paragraph 6.4.1 above.

6.5 Replacement of Properties

6.5.1 Clause 10 (Section 29AL) and Clause 13 (Section 29BD)

We note an exemption will be available to persons who acquire residential or non-residential property to replace previously owned property provided that the latter are:

- purchased or acquired by an Urban Renewal Authority (URA) re-development projects; or
- 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.

6.5.2 We query the failure to include the following Ordinances:

- MTR (Land Resumption and Related Provisions) Ordinance Cap.276;
- Roads (Works use and Compensation) Ordinance Cap.370;
- Railways Ordinance Cap.519; and
- Demolished Buildings (Re-development of Sites) Ordinance Cap.337

6.5.3 The Administration is invited to amend Sections 29AL and 29BD to include the Ordinances cited above.

6.6. Change of Residence

6.6.1 Clause 18 (Section 29DF)

The Administration has indicated that:

“Where a HKPR owns only one residential property (the 1st property) at the time he acquires another residential property (the 2nd property) but with the intent to dispose of the 1st property shortly, the New AVD will apply to the acquisition of the 2nd property as usual in the first instance, but he may seek a refund of the stamp duty paid in excess of that computed under the old rates upon proof that the 1st property has been disposed of within six months from the date when he executed the agreement to acquire the 2nd property.”

6.6.2 As we have previously stated, from a practical standpoint as practitioners the six months period is too short. Experience has shown that it often takes more than 6 months for an owner to sell his property. The Administration has failed to address this concern. These extraordinary measures are having an impact on the market but the Administration chooses to ignore the practical problems for owners of these measures. As this is not a revenue earning exercise we fail to see why Section 29DF cannot be amended to a more reasonable period of one year.

6.6.3 The Administration is invited to extend the period of disposal under Section 29DF from 6 months to 12 months.

6.7. Redevelopment

6.7.1 Clause 18 (Section 29DE)

This clause provides similar relief to that under BSD in relation to the acquisition of residential and non-residential properties for redevelopment and there is provision for the amount of New AVD paid in excess of the old rates to be refunded.

6.7.2 As stated in our earlier submissions, the imposition of New AVD inevitably increases significantly the costs of acquisitions by developers⁴ resulting in an unintended side effect namely *“the small developers become smaller while the big developers become bigger”*.

6.7.3 We re-state our view that an exemption for New AVD should be available to a developer who has acquired up to 30% of the undivided shares in a residential lot⁵ which is not less than 30 years old. The threshold of *“30% of the undivided shares in a residential lot which is not less than 30 years old”* is fair proof of redevelopment as it is unusual for someone to have acquired 30% or more for purposes other than redevelopment.

⁴ For calculation of the increase in costs, see the Law Society’s Submissions dated 5 February 2013 (para 7 at pages 5-6) and dated 2 April 2013 (para C at pages 7-8) available at www.hklawsoc.org.hk

⁵ As defined in Section 29DE(7) of the Stamp Duty (Amendment) Bill 2013

6.7.4 We note one of the Administration's goals is to encourage redevelopment of the urban areas and adoption of the proposed exemption will help minimize disruption to redevelopment activities.

6.7.5 **The Administration is invited to re-consider its policy of redevelopment and allow an exemption for developers from NEW AVD as proposed in paragraph 6.7.3 above.**

6.8 Companies

6.8.1 In Hong Kong it is a common practice for investment purchasers to own properties through a corporate entity in order to maximise tax advantages. In our previous submissions, we have proposed an exemption for corporate entities from the New AVD where all the shareholders are HKPRs and maintain only one class of shares.⁶

6.8.2 We note the Administration considers this proposal may have loopholes and enable HKPR shareholders to circumvent New AVD by transferring property entitlement to non-HKPR shareholders by way of nomination, declaration of trust or allotment of new shares, etc.

6.8.3 We invite the Administration to reconsider its stance as the loopholes can be addressed by imposing restrictions on "alienation of shares" for a fixed period to track the time limits for SSD and BSD. If alienated within the relevant period, then the New AVD previously exempted will be recouped.

