

# Stamp Duty (Amendment) Ordinance 2014

## Background

On 26 October 2012 the Financial Secretary announced the Government's proposals to

- adjust the duty rates and extend the property holding period in respect of the Special Stamp Duty (“SSD”); and
- impose Buyer’s Stamp Duty (“BSD”) on certain agreements for sale/conveyances on sale of residential property
- with effect from 27 October 2012

## Background

- Proposal was set out in the Stamp Duty (Amendment) Bill 2012 which was published in the Gazette on 28 December 2012
- The Stamp Duty (Amendment) Ordinance 2014 was published in the gazette on 28 February 2014.

## Residential Property

- Classification of immovable property as “non-residential property” is by reference to the permitted use rather than the actual use
- “Residential property” - Any immovable property other than “non-residential property”

## Residential Property

- “Non-residential property” - Any immovable property which, under the existing conditions of the following instruments may not be used, wholly or partly for residential purposes
  - a Government lease or an agreement for a Government lease
  - a deed of mutual covenant within the meaning of the Building Management Ordinance
  - an occupation permit issued under the Buildings Ordinance
  - any other instrument which effectively restricts the permitted user of the property

## Enhancement to the SSD

## SSD – Rates

Holding period	Residential property acquired by the vendor between 20 November 2010 and 26 October 2012	Residential property acquired by the vendor on or after 27 October 2012
6 months or less	15%	20%
More than 6 months but within 12 months	10%	15%
More than 12 months but within 24 months	5%	10%
More than 24 months but within 36 months	NA	10%

## SSD - Example

### Example 1

- Mr. A acquired a residential property on 10 November 2012 and disposed of it for \$6M on 1 March 2013
- Holding period: within 6 months
- SSD liability: \$1.2M (at 20%)

## SSD - Example

### Example 2

- Mr. B acquired a residential property on 10 November 2012 and disposed of it for \$6M on 1 August 2013
- Holding period: more than 6 months but within 12 months
- SSD liability: \$0.9M (at 15% )

## SSD - Example

### Example 3

- Mr. C acquired a residential property on 10 November 2012 and disposed of it for \$6M on 1 April 2014
- Holding period: more than 12 months but within 36 months
- SSD liability: \$0.6M (at 10%)

## SSD - Example

### Example 4

- Mr. D acquired a residential property on 10 November 2012 and disposed of it for \$6M on 1 April 2016
- Holding period: more than 36 months
- No SSD

## Introduction of the BSD

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## Introduction of the BSD

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## Introduction

- BSD – policy intent: to accord priority to the home ownership needs of Hong Kong permanent residents (“HKPRs”) in the midst of the tight housing supply situation
- The BSD provisions came into effect on 27 October 2012

## Scope

- Unless specifically exempted, BSD is payable on an agreement for sale or a conveyance on sale of residential property executed on or after 27 October 2012 , except that the purchaser or transferee is a HKPR acting on his/her own behalf
- If the instrument was preceded by another chargeable agreement for sale made by the same parties and on the same terms before 27 October 2012, the instrument is not chargeable with BSD



## Scope

### Example 5

- Mr. A, a non-HKPR, signed a provisional agreement for sale and purchase (PASP) to acquire a residential property on 15 October 2012. The formal agreement for sale and purchase (ASP) was signed on 15 November 2012
- Since the ASP was preceded by a PASP made before 27 October 2012, no BSD liability

## Scope

### Rate of BSD

- 15% on the stated consideration or market value of the property, whichever is the higher

## Scope

HKPR means:

- A person who holds a valid permanent identity card; or
- The aged, the blind or the infirm who is not required to apply for the issue of an identity card or for the renewal of an identity card under regulation 25(e) of the Registration of Persons Regulations and is entitled to be issued with a permanent identity card if he / she applies for it

## Scope

Joint acquisition

- Unless exempted, a residential property jointly acquired by a HKPR and a non-HKPR
  - BSD will be payable on the stated consideration or full value of the property, whichever is the higher, regardless of the share of interest of the property of the non-HKPR

## Scope

### Example 6

- Mr. A (a HKPR) and Mr. B (a non-HKPR) jointly purchased a residential property at purchase price of \$4M
- Mr. A and Mr. B are not close relatives
- BSD liability:  $\$4M \times 15\% = \$0.6M$

## Scope

### Acting on one's own behalf

- The buyer is both the legal and the beneficial owner of the residential property

## Scope

- An agreement for sale or a conveyance on sale of residential property signed by a person in the capacity of a trustee on behalf of another person

➤ chargeable with BSD

Exception:

