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Holding Residential Property on *Inter Vivos* Trusts in Singapore: Transfers to Trustees

By

Vincent OOI[*]

Abstract

As a response to the "missing beneficial owner" problem highlighted by the *Zhao Hui Fang* case, amendments have been made to Singapore's stamp duty regime. ABSD will now be levied at 35% on transfers of residential property to trustees, with a remission available if certain conditions are met. These conditions effectively mean that residential property held on *inter vivos* trusts in Singapore must be given to beneficiaries without conditions or powers of revocation or variation. This has major ramifications for succession planning, since such restrictions largely defeat the purpose of using a trust to hold property in the first place.

A. Introduction

Major cities around the world often face the problem of rapidly-rising residential property prices, leading to the need for governmental policies to regulate (cool) housing markets. Stamp duties are often chosen as a tool for such regulation[1] and can be specifically crafted to target certain groups of participants in the markets and influence particular behaviours. Over the past decade or so, the stamp duty regime for residential property in Singapore has been amended along those lines numerous times. Maximum stamp duty rates for a single property transaction have increased from about 3% in 2010 to about 56% in 2022. The complexity of the stamp duty system has also increased considerably over this period, starting off with only one significant type of stamp duty- Buyer's Stamp Duty ("**BSD**") and gradually adding other types such as Additional Buyer's Stamp Duty ("**ABSD**"), Seller's Stamp Duty ("**SSD**"), and Additional Conveyance Duty ("**ACD**"). As stamp duty rates increased, so did the incentive for various forms of tax planning, leading to refinements of the stamp duty regime to counteract such activities. The present stamp duty regime in Singapore contains a range of targeted and general anti-avoidance rules ("**TAARs**" and "**GAARs**", respectively) that are prescribed by a complex mass of legislation.

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[1] For an example of how stamp duties are used in governmental policies on residential property markets see Edward Ti, "Politics and Policy: Chinese Money and its Impact on the Regulation of Residential Property in the West" (2019) 4 Conv 371.

This is the first of two articles which focus on the stamp duty issues which arise from the holding of residential property on *inter vivos* trusts in Singapore. With recent amendments which took effect from 9 and 10 May 2022, the stamp duty regime for trusts has now arguably become the most complex area of the law of stamp duties in Singapore. There are significant implications for a whole range of transactions and structuring that lawyers and other private wealth professionals with clients with (direct or indirect) holdings in Singapore residential properties must be aware of. Even for professionals without any direct contact with Singapore, these articles remain useful given that certain key concepts may be similarly applicable in the numerous other jurisdictions which also have stamp duty regimes for residential property. This article analyses the development of the stamp duty regime for residential property held on *inter vivos* trusts in Singapore, exploring the issue of the "missing beneficial owner" in the case of a non-exhaustive discretionary trust, an issue which has surfaced in various other common law jurisdictions across different areas and at different times.

This issue was brought to the fore in Singapore through the case of *Zhao Hui Fang v CSD*[2] and triggered the recent amendments, which sought to plug the potential loopholes that were highlighted with the decision. The "missing beneficial owner" issue is one that arises through the operation of the law of equity, and attempts to counter tax planning which seeks to exploit this issue have often required the enactment of specific legislation. Such tax planning opportunities will thus tend to persist in jurisdictions and areas where no such legislation has yet been enacted. This article will then analyse the Singapore stamp duty implications of making a transfer of residential property to a trustee to hold on an *inter vivos* trust for a beneficiary. The second article will look at the corresponding tax implications of transferring equity interests in an entity holding residential property to and from a trust. It will then consider the landscape for succession planning in Singapore in light of the stamp duty regime and the recent amendments.

A Brief Introduction to the Stamp Duties Regime in Singapore

The three main stamp duties applicable to residential properties: BSD, ABSD and SSD are all designed to serve different functions (apart from raising revenue). They are calculated on different bases and can apply in addition to one other. BSD is the most basic of the three, computed solely on the purchase price of the property.[3] SSD is designed to discourage short-term speculation of residential properties, by levying a higher rate the sooner a property is sold after acquisition.[4] ABSD is the most complex of the three and is computed based on two main

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2 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 (SGHC) ("***Zhao Hui Fang***").

3 Applied in incremental rate bands ranging from 1%- 4% depending on the consideration paid for the property. See Stamp Duties Act 1929 (2021 Rev. Ed.) ("**SDA**"), First Sch, Art 3(a)(iii)(A).

