

Purposes of the Amendment Ordinance

According to the Legislative Council Brief for the Bill leading to the Amendment Ordinance prepared by the Transport and Housing Bureau dated 1 December 2010, the objectives of the Amendment Ordinance are to **“curb short-term speculative activities by substantially increasing the costs to speculators, reduce the risk of the development of an asset bubble and ensure the healthy and stable operation of the property market”**. The Brief goes on: **“genuine home buyers and long term investors should not be affected by those measures”**.

However, as the provisions now stand in the Amendment Ordinance, the imposition of SSD will not be dependent on the subjective intention of the vendors (i.e. whether speculating or not) but rather on the length of holding period by the vendor regardless of the true motive or intention of the vendor’s subsequent disposal. As we will see below, SSD could arise where there is no element of speculation at all.

Substantive Changes

The Amendment Ordinance amends the Stamp Duty Ordinance (Cap.117) (“SDO”) by:

- a. Imposing SSD, with some exceptions as mentioned below, on any chargeable agreement for sale or any conveyance on sale of residential property acquired on or after 20 November 2010 if the property has been held by the vendor or the transferor for 24 months or less. The amount of SSD is based on the stated consideration for the transaction or the

market value of the property as assessed by the Collector, whichever is the higher, at the following regressive rates:

- i. 15% if the property has been held for six months or less;
 - ii. 10% if the property has been held for more than six months but for 12 months or less; and
 - iii. 5% if the property has been held for more than 12 months but for 24 months or less.
- b. Cancelling the previous arrangements for deferral of payment of stamp duty chargeable on residential property transactions valued at HK\$20 million or below.

Retrospective Effect

The Amendment Ordinance (with the exception of the aforesaid cancellation of deferral of payment of stamp duty and some minor exceptions) is deemed to have retrospective effect from 20 November 2010.

The provisions regarding cancellation of the previous arrangements for the deferral of payment of stamp duty under Section 29C of the SDO became effective from the date of gazette of the Amendment Ordinance, i.e. 30 June 2011.

“Acquisition” and “Disposal”

SSD is only applicable where the residential property in question was acquired on or after 20 November 2010 and is disposed of within 24 months of the date of acquisition. The dates of acquisition and disposal

are therefore crucial in determining whether a certain agreement or conveyance on sale is chargeable with SSD.

For the purposes of determining the holding period and the liability of SSD, the acquisition and disposal dates for a property will be based on the date of the chargeable agreement for sale, or if no such chargeable agreement exists, the date of the conveyance. Chargeable agreements for sale include those “agreements for sale” as defined in Section 29A of the SDO. Where there is more than one chargeable agreement for sale in a transaction, the date of the earliest agreement will be taken as the date of acquisition or disposal of the property.

Joint and Several Liability

All the parties executing the chargeable agreement for sale and purchase are jointly and severally liable for payment of the SSD. In other words, both the vendor and the purchaser will be held jointly and severally liable for the SSD and any additional SSD after the assessment of the market value of the property by the Collector.

This means that a purchaser may be liable even though it is the vendor who is “speculating” or selling within 24 months.

Additional SSD

Additional SSD may be demanded by the Collector on a future date due to the inadequacy of the consideration stated in the agreement for sale and purchase. By that time, it is unlikely that the purchaser will be able to procure payment of the additional SSD by the vendor. The purchaser’s ability to obtain a mortgage loan for completion purpose may be affected as some banks may require evidence of full payment of all stamp duties, or a clean legal opinion on settlement of all taxes. Subsequent dealings of the property may also be hindered as it may not be clear whether or not any additional SSD is being assessed or may be due and payable.

To mitigate the effects of such practical difficulties, the Stamp Office has pledged that where an instrument is liable to SSD, the assessment to additional SSD will be made within 40 days after the

submission of the application for stamping. However, such performance pledge is not embodied in the Amendment Ordinance and it therefore appears not to be legally binding on the Stamp Office.

