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Holding residential property on Inter Vivos trusts in Singapore: Transfers of equity interests

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Holding Residential Property on *Inter Vivos* Trusts in Singapore: Transfers of Equity Interests

By

Vincent OOI[*]

Abstract

Following amendments to the ACD regime in Singapore, transferring equity interests to and from a trust with no beneficial owners will attract ACD, as will the exercise of a power of appointment by a trustee to grant equity interests to a beneficiary. Renunciation of interests in a bare trust will also attract ACD. Together with the introduction of ABSD (Trust), it is now impractical to use trusts to hold residential properties for succession planning purposes. Remaining options are to gift the properties without any strings attached or bequeath the properties in a will and risk subsequent changes to death taxation.

A. Introduction

This article continues the discussion on the recent amendments to the stamp duty regime for trusts holding residential property in Singapore from the previous article.[1] While the previous article considered the introduction of a new category of Additional Buyer's Stamp Duty ("**ABSD**"), applicable where residential property is transferred to a trustee, this article will look at the amendments to the Additional Conveyance Duty ("**ACD**") regime, applicable where transfers of equity interests in an entity are made.[2] Essentially, the regime catches situations where indirect transfers of residential property are made, through the transfer of an interest in a property-holding entity ("**PHE**").[3] Even before the new amendments, transfers of equity interests to and from trusts were already dutiable with ACD. However, there were two potential gaps in the regime. Firstly, as ACD is determined based on the holdings of the beneficial owner

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1 Vincent Ooi, "Holding Residential Property on *Inter Vivos* Trusts in Singapore: Transfers to Trustees" (2022) Trusts & Trustees (Forthcoming).

2 Equity interests, in the context of a property trust, is defined as "a unit in the trust". "Unit", in turn, is defined as "a share in the beneficial ownership in the property subject to the trust" or "a share in the profits, income or other payments or returns from the management of the property or operation of the business premised on the property" (see Stamp Duties Act 1929 (2020 Rev. Ed.) ("**SDA**"), s 23(21).

3 PHEs are defined as companies, partnerships or property trusts which have at least 50% of their market value made up of prescribed immovable properties (essentially, residential properties) (see SDA, ss 23(21), 23(13)(a) and 23(13)(b)).

of the equity interests (and its associates),[4] in a case where the beneficial ownership of the equity interests was held in suspense such that there was no beneficial owner,[5] ACD could not be levied. Secondly, it was unclear whether ACD was payable in a situation where a trustee exercised a power of appointment to grant a discretionary beneficiary under a trust an equity interest. The joint effect of these two potential gaps in the regime meant that it was arguable that it was possible to escape ACD liability by setting up a non-exhaustive discretionary trust and then getting the trustee to subsequently exercise a power of appointment in favour of a discretionary trustee. If this interpretation of the regime was to be upheld by the courts, then it had the potential to sidestep the entire ACD regime in relation to trusts.

The new amendments introduce the concept of a bare trust beneficiary ("**BTB**") which is of considerable importance in determining which parts of the amended stamp duty regime for trusts apply. Broadly speaking, it is arguable that the new amendments attempt to address the abovementioned two potential gaps by two main mechanisms that only apply to trusts which involve at least one beneficiary who is a non-BTB. Firstly, they provide that in a case where equity interests are transferred to a beneficiary whose interest is uncertain (potentially posing the "missing beneficial owner" problem), the holdings of the trustee (and its associates) will be taken into account rather than the holdings of the beneficiary.[6] Secondly, they provide that in the case of a beneficiary who is a non-BTB, where a trustee exercises a power of appointment to grant equity interests to that beneficiary, such a grant will be dutiable with ACD.[7] Of course, what the actual effects of the new amendments are may differ from what might have been intended, and are the focus of this article.

The new amendments also introduce a mechanism which only applies to trusts of which all beneficiaries are BTBs. Such a mechanism provides that the renunciation of interests in a bare trust by a BTB will effectively be a deemed transfer of the residential property to the settlor and thus dutiable.[8] After covering the technical details of the new amendments and its legal effects, this article will explore the practical implications for succession planning.

B. The Concept of Bare Trust Beneficiaries

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4 This is relevant both for determining whether the ACD regime is triggered in the first place (see SDA, ss 23(2), (3), (5), and (6)) and also in computing the quantum of duty payable (see SDA, First Sch, Arts 3A(1) and (2)).

5 This "missing beneficial owner" problem was highlighted with the decision of the Singapore High Court in *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 (see Ooi (n 1) for further discussion).

6 Stamp Duties (Amendment Bill) (Bill No. 13/2022) (the "**Bill**"), cl 5, adding SDA, s 23(22)(aa). The Bill was passed by Parliament on 5 July 2022, currently awaiting Presidential assent. There are provisions which provide for retroactive effect, effectively ensuring that the new amendments will similarly apply to transactions from 9 May 2022 (when the Bill was introduced in Parliament), to when it is eventually passed. Thus, the new amendments are effectively already in force.

