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Bills Committee on the  
Stamp Duty (Amendment) (No.2) Bill 2010  
Legislative Council  
Legislative Council Building  
8 Jackson Road,  
Central, Hong Kong

Dear James

Re : The Stamp Duty (Amendment) (No.2) Bill 2010  
Introduction of Special Stamp Duty

I refer to the captioned bill (the "Bill") introducing Special Stamp Duty ("SSD") and gazetted on 3 December 2010. In particular, I would like to set out in this letter my views on several important legal issues of SSD for the members' consideration.

### A. Meaning of "acquiring" a property

There are two notable problems in defining the time when a property is acquired in the Bill: 1. IRD's interpretation is misconceived; and 2. insufficient clarity in the Bill.

#### 1. IRD's interpretation is misconceived

As a measure to curb short term speculative activities in the local residential property market, the Government proposed to impose SSD on the resale of residential properties acquired on or after 20 November 2010 and resold within 24 months after acquisition. Before the Bill was gazetted, the Inland Revenue Department ("IRD") had published various materials with a view to explaining the policy, application and computation of SSD to members of the public.

In a Frequently Asked Questions section ("FAQ") on the IRD's website, and particularly in Question 6, it says "For the purpose of SSD, how to define the date of purchase and sale of the property?", and the answer given by IRD is that,

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"The relevant date is when the buyer and seller enter into a legally binding agreement for sale and purchase, i.e. the date on which the purchaser acquires or the seller disposes an interest in the property. Normally it is the date of the formal agreement for sale and purchase. If it is provided in the provisional agreement that legal action would be instituted against the party not completing the transaction, the date of provisional agreement may be regarded as the date of purchase and sale of the property." (Retrieved from <http://www.ird.gov.hk/eng/faq/ssd.htm> on 31 Dec 2010.)

From the above, IRD takes the view that when the parties enter into a *legally binding agreement* for sale and purchase, the date of that legally binding agreement is to be regarded as date of acquisition and that the date of formal agreement is to be regarded as the date of such "legally binding agreement" for sale and purchase and that if the remedy of specific performance is provided in a provisional agreement, the date of the provisional agreement would also be regarded as the date of acquisition.

However, the date of acquisition of a property is defined differently under clause 29DA (7) of the Bill, where it says that "a person acquires any residential property when equitable or legal ownership of the property is passed to the person (whichever occurs first)".

According to the letter by IRD to The Law Society of Hong Kong dated 10 December 2010 (a copy of which was attached for your Members' reference under cover of the letter from Secretary for Transport and Housing dated 20 December 2010), IRD takes the view that "a person 'acquires' a property if he enters into a *specifically enforceable agreement* with a seller for the sale and purchase of that property." IRD further expresses that "a specifically enforceable agreement is one that the parties thereto may rely on it to apply to the court for specific performance to compel the other party to sell/purchase the property." Further, and slightly differing from the FAQ, IRD suggests in the said letter that "whether a provisional agreement is a specifically enforceable agreement in respect of the sale and purchase of the property or not depends on the terms stated in the agreement".

As already pointed out by some members of the legal profession, the IRD's view that an agreement for sale and purchase will be regarded as specifically enforceable if it contains specific clause allowing the purchaser a right to claim specific performance was misconceived. In the Court of Appeal's decision in Man Sun Finance (International) Corporation Limited v Lee Ming Ching Stephen [1993] 1 HKC 113, the Court granted a decree of specific performance to the purchaser, where the provisional agreement did not expressly allow the purchaser to a remedy of specific performance. Hence, the earlier interpretation adopted by IRD must be wrong.

## 2. Lack of clarity

Neither the Bill nor the Stamp Duty Ordinance ("SDO") provide any definition for "legal ownership" and "equitable ownership" of a property. It remains uncertain as to what constitutes "equitable ownership" for the purpose of the SDO or SSD specifically.