4 Applicable rates start at 12%, tapering downwards with each year from acquisition until 0% after 3 years. See SDA, First Sch, Art 3(bg).

concepts: 1) the status of the purchaser; and 2) the property count. Different rates apply depending on whether the purchaser is a Singapore citizen, permanent resident, foreigner, entity,[5] or housing developer. For the first two categories of purchasers, the applicable rates increase with each residential property (or part thereof) already owned at the time of purchase, the final increase being when the purchaser seeks to purchase a third property, after which the rates remain constant. For the other three categories, rates are fixed regardless of the property count of the purchaser.

By way of illustration, the maximum applicable ABSD rates before 9 May 2022 for each category of purchasers was as follows: Singapore citizens (25%), permanent residents (30%), foreigners (30%), entities (35%), and housing developers (40%).[6] Housing developers are a special situation, since they can receive a remission of all but 5% of the purchase price of the property if they are able to sell all of the developed residential units within a fixed deadline.[7] In cases where there are multiple purchasers, ABSD would be levied at the highest applicable rate amongst all the purchasers. ABSD thus allows for very targeted measures for regulating the residential property market, allowing the Government to discourage certain groups of purchasers or purchasers with "excessive" numbers of residential properties from further purchases, while leaving the rest of the purchasers unaffected.

Since the ABSD rates were tied to the status and property count of the purchaser, there was a need to prevent purchasers from circumventing the regime by purchasing properties under another person's name. As far as companies are concerned, this was done by levying what was effectively the highest ABSD, eliminating the incentive to purchase properties through companies. As for the use of trusts, the stamp duty regime provided that the status of the beneficial owner rather than the legal owner should be considered wherever residential property was held on trust.[8]

Tax Planning Using *Inter Vivos* Trusts

While purchasers could not circumvent the stamp duty regime by indirectly purchasing property through companies or trusts, many realised that they could purchase properties for their children who might be subjected to a much lower ABSD rate. This proposition was made more attractive by the fact that Singapore does not have a gift tax, meaning that in the best-

[5] Entities are persons who are not individuals and include unincorporated associations, companies, variable capital companies, trustees of collective investment schemes, trustee-managers of business trusts, and the partners of a partnership. They exclude trustees. See SDA, First Sch, Art 3, Notes, para 1.

[6] SDA, First Sch, Art 3(bh).

[7] See the Stamp Duties (Housing Developers) (Remission of ABSD Rules 2013) (No. S 362).

[8] SDA, First Sch, Art 3(2)(d), since amended to apply only to instruments executed before 9 May 2022.

case scenario, the only tax payable on the purchase of the residential property for a child might be BSD.

Those seeking to use this tax planning opportunity soon ran into some difficulties. Firstly, an outright gift of residential property to an adult child would mean that the parent had no legal rights in the property thereafter and could not control how their child might deal with the property. The gift could not be revoked, nor could the parent benefit from the property without being scrutinised by the tax authorities for potentially having entered into a sham transaction (and/or even accused of tax evasion). Secondly, adult children tended to have properties of their own and it was minor children that had low property counts. However, it would be administratively impractical for parents to purchase properties directly in the names of their minor children.[9] Thirdly, since no bank would allow a mortgaged property to be transferred to a minor, the parent would have to pay for the entirety of the purchase price in cash, which presents a liquidity issue. Thus, it was clear that this tax planning opportunity was only open to those of considerable means. Despite the difficulties, high stamp duty rates meant that people were willing to jump through the various hoops. The savings in stamp duties from purchasing a residential property in a child's name in common scenarios would generally be about 25%.[10]

The use of *inter vivos* trusts provided a solution to some of the difficulties faced by those seeking to use this tax planning opportunity. Such trusts could be drafted to be exceedingly flexible, allowing the settlors to retain a significant amount of control over the trust property. Most importantly, they solved a problem facing many settlors. As a matter of succession planning, many settlors were content to gift their wealth to their children eventually, but were concerned about immature beneficiaries frittering away the wealth. They also wanted to be able to decide how the wealth should be allocated to their heirs based on factors that would only become apparent in the future, such as need or financial acumen. For the first concern, an express trust with a condition precedent would typically suffice, with a common condition being that the child must reach a certain age or get married. For the second concern, a discretionary trust would generally allow the trustee (usually a relative or close family friend) to determine how the trust income and capital should be distributed in the future.

The ACD Tax Trap

[9] See has noted that this is technically possible under the law. See Alvin See, "Dealing with a Minor's Land in Singapore" (2022) Oxford University Commonwealth Law Journal. However, it would still be extremely difficult to administer the property in practice without being appointed as a trustee for the child.