7 The Bill, cls 7(b) and (c), adding SDA, First Sch, Arts 3A(1)(aa) and 3A(2)(aa).

8 The Bill, cl 4, adding SDA, s 22C.

Under the new regime, a clear distinction is drawn between trusts of which all beneficiaries are BTBs and those where there is at least one non-BTB. The former attracts tax consequences if the beneficiary renounces the interest in the property. The latter is subject to two mechanisms, the first of which levies ACD on the trustee instead of the beneficiary on transfers of equity interests, and the second of which imposes ACD where a trustee exercises a power of appointment to grant a beneficiary equity interests.

A BTB is defined as a person who: 1) is identified in the declaration of trust as a beneficiary of that property; and 2) upon declaration of the trust, has beneficial ownership of that property. Both limbs of the definition are to be read conjunctively.[9] Great care has to be taken when using the term BTB (and, for that matter, identifiable individual beneficiaries ("**IIBs**")[10] as well). These are statutorily defined terms that may not exactly correspond with the common law meanings of these terms.

While a BTB shares certain characteristics with a beneficiary of a bare trust under the common law, the two differ in several important respects and should not be conflated. Firstly, the former requires the beneficiary to be identified in the declaration of trust, while the latter does not require any such identification or for there to be a declaration of trust at all. In fact, many bare trusts are likely to be implied trusts such as resulting or constructive trusts, that do not involve any declarations of trust. Secondly, the former requires that the beneficiary have beneficial ownership of the property upon declaration of the trust, while under the latter, it is possible for the beneficiary to gain beneficial ownership of the property subsequent to the declaration of the trust (or even in the absence of a declaration of trust). A common example of this is where there is a condition precedent, such that the beneficial owner does not initially have beneficial ownership of the property, but later receives it upon fulfilment of the condition precedent.

Thirdly, the former merely requires the beneficiary to have beneficial ownership of the property upon declaration of the trust, while the latter is stricter and requires that it cannot be possible for the beneficial ownership to be taken away. Thus, for example, there cannot be any clauses providing for revocation, variation or conditions subsequent that can affect the beneficial ownership of the property. At the heart of a bare trust is not the transfer of only beneficial ownership, but *absolute* ownership. The beneficiary is entitled at any point to call for a conveyance of the property under the rule in *Saunders v Vautier*, and the trustee must comply.[11]

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9 The Bill, cl 2, amending SDA, s 2(1).

10 The concept of an IIB is central to the mechanism in the stamp duty regime which levies ABSD where residential property is transferred into a trust (discussed extensively in Ooi (n 1)). Generally speaking, an IIB is an individual who is identified in the declaration of trust as a beneficiary and who has an interest which cannot be subsequently revoked or varied. Nor can such an interest be subject to any conditions.

11 *Saunders v Vautier* (1841) 4 Beav 115.

The overall framework of the new amendments suggest that it was intended for two regimes to apply. The first governs transfers of residential property to trustees and relies on the IIB concept to determine if a remission should be granted. The second governs what are effectively indirect transfers of residential property to and from trusts and uses the BTB concept to determine whether it is the beneficiary or trustee who should be liable to pay ACD.

Both the IIB and BTB concepts can be said to address the problem of the "missing beneficial owner". Both an IIB and BTB must be a beneficial owner whose interest cannot be varied in any way, preventing a situation where there is no beneficial owner under the trust. In many cases, a BTB will also be an IIB. However, the concepts do not completely overlap and there may be a variety of situations where a beneficiary will qualify as a BTB but not as an IIB.[12] The BTB only needs to have beneficial ownership of the trust property at the point of declaration of the trust, but it appears to be possible to be a BTB even if there are conditions in the trust deed that can subsequently vary the beneficial ownership of the BTB.[13] This is strictly prohibited for IIBs.

C. Transfers of Equity Interests to Beneficiaries who are Non-BTBs

There are two mechanisms introduced by the new amendments which apply to trusts of which there is at least one beneficiary who is a non-BTB. The first provides that where there is a transfer of equity interests to a beneficiary who is a non-BTB, the holdings of the trustee (and its associates) will be taken into account rather than the holdings of the beneficiary, and the trustee will be liable to pay ACD.[14] The second provides that where a trustee exercises a power of appointment to grant equity interests to a beneficiary who is a non-BTB, such a grant will be dutiable with ACD.[15] The two mechanisms largely build on the existing ACD regime and are very similar to the latter save for a few differences. For the first mechanism, the person whose holdings are considered is the trustee and not the beneficial owner. For the second mechanism, ACD is extended to apply in a new situation, that of the grant of equity interests through the exercise of a power of appointment.