To protect a party’s interest where the other party (usually the vendor) has agreed to pay the SSD and additional SSD, it is important to provide for safeguards (e.g. the vendor’s covenant to pay and/or stakeholding arrangements) in the very first agreement for sale and purchase entered into by the parties. In most cases, estate agents (as opposed to lawyers) are involved in the preliminary agreement stage.

Exemptions

Other than the exemptions for SSD included in the original version of the Bill, the Amendment Ordinance incorporates new instances of exemptions. The full list of exemptions are stated below.

- a. SSD will be exempted in the following cases:
 - i. Nomination of the spouse, parents, children, brothers or sisters to take up the assignment of the property;
 - ii. Addition/deletion of name(s) to/from a chargeable agreement for sale or assignment if the person(s) added/deleted is the spouse, parents, children, brothers or sisters of the original purchaser(s);
 - iii. Sale or transfer of residential property to the spouse, parents, children, brothers or sisters;
 - iv. Sale, transfer or vesting of properties made by the courts or pursuant to court orders (including compulsory sale orders made under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap.545), and foreclosure order made to a mortgagee, irrespective of whether the mortgagee is a financial institution within the meaning of Section 2 of the Inland Revenue Ordinance (Cap.112));
 - v. Sale or transfer of a property which was sold to, transferred to or vested in the vendor by or pursuant to any decree or order of any court;

- vi. Sale of mortgaged properties by a mortgagee which is a financial institution within the meaning of Section 2 of the Inland Revenue Ordinance, or by a receiver appointed by such a mortgagee;
 - vii. Sale of the estate of a deceased person by the personal representative;
 - viii. Sale or transfer of a property by a person whose property is inherited from a deceased person's estate or is passed to that person under the right of survivorship;
 - ix. Sale or transfer of properties between associated body corporates under Sections 45 and 29H(3) of the SDO;
 - x. The property sold relates solely to a bankrupt's estate or relates solely to the property of a company which is being wound up by the court by reason of its inability to pay debts; or
 - xi. Sale or transfer of properties to the Government.
- b. For SSD purposes, the Inland Revenue Department ("IRD") will accept whole blood relationship, half-blood relationship, an adopted person, or step-parents, stepchildren and the children of the stepparents as having "parents", "spouse", "children", "brother" and "sister" relationship.
- c. Under the Amendment Ordinance, sale or transfer of a residential property to spouse, parents, children, brothers or sisters is exempted from SSD. However, if the person disposes of the inherited property within 24 months from the date of transfer (including property transferred from spouse, parents, children, brothers or sisters), the transaction is SSD chargeable.
- d. Under the Amendment Ordinance, sale or transfer of a residential property which is inherited from a deceased person's estate under a will, the law of intestacy or right of survivorship by a beneficiary is exempted from SSD. Therefore, SSD will not apply to the disposal of the inherited property if it is

disposed of within 24 months from the date of inheritance.

It is the Administration's intention that the definition of "agreement for sale" in Section 29A(1) of the SDO has no application in respect of a bona fide mortgage or charge. IRD has agreed to update its Practice Notes to state explicitly that a bona fide mortgage or charge will not be considered as an agreement for sale as defined and is therefore not chargeable with SSD. However, the definition of "agreement for sale" in Section 29A(1) of the SDO has not been amended in this respect.

Although the SDO will exempt the usual ad valorem stamp duty as well as SSD for intra-group associated companies transfers under Sections 45 and 29H(3) of the SDO, it should be noted that the date of "acquisition" of the property will be recounted from the date of the intra-group transfer to the transferee and not the original date of the acquisition by the transferor. In other words, the transferee will be subject to SSD if it disposes of the property within 24 months after the intra-group transfer even though from the point of view of the parent company, the property has all along been within the same group.

