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By email: bc_05_12@legco.gov.hk

Clerk to Bills Committee on Stamp Duty (Amendment) Bill 2013

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

Attn: Ms May LEUNG

Dear Madam

Stamp Duty (Amendment) Bill 2013 (the "Bill")

We refer to your letter dated 8 May 2013.

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

HKAB understands the policy intention of the Bill. Our specific comments on the Bill are in the **Annex** attached to this letter for the Bills Committee's consideration.

Should you have any question or require further clarification/ elaboration on HKAB's comments and recommendations on the Bill in the Annex, then please contact our Manager, Ms Ivy Wong at 2521-1160.

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
香港上海匯豐銀行有限公司
秘書 黃凱儀



ANNEX

Submissions of The Hong Kong Association of Banks

Comments and Recommendations on the Stamp Duty (Amendment) Bill 2013

1. Exemption on transfer of mortgaged property

- 1.1 Clause 10 (Section 29AM(c)) provides that a transfer of a mortgaged property remains chargeable at the old ad valorem stamp duty (“AVD”) rates if it is shown to the satisfaction of the Collector of Stamp Revenue that “*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*”.
- 1.2 The actual scope and intended effect of the exemption in Section 29AM(c) is uncertain as there is no express requirement that the mortgagee referred to in this section must be the same mortgagee of the mortgaged property.
- 1.3 The Bill also does not specify whether the term “*mortgagee*” also covers, say, foreign banks and mortgagees of genuine staff loans.
- 1.4 The Administration should clarify the definition of “*mortgagee*” in the Bill to take into account 1.2 and 1.3 above.

2. Underpayment of AVD

- 2.1 There is an inherent risk that, with a view to avoiding payment of the *new* AVD, the purchaser may make misrepresentation either or both of the following on the date of acquisition of the residential property :-
 - (a) The purchaser is a Hong Kong permanent resident acting on his or her own behalf.
 - (b) The purchaser is not the beneficial owner of any other residential property in Hong Kong or any share or part thereof.
- 2.2 However, there is currently no means available for the mortgagee banks and the handling solicitors to verify the truthfulness and accuracy of a purchaser’s statutory declaration to declare the above issues. In any event, it would be unreasonable to impose *additional* burden/ obligation on the mortgagee banks to verify the contents of a purchaser’s statutory declaration or the purchaser’s information referred to in paragraph 2.1 above.
- 2.3 The title of the property in question will be affected in future sale of the property if it is subsequently discovered that there is underpayment of the AVD. This will



prejudice the ability of the mortgagee banks to sell the residential properties in mortgagee actions.

2.4 The Administration may consider that the following measures are sufficient to deter underpayment of AVD :-

- (a) Civil liability borne by the purchaser of the residential property (Clause 18 (Section 29DH) of the Bill);
- (b) Penalty for late stamping (Section 9 of the Stamp Duty Ordinance ("SDO"));
- (c) Inadmissibility in evidence for any instrument which is not duly stamped, except for criminal proceedings and civil proceedings by the Collector to recover stamp duty and penalty (Section 15 of SDO); and
- (d) Any person who knowingly and wilfully makes a false statutory declaration shall be guilty of a criminal offence and shall be liable on conviction upon indictment to imprisonment for 2 years and to a fine (Section 36 of the Crimes Ordinance).

However, none of the above measures can effectively address the concern of mortgagee banks, namely, the adverse impact on the title to the property and the interest of mortgagee banks in subsequent sell or disposal of the properties.

2.5 We submit that provisions should be incorporated into the Bill to cover the following items to ensure that subsequent sale or disposal of the property and the interest of mortgagee banks will *not* be adversely affected by reason of underpayment of AVD :-

- (a) If a purchaser defaults paying all or any part of the new AVD (which may or may not involve a false statutory declaration by the purchaser), only the purchaser shall be liable for such underpayment.
- (b) The fact that there is underpaid new AVD should not create any encumbrance on the residential property or affect the title to the residential property in subsequent sale.
- (c) There shall be no liability on the mortgagee banks and subsequent bona fide purchasers for valuable consideration for repayment of any additional AVD.
- (d) The mortgagee banks and subsequent bona fide purchasers for valuable consideration should be able to take the residential property free from any encumbrance.
- (e) The duly stamped instruments or stamping certificates should be conclusive evidence that there is no underpayment of AVD.

- 2.6 We urge the Administration to amend the Bill to deal with above issues explicitly, otherwise it would cause great complication and uncertainty to future disposal of the property and to the lending business in Hong Kong.

3. Duty to provide certified copy of statutory declaration to mortgagee banks

- 3.1 There is no provision in the Bill requiring the purchasers to supply the vendors or mortgagee banks with a certified copy of the relevant statutory declaration filed with the Stamp Office for exemption from new AVD.
- 3.2 While it is not uncommon that the solicitors acting for the mortgagee banks may also act for the purchasers/ mortgagors in the acquisition, there are occasions where they are separately represented. The Administration should consider imposing an obligation on the purchaser to supply the vendors and mortgagee banks with certified copy of the stamp statutory declaration filed with the Stamp Office for record.