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[12] It is technically possible for a beneficiary to qualify as an IIB but not a BTB. BTBs must have beneficial ownership of the trust property upon declaration of the trust, but IIBs technically do not have this requirement. However, in order for an IIB to gain beneficial ownership subsequently, there must be at least another beneficiary who is not an IIB, meaning that the remission would not be available anyway.

[13] As discussed above, this is where a BTB differs from a beneficiary under a bare trust at common law, since for the latter, there cannot be any conditions in the trust deed that can subsequently vary its beneficial ownership.

[14] The Bill cl 5, adding SDA, s 23(22)(aa).

[15] The Bill, cls 7(b) and (c), adding SDA, First Sch, Arts 3A(1)(aa) and 3A(2)(aa).

Looking to the Trustee Where there is No BTB

The Potential Loophole Under the Old Regime

A brief summary of the ACD regime before the new amendments is necessary to understand the potential loophole which the first mechanism attempts to address.[16] ACD can be imposed in four different qualifying situations. For all four, there must be a conveyance of equity interests in a PHE.[17] In the case of Duties A and C, the grantee must be a "significant owner"[18] of the PHE after the transfer, while for duties B and D, the grantor must be a "significant owner" before the transfer.[19] Duty is imposed on the change in beneficial interest in the PHE, which is generally based on the amount of equity interests that are comprised in the conveyance.[20] Under the ACD regime, both direct holdings and indirect holdings of real property are included in the computation of duty. Further, the holdings of "related entities"[21] and "associates"[22] are also taken into account.

The issue with the old regime is that it focused on the concept of beneficial ownership in various crucial parts of the regime. For example, "significant owner" is determined by the beneficial ownership of a PHE and a change in beneficial interest is based on the change in beneficial ownership of a PHE. Hence, the entire ACD regime might well not be applicable where there is no beneficial owner. As discussed earlier, in the case of a non-exhaustive discretionary trust, it is arguable that the beneficial ownership is in suspense and that there is no beneficial owner.

Addressing the Potential Loophole

The first mechanism is arguably designed to address this potential loophole. The issue of there being no beneficial owner is addressed by legislation which provides that in the case where a conveyance is executed on or after 10 May 2022 where the equity interests being conveyed are held[23] or to be held on trust by a trustee for a beneficiary who is not a BTB, then any reference to equity interests beneficially owned by a person is a reference to the equity interests held or

[16] For an overview, see Vincent Ooi, 'The New Additional Conveyance Duties Regime in the Stamp Duties Act' (2018) 30 SAcLJ 119 at [28]- [44]. This article will not cover the entire ACD regime in detail and will instead focus on the amendments that change things.

[17] See Ooi (n 16) at [12]- [19].

[18] See Ooi (n 16) at [29].

[19] The grantee-side duties (duties A and C) largely mirror ABSD and BSD, while the grantor-side duties (duties B and D) broadly mirror SSD.

[20] The rules are considerably more complex in some other situations. See Ooi (n 16) at [37]- [38].

[21] See Ooi (n 16) at [39]- [44].

[22] See Ooi (n 16) at [21]- [27].

[23] Only applies to equity interests conveyed to the trustee on or after 10 May 2022 (see The Bill, cl 5, adding SDA, s 23(22)(aa)(ii)).

to be held on trust by that trustee for that beneficiary.[24] Thus, the fact that the beneficial ownership is in suspense, and that there is no identifiable beneficial owner, no longer matters in the application of the ACD (Trusts) regime, since the equity interests held by the trustee under the trust can be considered instead.

D. Exercise of Power of Appointment by Trustee to Grant Equity Interests to Beneficiaries who are Non-BTBs

Extending the ACD Regime to a New Situation

The Potential Loophole Under the Old Regime

Under the old regime, ACD was charged on conveyances of equity interests whether or not the conveyance was: 1) on a sale; 2) by way of gift, release or settlement; or 3) pursuant to a declaration of trust where the beneficial interest in the equity interests passes.[25] Notably, this list does not include any mention of the grant of equity interests through the exercise of a power of appointment. Further, the old regime provided for an exemption, such that in certain situations, voluntary conveyances *inter vivos* were not dutiable. Section 16(5)(d) was of particular relevance to this situation, since it provided that a conveyance or transfer made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, whether expressed or implied, is not chargeable with duty under the section.[26]

The two sections created a potential loophole which the second mechanism is arguably designed to cover. In a discretionary trust, a trustee could exercise a power of appointment to grant equity interests to the beneficiaries. Such a grant would arguably not fall within the instances of conveyances charged with ACD. Further, as the recipient would be a beneficiary under the trust, any conveyance or transfer of the equity interests would fall under the exception to the voluntary conveyances *inter vivos* provision and no ACD would be payable in any case.

