

**立法會**  
**Legislative Council**

LC Paper No. CB(1) 1190/10-11  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/2/10/2

**Bills Committee on Stamp Duty (Amendment) (No. 2) Bill 2010**

**Minutes of second meeting**  
**held on Tuesday, 21 December 2010, at 8:30 am**  
**in Conference Room A of the Legislative Council Building**

- Members present** : Hon James TO Kun-sun (Chairman)  
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP  
Dr Hon Margaret NG  
Hon Audrey EU Yuet-mee, SC, JP  
Hon WONG Kwok-hing, MH  
Hon LEE Wing-tat  
Dr Hon Joseph LEE Kok-long, SBS, JP  
Hon WONG Ting-kwong, BBS, JP  
Hon Starry LEE Wai-king, JP  
Hon Paul CHAN Mo-po, MH, JP  
Hon Alan LEONG Kah-kit, SC
- Members absent** : Hon Albert HO Chun-yan  
Hon CHAN Kam-lam, SBS, JP  
Hon Miriam LAU Kin-ye, GBS, JP  
Hon Abraham SHEK Lai-him, SBS, JP  
Hon Ronny TONG Ka-wah, SC  
Hon CHIM Pui-chung  
Hon Paul TSE Wai-chun  
Hon Tanya CHAN
- Public officers attending** : **For item I**  
Transport and Housing Bureau  
  
Ms Annette LEE  
Deputy Secretary for Transport and Housing  
(Housing)

Mr Eugene FUNG  
Principal Assistant Secretary for Transport and  
Housing (Housing)(Private Housing)

Financial Services and the Treasury Bureau

Ms Shirley KWAN  
Principal Assistant Secretary for Financial Services &  
the Treasury (Treasury)(Revenue)

Inland Revenue Department

Mr WONG Kuen-fai  
Deputy Commissioner of Inland Revenue (Technical)

Mr HONG Wai-kuen  
Senior Superintendent of Stamp Office

Department of Justice

Mr Sunny CHAN  
Senior Assistant Law Draftsman

Mr Manuel NG  
Government Counsel

**Clerk in attendance** : Miss Becky YU  
Chief Council Secretary (1)1

**Staff in attendance** : Miss Winnie LO  
Assistant Legal Adviser 7

Mrs Mary TANG  
Senior Council Secretary (1)2

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**I. Meeting with the Administration**

(LC Paper No. CB(1) 855/10-11(01) — Legislative Council Brief on amendments to the Stamp Duty Ordinance to curb speculation in residential properties

LC Paper No. CB(1) 855/10-11(02) — List of follow-up actions arising from the discussion at the meeting on 17 December 2010)

The Bills Committee deliberated (Index of proceedings attached in **Annex**).

2. The Administration was requested to -

- (a) advise (with illustrations) the existing revenue ordinances which had retrospective effect;
- (b) provide a flowchart on the application of stamp duty in respect of property transactions. To advise the differences in the application of stamp duty and special stamp duty (SSD);
- (c) compare the effectiveness of SSD and punitive profits tax (say 90%) in curbing property speculation while minimizing the impact on genuine home buyers;
- (d) advise whether a Provisional Agreement for Sale and Purchase (PASP) was binding, and whether a person was assumed to have “acquired” a property upon signing of PASP. To provide relevant court cases on disputes over PASP, and advise the application of the term “acquire” and SSD in these cases. For the sake of clarity, there might be a need to provide a definition for the term “acquire”. Consideration might also be given to dispensing with the term “acquire” by back-dating the period of 24 months from the date of disposal of the property to ascertain the presence of an instrument chargeable with SSD;
- (e) advise whether it was a usual practice for an Agreement for Sale and Purchase to be completed 14 days after the signing of PASP. If so, the application of SSD to PASP signed 14 days before the announcement of SSD on 19 November 2010;
- (f) advise the number of property transactions through transfer of shares of property-holding shell companies, including those registered overseas, for the period between April and November 2010. To also advise whether the anti-tax evasion measures under the existing tax legislation could be invoked if the setting up of shell companies was to evade SSD. To consider the feasibility of applying SSD to property transactions through transfer of shares of companies;
- (g) clarify whether there was a question of double taxation if property transactions would be subject to both SSD and profits tax;
- (h) provide a paper explaining the application of SSD in respect of mortgaged properties, including those subject to foreclosure

orders; and

- (i) provide a written response to LC Paper No. CB(1) 822/10-11(03), particularly on the question of conformity with the Basic Law if SSD amounted to a partial confiscation of the value of property sold within 24 months.