[10] Considering relatively common scenarios such as a Singapore citizen parent with two properties purchasing a property for a Singapore citizen child with none (25% vs 0%), or a permanent resident parent with two properties purchasing a property for a permanent resident child with none (30% v 5%).

A new type of stamp duty was introduced in 2017 that would apply to indirect transfers of residential properties.[11] Prior to the introduction of ACD, only direct transfers were dutiable, making it extremely attractive to incorporate companies to hold residential properties and transfer the shares of the holding company instead.[12] To counter this, at the heart of the ACD regime is the simple concept that if the effect of a transaction is to transfer ownership (or part thereof) of residential property, even indirectly through layers of holding entities or through one's associates (typically family), the transaction will be subjected to stamp duty as if it were a transfer of the residential property.[13] While that might have been the intention behind the ACD regime, it did not create tax neutrality between direct and indirect transfers of residential property.[14]

However, it did create some issues for those seeking to use *inter vivos* trusts to hold residential property. Even before ACD was introduced, indirect transfers of residential property using trusts were uncommon, since the ABSD regime would look through the trust and to the beneficial owner in any case. ACD created a trap for the unwary, in that the indirect transfer of residential property would result in ACD (levied at much higher rates than BSD and ABSD) being payable. ACD is currently levied at rates of about 44%, being computed on the highest possible BSD and ABSD rates (without the housing developer remission).[15] This rate would apply regardless of the status or property count of the beneficial owner. ACD might also be payable on the indirect sale of the property, which would be levied at a flat rate of 12% if sold within three years of acquisition (without the rates tapering down over time).[16] Thus, the advent of ACD made it extremely important for trustees and beneficiaries seeking to transfer residential property to ensure that they transferred the residential property itself directly, rather than an interest in a trust.

B. *Zhao Hui Fang* and the Problem of the Missing Beneficial Owner

Zhao Hui Fang

Barely two months after the ACD regime was introduced, the stamp duty landscape underwent another major change with the decision of the Singapore High Court in *Zhao Hui Fang*. It should be noted that the applicable law in question in *Zhao Hui Fang* predated the introduction of the ACD regime. The case itself involved a dispute over whether ABSD was payable upon

[11] For a comprehensive overview of the ACD regime and its legislative history, see Vincent Ooi, "The New Additional Conveyance Duties Regime in the Stamp Duties Act" (2018) 30 SAcLJ 119.
[12] See "ABSD Hike May See More Investing in Property SPVs" The Business Times (24 January 2013). In such a case, only share transfer duty would be payable, with a rate of 0.2%.
[13] Ooi (n 11) at [9].
[14] Ooi (n 11) at [70] – [82].
[15] SDA, First Sch, Article 3A, Note 1(a)(ii)- (d).
[16] SDA, First Sch, Article 3A, Note 1(e)- (f).

a property purchased by a charitable trust. The brief facts are as follows. A testator, Mr Chew, willed a piece of residential property ("**the Chee Hoon Property**") to the Chew How Teck Foundation, a charitable purpose trust. This bequest was subject to the condition that his family members were to be permitted to live in the property during their lifetimes, an interest which the court held was a personal license.[17] The charitable trust sold the Chee Hoon Property and purchased another residential property ("**the Goodwood Property**") as a substitute for Mr Chew's family members to live in. The question was whether ABSD was payable on the purchase of the Goodwood Property by the charitable trust.

To determine this, the court began by inquiring as to who the beneficial owner of the Goodwood Property was. Aedit Abdullah JC held that in the present case, the beneficial interest in the property was in suspense and there was no beneficial owner.[18] As the ABSD regime was premised upon a property held on trust having an identifiable beneficial owner,[19] there was nothing that the ABSD could attach to in the present case and no ABSD was chargeable.[20] Abdullah JC made it clear that the issue of whether a charitable trust should be liable for ABSD was a matter of policy for the relevant statutory instrument and needed to be clearly imposed if it were to apply.[21]

Tax Planning After *Zhao Hui Fang*

While *Zhao Hui Fang* involved a charitable trust, it is arguable that the same reasoning could apply to certain kinds of discretionary trusts as well, in particular, non-exhaustive discretionary trusts, where the beneficial ownership is in suspense.[22] Care would have to be taken in the structuring of the trust so as not to fall foul of the beneficiary principle and end up with a trust void for uncertainty of objects.[23] The author is not aware of any systematic study that has been conducted to determine the extent to which non-exhaustive discretionary trusts were used to avoid ABSD. However, there was certainly much discussion on the ground as to the feasibility of using such a structure.

