



## **BUYERS' STAMP DUTY**

### **Law Society's Submissions**

#### **1. Introduction**

The Government introduced Buyers' Stamp Duty (BSD) on 26 October 2012 (which took effect on 27 October 2012) as one of its stated policy tools to address the "*overheated property market, and to ensure healthy and stable development of the property market*".

The Law Society notes the issue of affordable housing is a matter of concern for the Administration and for Hong Kong citizens as a whole. This is a world-wide phenomenon particularly in major cosmopolitan cities around the world; it is not a problem solely confined to Hong Kong. The Law Society does not comment on the economics aspect of the BSD but wishes to raise observations from a legal application point of view.

The Administration has not yet provided clear guidance on the scope of exemptions under the BSD; this has caused confusion and uncertainty in the market, and has caused difficulties for solicitors who have not been able to fully advise their clients on the impact of BSD and whether exemptions are available to their transactions.

#### **2. Analytical Review of Special Stamp Duty (SSD) and BSD**

SSD was introduced in November 2010 to "*ensure that the property market continues in a healthy state*" by the imposition of additional stamp duty. The intended effect of the SSD was to discourage short-term speculations in the property market.

Whilst the Financial Secretary in his speech on 26 October 2012 had given some statistics on the application of SSD generally in the past two years, it was apparent that BSD was introduced to supplement the stated intention of the SSD. The Law Society considers it useful if the Administration can:

- Release reports or analyses performed by the Inland Revenue Department (IRD) or the Transport and Housing Department in relation to the success or otherwise of the SSD
- Release projections on the goals to be achieved by introducing BSD

- Confirm whether the Government will be conducting a full analysis of the success or otherwise of the BSD (and SSD) within a stated timeframe, and whether there will be a timetable to ascertain the success or otherwise of this twin-pronged approach via stamp duty

### **3. Comments on BSD**

Since the announcement of the introduction of BSD, there has been market uncertainty on how BSD would be applied, and this uncertainty will continue until passage of the amendment bill unless the Administration can now clarify some of these points at the earliest opportunity:

#### **(a) Exemptions**

The Government is invited to announce with certainty the scope of exemptions to be applied to BSD. Clarification is needed in order to help legal practitioners advise clients particularly in relation to transactions which straddle the announcement of BSD.

##### *(i) Trusts*

The Law Society considers the current exemptions under the Stamp Duty Ordinance (SDO) applicable to trusts should continue. In addition, Government should clarify:

- What are the current exemptions applicable in relation to trusts (as failure to do so will create confusion)?
- What is the position in relation to *new* trusts formed since the announcement of BSD?
- What is the situation involving a change of trustee and the buying and selling of trust property?

The Law Society considers that BSD legislation should follow the SDO and simplify the policy on exemptions; if provisions dealing with exemptions are complicated, this will be contrary to stated policies of wanting to attract trust work to Hong Kong. It is important for the Administration to advocate a consistent policy with predictable outcome.

There are also many other examples where BSD may cut across commonly used techniques in asset protection and succession planning for Hong Kong permanent residents. In such cases, offshore companies are generally used to hold Hong Kong real estate occupied by Hong Kong permanent residents.

Expanding on our question earlier about transactions which straddle the introduction of BSD, the Law Society considers that exemptions should be granted to any Agreements executed before the effective date of BSD under which properties will be transferred to the beneficiaries, or BSD should not apply to these transactions. Any parties under these arrangements should be allowed to elect to

use corporation(s) to take up the ownership of these assets whether or not they are Hong Kong permanent residents.

(ii) *“Close Relative” exemption and requirement for co-ownership*

A clear and unambiguous definition of “Close Relative” is required. It should be wide enough to cover common transfers between close relatives such as: spouse, parents, grandparents, children, grandchildren, brothers, sisters, sons-in-law and daughters-in-law. In addition, clarification should be made whether there will be requirements on “co-ownership”, namely whether a property must be held by the owners as “joint tenants” or “tenants-in-common”, in order to be eligible for the “Close Relative” exemption”.

(iii) *Distribution of estates*

It is unclear whether an exemption will still be available if the estate of a deceased is distributed other than in accordance with the Will or the law of intestacy. It is common for the beneficiaries under the estate of a deceased to enter into a Deed of Family Arrangement for distribution of properties which may deviate from the provisions in the Will or the law of intestacy.

(iv) *Tenders*

In relation to tenders which straddle the transitional period, namely those submitted prior to 27 October 2012 but accepted on or after that date, we invite the IRD to clarify whether BSD is imposed on the date a tender is submitted, or on the date the tender is accepted. As BSD was introduced without prior public knowledge, the additional duty was not factored into these tenders but would impact on genuine commercial activities.

(v) *Redevelopments*

It takes considerable time for a developer to acquire the whole or at least 80% of an old building targeted for re-development, and it takes even longer to complete construction of the new development.

The IRD is invited to clarify whether there will be a prescribed period within which a developer must complete the acquisition and redevelopment, and when such period would start to run. In terms of logistics, it would also be useful for clarification on whether developers will be required to pay BSD first and then apply for a refund if there is a subsequent exemption, or will developers be given conditional exemptions first but BSD to be recouped in the event of BSD becomes payable.