## **II. Any other business**

3. There being no other business, the meeting ended at 10:35 am.

Council Business Division 1  
Legislative Council Secretariat  
27 January 2011

**Bills Committee on  
Stamp Duty (Amendment) (No. 2) Bill 2010**

**Proceedings of the second meeting  
on Tuesday, 21 December 2010, at 8:30 am  
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
<i>Agenda Item I - Meeting with the Administration</i>			
001053 - 002212	Chairman Administration	<p>Discussion on the correspondences between the Inland Revenue Department (IRD) and the Law Society of Hong Kong (LS), Estate Agent Authority and Taxation Institute of Hong Kong (LC Paper No. CB(1)879/10-11).</p> <p>Administration's explanation -</p> <p><u>"Acquire" a property</u></p> <p>(a) for the purpose of determining the holding period so as to ascertain the liability of special stamp duty (SSD), a person "acquired" a property if he entered into a specifically enforceable agreement with a seller for the sale or purchase of that property, i.e., one that was binding on the seller to transfer the property, not one that allowed the seller to renege on a return of the deposit with/without compensation;</p> <p>(b) a specifically enforceable agreement was one that parties might rely on it to apply to the court for specific performance to compel the other party to sell/purchase the property;</p> <p>(c) whether a provisional agreement for sale and purchase (PASP) was a specifically enforceable agreement in respect of the sale or purchase of the property would depend on the terms stated in the agreement; and</p> <p><u>Sale by mortgagee</u></p> <p>(d) a mortgagee who took possession of a mortgaged residential property by means of a foreclosure order on or after 20 November 2010, and resold within 24 months would be subject to SSD because the mortgagee had acquired</p>	

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		<p>ownership of the property. However, if the mortgagee only sold the pledged property by exercising the right granted under the mortgage, he only acted as the mortgagor's attorney and sold the property on behalf of the mortgagor. He would not be subject to SSD because he had not acquired the property.</p>	
002213 - 004539	Chairman Ms Audrey EU Administration	<p>Ms Audrey EU's views/enquiries -</p> <p>(a) the Administration's interpretation on the term "acquire" was different from the conveyancing practices adopted by lawyers;</p> <p>(b) while it was a normal practice for a formal Agreement for Sale and Purchase (ASP) to be signed 14 days after PASP, there were cases where ASP had not been entered into due to disagreement to certain terms and conditions. However, the transaction was still completed according to PASP. Under such circumstances, PASP was treated as a binding agreement. Hence, IRD's reply to LS dated 26 November 2010 on whether PASP should be binding was misleading;</p> <p>(c) while most PASPs did not contain a "must buy must sell" provision, they usually contained provisions for alternative performance i.e. to allow the seller/buyer to renege on a return of the deposit on or before a specific date;</p> <p>(d) need to clarify whether a PASP entered into before 20 November 2010 was specifically enforceable, as this would affect the determination of the holding period of 24 months for the imposition of SSD.</p> <p>Chairman's enquiry on the charging of stamp duty under the existing arrangement.</p> <p>Administration's explanation -</p> <p>(a) whether a PASP was a specifically enforceable agreement in respect of the sale or purchase of the property would depend on the terms stated in the</p>	<p>The Administration to -</p> <p>(a) advise whether a PASP was binding, and whether a person was assumed to have "acquired" a property upon signing of PASP;</p> <p>(b) provide relevant court cases on disputes over PASP, and advise the application of the term "acquire" and SSD in these cases;</p> <p>(c) provide a flowchart on the application of stamp duty in respect of property transactions; and</p> <p>(d) advise the differences in the application of stamp duty and SSD.</p>

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		<p>agreement;</p> <p>(b) most PASPs were not specifically enforceable agreements and formal ASPs would be required for the transfer of ownership of the properties; and</p> <p>(c) the definition of ASP was provided under section 29A of the Stamp Duty Ordinance (Cap. 117)(SDO).</p>	
004540 - 005632	Chairman Mr LEE Wing-tat Administration	<p>Mr LEE Wing-tat's views/enquiries -</p> <p>(a) supported the Bill which aimed to curb speculative activities, and increase the cost of short-term resale of residential properties;</p> <p>(b) it might not be fair to apply SSD to genuine home buyers who had signed PASP just before the announcement of SSD on 19 November 2010, as they had bought the properties not knowing the changes;</p> <p>(c) whether consideration could be given to excluding PASPs signed 14 days before the announcement of SSD on 19 November 2010 from SSD.</p> <p>Administration's explanation -</p> <p>(a) the arrangement for SSD to take effect after the announcement on 19 November 2010 and prior to the enactment of the Bill was necessary to prevent speculative activities during the interim;</p> <p>(b) a definitive effective date was necessary to send a clear message to the property market. The exclusion of SSD to certain transactions signed 14 days before the announcement of SSD might give rise to confusion; and</p> <p>(c) genuine home buyers would unlikely be affected by SSD as they would not normally sell their properties within 24 months.</p>	The Administration to advise whether it was a usual practice for an ASP to be completed 14 days after the signing of PASP. If so, the application of SSD to PASP signed 14 days before the announcement of SSD on 19 November 2010.