While this was an obvious potential loophole which unsurprisingly prompted Parliamentary action, it is not clear that such a structure would have succeeded in avoiding tax. Section 33A of the SDA provides for a GAAR which empowers the Commissioner of Stamp

[17] *Zhao Hui Fang* at [46] – [54].
[18] *Zhao Hui Fang* at [70].
[19] *Zhao Hui Fang* at [102]. The relevant statutory provisions were SDA, First Sch, Art 3(bf)(viii), read with Arts 3(1) and 3(2)(d). In particular, Art 3(2)(d) provided that with certain exceptions, where a residential property is held on trust, a reference to the transferee is a reference to the beneficial owner.
[20] *Zhao Hui Fang* at [32] and [87].
[21] *Zhao Hui Fang* at [114].
[22] See Patrick Parkinson, Reconceptualising the Express Trust (2002) 61(3) CLJ 657, 660-661.
[23] For the *locus classicus*, see *Knight v Knight* (1840) 3 Beav 148 per Lord Langdale MR, adopted locally in *Joshua Steven v Joshua Deborah Steven and others* [2004] 4 SLR(R) 216 at [12].

Duties ("**the Commissioner**") to disregard a tax avoidance arrangement and counter the resultant tax advantage. The GAAR has been invoked even prior to the introduction of ABSD or SSD.[24] A person who sets up a non-exhaustive discretionary trust to hold residential property would very likely be questioned by the Inland Revenue Authority of Singapore ("**IRAS**") and have to show that the arrangement was entered into for *bona fide* commercial reasons and had not as one of its main purposes the avoidance or reduction of duty.[25] With the recent introduction of a 50% surcharge imposed on the amount of tax avoided,[26] a finding of tax avoidance would not only counteract any tax advantage that might be attained through the use of the arrangement but further leave the taxpayer with a hefty tax bill.

C. Amendments to the Stamp Duty Regime Concerning *Inter Vivos* Trusts

On 9 and 10 May 2022, the stamp duties regime for residential properties in Singapore underwent a significant change as a group of amendments to both primary and secondary legislation were announced. Broadly speaking, the legislative amendments can largely be understood as having two main effects: 1) introducing a new category of ABSD (at a rate of 35%) for transfers of residential property to trustees to hold on trust for beneficiaries,[27] but then providing a remission mechanism for the duty paid (or part thereof) if certain conditions are met;[28] and 2) providing for ACD to be payable in situations where there is a transfer of equity interests in an entity even if there is no beneficial owner of such interests.[29] There are a number of mechanisms enacted to give rise to these effects, resulting in a complex new stamp duty regime for trusts. The first set of amendments are the subject of this article, while the second set will be discussed in the second article.

In two press releases by the Singapore Ministry of Finance, the stated main reason for the amendments was to "plug a gap in the existing ABSD and ACD regime" since "[w]here [a] living trust is structured such that there is no identifiable beneficial owner at the time when the

[24] See *UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties* [2008] 1 SLR(R) 126; and *Lai Ling Wan v Commissioner of Stamp Duties* [2011] 4 SLR 845.

[25] SDA, s 33A(5).

[26] SDA, s 33B(2).

[27] See Stamp Duties Act 1929 (Amendment of First Schedule) Notification 2022 (No. S 366).

[28] See Stamp Duties (Trusts for Identifiable Individual Beneficiary) (Remission of ABSD) Rules 2022 (No. S 367) (the "**Rules**").

[29] Stamp Duties (Amendment Bill) (Bill No. 13/2022) (the "**Bill**"). 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.

residential property is transferred into the trust, ABSD [and ACD] currently does not apply".[30] Thus, it appears clear that these amendments were enacted in response to the *Zhao Hui Fang* case and to remove the possibility of the potential tax loophole being used. The intent of the amendments has been further explained as being to "ensure similar stamp duty treatment for transfers of residential property or equity interests in a PHE, whether acquired directly or through a trust."[31]

As a set of measures designed to address a potential tax loophole, the amendments are certainly successful in ensuring that it will no longer be possible to use a non-exhaustive discretionary trust without an identifiable beneficial owner to avoid ABSD and ACD. However, the amendments may 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 reasons for this are complex and will be explored subsequently in this article. The crucial point to note is that bare trusts are rarely used in succession planning. Yet there are a variety of non-tax reasons why non-bare trusts with identifiable beneficial owners are used. Such trusts will no longer be feasible for use in succession planning with an applicable ABSD rate of 35% and no prospect of remission.

