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Stamp Duty (Amendment) Bill 2012
- Submission of The Real Estate Developers Association of Hong Kong

The Chief Executive has stated in his Policy Address that the long-term solution to the present housing problem is to increase the supply of residential accommodation coming onto the market.

Prior to the Policy Address, the Financial Secretary introduced the new concept of Buyer's Stamp Duty (**"BSD"**) for which the Administration is currently seeking legal ratification in the Legislative Council. The introduction of BSD is intended as a demand side management tool to reduce purchasing demand from Mainland buyers and allow Hong Kong Permanent Residents (**"HKPRs"**) a better opportunity to join the housing ladder.

Urban Renewal

The Administration has clearly stated that it is not the intention to impede the site assembly process and thereby the construction of new homes through private sector urban renewal projects. However, an unintended consequence of limiting the exemption to BSD to HKPRs only is to directly impact this supply chain and significantly reduce the production of new residential accommodation for the following reasons:

1) Site assembly is a lengthy and difficult process with a high degree of risk and uncertainty as to whether and when a site can be successfully assembled. One of the effective ways to minimize such risk as adopted by investors/developers for many years is to rely on anonymity and the use of corporate structures.

2) If site assembly were to be undertaken by individual HKPRs, the anonymity will be lost immediately and the process of site assembly will undoubtedly founder. It is practically impossible to use a wide range of individual purchasers to undertake the site assembly process given the

high degree of risk and uncertainty with respect to the ownership by individuals which cannot be legally guaranteed.

3) Although there are other sound justifications for exempting HKPR-controlled companies from BSD (see below under "Company-owned properties" for further details), this would not in fact help overcome the site assembly problem due to the transparency requirement to show the identity of shareholders to ensure that they are HKPRs.

4) Even assuming that an investor/developer decides to use a corporate structure and absorb the additional cost of BSD (which is highly unlikely), the signal this will send to other owners will be clear as soon as several sales in a specific building are registered. As a result, the chances of a successful outcome of site assembly will become extremely low and the effort will likely fail.

5) A crucial step in the site assembly process is the ability to consolidate ownership into one entity once acquisition is complete. This can be done effectively and efficiently using a corporate structure (e.g. internal transfer between associated body corporate) but not under other circumstances.

Compounding the problem is that an investor/developer is required, under the Government's proposal, to pay the 15% BSD *upfront* on each residential property it acquires even though it could not predict whether and when it would be able to amalgamate the entire site, which process could easily take over 10 years. The Government proposes that the investor/developer may apply for a *subsequent* refund of the BSD, but only after it has completed the amalgamation of the entire site and construction of the project with an arbitrarily set 6-year timespan. If the development is not completed within 6 years, then the BSD, which has already been tied up for, say, 10 to 15 years, during a time of economic uncertainty and unpredictable interest rates, would be forfeited.

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In short, the whole urban renewal process, except those situations initiated by the Urban Renewal Authority, will be significantly undermined with the unintended outcome that this important contribution to the supply side by the private sector will be dramatically reduced.

There is no solution to this problem if companies are to be charged BSD. However, in order to provide some encouragement to private sector investment in urban renewal, REDA proposes that the refund of the BSD should be made at the time when an investor/developer has accumulated an interest of not less than 80% in a residential building rather than having to wait until the completion of the redevelopment as proposed by the Government which could easily be 6 to 8 years later. REDA considers that the setting of 80% interest is reasonable and appropriate because it is the threshold for the majority owners of a building to make a compulsory sale application under the Land (Compulsory Sale for Redevelopment) Ordinance for buildings with the occupation permit issued for 50 years or more.

By the same token, REDA also proposes that any outright purchase of an 80% interest or more in a residential building intended for redevelopment should be exempt from the BSD.

To be clear, this will not reverse any of the unintended consequences brought about by the Government's proposal; however, it will hopefully procure some form of relief to allow the private sector to continue their contribution to the production of new homes through urban renewal albeit to a much reduced scale.

Company-owned properties

A second area of concern is the impact which BSD will have on the legitimate acquisition of residential properties by Hong Kong persons wishing to use companies for reasons of estate planning, family investments, the acquisition of an asset as collateral for bank financing, particularly in the case of the SMEs, and other legitimate reasons.

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There is no substantive difference between the acquisition of residential properties by HKPRs and the acquisition of residential properties by Hong Kong companies owned and controlled by HKPRs. There seems to be no sense or reason to penalize those HKPRs who wish to use a company to make a property purchase for some legitimate reasons.

The Government's excuse for not considering any exemption is that it is extremely difficult to put in place an exemption mechanism that can effectively cover all scenarios and plug all loopholes. REDA submits that this can easily be addressed by imposing some simple conditions for so long as the BSD is still in place. Details of our proposal are provided in the **Annex**. As a brief summary of our proposal:

1) The number of shareholders of a company incorporated under the Companies Ordinance is limited to no more than, say, 5 and all of them must be HKPRs.

2) Each shareholder will be required to file a declaration to the effect that he is holding the shares as beneficial owner for himself, or holding the shares on behalf of a HKPR.

3) Such shares must be held directly by individuals and not through any intermediate holding companies.