4. Duty on mortgagee banks to verify status of the purchasers

- 4.1 We understand that it is not the intention of the Bill to impose additional obligation on the banks to verify whether or not a purchaser/ mortgagor (a) is a Hong Kong permanent resident acting on his/ her own behalf and (b) has more than one residential property in Hong Kong.
- 4.2 When the Administration responded to HKAB's submissions on the Stamp Duty (Amendment) Bill 2012 on the similar issue, the Administration said that, since there will be a declaration mechanism, the Administration "*does not consider that there will be an undue burden on the solicitors or the banks to verify the purchaser's residency status and his/ her capacity in the transaction*"¹.
- 4.3 We do not think HKAB's concerns have been adequately addressed and would like to provide the following for the Bills Committee's consideration :-
- (a) As mentioned in paragraph 2 above, there is currently no means available for the mortgagee banks and the handling solicitors to verify the truthfulness and accuracy of a purchaser's statutory declaration.
 - (b) The mortgagee banks may have records of the purchasers/ mortgagors with respect to their previous purchase/ mortgage transactions. In the absence of explicit provision in the Bill to confirm that the mortgagee banks will not be liable to verify the status of the purchasers, this will create *uncertainty* as to the extent of the mortgagee banks' obligations to verify the status and other information of the purchasers and/or to disclose the information in

¹ See the document titled "*The Administration's response to the issues raised at the meeting of the Bills Committee on the Stamp Duty (Amendment) Bill 2012 held on 18 February 2013*" (LC Paper No.CB(1)893/12-13(02) issued by the Transport and Housing Bureau dated April 2013, at page 27



the banks' possession (which may well be protected by the Personal Data (Privacy) Ordinance).

- (c) Accordingly, if the Bill is not explicit in this regard, the declaration mechanism will not remove the doubt mentioned above and it remains uncertain as to the mortgagee banks' obligation in respect to the verification/ disclosure.
- 4.4 In any event, while HKAB appreciates the purpose of the Bill to curb the property market, we do not consider that it is reasonable to impose additional burden/ obligation on the mortgagee banks in order to facilitate the Administration to achieve such purpose.
- 4.5 We therefore urge the Administration to amend the Bill to take into account the following :-
- (a) There should be no obligation on the part of the mortgagee banks and subsequent bona fide purchasers for valuable consideration to verify the information provided by the purchasers (e.g. whether the purchaser is a HKPR, whether the purchaser has more than one residential property in Hong Kong).
 - (b) There should be no obligation on the part of the mortgagee banks to take into account or disclose the information or data in relation to the purchasers/ mortgagors (including without limitation any previous transaction records of the purchasers/ mortgagors) in the banks' possession.
 - (c) If the Collector confirms there is any underpayment of AVD, the mortgagee banks and subsequent bona fide purchasers for valuable consideration should not be convicted of aiding and abetting of an offence, irrespective of the mortgagee banks or any such bona fide purchasers may have relevant information of the purchasers/ mortgagors as a result of any internal due diligence on the mortgagor before granting of the loan.

5. Exemption for mortgagee sale cases

- 5.1 FAQ 12 published by the Inland Revenue Department lists out the circumstances where the *new* AVD will be exempted. Among other situations, items (vi) and (vii) are the only exemptions relevant to mortgagee banks :-

“(vi) *acquisition or transfer of a property by a court order or pursuant to a court order, which includes a foreclosure order obtained by a mortgagee whether or not it falls under the definition of a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap.112);*

(vii) *transfer of a mortgaged property 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;”*

- 5.2 Item (vi) is reflected in Section 29AM(a) and (b) of the Bill and item (vii) is reflected in Section 29AM(c) of the Bill.
- 5.3 However, we note that **no** exemption is proposed to be granted in the situation where property is sold by the mortgagee bank (e.g. sale by mortgagee bank after the bank has exercised its power under the mortgage to enter into possession of the property upon default in payment by the mortgagor).
- 5.4 We consider that the underlying principle of mortgagee sale is substantially similar to that in items (vi) and (vii) of the FAQ. It is particularly the case for mortgagee sale because it would not be reasonable and fair to both the mortgagee banks and the prospective purchasers that the mortgagee sale should be subject to the *new* AVD when the mortgagee sale is caused as a result of the default in payment by the mortgagor under the mortgage.
- 5.5 We urge the Administration to amend the Bill to include provisions to the effect that mortgagee sale is also exempted from the *new* AVD.

6. **Problem of requirement to prove a purchase is acting “on his own behalf”**

- 6.1 In the existing stamp duty regime, there is no express requirement under the Stamp Duty Ordinance that a purchaser must establish that he is acting “*on his own behalf*”. This phrase is however specifically introduced in the Bill.
- 6.2 It is not uncommon that, for acquisition of residential properties, the purchase price is in fact financed by another person (e.g. by a friend or family member who may not necessarily be a “close relative” as defined in the Bill). In the eye of the law, such financing may give rise to a presumption of trust (e.g. resulting trust, constructive trust, presumption of advancement, etc.).
- 6.3 There is always a risk that, even before the Bill was introduced by the Administration, so long as the purchase price is financed by a third party, then a trust may be established and it is up to the person who claims to have beneficial interest as a result of the trust to prove the existence of the trust. However, there is no specific requirement for a purchaser to establish that he is acting “*on his own behalf*”.
- 6.4 As the Bill now proposes to require specific proof of “on his own behalf” by the purchaser, it will create uncertainty as to :-
 - (a) whether and how the presumption of trust will affect the mortgagee bank’s interest in a purchase transaction; and



- (b) whether any legal obligation will be imposed on the mortgagee bank to take further steps or actions as a result of such new requirement.

It is particularly the case because the solicitor handling the purchase/ mortgage and/or administering the statutory declaration of the purchaser will not be in a position to verify that the purchaser making the declaration is in fact acting on his own behalf and that there is no means available for the mortgagee banks to verify the truthfulness and accuracy of a purchaser's statutory declaration

- 6.5 In the circumstances, we urge the Administration to incorporate suitable provisions in the Bill to ensure that a mortgagee bank can rely on the truthfulness of the statutory declaration made by the purchasers and that no additional burden will be imposed on the mortgagee banks to verify that the purchaser is acting "on his own behalf".