D. The New ABSD (Trust) Regime

Based on the stated purpose of the new amendments, the ABSD (Trust) regime appears to be intended to work as follows. All transfers of residential property made to a trustee will be subject to ABSD at the rate of 35%. However, assuming that there is an identifiable beneficiary, a remission will apply to bring down the effective rate to what the beneficiary would have paid if the property had been transferred to the beneficiary directly. However, should there be no identifiable beneficiary, then the rate of 35% will stand, being at a sufficiently high level to prevent any incentive to tax plan using trusts. However, regardless of the intended policy outcomes, the effects of the new amendments are much more complex.

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[30] Ministry of Finance, "Additional Buyer's Stamp Duty (ABSD) For Residential Properties Transferred Into A Living Trust" (8 May 2022) <https://www.mof.gov.sg/news-publications/press-releases/additional-buyer-s-stamp-duty-(absd)-for-residential-properties-transferred-into-a-living-trust>; and "Additional Conveyance Duties For Equity Interests Of Property Holding Entities Transferred Into A Living Trust" <https://www.mof.gov.sg/news-publications/press-releases/additional-conveyance-duties-for-equity-interests-of-property-holding-entities-transferred-into-a-living-trust> (9 May 2022) (both accessed 20 July 2022).

[31] Singapore Parliamentary Debates, Official Report (5 July 2022), Stamp Duties (Amendment) Bill (Mr Chee Hong Tat, Senior Minister of State for Finance). Also see IRAS, "Additional Buyer's Stamp Duty (ABSD)" <https://www.iras.gov.sg/taxes/stamp-duty/for-property/buying-or-acquiring-property/additional-buyer's-stamp-duty-(absd)> (accessed 20 July 2022).

A New Category of ABSD

The first major change to the stamp duties regime for trusts came into effect on 9 May 2022. It involved the introduction of a new category of ABSD: ABSD (Trust), that would apply on the conveyance, assignment or transfer[32] on sale of residential property if there is at least one transferee that is a trustee. In such a case, duty at the rate of 35% the consideration of the residential property in question would be payable.[33] This is effectively the highest ABSD rate currently applicable.[34] Under this new regime, so long as the residential property is transferred to a trustee, the rate of 35% will be payable by the trustee,[35] regardless of the characteristics of the beneficial owner, and indeed, regardless of whether there is a beneficial owner or not.

Remission

If certain conditions are met, some (or even all) of the ABSD paid may be remitted. The amount of the remittance is the difference between 35% and the rate that would have been payable had the beneficial owner(s) under the trust received the property directly and not through the trust.[36] The taxpayer must pay first and apply for remission later, with the claim for remission made within six months after the date of execution of the instrument.[37] The conditions for remission are complex and the relevant rule is best reproduced in full before subsequently being broken down:

> "(a) a conveyance, assignment or transfer on sale of residential property or an estate or interest therein to a person to hold on trust for one or more identifiable individual beneficiaries only, whether or not the conveyance, assignment or transfer is also made to another person (called in these Rules *X*)."

Thus, there must be: 1) a transfer of residential property to a trustee to hold on trust; 2) the beneficiaries of the trust must all be identifiable individual beneficiaries ("**IIBs**"); and 3) the trustee does not need to be the sole transferee, there can be another person who can share ownership of the property with the trustee.

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32 Henceforth, this article will only refer to "transfer", but this should be taken to mean all three terms and "grant" unless otherwise specified.
33 SDA, First Sch, Article 3(bh)(xviii)(B).
34 Transfers to housing developers or trustees for housing developers are technically dutiable at 40%, but are likely to qualify for remission of 35% if certain conditions are met, making the effective rate 5% (see SDA, First Sch, Article 3(bh)(xix)).
35 SDA, Third Sch, Article 2.
36 The Rules, r 3(2).
37 The Rules, r 4.

The rule does not expressly provide for a situation where a transfer might be made to more than two people (the trustee and other persons). It also does not provide for a situation where a transfer might be made to more than one trustee. The standard approach of statutory construction is to construe words in the singular to also include the plural.[38] A transfer to more than two people, only one of which is a trustee appears to be straightforward. The remission will be computed based on the highest ABSD rate applicable amongst all the beneficiaries and other transferees.

On the other hand, it is harder to apply the rule to a transfer to more than one trustee. The plain language of the statute does not expressly state that *X* cannot be a trustee. In which case, might it be argued that so long as there is one trust whose beneficiaries are all IIBs, then the remission should be granted? However, this interpretation does not seem to be in line with the apparent purpose of the legislative framework, which is to only allow for a remission where all beneficiaries are identifiable. Thus, it is submitted that the proper interpretation of the rule should be that there can be any number of transferees, all of whom can be trustees, but every beneficiary under the relevant trusts must be an IIB for the remission to be granted. This is a point which might be worth clarifying in The Rules, especially since they are secondary legislation and can be amended by the Minister without the need to go through Parliament.