Developers to note exemptions relating to bare sites/first-hand residential units

The newly added Section 29CA(4) of the SDO states:

"For the purposes of [SSD], [SSD] does not apply to a chargeable agreement for sale if the residential property disposed of by the vendor under the agreement, or part of the residential property, consists of—

- a. *Any building or any part of a building (whether completed or uncompleted), and—*
 - i. *The building is constructed, or caused to be constructed, by the vendor;*
 - ii. *The land on which the building is constructed was acquired by the vendor (irrespective of whether or not any building existed on the land before the construction commenced); and*
 - iii. *The existing building (if any) was demolished, or caused to be demolished, by the vendor; or*

- b. *Any land, and—*
 - i. *A building existed on the land when the land was acquired by the vendor;*
 - ii. *The building was demolished, or caused to be demolished, by the vendor; and*
 - iii. *There is no building on the land at the time of disposal by the vendor.”*

Hence, if a developer acquires a site to construct a new building on it, and then sells the newly built residential units of the new building (or the new building as a whole), SSD is not payable even though the sale takes place within two years of the date of acquisition of the site by the developer and irrespective of whether the developer purchased the site from the Government or another developer (Section 29CA(4)(a) of the SDO).

Further, if a developer acquires a piece of land with an existing building on it, demolishes the building and then disposes of the land as a bare site (i.e. without building on the land), no SSD is imposed on the disposal of the bare site even though the disposal takes place within two years (Section 29CA(4)(b) of the SDO).

The above exemptions do not appear to cover the scenario where:

- a. Developer A acquires a bare site and instead of building on it, sells/transfers the bare site to developer B within 24 months. It seems that SSD will be chargeable since developer A had “*acquired*” the bare site and subsequently “*disposed of*” it. This is the case even where the developer may have to sell the bare site not due to speculation, but due to insufficient capital for the development. The additional cost of SSD incurred therefrom may inevitably be transferred to consumers. Obviously, if the assignment of bare sites is between associated companies, it can still enjoy the exemption from SSD under Section 45 of the SDO, although, as mentioned above, the holding period of the property will be recalculated as from the date of the acquisition by the transferee.
- b. Several subsidiaries or associated companies

of two or more developers separately purchase residential units of a building from individual owners, and then transfer some or all of their interests in the units to an ultimate development company or exchange their interests in the units among themselves, before the existing building is demolished.

- c. A developer who acquires an old residential building for renovation and then resells the renovated units without demolishing the old building.

Developers should therefore be advised to plan their redevelopment strategies accordingly under the new taxation environment.

Review of SSD

The Administration has undertaken to review the need to impose SSD once every 24 months after the enactment of the Amendment Ordinance, or as the circumstances may require. If SSD is considered no longer necessary, the Administration will go through the normal legislative process to amend the legislation.

Conclusion

SSD could be a trap for unwary purchasers and vendors, and may add to the cost of urban redevelopment for developers. It also has a lot of unintended legal effects. As mentioned above, SSD could arise under circumstances where there is no element of property speculation at all.

There is no appeal mechanism built in the Amendment Ordinance on the applicability of SSD on a case by case basis in the light of individual or personal circumstances such as financial hardship, bereavement, serious sickness, etc. This could lead to inequitable results where a vendor is forced to sell under such unexpected circumstances.

SSD also tends to have a side effect of imposing a “lock-up” period of two years in the secondary market and, as some people suggest, will reduce the number of residential units available for sale in the secondary market. The more transactions in the secondary market there are, the more units will be “locked-up”, thereby further reducing the supply in the market.

Such arguments may not be without justification, particularly in view of the persistent increase in property prices after the imposition of SSD since 20 November 2010.

The imposition of SSD is introduced by the Government as an exceptional measure to counter exceptional property price rise. Yet, it is disappointing to note that no “*sunset clause*” has been included in the Amendment Ordinance. It is hoped that the Government will nevertheless review the situation from time to time and promptly propose the removal of SSD as soon as the property situation no longer justifies its continuance.

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