4) In the case of non-compliance of the conditions (e.g. transfer of ownership of the shares, or issue of new shares, to any non-HKPRs), the exemption would be lost and the BSD become payable immediately.

5) It is a criminal offence for any shareholder to make an ownership declaration which is false in any material respect.

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REDA believes it is in everyone's interest to resolve the long-standing issues facing Hong Kong's property market, but to do so in an effective and reasonable manner would require the Government to be open to practical solutions and suggestions from the industry and relevant experts that would meet its stated policy objectives and protect the long term future of the community.

At the end of the day, it is the Government's primary duty to use every resource available to protect Hong Kong people's rights and freedoms and that includes the inalienable right to buy and sell property as is guaranteed under the Basic Law.

The Real Estate Developers Association of Hong Kong
January 2013

Annex

BUYER'S STAMP DUTY ("BSD")
REDA's proposal on company purchaser

Objective of BSD

1. As explained to REDA, Government's objective in introducing BSD is to manage demand by giving priority to Hong Kong Permanent Residents ("**HKPRs**").

Concerns of Government

2. If a company purchaser were to be exempted from BSD, Government's primary concern, as explained to REDA, is the difficulty in plugging loopholes. The following examples were given :-
   (a) A company can have many shareholders.
   (b) Shares may be held by nominees or through intermediate holding companies and it might be difficult to determine who are the ultimate beneficial shareholders.
   (c) New shares may be issued, thereby altering the ownership of the company.

3. REDA submits that, for so long as the BSD is still in place as proposed in the Stamp Duty (Amendment) Bill 2012, the following simple conditions for the exemption can be imposed to effectively address Government's concerns.

Conditions for exemption

4. A company purchaser is exempt from BSD only if the following conditions are fulfilled :-
   (a) The company must be incorporated under the Companies Ordinance and limited by shares.
   (b) The number of shareholders is limited to no more than, say, 5.
   (c) All the shareholders or the sole shareholder must be HKPRs.
   (d) Each of the shareholders or the sole shareholder has made a declaration ("**Ownership Declaration**") to the effect that he is the registered owner of the shares, and holds the shares as beneficial owner for himself, or holds the shares on behalf of a HKPR.
   (e) Each of the shareholders or the sole shareholder holds the shares directly and not through any intermediate holding companies.

Loss of exemption

5. The exemption is lost and BSD will be payable within 30 days of the date when any of the following events (each a "**Relevant Event**") occurs :-
   (a) If any of the shareholders transfers or enters into an agreement for the transfer of the legal or beneficial ownership of any of the shares held by him unless :-
      (i) the transferee is a HKPR; and
      (ii) an Ownership Declaration has been made by the transferee.
   (b) If any new shares are issued unless :-
      (i) the new shares are issued to a HKPR; and
      (ii) the person to whom the new shares are issued makes an Ownership Declaration.

6. When a Relevant Event occurs, BSD shall be payable at 15% of whichever the higher of the value of the Property or the consideration of the transfer which would have been chargeable as if no BSD exemption had been granted.

7. If the amount is not paid within the 30 days from the date of occurrence of a Relevant Event, then the company shall be liable to a penalty calculated under section 9 of the Stamp Duty Ordinance (i.e. penalty for late stamping outside the prescribed time limit for stamping the instrument).

Obligation to give notice

8. A shareholder must give notice to the Collector of Stamp Duty within 14 days of the occurrence of a Relevant Event.

Penalties

9. It is an offence for a shareholder to make an Ownership Declaration which is false in any material respect.

Loss of exemption arrangement follows section 45 of Stamp Duty Ordinance

10. The arrangement regarding the loss of exemption (i.e. payment of BSD within 30 days of the date of occurrence of a Relevant Event) and the notification requirement as proposed in paragraphs 5, 6, 7 and 8 above in fact follow the arrangement regarding the loss of stamp duty relief

granted for internal transfer between associated body corporate under section 45 of the Stamp Duty Ordinance.

11. Under section 45(5A) of the Stamp Duty Ordinance, if the transferor and transferee cease to be the associated body corporate (the "**cessation**") within 2 years after the date of execution of the relevant instrument, and stamp duty relief has been claimed under section 45, then, among other things :-

   (a) the transferor and transferee shall notify the Collector of that fact and of the date of the cessation within 30 days after the date of the cessation [*It should be noted that, in REDA's proposal in paragraph 8 above, REDA even proposes to shorten the notification period for BSD to 14 days from the date of the Relevant Event*];

   (b) if any relief from stamp duty has been granted under section 45, then such relief shall be lost and the parties to the transaction shall pay, within 30 days after the date of the cessation, by way of stamp duty an amount equal to the stamp duty which would have been chargeable on the instrument as if no relief from stamp duty had been granted under section 45; and

   (c) if the amount is not paid within the 30 days, the parties shall be liable to a penalty calculated under section 9 of the Stamp Duty Ordinance (i.e. penalty for late stamping outside the prescribed time limit for stamping the instrument).

12. The arrangement on loss of stamp duty relief under section 45(5A) of the Stamp Duty Ordinance above has been in effective operation for many years. There is no reason why the same arrangement should not be adopted for loss of exemption of BSD in relation to company purchaser.

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January 2013