Identifiable Individual Beneficiary

The new ABSD (Trust) regime introduces the concept of an IIB, which plays a significant role in the regime as only trusts with an IIB would qualify for remission of the ABSD (Trust) payable. An IIB is defined as an individual: 1) who is identified in the declaration of trust as a beneficiary of the estate or interest whether solely or together with another; and 2) who, because of the trust, has beneficial ownership of the estate or interest that is not, under the terms of the trust, revocable, variable, or subject to any condition subsequent. Further, the definition expressly excludes an individual who is entitled to any estate or interest in property in remainder or reversion.[39] These two requirements are cumulative, as indicated by the word "and" linking them in the statute. There is also a third, "exclusionary" requirement. The requirements will be analysed in turn.

<u>The First Requirement</u>

Identification of Beneficiary

38 Interpretation Act 1965 (2020 Rev. Ed.), s 2.
39 SDA, First Sch, Article 3(1A).

While there can be multiple beneficiaries of a trust, for one to be an IIB, one must be identified in the declaration of trust as a beneficiary of the estate.[40] This requirement will obviously be satisfied if the beneficiary is expressly named in the declaration of trust. However, it is less clear what the limits of "identification" are. Equity has generally been willing to recognise trusts in which the beneficiaries have been identified as members of a class rather than individually by name, though there must be sufficient certainty to enable the trustee to determine whom the beneficiaries are.[41]

The new amendments state that for the avoidance of doubt, individuals who are not born as of the date of the declaration of trust would not be IIBs.[42] The reference to the "avoidance of doubt" means that this part of the statute does not act as a standalone rule, but assists in the interpretation of other statutory provisions. It can be reasoned that if the statute has to expressly clarify that individuals not yet born as of the date of the declaration of trust are excluded, then it must be possible to identify the beneficiaries other than by their specific names.

In the Declaration of Trust

The requirement that the beneficiaries have to be identified in the declaration of trust appears to assume that the IIBs have to be beneficiaries of an expressly created trust. In the majority of situations where a piece of residential property is transferred to a trustee to be held on trust, this is indeed likely to be the case. Since the ABSD regime is concerned with immovable property, the declaration of trust here would typically be the trust deed or some other document drafted in order to comply with the writing requirements under the Civil Law Act 1909.[43] However, it is also possible for situations to arise where residential property is transferred to a trustee of an implied trust, even if rare. An example would be a situation where a resulting or constructive trust over some monies have arisen, and the trustee uses such monies to purchase a property. In such situations, the trustee might not know that it is acting as a trustee, with this coming to light only subsequently. However, under the ABSD (Trust) regime, a trustee is defined as "a trustee for any trust when acting in that capacity…". This definition does not specify that only trustees of express trusts can fall within the definition. Thus, stamp duty might

[40] SDA, First Sch, Article 3(1A).

[41] This depends on the type of trust (see for example, the given postulant test in *Re Gulbenkian's Settlements* [1970] AC 508).

[42] SDA, First Sch, Article 3(1B)(a).

[43] Civil Law Act 1909 (Rev. Ed. 2020) ("**CLA**"), s 7(1), requiring that a declaration of trust respecting any immovable property or any interest in such property must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.

have been paid at the wrong rate in that situation and the instrument might require up-stamping. However, a remission might well be denied due to the absence of a "declaration of trust".[44]

The Second Requirement

Under the terms of the trust, the IIB's beneficial ownership of the estate or beneficial interest, must not be revocable, variable or subject to any condition subsequent.[45] All these three requirements essentially operate to prevent the IIB's interest in the trust from changing in any way due to the terms of the trust. The idea behind the new regime appears to be to prevent a situation where the beneficiary's interest is not fixed from the outset.

Interest Must Not Be Revocable

Under trusts law, specific triggers may be drafted into the trust deed, or certain persons may be given powers of revocation to exercise at their discretion. It is possible for the interests of particular beneficiaries to be revocable, or even for the entire trust to be revocable. In the latter case, the trust property will be held on a resulting trust for the settlor. Revocable trusts are generally valid under trusts law and there is no blanket rule deeming them to be void, provided that the trust is not a sham.[46] However, they are understandably generally viewed with suspicion by tax authorities due to their potential for tax avoidance. The most obvious being that the settlor could actually have no intention to gift the trust property in the first place and only wishes to benefit from the advantageous tax status of the beneficiary.