Addressing the Potential Loophole

The new amendments provide that ACD will now be charged on conveyances of equity interests whether the conveyance was "on a sale or otherwise", expanding what was a closed list of instances to include all possible situations, and substantially broadening the scope of what conveyances fall to be charged with ACD.[27] Thus, transfers of equity interests made

[24] The Bill, cl 5, adding SDA, s 23(22)(aa).
[25] SDA, s 23(1).
[26] SDA, s 16(5)(d).
[27] The Bill, cl 5, amending SDA, s 23(1)(c)(i).

through the exercise of a power of appointment will now be caught under the legislation. Further, the voluntary conveyance *inter vivos* exemption has been amended, such that where equity interests in an entity were conveyed or transferred on or after 10 May 2022 to a trustee to hold on trust for a beneficiary who is not a BTB, then the exemption in s 16(5)(d) does not apply to a conveyance or transfer, executed on or after that date, by the trustee of those equity interests to the beneficiary.[28] The explanatory statement to The Bill states that the exemption is removed so that "duty under section 23 (if applicable) becomes payable on the conveyance or transfer to the beneficiary." Duty under s 23 is ACD and thus is levied on the transfer of equity interests to the beneficiary.

Section 16(7) applies where there is a beneficiary who is not a BTB, meaning that it would apply in situations where the beneficial ownership under the trust is in suspense; or where, under the trust, the interests of the beneficiaries may be revoked, varied, or otherwise altered. As discussed earlier, if the interests of the beneficiaries are altered though the exercise of a power of appointment by the trustee, ACD will now be payable on such a conveyance. Thus, the exemption also had to be amended, for it would have the effect of exempting the payment of ACD on that conveyance. However, should the trustee eventually transfer the legal title of the property held on trust to the beneficiary, such a transfer would still be exempt from stamp duties under s 16(5)(c), which provides an exemption where there is a conveyance under which no beneficial interest passes in the property conveyed or transferred. This avoids a situation where the beneficiary has to pay twice: once when it receives the equity interests and again when it receives the legal title.

E. Computation of ACD (Trust) Under the Two Mechanisms Relating to Beneficiaries who are Non-BTBs[29]

Differences from the Old Regime

The computation of ACD (Trust) under the two new mechanisms only requires some slight tweaks to the existing ACD regime. As discussed earlier, in a case of a trust with a beneficiary who is a non-BTB, the equity interests of the trustee in relation to that trust will be considered rather than that of the beneficial owner (since there may not be a beneficial owner).[30] Apart from that, the old rules for determining if the grantee or grantor is a "significant owner" of the PHE still apply.[31] A further change relates to the determination of "associates" for the purposes of levying ACD. The ACD regime requires that not only the grantee or grantor's equity

[28] The Bill, cl 3, adding SDA, s 16(7).
[29] This entire section builds heavily on the framework laid out in Ooi (n 16) at [28]- [44], since many parts of the ACD regime remain unchanged with the new amendments.
[30] The Bill, cl 5, adding SDA, s 23(22)(aa).
[31] See Ooi (n 16).

interests are taken into account, but also their associates.[32] Under the general ACD regime, s 23(20) operates to specify how associate relationships may be formed.[33] But with the new amendments, in a case where there is a beneficiary who is a non-BTB, the associates of the trustee will be considered rather than that of the beneficiary.[34] Finally, in the case of a trustee exercising a power of appointment to grant equity interests to a beneficiary, the definition of "U" in both items 1 and 2 of Article 3A is replaced, changing the computation of ACD slightly. This article will now provide an illustration of how the ACD (Trust) regime might work.

Four Different Kinds of Duties

ACD is the collective term for four distinct kinds of duties which broadly mirror Buyer's Stamp Duty ("**BSD**"), ABSD; and Seller's Stamp Duty ("**SSD**"). The duties are levied whenever there is a transfer resulting in a change in beneficial interest in a PHE. Duty A is levied where the grantee has no other related interests and mirrors BSD and ABSD. The maximum BSD and ABSD rates are levied on the value of the change in beneficial ownership of all prescribed immovable properties ("**PIPs**")[35] indirectly owned by the PHE (apportioned by percentage of ownership).[36] Duty B is levied where the grantor has no other related interests and mirrors SSD. The maximum SSD rate is levied on the value of the change in beneficial ownership of all PIPs indirectly owned by the PHE (apportioned by percentage of ownership).[37]

Duty C is computed in a similar manner to Duty A, but applies instead where the grantee has other related interests.[38] In such a case, the holdings of the related entities must also be taken into account.[39] The same applies for Duty D, which is computed in a similar manner to Duty B, but applies instead where the grantor has other related interests.[40] Where there is a transfer of equity interests to a beneficiary who is a non-BTB, the computation of ACD is exactly the same as under the old regime,[41] except that the holdings of the trustee and its associates will be considered rather than those of the beneficial owner. Things are slightly different where there is an exercise of a power of appointment instead.

