



Room 525, 5/F., Prince's Building, Central, Hong Kong
Telephone: 2521 1160, 2521 1169 Facsimile: 2868 5035
Email: info@hkab.org.hk Web: www.hkab.org.hk

香港中環太子大廈5樓525室
電話：2521 1160, 2521 1169 圖文傳真：2868 5035
電郵：info@hkab.org.hk 網址：www.hkab.org.hk

8 February 2013

By email: bc_01_12@legco.gov.hk

Clerk to Bills Committee on Stamp Duty (Amendment) Bill 2012

Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Attn: Ms. Annette Lam

Dear Madam,

Stamp Duty (Amendment) Bill 2012 (the “Bill”)

We write on behalf of the members of the Hong Kong Association Banks (“HKAB”), being the licensed banks of Hong Kong, to provide a formal written submission on the Bill to the Bills Committee.

We would like to set out our comments and recommendations on the Bill in the **Annex** hereto for the consideration by the Bills Committee.

Meanwhile, should there be any comments or recommendations in the Annex you would like HKAB to elaborate, please contact our Manager Ms Ivy Wong at 2526 8895.

Yours faithfully,

Boey Wong
Secretary

Enc.

Chairman Standard Chartered Bank (Hong Kong) Ltd
Vice Chairmen Bank of China (Hong Kong) Ltd
The Hongkong and Shanghai Banking Corporation Ltd
Secretary Boey Wong

主席 渣打銀行（香港）有限公司
副主席 中國銀行（香港）有限公司
香港上海滙豐銀行有限公司
秘書 黃凱儀

ANNEX

Submissions of The Hong Kong Association of Banks Comments and Suggestions on the Stamp Duty (Amendment) Bill 2012

1. Special stamp duty (“SSD”) based on value of the residential property at the time of disposal

- 1.1 As SSD is based on the consideration stated in the agreement for sale and purchase of the residential property *or* the full value of the residential property as at the date of disposal as assessed by the Stamp Office, whichever is higher, there may be possibility that the Stamp Office would demand for additional SSD due to the inadequacy of the stated consideration.
- 1.2 It is noted that there is no statutory limitation within which the Stamp Office must demand for additional SSD.
- 1.3 This is relevant to mortgagee banks in two scenarios :-

Scenario 1

- (a) Where the purchase of a residential property is to be financed by a loan secured by a mortgage over the residential property, and the relevant agreement for sale and purchase is chargeable for SSD :-
- (i) At any time before the completion of the sale and purchase, the Stamp Office may consider the consideration stated in the relevant agreement for sale and purchase inadequate and demand for additional SSD from the vendor and purchaser.
 - (ii) Until the additional SSD is fully paid, it cannot be said that the residential property is free from encumbrance.
 - (iii) Mortgagee banks may receive qualified legal opinion on title to the residential property from their solicitors where re-assessment of the amount of payable SSD is pending.
 - (iv) The drawing down of the loan by the purchaser on completion may also be affected, as the mortgagee banks may have to withhold a certain amount of loan for payment of additional SSD (if any) which the Stamp Office may demand for after completion.
 - (v) It may be difficult to locate the vendor after completion of the sale and purchase of the residential property and the purchaser may have to pay the additional SSD solely. If the purchaser is unable to pay the additional SSD, the mortgagee bank may have to pay up the additional SSD in order to protect its interest in the residential property.

- (vi) The situation is even more unsatisfactory when an uncompleted residential property is to be mortgaged and the mortgagor is a sub-purchaser under an agreement for sub-sale and purchase (on which SSD is chargeable). According to section 15(1) of the Stamp Duty Ordinance (Cap.117) (the “**Ordinance**”), the relevant agreement for sub-sale and purchase would not be received in evidence in legal proceedings unless duly stamped. Given that there is usually a long period before completion shall take place and the mortgagee bank’s interest in the uncompleted residential property derives from the agreement for sub-sale and purchase, it is of paramount importance to see that any additional SSD chargeable on the agreement for sub-sale and purchase shall be settled before the drawing down of the loan.

Scenario 2

- (b) Where a mortgagee bank is exercising its power of sale of a residential property under a mortgage:-
 - (i) In the course of selling the residential property by the mortgagee bank, the mortgagor/owner may receive a demand note from the Stamp Office for additional SSD chargeable on the agreement for sale and purchase through which the residential property was purchased.
 - (ii) It may be difficult to locate the vendor of the original transaction after completion of the sale and purchase of the residential property and it is unlikely that the mortgagor/owner would have the financial resources to settle the additional SSD in such situation.
 - (iii) To perfect the title to the residential property for the purpose of sale, the mortgagee bank would have to settle the additional SSD on behalf of the mortgagor/owner.

1.4 We acknowledge that (a) the possibility of re-assessment of the stamp duty payable has already existed before the introduction of the SSD and (b) the policy intent behind introduction of the SSD is to curb short-term speculation on residential properties. However, according to the proposals made under the Bill, the amount of SSD has been increased up to 20% of the full value of the residential property and the holding period has been extended to 36 months. The increased SSD rate and extended holding period will have an unintended side effect of posing a *higher* economic risk to mortgagee banks which is clearly inconsistent with such policy intent.