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005633 - 010242	Chairman Dr Margaret NG Administration	<p>Dr Margaret NG's concerns/enquiries-</p> <ul style="list-style-type: none"> <li>(a) the Administration's explanation on whether PASP was binding was misleading;</li> <li>(b) the existing revenue ordinances which had retrospective effect; and</li> <li>(c) the circumstances/consequences if the commencement date in clause 1(2) was deleted or amended.</li> </ul> <p>Administration's explanation -</p> <ul style="list-style-type: none"> <li>(a) SSD should take immediate effect to avoid further speculative activities;</li> <li>(b) an example of retrospective legislation was section 16E of the Inland Revenue Ordinance (Cap. 112) when the then Financial Secretary announced in 1991 that expenditure on the purchase of trademarks etc would no longer qualify for deduction. The legislation took effect on the next day of the announcement while the relevant Bill was enacted in 1992.</li> </ul>	The Administration to advise (with illustrations) the existing revenue ordinances which had retrospective effect.
010243 - 011245	Chairman Administration	<p>Chairman's views -</p> <ul style="list-style-type: none"> <li>(a) the imposition of a heavy profits tax would be more effective than SSD in curbing speculative activities. Besides, it would minimize the impact on genuine home buyers; and</li> <li>(b) need to analyze and compare the effectiveness of SSD and punitive profits tax.</li> </ul> <p>Administration's response -</p> <ul style="list-style-type: none"> <li>(a) as SSD was charged on the price of the property and not on the net profits of transactions, it would substantially increase the cost of property speculation and hence would be more effective than profits tax in curbing speculative activities and preventing short-term resale; and</li> </ul>	The Administration to compare the effectiveness of SSD and punitive profits tax (say 90%) in curbing property speculation while minimizing the impact on genuine home buyers.

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		(b) assessment had been made on the effectiveness of different measures in curbing property speculation.	
011246 - 011737	Chairman Mr WONG Ting-kwong Administration	Mr WONG Ting-kwong's view/enquiry -  (a) SSD would not affect genuine home buyers; and  (b) whether both profits tax and SSD would be charged on short-term resale which yielded profits.  Administration's explanation -  (a) as SSD and profits tax were governed under separate ordinances, any short-term resale which yielded profits would be subject to both SSD and profits tax. However, the amount of SSD paid would be offset as part of the operating costs in the assessment of profits tax; and  (b) SSD was an extraordinary measure to curb property speculation and would not affect the existing tax regime.	The Administration to clarify whether there was a question of double taxation if property transactions would be subject to both SSD and profits tax.
011738 - 011957	Chairman Administration	Chairman's request for a written response to Mr David WEBB's submission dated 14 December 2010 (LC Paper No. CB(1) 822/10-11(03)), particularly on the question of conformity with Article 105 of Basic Law on whether SSD amounted to a partial confiscation of the value of property sold within 24 months.	The Administration to provide a written response to LC Paper No. CB(1) 822/10-11(03), particularly on the question of conformity with the Basic Law if SSD amounted to a partial confiscation of the value of property sold within 24 months.
011958 - 013204	Chairman Ms Audrey EU Administration	Ms Audrey EU's views/enquiries -  (a) need for a clear definition of "acquire" under the Bill;  (b) while the application of "acquire" and "dispose" under the Bill was in order, the Administration's interpretation on the binding effect of PASP had caused confusion as this had deviated from the existing conveyancing practices; and	The Administration to -  (a) provide a definition for the term "acquire"; and  (b) provide a paper explaining the application of

