



STAMP DUTY (AMENDMENT) BILL 2012

The Law Society's 2nd Submission

1. BACKGROUND

- 1.1 The Law Society published its submissions on 5 February 2013 (1st Submission)¹.
- 1.2 The Transport and Housing Bureau ("THB") responded to the submissions made by the Law Society, the Hong Kong Conveyancing & Property Law Association Limited and the Hong Kong Association of Banks in one document dated April 2013 ("Response")².
- 1.3 Whilst some of our comments have been addressed by the Administration, there are still outstanding issues of concern which have not been adequately addressed or have been simply ignored.

2. OUTSTANDING ISSUES

- 2.1 Despite our request for analytical review of Special Stamp Duty ("SSD") and Buyer's Stamp Duty ("BSD"), the figures provided by the Administration in its Response fall short of a detailed study and analysis thereof.
- 2.2 The Administration has not addressed or has simply ignored our concerns raised in the 1st Submissions:
 - (a) the basis for rejecting the recommendation to include a sunset clause (**Clause 2**); and

¹ The Submission dated 5 February 2013 can be viewed at the Law Society's website at <http://www.hklawsoc.org.hk>

² The written response of the Administration can be viewed at the website of Legislative Council at <http://www.legco.gov.hk>

- (b) complications in the exemptions for trusts is contrary to the Government's stated policy of enhancing Hong Kong as a destination for trust business (**Clause A2.2 and A2.3**).

2.3 We remain dissatisfied with the comments in the Response to the following issues raised in our 1st Submissions as they remain vague or unclear:

- (a) Narrow scope of close relatives (**Clause A4**).
- (b) The impact of BSD on re-development activities and need for exemption for developers (**Clause A7**).
- (c) Need for clear guidelines on treatment for car parks (**Clause 10**).
- (d) Exemption for a corporate entity whose shareholders are Hong Kong Permanent Residents ("HKPR") (**Clause A12**). We note the Administration considers this proposal may have loopholes and enable HKPR shareholders to circumvent BSD by transferring property entitlement to non-HKPR shareholders by way of nomination, declaration of trust or allotment of new shares, etc. In fact, these loopholes can be addressed by imposing restrictions on "alienation of shares" for a fixed period and, if alienated within the relevant period, then BSD previously exempted will be recouped.
- (e) Excessive and disproportionate penalty (15% x 10 times) (**Clause B**).
- (f) The practical problems arising out of the definition of HKPR and difficulties for verification by solicitors (**Clause C**).
- (g) 3rd Party liabilities (**Clause D**). The Administration is required to clarify whether non-payment of BSD would result in an encumbrance and thereby affect title.

2.4 Resulting or constructive trusts

Given the nature of BSD and the Response by the Administration as a whole, it is clear that BSD is being levied with reference to beneficial ownership of property. However, there are practical difficulties to ascertain whether a HKPR purchaser is acting "*on his own behalf*".

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 funding arrangement creates a resulting trust arrangement at law, which is by its nature not documented or created by any instrument, but affects the analysis of whether someone is purchasing for his own benefit, or for someone else.

For example, a buyer, receiving finance from a relative (other than a close relative as defined in the Bill) in the purchase of a residential property, may think he is acting for

his own behalf when the property, at law, belongs to his financier because of a resulting trust. The following questions arise out of the above example:-

- Will such transactions be subject to BSD?
- How can the Collector be satisfied that the HKPR is acting on his own behalf?
- The solicitor administering the statutory declaration will not be in the position to confirm the capacity of the HKPR buyer - is such buyer acting on his own behalf?

The Administration is invited to clarify these concerns.

The Law Society of Hong Kong
28 May 2013