The other person is a HKPR and is a mentally incapacitated person (“MIP”)

## Scope

### Mentally incapacitated person

- “Mentally incapacitated person”
  - a person who is mentally disordered or mentally handicapped within the meaning of the Mental Health Ordinance (Cap. 136); and
  - because of his / her mental state, is incapable of managing and administering his / her property and affairs

## Scope

### MIP

#### Documentary evidence required:

- Court order or guardianship order as to whether the MIP is incapable to manage and administer his or her property and affairs
- Valid and legally binding trust instrument showing that the person acquired the property in trust for the MIP
- Source of funds to acquire the property and certified documents showing the relationship between the trustee and the MIP may be required

## Scope

### Example 7

- Mr A (non-HKPR) acquired a residential property on behalf of Mr B (HKPR). Mr B is a MIP
- No BSD as the beneficiary is a HKPR who is a MIP

## Scope

### Example 8

- Mr C (HKPR) acquired a residential property on behalf of Mr D (HKPR) who is not a MIP
- Chargeable with BSD

## Scope

### Example 9

- Mr E (non-HKPR) holds a residential property as a trustee of Mr F (non-HKPR). Mr E now transfers the residential property back to Mr F
- No change of beneficiary interest – not chargeable with any stamp duty

# Chargeable Instrument

## Chargeable agreement for sale

- Includes PASP and ASP
- If more than one chargeable agreement for sale is entered into between the same parties and on the same terms
  - the one chargeable with ad valorem stamp duty is chargeable with BSD
- If a chargeable agreement for sale consists of two or more instruments
  - the principal agreement is chargeable with BSD

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# Chargeable Instrument

## Conveyance

- If there is no chargeable agreement for sale, the assignment including a deed of gift is the chargeable instrument
- Where the conveyance consists of two or more instruments
  - the first instrument

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# Chargeable instrument

## Mortgage and charge

- A bona fide mortgage or charge is not considered to be an agreement for sale and is therefore not chargeable with any stamp duty
- Only those disguised mortgages which expressly or impliedly, provide an immediate or automatic right of disposal of a residential property, will be regarded as agreements for sale and be subject to stamp duty

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# Chargeable Instrument

## Series of agreements with common purchaser(s)

Example 10 - addition of name

	Vendor	Purchasers
Agreement 1	A	B + C
Agreement 2	A	B + C + D

- A signs Agreement 1 to sell a residential property to B and C
- D (non-HKPR) acquires 1/3 of the property from B and C under Agreement 2
- Unless specifically exempted, BSD will be charged on Agreement 2 based on the stated consideration or the market value of the property, whichever is the higher

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# Chargeable Instrument

## Series of agreements with common purchaser(s)

### Example 11 – deletion of name

	Vendor	Purchasers
Agreement 1	A	B + C + D
Agreement 2	A	B

- A signs Agreement 1 to sell a residential property to B (non-HKPR), C and D
- B acquires 2/3 of the property from C and D under Agreement 2
- Unless specifically exempted, BSD will be charged on Agreement 1 and Agreement 2 based on the consideration stated or the market value of the property, whichever is the higher

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# Chargeable Instrument

## Conveyance on sale executed “in pursuance of” a chargeable agreement for sale

### Example 12 - addition of name

	Vendor	Purchasers
Agreement	A	B + C
Assignment	A	B + C + D

- A signs an agreement to sell a residential property to B and C
- D (non-HKPR) acquires 1/3 of the property from B and C under the Assignment
- Unless specifically exempted, BSD will be charged on the Assignment based on the stated consideration or the market value of the property, whichever is the higher

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# Chargeable Instrument

## Conveyance on sale executed “in pursuance of” a chargeable agreement for sale

Example 13 – deletion of name

	Vendor	Purchasers
Agreement	A	B + C + D
Assignment	A	B

- A signs an agreement to sell a residential property to B (non-HKPR), C and D
- B acquires 2/3 of the property from C and D under the Assignment
- Unless specifically exempted, BSD will be charged on the Agreement and the Assignment based on the consideration or the market value of the property, whichever is the higher

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# Exchange of Property

## Exchange of residential properties (s.29CC and s.29DC)

- A non-HKPR uses his / her smaller value residential property to exchange for another larger value residential property
- The person who paid the consideration is deemed as the purchaser
- BSD will be calculated by reference to the equality money or the difference in the values of the properties

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# Exchange of Properties

## Example 14

- Mr. X (a non-HKPR) owned a residential property A
  - Mr. Y (a HKPR) owned a residential property B
  - They executed an agreement for exchange and Mr. X paid an equality money of \$1M to Mr. Y
- 
- Mr. X is regarded as the purchaser
  - BSD payable:  $\$1M \times 15\% = \$150,000$