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32 See SDA, s 23(12).
33 See Ooi (n 16) at [21]- [27].
34 The Bill, cl 5, adding SDA, ss 23(20A), (22)(aa)(i) and (ii).
35 Under para 5 of the Stamp Duties (Section 23) Order 2017, the zones are: "residential"; "commercial and residential"; "residential/institution"; "residential with commercial at 1st storey"; or "white". Other specific provisions exist.
36 SDA, First Sch, Arts 3A(1)(a) and 3A(1)(b).
37 SDA, First Sch, Art 3A(1)(e).
38 SDA, First Sch, Arts 3A(1)(c), 3A(1)(d), 3A(2)(c) and 3A(2)(d).
39 See Ooi (n 16) at [39].
40 SDA, First Sch, Arts 3A(1)(e), 3A(1)(f), 3A(2)(e) and 3A(2)(f).
41 See Ooi (n 16) at [36]- [44].

Change in Beneficial Interest Where there is the Exercise of a Power of Appointment

As discussed earlier, computation of ACD under the new regime is still very similar to that under the old regime, with the difference that the definition of "U" in items 1 and 2 of Article 3A is replaced. However, the change is only applied where all the following conditions are met: 1) the equity interests had earlier been conveyed to the trustee on or after 10 May 2022 to hold on trust for the grantee as beneficiary (who is a non-BTB); 2) the trustee then exercised a power of appointment (whether pursuant to the trust or otherwise) over those equity interests in favour of the beneficiary, as a result of which the beneficiary became a significant owner of the PHE; and 3) the conveyance is a conveyance executed on or after 10 May 2022 of those equity interests by the trustee to the beneficiary under the trust.[42]

For duties B and D, the change in beneficial interest is simply the amount of equity interests that are comprised in the conveyance.[43] These computations do not use the value "U" at all, and thus remain completely the same as before this round of amendments. For duties A and C, a more complex calculation is required. The calculation of a change in beneficial interest requires the establishment of two reference values with which to calculate the change: a "before" value and an "after" value. Subtracting the "before" value of beneficial interests from the "after" value will determine the change in beneficial interests. The "after" value is always fixed as the value immediately after the conveyance. However, the "before" point is based on the status of the grantee.[44] For a grantee who has never been a significant owner of the PHE since on or after 10 May 2022, the "before" value is the lowest amount of the beneficial interest he owns in the PHE between the enactment of the ACD regime and the conveyance.[45] For a grantee who becomes a significant owner at any other time, the "before" value is the lowest value of the beneficial interest he owned in the PHE since he was last a significant owner of the PHE.[46] In all calculations of the quantum of ACD, the interests owned by the grantor and grantee include those owned by their respective associates.[47]

F. Renunciation of Interests by a Bare Trust Beneficiary

The new amendments also introduce a mechanism which applies exclusively to trusts where all beneficiaries are BTBs. It provides that where a BTB renounces its interest in a bare trust, giving rise to a resulting trust over residential property in favour of the settlor of the bare trust,

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42 The Bill, cl 7, amending SDA, First Sch, Arts 3A(1)(a)(ii)(B), 3A(2)(a)(ii)(B) and 3A(2)(b)(ii)(B).
43 The Bill, cl 7, amending SDA, First Sch, Arts 3A(1)(b) and (2)(c).
44 The Bill, cl 7, amending SDA, First Sch, Arts 3A(1)(a)(i)(A), 3A(1)(a)(ii)(A), 3A(1)(a)(iii), 3A(2)(a)(i)(A), 3A(2)(a)(ii)(A), 3A(2)(a)(iii), 3A(2)(b)(i)(A), 3A(2)(b)(ii)(A) and 3A(2)(b)(iii).
45 The Bill, cl 7, amending SDA, First Sch, Arts 3A(1)(a)(i)(B), 3A(2)(a)(i)(B) and 3A(2)(b)(i)(B).
46 The Bill, cl 7, adding SDA, First Sch, Arts 3A(1)(aa) and 3A(2)(aa).
47 SDA, s 23(12) and First Sch, Art 3A.

there will effectively be a deemed transfer of the residential property to the settlor and duty will accordingly be payable.[48]

Renunciation of Interest in a Bare Trust

The Potential Loophole Under the Old Regime

Before the new amendments were enacted, there was some discussion on the ground about the potential use of a certain structure to avoid ABSD. Residential property could be purchased for the beneficiary and held on a bare trust. Given that the beneficiary would be the beneficial owner of that property, ABSD would be calculated based on the status and property count of the beneficiary (which might well result in a lower rate of ABSD or even no ABSD payable). The beneficiary could then renounce the beneficial interest in the bare trust.