Indeed, within Singapore tax law, anti-avoidance provisions to counter such arrangement do exist. For example, s 31 of the Income Tax Act, provides that if the terms of any settlement are such that any person has or may have power to revoke or otherwise determine the settlement or any provision thereof, and in the event of the exercise of the power, the settlor or the spouse of the settlor will or may become beneficially entitled to any part of the property or income of the trust, then all income arising under the settlement is deemed to be the income of the settlor.[47]

Interest Must Not Be Variable

[44] Assuming that all of this is discovered within the six-month time limit for the claiming of the remission.
[45] SDA, First Sch, Article 3(1A).
[46] Lynton Tucker, Nicholas Le Poidevin QC and James Brightwell, *Lewin on Trusts* (20th Edn) (Sweet & Maxwell) (2022) at [5-038].
[47] Singapore Income Tax Act 1947 (2020 Rev. Ed.), s 31.

Similar to powers of revocation, powers of variation may also be provided for in the terms of the trust deed. These powers may be exercised by the trustees or other persons to either increase or decrease the interests of the beneficiaries, though the former is much more common and is a key part of the operation of discretionary trusts. Since under the new regime, IIBs cannot have interests which are variable under the terms of the declaration of trust, it follows that discretionary trusts cannot be used if one wishes to qualify for remission of ABSD (Trust).

Interest Must Not Be Subject to Any Conditions Subsequent

Conditions subsequent operate to defeat gifts which have already been vested in a beneficiary upon the fulfilment of certain conditions stipulated. They are distinguished from conditions precedent in that in the latter case, the gift does not vest until the conditions stipulated are satisfied. Conditions subsequent are much rarer than conditions precedent and the courts adopt a stricter test of construction in determining their scope and application. In the case of a condition subsequent, the term must be framed in such a manner that the beneficiary knows right at the outset, the exact event that may divest their interest,[48] failing which, the gift would remain valid but the condition would be void.[49] One of the more well-known examples of a condition subsequent is the clawback of property should the beneficiary marry or remarry. This may be due to the fear of the settlor that the trust property would "leave the family".

Beneficiary Must Have Beneficial Ownership

The requirement that the beneficiary must have beneficial ownership of an interest in the trust necessarily means that the interest must have vested in the beneficiary. While not explicitly stated, this means that conditions precedent cannot be imposed under the trust,[50] since an interest does not vest in the beneficiaries until all conditions precedent are satisfied. The fact that conditions precedent cannot be imposed under the trust if one wishes to benefit from the remission deals a major blow to succession planning. Conditions precedent are extremely common to prevent an adult child from gaining full access to trust property even after they reach the age of 21. It is common to delay this to the age of 30 or even later, or be based on an event such as getting married.

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[48] *Re Allen* [1953] Ch 810.

[49] *Re Tepper's Will Trusts* [1987] Ch 358.

[50] Technically, if a beneficiary is identified in the declaration of trust, its interest could be made subject to conditions precedent so long as the interests vest before the remission is claimed. However, there is a six-month time limit for the claiming of the remission. Further, as a matter of practical drafting, it is very likely that in such a situation, there would be another beneficiary whose interest is varied by the vesting of the interest in the first beneficiary, which would mean that the trust would have at least one non-IIB, disqualifying it from the remission anyway.

If all the parts of the second requirement are viewed collectively, it appears that under the new regime, settlors must be prepared to gift the trust property to the beneficiaries practically outright, without any strings attached or retaining any effective control over the trust property. Without any conditions precedent, or any means of revoking or varying the interests of the beneficiaries, the trust property will effectively be held on a bare trust for the beneficiaries, meaning that they will be entitled at any point to call for a conveyance of the property under the rule in *Saunders v Vautier*,[51] though, of course, all beneficiaries must be of full age, not under any disability, and able to agree to exercise this right collectively.

Third Requirement

Beneficiary Cannot Be Entitled In Remainder or Reversion

The remainder interest refers to whatever is left in the trust after all other gifts are distributed. Crucially, if a trust imposes any conditions, whether precedent or subsequent, there will be a need for a remainder beneficiary who will receive whatever interests which did not pass to a beneficiary due to the conditions. Otherwise, the trust will be void for lack of certainty of objects. A reversionary interest refers to an interest that will only vest in a beneficiary after a periodic interest in the property or income of the property has lapsed, for example, after a life interest has expired.