# Exchange of Properties

## Example 15

- Mr. X (a non-HKPR) owned a residential property A
  - Mr. Y (a HKPR) owned a residential property B
  - They executed an agreement for exchange and Mr. Y paid an equality money of \$1M to Mr. X
- 
- Mr. Y is regarded as the purchaser
  - No BSD payable

# Exchange of Properties

## Exchange of non-residential property for residential property

- A non-HKPR uses his / her non-residential property to exchange for a residential property
- The person to whom the residential property is to be transferred is deemed to be the purchaser
- BSD will be calculated by reference to the value of the residential property

# Exchange of Properties

## Exchange of non-residential property for residential property

### Example 16

- Mr. X (a non-HKPR) owned a non-residential property A
  - Mr. Y (a HKPR) owned a residential property B
  - The market value of property B is \$8M
  - They executed an agreement for exchange and Mr. X paid an equality money of \$1M to Mr. Y
- 
- Mr. X is regarded as the purchaser
  - BSD payable:  $\$8M \times 15\% = \$1.2M$

# Exchange of Properties

## Exchange of non-residential property for residential property

### Example 17

- Mr. X (a non-HKPR) owned a residential property A
  - Mr. Y (a HKPR) owned a non-residential property B
  - The market value of property B is \$8M
  - They executed an agreement for exchange and Mr. X paid an equality money of \$1M to Mr. Y
- 
- Mr. Y is regarded as the purchaser
  - Not liable to BSD

# Exemptions

## Transactions between close relatives

- (a) Acquisition of a residential property by a HKPR jointly with a non-HKPR close relative(s) (i.e. spouse, parents, children, brothers and sisters) (s.29CB(2)(b) and 29DB(2)(b));
- (b) Transfer of a residential property to a non-HKPR close relative(s) (s.29CB(2)(c) and 29DB(2)(c));
- (c) Nomination of a non-HKPR close relative(s) to take up the assignment of a residential property (note 2 of head 1(1C) in First Schedule);
- (d) Addition/deletion of name(s) of a non-HKPR(s) to/from a chargeable agreement for sale or a conveyance on sale in respect of a residential property if the person(s) is/are close relative(s) of the original purchaser(s) (addition – s.29CB(3)(a) and 29DB(3); deletion – s.29CB(3)(b)&(c) and 29DB(4));

## Exemptions

### Example 18

- Mr. A (a HKPR) and his spouse, Ms. B (a non-HKPR) jointly purchased a residential property at purchase price of \$4M
- Not liable to BSD

## Exemptions

### Transfer under court order

Acquisition or transfer of a residential property by a court order (s.29DB(8)(b) or pursuant to a court order (s.29CB(7) and s.29DB(8)(a))

“Court” means any court of the Hong Kong Special Administrative Region of competent jurisdiction



# Exemptions

## Transfer to a mortgagee

- Under the conveyance, a mortgaged property is transferred to or vested in its mortgagee that is
  - a financial institution within the meaning of section 2 of the Inland Revenue Ordinance; or
  - a receiver appointed by the mortgagee (s.29DB(8)(c));

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# Exemptions

## Replacement of Property

Acquisition of residential properties by non-HKPRs to replace residential properties which are sold pursuant to s.29CB(4) – (6) and 29DB(5) – (7));

- acquired by the Urban Renewal Authority;
- resumed by the Government under the Lands Resumption Ordinance (Cap.124);
- sold pursuant to an order for sale made by the Lands Tribunal under section 4(1)(b)(i) of the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545);
- resumed under an order made under section 4(1) of the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap. 276);

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# Exemptions

## Replacement of Property

- resumed under an order made under section 13(1) of the Roads (Works, Use and Compensation) Ordinance (Cap. 370);
- resumed under an order made under section 16 or 28(1) of the Railways Ordinance (Cap. 519);
- acquired under an acquisition order made under section 3(1) or (2) of the Land Acquisition (Possessory Title) Ordinance (Cap. 130); or
- resumed under an order made under section 37(2) of the Drainage Ordinance (Cap. 446).