The effect of a renunciation is that the situation is treated as if the settlor had never, in the first instance, settled the trust in favour of the beneficiary.[49] The bare trust would thus be considered to never have existed *ab initio*, but the trustee would also not be able to keep the trust property for itself. Thus, an automatic resulting trust would arise in favour of the settlor, with the trustee holding the trust property for the benefit of the settlor. This effective transfer of the beneficial ownership of the trust property would arguably not be dutiable since it was not a conveyance on sale, nor another kind of instrument falling within any of the articles in the First Schedule to the SDA.[50] The settlor could then ask for the legal title to the property to be conveyed to the settlor, with the result that no stamp duties would be payable on such a conveyance.[51]

The author is not aware of any systematic study that has been conducted to determine the extent to which this potential loophole was used to avoid ABSD. However, such an arrangement might be highly risky for the settlor on several grounds. There was always an overarching risk of the Commissioner of Stamp Duties ("**the Commissioner**") invoking the general anti-avoidance rule ("**GAAR**") to disregard the arrangement for tax purposes.[52] There is currently also a tax surcharge of 50% to be applied to the tax advantage counteracted through the use of the GAAR.[53]

Quite apart from the tax consequences, such an arrangement would inherently run the risk of the beneficiary refusing to cooperate once the beneficial ownership of the residential

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48 The Bill, cl 4, adding SDA, s 22C.

49 See the decision of the Singapore High Court in *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR(R) 296 (at [100]-[101]), which involved an analogous situation of the disclaimer of a gift.

50 SDA, First Sch.

51 Under SDA, s 16(5)(c) or (d).

52 SDA, 33A.

53 SDA, 33B.

property had been received. Should the beneficiary refuse to renounce the beneficial interest in the trust, it is arguable that the settlor would be stuck between a rock and a hard place. On one hand, the settlor could argue that the arrangement was a sham, which would result in the trust being declared void and the beneficial ownership of the trust property return to the settlor. However, this would almost inevitably result in the tax authorities bringing a tax avoidance claim against the settlor at best, or a criminal prosecution for evasion of duty, at worst.[54] On the other hand, the settlor would have significant trouble demanding the trust property if a sham is not alleged.

Addressing the Potential Loophole

The new regime provides that where a settlor declares a bare trust over residential property (or an interest therein) on or after 10 May 2022, and the BTB renounces its interests in the bare trust, giving rise to a resulting trust over residential property in favour of the settlor, there will effectively be a deemed transfer of the residential property to the settlor and duty will accordingly be payable.[55] Since stamp duties remain a tax on instruments in Singapore, the statute prescribes that the beneficiary must give the Commissioner and the settlor a notice in prescribed form, which must accordingly be stamped.[56] The potentially applicable duties are BSD and ABSD on the part of the settlor and SSD on the part of the beneficiary. Failure to deliver such a notice can result in a fine not exceeding $1,000 on the part of the beneficiary[57] and the Commissioner can nevertheless give such a notice to the beneficiary and settlor and require it to be stamped.[58] If the beneficiary is a minor or otherwise lacks capacity, any reference to the beneficiary will accordingly be taken to be a reference to the guardian, done, deputy or other person having the direction, control or management of the renounced interest on the beneficiary's behalf.[59]

The Effect of the Section 22C Notice

While the Commissioner can issue a s 22C Notice and require it to be stamped, the statute makes it clear that the Notice has no other effect with respect to affecting the beneficial ownership of the interest renounced by the BTB (at least, as far as the ABSD regime is concerned).[60] In other words, the s 22C Notice may be intended to be issued in a situation

54 Under SDA, ss 33A or 62, respectively.
55 The Bill, cl 4, adding SDA, s 22C.
56 The Bill, cl 4, adding SDA, s 22C(2).
57 The Bill, cl 4, adding SDA, s 22C(3).
58 The Bill, cl 4, adding SDA, s 22C(4).
59 The Bill, cl 4, adding SDA, s 22C(8)(b).
60 The Bill, cl 7, adding SDA, First Sch, Article 3(2)(ab).

where the beneficial interest in a bare trust has been transferred to the settlor through an automatic resulting trust. However, the conditions for the automatic resulting trust have to be present for the trust to arise. The issuance of the Notice itself cannot be taken to be proof of or a direction that the beneficial ownership of the real property in question has been transferred to the settlor. Accordingly, the Notice itself will not affect the property count for the purposes of ABSD, though if the Notice is correctly issued, the property count would change due to the transfer of beneficial ownership.[61]

Application of ACD Regime for Bare Trust Beneficiaries

The amendments introduce a new section which specifically addresses the situation where transfers of equity interests in PHEs are made by trustees acting in the capacity of trustees for BTBs. Where any transfers of equity interests in relation to such a trust is made, the BTBs will be taken to be the grantees or grantors[62] rather than the trustees. Accordingly, the BTBs will be liable for any duty.[63] This does not appear to change the effect of the ACD regime, but clearly stands in contrast to situations involving trusts with at least one beneficiary who is a non-BTB, where the trustees will be taken to be the grantees or grantors and accordingly liable for any duty.