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		<p>(c) the application of SSD in respect of mortgaged properties, including those subject to foreclosure orders.</p> <p>Administration's explanation -</p> <p>(a) the term "acquire" under proposed section 29CA was required for the purpose of ascertaining the presence of an instrument chargeable with SSD within a holding period of 24 months;</p> <p>(b) under proposed section 29CA(4), "a person acquires any residential property when equitable ownership or legal ownership of the property is passed to the person (whichever occurs first)";</p> <p>(c) under proposed section 29CA(6), "a person disposes of any residential property when equitable ownership or legal ownership of the property is passed from the person to the other person (whichever occurs first)";</p> <p>(d) a mortgagee who took possession of a mortgaged residential property by means of a foreclosure order on or after 20 November 2010, and resold it within 24 months would be subject to SSD;</p> <p>(e) if the mortgagee only sold the pledged property by exercising the right granted under the mortgage, he only acted as the mortgagor's attorney and sold the property on behalf of the mortgagor. He would not be subject to SSD because he had not acquired the property; and</p> <p>(f) the charging of stamp duty for ASP and PASP was provided under existing section 29A(1) as well as the First Schedule under Head 1(1A)note 2.</p>	<p>SSD in respect of mortgaged properties, including those subject to foreclosure orders.</p>
013205 - 014752	Chairman Mr LEE Wing-tat Administration	<p>Mr LEE Wing-tat's views -</p> <p>(a) speculators would tend to conduct property transactions through transfer of shares of property-holding shell companies as they would only be required to pay profits tax and not SSD which was much higher on account that the latter was</p>	<p>The Administration to advise -</p> <p>(a) the number of property transactions through transfer of shares of</p>

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		<p>charged against the value of the property. Besides, it would not be difficult to set up property-holding shell companies, the cost of which was comparatively low as compared to the savings in SSD; and</p> <p>(b) need to consider the feasibility of applying SSD to property transactions through transfer of shares of companies.</p> <p>Administration's response -</p> <p>(a) SSD would apply to the resale of properties owned by individuals and companies within a holding period of 24 months, but not to the transfer of shares of a company;</p> <p>(b) only 11% of property transactions involved company-owned properties;</p> <p>(c) there would be risk involved in acquiring the shares of a company as this would include acquisition of all the liabilities of the company;</p> <p>(d) profits tax would be charged on companies operating with a profit; and</p> <p>(e) IRD had been collating information on property transactions through transfer of shares of property-holding shell companies incorporated in Hong Kong from April 2010 onwards.</p>	<p>property-holding shell companies, including those registered overseas, for the period between April and November 2010; and</p> <p>(b) the feasibility of applying SSD to property transactions through transfer of shares of companies.</p>
014753 - 015426	Chairman Ms Starry LEE Administration	<p>Ms Starry LEE's views -</p> <p>(a) SSD would indirectly encourage property transactions through transfer of shares of property-holding shell companies, as these would only be chargeable with profits tax which was subject to appeal;</p> <p>(b) SSD would likely affect genuine home buyers who usually held properties as individuals but would unlikely affect speculators who usually held properties under shell companies; and</p> <p>(c) whether anti-tax evasion measures under the existing tax legislation could be invoked if the setting up of shell</p>	<p>The Administration to advise whether the anti-tax evasion measures under the existing tax legislation could be invoked if the setting up of shell companies was to evade SSD.</p>

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		<p>companies was to evade SSD.</p> <p>Administration's explanation -</p> <p>(a) SSD was an extraordinary measure aimed at curbing speculative activities under the exuberant state of the property market;</p> <p>(b) as the transfer of ownership of properties and the transfer of shares of companies were two separate matters, there were technical difficulties in charging SSD on the latter. Besides, there was a Privy Council decision where IRD had been unsuccessful in charging profits tax on a company making profits from the sale of shares in another company holding land in Hong Kong. The judges found it difficult to understand the concept of trading of land via shares; and</p> <p>(c) the Administration would closely monitor the property market. Further measures would be considered if the existing measures were found not effective in curbing speculative activities.</p>	
015427 - 020415	Chairman Dr Margaret NG Administration	<p>Dr Margaret NG's views -</p> <p>(a) there was much confusion over the binding effect of PASP;</p> <p>(b) under existing section 4 of SDO, every instrument specified in the First Schedule would be chargeable with stamp duty; and</p> <p>(c) the proposed section 29CA which had introduced a new concept of "acquire" had given rise to much contention. Consideration should be given to dispensing with the term "acquire" by back-dating the period of 24 months from the date of disposal of the property to ascertain the presence of an instrument chargeable with SSD.</p> <p>Administration's explanation -</p> <p>(a) whether a PASP was a specifically enforceable agreement in respect of the sale or purchase of the property would</p>	The Administration to consider dispensing with the term "acquire" by back-dating the period of 24 months from the date of disposal of the property to ascertain the presence of an instrument chargeable with SSD.

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		<p>depend on the terms stated in the agreement;</p> <p>(b) as SSD was premised on the short-term resale of a residential property, there was a need to define a date on which a person acquired (and disposed of) the property; and</p> <p>(c) the term "acquire" was included in proposed section 29CA for the calculation of the holding period of 24 months for the charging of SSD.</p>	
020416 - 020442	Chairman	Date of next meeting.	