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# Exemptions

## Replacement of Property

- The original property was jointly owned by two or more persons
  - the exemption provision does not require the joint owners to jointly acquire a replacement property
  - each joint owner may acquire a replacement property alone or jointly with the other joint owner or any of the other joint owners

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# Exemptions

## Group transfer

Acquisition or transfer of residential properties by or to a body corporate from another associated body corporate (s.29H(3)(a) and s.45(1));

## Government

Acquisition or transfer of residential properties by or to the Government (s.39(b))

## Charitable institutions

Gift of residential properties to charitable institutions (s.44)

# Exemptions

## Estate

- Transfer of residential property under an estate pursuant to a will or in accordance with the law of intestacy
  - not chargeable with stamp duty
- The assets distributed are different from the entitlements under the will or the law of intestacy
  - stamp duty including BSD is payable on the amount of the excess distribution if the transferee is a non-HKPR



# Applying for exemptions

## HKPR

- Statutory declaration (IRSD 131 or IRSD 131A) made by each purchaser, declaring that he / she is a HKPR and he / she acquires the property on his / her own behalf
- Statutory declaration could be made before a Notary Public, Justice of the Peace, solicitor, the Commissioner for Oaths at the District Offices of the Home Affairs Department or the IRD.

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# Applying for exemptions

## HKPR

- If the purchaser is unable to make a statutory declaration in Hong Kong, he/she could make the statutory (IRSD131A) outside Hong Kong before a notary public, justice of the peace, or other person having authority to take or receive a declaration.
- The Stamp Office may require the purchaser to provide further evidence, such as the source of funds for payment of consideration, to substantiate that he/she acquires the property on his/her own behalf in the transaction

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# Applying for exemptions

## Transfer of property between close relatives

- Statutory declaration (IRSD131 or IRSD131A) declaring that the buyer/transferee is acting on his/her own behalf
- Form IRSD118
- Documentary evidence such as marriage certificate or birth certificate to prove the relationship

# Refund for redevelopment

(s.29DD)

- The residential property concerned consisted, or formed part, of a lot
- The applicant alone or jointly with an associated body corporate, became the owner of the lot; or after becoming the owner of the lot was granted a new lot by the Government due to:

## Refund for redevelopment

- the surrender to the Government of the lot; and / or
- the acquisition by the Government through purchase by agreement under section 4A of the Lands Resumption Ordinance, or resumption by the Government under an order made under section 3 of that Ordinance, of the lot

## Refund for redevelopment

- The applicant alone or jointly with the associated body corporate
  - has obtained consent to commence any foundation works for the lot or the new lot from the Building Authority under the Buildings Ordinance; or



## Refund for redevelopment

- has demolished or caused to be demolished all buildings (if any) existing on the lot or the new lot, other than a building or part of a building the demolition of which is prohibited under any Ordinance; and
- has obtained approval of plans and details in respect of building works to be carried out on the lot or the new lot from the Building Authority under the Buildings Ordinance

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## Refund for redevelopment

- If the property was subsequently transferred by a body corporate to an associated body corporate, the latter may also apply for a refund of BSD paid by the former if the conditions mentioned above are met
- Does not cover acquisition of residential property for refurbishment or renovation

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## Liable Persons

- Only the purchaser or transferee is liable to pay BSD

## Time for Payment

- The time for stamping of BSD is the same as that for ad valorem stamp duty and SSD
- In general, within 30 days after the date on which the chargeable agreement for sale or conveyance on sale is executed

## Admissibility of instruments

An instrument can be received in evidence in civil proceedings before a court, even if it is not duly stamped with the BSD, on condition that the instrument has to be produced by a person other than the purchaser.

## Further BSD

- Stated consideration is less than the full market value of the property
  - Further BSD will be charged on the full market value of the property

## Appeal

- If the duty payer is dissatisfied with the assessment, he may, within one month from the date on which the assessment was made, lodge an appeal to the District Court
- A duty payer may appeal against the BSD payable on an instrument on the grounds that:
  - the instrument is not chargeable to BSD; and / or
  - the amount of BSD chargeable on such instrument is not correct

## Refund of BSD

- The person who paid BSD can apply for refund if:
  - the agreement for sale is cancelled, annulled or rescinded
  - the agreement for sale is otherwise not performed other than for further sale such as confirmor sale or nomination of another buyer
- The application for refund should be made within 2 years after the cancellation, annulment or rescission of the agreement, or in the case where the agreement is not performed, 2 years after the agreed date of completion of the transaction



## Penalty

- If BSD is not stamped by the due date
  - Section 9(1) of the Stamp Duty Ordinance provides for the imposition of a late stamping penalty in addition to the normal duty
  - Outstanding BSD and the applicable penalty are recoverable as a civil debt from all the liable parties

## Penalty

- Any unstamped chargeable agreement for sale or conveyance cannot be registered at the Land Registry
  - Purchaser or transferee cannot obtain the legal benefits associated with the registration