1.5 For the reasons above, we submit the following :-

- (a) The liability to pay SSD should rest on the vendor solely or, if this is not accepted by the Bills Committee, any *additional* SSD due to any inadequacy of the stated consideration should be payable by the vendor solely.

- (b) In any event, appropriate provisions should be included in the Bill to clarify that the liability to pay any additional SSD should *not* create any encumbrance on the residential property or affect the title to the residential property, or alternatively, to provide for protection to *bona fide* purchasers (including mortgagees) for valuable consideration dealing with the residential property.

2. Whether buyer's stamp duty ("BSD") is chargeable on disposal of residential property by a mortgagee

- 2.1 In the answer to Question 9 of the FAQ (item 9(vi)) for BSD uploaded on IRD's website¹, it is stated that the following transactions are *exempted* from BSD :-

"(vi) acquisition or transfer of a mortgaged residential property under a conveyance by or to a mortgagee which is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap 112), or by a receiver appointed by such a mortgagee." (emphasis added).

- 2.2 Based on this answer, a purchaser is exempted from BSD where the residential property is sold to him by a mortgagee bank.

- 2.3 However, new section 29DB(8) (to be added under section 12 of the Bill) provides that :-

"A conveyance on sale is not chargeable with buyer's stamp duty ... if it is shown ... that-

...

- (c) under the conveyance, a mortgaged property is transferred to or vested in a mortgagee that is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap. 112) or a receiver appointed by such a mortgagee." (emphasis added.)*

- 2.4 According to the wording of the draft new section 29DB(8), a sale of the residential property by a mortgagee is not exempted from BSD, which is different from what was represented in item 9(vi) of Question 9 of the FAQ. Section 29DB(8) should be amended to clarify that a conveyance by or to mortgagee that is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance or a receiver appointed by such a mortgagee should be exempted from BSD.

- 2.5 Furthermore, the actual scope and intended effect of the exemption provided in the new section 29DB(8)(c) is *uncertain* :-

¹ See: <http://www.ird.gov.hk/eng/faq/bsd.htm#a9>

- (a) There is no express requirement that the *mortgagee* referred to in that section must be the *same* mortgagee of the mortgaged property.
- (b) Other than a mortgage of the residential property which is regarded as a conveyance within the meaning of section 2(1) of the Stamp Duty Ordinance (Cap.117), we would like the Committee to seek guidance from the Government on examples which would come within the scope of this exemption.

3. Whether agreement for sale of residential property to mortgagee and receiver is exempted from BSD

- 3.1 The new section 29DB(8) proposes to exempt a *conveyance on sale* from BSD, if under the conveyance the mortgaged property is transferred to or vested in a mortgagee (that is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap. 112)) or a receiver appointed by such a mortgagee.
- 3.2 However, there is no equivalent provision in the new section 29CB (to be added under section 9 of the Bill) to exempt an *agreement for sale* from BSD, if under the agreement for sale the mortgaged property is sold to such a mortgagee or a receiver appointed by such a mortgagee.
- 3.3 Provisions should be added to the Bill to the effect that an *agreement for sale* of residential property sold to such a mortgagee or a receiver appointed by such a mortgagee is also exempted from BSD.

4. Duty on mortgagee bank to verify Hong Kong permanent resident status

- 4.1 HKAB understands it is not the intention of the Bill to impose any duty on the banks to verify the Hong Kong permanent resident status of purchasers/ mortgagors for the purpose of ascertaining and assessing BSD. However, the Bill is not explicit in this regard and hence casts doubt on whether the banks would be imposed of such duty.
- 4.2 In any event, HKAB considers that it is not necessary to impose additional burden or duty on the banks to verify the Hong Kong permanent resident status of purchasers/ mortgagors because the purchasers of residential property are required to make a declaration in the stamping request from IRSD 112 whether they are Hong Kong permanent residents and whether they acquire the property on behalf of non-Hong Kong permanent residents.
- 4.3 Government should confirm with the Committee and HKAB that :-
 - (a) the amended Ordinance will not impose additional legal duty or obligation on the banks to verify the Hong Kong permanent resident status of purchaser/ mortgagors; and

- (b) no administrative measures will be implemented by the Government to impose additional duty or obligation on the banks to verify the Hong Kong permanent resident status of purchaser/ mortgagors.

5. Protection of mortgagee banks against liability for BSD in fraudulent cases

- 5.1 There is always a risk that, with a view to avoiding payment of BSD, fraud may be perpetuated by purchasers/ mortgagors by misrepresenting that they are Hong Kong permanent residents.
- 5.2 HKAB considers that provisions should be included in the Bill to protect the interests of mortgagee banks in case of any fraud perpetuated by the purchasers/ mortgagors by misrepresenting their residency status to avoid the payment of BSD which is otherwise payable.
- 5.3 In particular, the Bill should clarify the following :-
 - (a) The failure to pay BSD due to the fraud perpetuated by purchasers/ mortgagors should not create an encumbrance on the residential property or affect the title to the residential property.
 - (b) Subsequent bona fide purchasers (including the mortgagee banks) for valuable consideration dealing with the residential property with such fraudulent buyer should be protected.