6.8.4 **We invite the Administration to re-consider an exemption for corporate entities from New AVD as proposed above.**

7. Constructive and Resulting Trusts

7.1 We remain skeptical as to how one can establish that a HKPR purchaser is acting "on his own behalf".

7.2 It is not uncommon for residential property acquisitions to be financed by another person (e.g. a relative who may / may not necessarily be a "close relative"). This sort of funding arrangement creates resulting trust arrangement at law, which are by their nature not documented or created by any instrument. The applications of the legal principles on resulting trust, constructive trust, presumption of advancement, gifts etc affect the analysis of whether someone is purchasing for his own benefit, or for someone else.

⁶ See para D at page 8 of the Law Society's Submissions dated 2 April 2013 available at www.hklawsoc.org.hk

- 7.3 Indeed, a purchaser may think he is acting for his own behalf when the property, at law, belongs to his financier because of a resulting trust:

For example:

“A” provides money to a HKPR (“B”) to purchase a residential property in the name of B without any oral or written trust document. At equity where a person (B) acquires a property with the purchase money provided by another person (A), then, as a rule, the presumption is that A is the beneficial owner and the property is held by B on resulting trust for A. However, if A is the parent or husband of B, there may be a presumption of advancement such that the property is presumed to belong beneficially to B.

- 7.4 As the proposed amendments to the Stamp Duty Ordinance seek to levy duty with reference to beneficial ownership of the property, these equitable presumptions cannot be ignored. However, how or when these presumptions should be tested or rebutted is not clear:

- Is it the case that any HKPR who has family financial support to acquire the property would not be entitled to Schedule 2 rates unless there is evidence to rebut the presumption of resulting trust?
- How can the Collector be satisfied that the HKPR is acting on his own behalf?
- Unfortunately, the solicitor administering the statutory declaration will not be in the position to confirm that the HKPR making the declaration is acting on his own behalf.

8. Late Stamping - Penalties

- 8.1 Section 9 of the SDO imposes a maximum penalty of 10 times the stamp duty for late stamping of any instrument chargeable with stamp duty.
- 8.2 We consider the impact of this section in relation to the New AVD rates to be a penalty and excessive as the financial penalty could amount to 85% of the value of the property. The cumulative impact of all the new measures is likely to discourage rectification and voluntary compliance absent strong indications that such penalties would not be applied. A penalty of 10 times the stamp duty of 8.5% is well in excess of any amount required to compensate the Government for the time value of money. It is also difficult to see the pressing public interest in effectively confiscating the property of someone who simply fails to pay stamp duty on time. While there is a public interest in ensuring taxes are not evaded, this is already dealt with via criminal sanctions.
- 8.3 The Administration has chosen to ignore the cumulative impact of SSD, BSD and now the New AVD as it simply noted the "*Collector of Stamp Duty has discretion depending on the facts of each case*". This is unacceptable. There is no commitment to

provide any guidelines to the Collector on the exercise of such discretion. The system lacks transparency.

- 8.4 We submit the Administration must thoroughly review the impact of all these amendments on the provisions in Section 9 of the SDO. It is inappropriate to leave this matter to the Collector's discretion.**

9. Transitional Arrangement

9.1 Clause 23 (Section 71)

We note the old ad valorem stamp duty rates remain in place pending enactment of the Bill and the balance of New AVD has to be paid within 30 days commencing immediately after the date of gazettal of the amendment ordinance.

- 9.2 The Bill has not addressed a number of issues involving transactions entered into and/or completed during the transitional period:

- 9.2.1 There is no mechanism for solicitors to verify the buyer's:

- HKPR status or
- whether he owns other residential properties.

This places additional responsibilities on solicitors as the buyer may have to pay outstanding the AVD and hold the same as stakeholder pending enactment of the Bill. However, a buyer has no responsibility to pay this sum to the solicitor as stakeholder.

- 9.2.2 After enactment of the new legislation who will be responsible for collecting outstanding AVD for the transitional period transactions as collection of this will be beyond the ability or control of solicitors upon completion of the transaction?

Will the solicitor acting for a buyer during the transitional period incur any liability for failing to collect such additional AVD? Will the Commissioner impose a charge on the property?

- 9.2.3 **We urge the Administration to clarify how this matter will be resolved as soon as possible.**

The Law Society of Hong Kong
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