G. How the New Regime Affects Succession Planning

Impact on Using *Inter Vivos* Trusts to Hold Residential Property

Quite apart from the various tax advantages that have been specifically counteracted by the new amendments, the upshot is that it is no longer viable to use *inter vivos* trusts to hold residential property in the vast majority of common succession planning situations, whether because the tax costs are prohibitive or because the new regime places limitations on structuring that defeat the purpose of using a trust in the first place. Would-be settlors will have to decide whether to gift their residential properties to their beneficiaries without any strings attached, or bequeath such properties in their will. The latter option, of course, only remains attractive insofar as there are no tax changes in the areas of estate duty, inheritance tax, or transfers of residential property on death.

The new ABSD (Trust) regime and accompanying remissions framework make the tax costs far too prohibitive to structure a trust of which not all beneficiaries are IIBs. However,

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61 SDA, First Sch, Article 3(2)(a).

62 For grantors, only applies to equity interests conveyed to the trustee on or after 10 May 2022 (see The Bill, cl 6, adding SDA, s 23BA(b)).

63 The Bill, cl 6, adding SDA, 23BA.

the requirements to qualify as an IIB are very strict, prescribing that a beneficiary's beneficial ownership of the estate or interest under a trust cannot, under the terms of the trust, be revocable, variable, or subject to any condition subsequent. The first of these two articles also explained that there is an effective requirement that there cannot be any conditions precedent either.[64] Further, the trust cannot be a discretionary trust, for there would be at least one beneficiary who would not be an IIB in that case. All of these requirements restrict the ability of an *inter vivos* trust to effectively operate as a tool for succession planning, since it limits how the trust can be structured.

Generally, *inter vivos* trusts are used to hold residential property for two main (non-tax) reasons. Broadly, the settlor wishes to ensure that the beneficiaries are provided for in the future, with the trust property clearly segregated from the settlor and therefore safe from any of the settlor's creditors, but without handing the beneficiaries the property outright. There are two specific motivations. Firstly, to prevent the trust assets from being squandered away by a beneficiary who does not know how to manage them. A settlor may wish to use such trusts to ensure that the beneficiaries receive distributions of the trust property and income in a carefully controlled manner and not all at once, or in a manner which they can spend the entirety of the trust property quickly. Secondly, to distribute the trust property amongst the settlor's multiple beneficiaries in the future, without having to decide in advance as to the exact proportions to be given. A settlor may also wish to use such trusts to ensure that it is possible for a trustee to exercise its discretion to distribute appropriate amounts of trust property and income to each of the beneficiaries of the trust, in accordance with their needs.

The new amendments deny settlors both these key advantages. In order to benefit from the remission, there cannot be any conditions set on the beneficial interests of the beneficiaries, meaning that the trust would have to be a bare trust. The beneficiaries would be entitled at any point to (collectively) call for a conveyance of the property under the rule in *Saunders v Vautier*, and the trustee must comply.[65] The settlor retains no control over the property whatsoever. Further, in order to benefit from the remission, there cannot be any variation in the interests of the beneficiaries and the trust cannot be a discretionary trust. This means that any distribution of the interests will have to be fixed from the outset and cannot be subsequently altered according to the needs of each beneficiary. The settlor cannot get around these restrictions by making indirect transfers of residential property through transferring equity interests in a PHE instead, for this would attract ACD at rates even higher than standard BSD and ABSD. Other potential loopholes in the ACD regime have also been addressed by the new amendments.

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64 Ooi (n 1).

65 *Saunders v Vautier* (1841) 4 Beav 115. An exception is if the beneficiaries are minors or who lack mental capacity. Even so, the beneficiaries are entitled to call for the conveyance of the property once they attain the age of majority.

Impact on Testamentary Dispositions of Residential Property

The new amendments complicate the tax position on testamentary dispositions of residential property. The tax position prior to the new amendments was as follows. The starting point is to note that there is no express exemption for testamentary dispositions (including the creation of testamentary/will trusts) from stamp duties.[66] The reason why stamp duties are not levied on such transfers is because they take place without the need for a stampable instrument. Such transfers do not fall within any of the articles in the First Schedule to the SDA, nor do they fall under the scope of the voluntary conveyance *inter vivos* provision,[67] since obviously, they are not *inter vivos* transfers.