(vi) *Deed of Exchange / Winding-Up*

The IRD is invited to provide guidance for the following situations:

- Residential properties transferred by way of exchange with or without equality monies to non-Hong Kong permanent residents

- Distribution of residential properties owned by a corporation to non-Hong Kong permanent resident shareholders

(vii) *Chargeable Agreements*

There are situations when it may prove difficult to determine whether an instrument is a chargeable agreement, particularly when there are problems with documentation during the transition period. The IRD is invited to provide clear guidelines.

(viii) *Residential properties and Car Parks*

The IRD is invited to clarify how BSD will be assessed and applied where a purchase comprises of residential property and non-residential property (for example, corresponding car parking space).

(ix) *Children under 18*

The IRD is invited to clarify whether BSD is applicable to Hong Kong permanent resident minors, and whether parents, who are not Hong Kong permanent residents, are able to purchase residential properties in trust for such minors without attracting BSD.

**(b) Narrow Scope of Exemption**

The Law Society notes that the scope of exemptions is narrow, and query why exemptions should not be available in the following situations:

- (i) A Hong Kong incorporated company where all the directors and shareholders are Hong Kong permanent residents provided that such shareholders do not hold their shares on trust for non-Hong Kong permanent resident.
- (ii) A company, whether incorporated in Hong Kong or not, acquires and holds residential property on trust for Hong Kong permanent residents.
- (iii) A person (whether or not a Hong Kong permanent resident) who transfers his or her residential property to a company to hold such property on trust for himself or herself when there is in fact no transfer of beneficial interests.
- (iv) Exemptions for mortgagees: if there are to be exemptions then an overseas mortgagee should be included regardless of whether they are financial institution within the meaning of section 2 of the Inland Revenue Ordinance (IRO).
- (v) Acquisition of residential property, for which property will be redeveloped for non-residential use.

### **(c) Sanctions**

The Law Society notes that the current proposal is to impose a maximum sanction of 10 times the amount of BSD payable. This can amount to 1.5 times the current value of a residential property. The Law Society question whether this amount is proportionate and be regarded as confiscatory and a penalty, and whether persons who had offended this legislation will volunteer to rectify any breaches. The IRD is invited to consider introducing a lower cap, as well as to clarify whether the Commissioner of the IRD will have any discretion to remit BSD penalties or any portion of it.

### **(d) Statutory Declaration - "Buyers' Stamp Duty" – Sample Statutory Declaration For Owner Buyer"**

The Law Society notes the IRD has issued a sample statutory declaration form titled "Buyers' Stamp Duty" – Sample Statutory Declaration For Owner Buyer" which is to be declared before a solicitor.

The Law Society has the following comments:

- (i) It is noted that the stated policy is to exclude Hong Kong permanent residents from the scheme. We question the practical aspect of this policy as the permanent resident status of the client can be lost<sup>1</sup>.

An issue which flows from a seller of a residential property who was (at the time of purchasing the property) a Hong Kong permanent resident but who had subsequently lost this status, may have questions raised as to the validity of the seller's title to the property. The IRD is invited to address this question at the outset when legislating.

- (ii) The requirement of a statutory declaration to be made in the presence of a solicitor can result in practical and logistics issues. For example, a solicitor's ability to administer a statutory declaration is limited to declarations made within Hong Kong. An overseas client may not be able to come to Hong Kong in order to make such declaration.
- (iii) The IRD proposes that an ultimate beneficiary who is a Hong Kong permanent resident should make a statutory declaration to confirm his or her status as a Hong Kong permanent resident. The IRD is invited to address the situation when such beneficiary is a minor having no legal capacity to do so.
- (iv) The Law Society notes that provisional sale and purchase agreements have not been included as a choice to Clauses 1 and 2 of the sample Statutory Declaration. The date of a provisional sale and purchase agreement may be relevant or appropriate date in determining the status of the buyer at the time of purchase.

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<sup>1</sup> Sections 2(d) and 7 Schedule 1 of Immigration Ordinance: A person not of Chinese nationality who has entered Hong Kong with a valid travel document, and who has ordinarily resided in Hong Kong for 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 can acquire status as a Hong Kong permanent resident. However, this status can be lost if the person is absent from Hong Kong for a continuous period of not less than 36 months since he or she ceases to be ordinarily resident in Hong Kong.

**(e) Court Orders**

The IRD is invited to clarify which types of court orders will receive exemption under the new legislation. Currently it is proposed that orders issued by the Family Court in relation to the transfer of former matrimonial homes would be exempted but there is uncertainty over other court orders involving domestic (residential) properties and also in relation to land exchanges.

**(f) Islamic finance**

The Law Society notes that the Financial Services and Treasury Bureau is proposing amendments to the IRO and the SDO. The asset base of many *sukuks* will be Hong Kong properties. The Administration is invited to clarify how these amendments will affect or facilitate the development of an Islamic Bond market in Hong Kong.

**(g) Procedural matters**

IRD is invited to provide procedural guidance on the exemptions available as any adjudication process can be time consuming and expensive. In addition, clarity is sought on what type of documents will be required as evidence.

**(h) Third party liabilities**

The Law Society considers that it will be useful to make clear in legislation and include a savings provision that when a determination is made that a transaction is exempted from BSD, then that decision shall be recognised conclusively in favour of the mortgagees, subsequent buyers and any third party(ies). In other words, if it subsequently transpires that the buyer was somehow liable for BSD then only that person shall be liable for BSD. Failure to clarify such liability may well result in a blot on title and all subsequent mortgagees/buyers will remain at risk.

**The Law Society of Hong Kong**  
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