Since a beneficiary entitled in remainder or reversion cannot be an IIB[52] and a remainder beneficiary is required if any conditions are imposed under a trust, it follows that where a trust involves conditional interests, there must be at least one non-IIB, which means that the remission will not be granted.

Settlement and Declaration of Trusts

The new regime provides that ABSD (Trust) will be imposed on transfers on sale of residential property to trustees. However, there are other ways for the legal or beneficial ownership of residential property to be transferred rather than on an outright sale. The legislation prescribes that equivalent duties will be levied in such situations. For example, Article 4 addresses situations where there is any declaration of trust of or concerning any immovable property, stock or shares, or equity interests in an entity, by any writing.[53] Article 11 addresses situations

[51] *Saunders v Vautier* (1841) 4 Beav 115.
[52] Also see SDA, First Sch, Article 3(1B)(c).
[53] SDA, First Sch, Article 4. A written declaration typically being present due to the need to comply with CLA, s 7(1).

where an instrument of settlement or agreement for settlement of immovable property, stocks or shares, or equity interests in an entity is executed.[54]

Typically, a "declaration of trust" refers to a situation where the settlor and trustee are the same person. The settlor, holding onto the property, makes the declaration and then holds the property as a trustee on behalf of the beneficiary. Thus, while the beneficial ownership of the property will move from the settlor, there will be no transfer of legal title on any sale and thus, this scenario would not fall within the general charging provision of the ABSD (Trust) regime, requiring Article 4 to catch this situation. This declaration of trust must be proved by signed writing in order to comply with the requirements of the Civil Law Act.[55]

"Settlement" typically refers to a situation where the Settlor and Trustee are different people, such that the Settlor, holding onto the property, makes the settlement and then transfers the property to the Trustee to hold on behalf of the Beneficiary. This differs from a "transfer on sale" in that while there is a transfer of both legal and beneficial ownership, there is no sale to speak of. However, voluntary conveyances *inter vivos* are dutiable as if they were transfers on sale.[56] Thus, even if Article 11 were absent, ABSD (Trust) would still be chargeable.

The fact that duty is paid under Article 4 or 11 does not mean that it is excluded from the remission regime. The legislation expressly states that if all the specific conditions are satisfied, remission also applies to "any instrument chargeable in like manner" as a transfer on sale to a person to hold on trust for IIBs.[57]

Interaction with the Property Count Framework

The new ABSD (Trust) regime co-exists with the existing property count framework for ABSD. Thus, where a piece of residential property (or part thereof) is held on trust for beneficiaries, each beneficiary will have one property added to their property count for the purposes of ABSD. Under the new regime, it is provided that where an instrument is executed on or after 9 May 2022, and any estate or interest in any residential property is held on trust for an IIB, that IIB is treated as one who beneficially owns the estate or interest. Thus, in the case where there are IIBs, the identification of the beneficial owner(s) is a straightforward task due to this deeming provision.[58] However, there is no express direction as to how to determine whom the beneficial owner is in a situation where there is no IIB. It is submitted that the common law rules which previously applied should continue to apply. Thus, in the case of a non-exhaustive discretionary trust, no remission will be applicable, but all of the beneficiaries

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[54] SDA, First Sch, Article 11.
[55] CLA, s 7(1).
[56] SDA, s 16(1).
[57] The Rules, r 3(b).
[58] SDA, First Sch, Article 3(2)(d).

will not have one property added to their property count until the discretion is actually exercised in their favour.

E. Conclusion

This article has summarised the development of the stamp duty regime for trusts in Singapore over time, considering the implications for succession planning for tax and non-tax purposes. It has explained how the issue of the "missing beneficial owner", a common one encountered across jurisdictions, was brought to the fore in Singapore with the *Zhao Hui Fang* case, and resulted in the enactment of a variety of amendments to the stamp duty regime for trusts. The key change is the introduction of a new category of ABSD, where the highest effective rate of 35% is levied on transfers of residential property to trustees, but a remission mechanism operates to reduce the effective rate to what would be payable if the beneficiaries had received the property directly instead of through a trust. However, the remission will not be granted in cases where the terms of the declaration of trust impose conditions on the beneficiary's interest or enable it to be revoked or varied. The effect is that if one wishes to benefit from the remission, residential property held on *inter vivos* trusts in Singapore must effectively be given outright to the beneficiaries, without any strings attached or retaining any effective control over the trust property. This is likely to have major ramifications for succession planning, since such restrictions largely defeat the purpose of using a trust to hold residential property in the first place. The second article of this series will address the tax implications of transfers of equity interests in trusts under the new regime and consider how the recent amendments will affect succession planning in that context.