Under the new regime, testamentary dispositions involving direct transfers of residential property will still not be dutiable, whether or not they are made to a trustee or directly to a beneficiary. In the case where the will creates a testamentary/will trust, there is an express exemption in Article 4 of the First Schedule to the SDA, such that ABSD (Trust) will not be payable. Thus, as far as direct transfers are concerned, the tax positions on testamentary dispositions largely remains unchanged under the new regime. It should be noted, however, that it is only the transfer on death that is not chargeable with stamp duties. If a testamentary/will trust is created under the will, any subsequent transfers on sale to the trustee will be subject to the usual 35% ABSD rate. Further, any transfers of the equity interests in the testamentary/will trust will similarly be subject to the ACD regime.

As for testamentary dispositions involving transfers of equity interests in entities under the new regime, the position taken by the Inland Revenue Authority of Singapore ("**IRAS**") is that "no stamp duties including ACD will apply if the transfer of equity interest in a PHE is pursuant to a will or by way of assent".[68] This has to be carefully considered in light of the amendments to the legislation. Here too, there is obviously no scope for the voluntary conveyance *inter vivos* provision to operate. Nor will Articles 3 or 4 of the First Schedule to the SDA apply, due to the absence of any transfer on sale in the case of the former, and due to the express exemption in the article for the latter. The difficulty is with the charging section for ACD in the SDA post-amendments. As previously discussed, under the old regime, ACD was charged on conveyances of equity interests, whether or not the conveyance was 1) on a sale; 2) by way of gift, release or settlement; or 3) pursuant to a declaration of trust where the beneficial

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66 Technically, SDA, First Sch, Art 4 does exempt wills from the payment of the nominal $10 stamp duty if it contains a declaration of trust concerning any immovable property, stock or shares.

67 SDA, s 16(1).

68 IRAS, "Overview of Additional Conveyance Duties (ACD)" <https://www.iras.gov.sg/taxes/stamp-duty/for-property-holding-entities-('phe')/basics-of-stamp-duty-for-property-holding-entities/overview-of-additional-conveyance-duties-(acd)> (accessed 20 July 2022).

interest in the equity interests passes.[69] This has since been amended, such that ACD will now be charged on conveyances of equity interests whether or not the conveyance was on a sale or otherwise.[70] The expanded scope of the provision is now broad enough to catch transfers of equity interests due to testamentary dispositions. It is thus arguable that ACD will be applicable on such transfers even if in accordance with the will or intestate succession.[71] If this is the case, the IRAS's position should been seen more as an administrative concession (which can be revoked) rather than a representation of what the legal position is.

H. Conclusion

The new amendments may have been intended to address potential loopholes in the stamp duty regime for trusts in Singapore. However, a careful examination of the effects of the legislation makes it clear that they go further than this and have considerable implications for succession planning. These amendments do not stop at "equalising the treatment" between transfers of residential property or equity interests made directly or through a trust. It might be argued that the new amendments achieve tax neutrality between transfers made directly and those made through a bare trust, but not for other kinds of trusts, even if those kinds of trusts may have identifiable beneficial owners.

The effect of the new amendments is to largely render ineffective the use of trusts holding residential property for succession planning. The settlor will be faced with the choice of gifting the property entirely without any strings attached, effectively giving up all control over it;[72] or paying the prohibitive rate of 35% in ABSD without any prospect of remission. If a property can only held on a bare trust, there may not be much point in creating a trust at all. As far as practice is concerned, the range of tools available to the lawyer or private wealth practitioner has unfortunately decreased. Moving forward, succession planning strategies are likely to be different depending on whether the assets involve residential properties or not. It would not be surprising if lawyers or private wealth practitioners simply advise their clients to completely exclude the use of trusts to hold residential property altogether to avoid the complexities of the stamp duties regime. This is a bit of a shame since there were many non-tax advantages to using trusts to hold residential properties for succession planning purposes.

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69 SDA, s 23(1).

70 The Bill, cl 5, amending SDA, s 23(1)(c)(i).

71 Note that this applies to transfers of equity interests in any kind of PHE, which include companies and partnerships, in addition to trusts.

72 A person may be able to retain control by gifting the property to a minor or to a person who lacks mental capacity. Such individuals can hold the property in their own names without the need for a trust. The grantor may be able to make decisions on behalf of the grantee through powers under the Settled Estates Act 1934 (2020 Rev. Ed.) or the Mental Capacity Act 2008 (2020 Rev. Ed.) (see Alvin See, "Dealing with a Minor's Land in Singapore" (2022) Oxford University Commonwealth Law Journal). However, it would be extremely difficult to administer the property without being appointed as a trustee.