It is trite law that once a legally enforceable contract has been concluded, the purchaser is

regarded by equity as enjoying a certain proprietary interest. Also, in the judgment of Sir George Jessel MR in *Lysaght v Edwards* [1976] 2 HD 499 at 506, he ruled that "the moment you [the purchaser] have a *valid contract* for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the *beneficial ownership* passes to the purchaser". And if, for whatever reason, specific performance will not issue, no trust will arise. (*Degeling and Edelman in Equity in Commercial Law* at Chapter 18, p. 465 and cited in *Okachi (Hong Kong) Co Ltd v Nominee (Holding) Ltd*, CACV347/2005, per Hon Cheung JA)

The question is whether "equitable ownership" as stipulated in the Bill has the same meaning under "beneficial ownership" in *Lysaght v Edwards*. If the Bill does not attempt to provide a clear definition of the said two essential terms, I would anticipate that a great deal of disputes would arise between the homebuyers (or their legal representatives) and IRD, in this respect.

## **B. Retrospective effect**

Another problem underlying the present Bill, if the IRD's interpretation of the relevant date of "acquisition" of a property is that the Bill will have retrospective effect on the purchaser who entered into a provisional agreement for sale and purchase without an express term allowing the purchaser to claim specific performance.

As a matter of market practice, the provisional agreement is rather a standard form adopted by the estate agents. The form of such provisional agreement usually does not include a specific term referring to a claim for specific performance. However, as mentioned above, the Court may still grant specific performance unless the agreement expressly precludes such remedy.

Further, the standard form memorandum for sale adopted in sale and purchase of uncompleted residential properties under the consent scheme is only an option to purchase agreement, whereby the vendor is bound to sell the property but the purchaser is not bound to purchase unless and until a formal agreement has been executed. As this kind of provisional agreement is generally not specifically enforceable against the purchaser, it remains uncertain whether those homebuyers executed the provisional agreements under the consent scheme before 20 November 2010 were caught by SSD.

For a purchaser who entered into the standard form provisional agreement before 19 November 2010, he/she would not be regarded to have "acquired" the property before 19 November 2010 if IRD's interpretation of the Bill applies. What these purchasers are faced with, if they are minded to re-sell the properties within 2 years for whatever reasons, is a dilemma – to complete or not to complete the transaction. If they opt not to complete, the deposit paid would be forfeited or they would have to pay such amount as stated in the provisional agreement as damages.

The practical impact of the proposed Bill is that parties to an agreement freely negotiated according to the current legal provisions under SDO will be penalized or jeopardized unjustifiably by the retrospective effect of the Bill. It would be *a fortiori* to say that if such penalty or jeopardy to be imposed on the innocent purchasers is not an inevitably means to achieve the policy objective of SSD, it will be even more unfair and unjustified to pass

the Bill as is currently presented.

I believe that it is the very concept of the rule of law, which, among others, laid down the foundations of civil society and prosperity of Hong Kong that every statutory enactment which alters the rights and interests of private individuals for acts done before its enactment (or announcement) should avoid creating unfair and unreasonable results on those individuals and the power of the legislature to make laws with retrospective effect should only be exercised with due care and only in exceptional cases.

The true intent of the Bill is to curb *future (i.e. starting from the announcement of the policy)* short term speculative activities in the private residential property market. This objective can be achieved without jeopardizing the interest of those purchasers who entered into a provisional agreement before 20 November 2010. For those future buyers, who have not yet executed a provisional agreement to bind themselves, they have to consider whether to proceed to purchase a property given that SSD will be imposed if they intend to re-sell their properties within 2 years, by taking into account the underlying costs of doing so.

For the reasons stated above, any acquisition of a property pursuant to a provisional agreement (whether or not under the consent scheme) entered into before 20 November 2010 should not fall within the scope of SSD in the first place and that should also be clearly provided in the Bill.

Whilst members of the Bills Committee are still having discussions over the Bill in the coming weeks, I hope that members can address the aforesaid notable problems of the Bill to the Administration and make necessary amendments to the Bill to remove the ambiguities in the provisions, and also unfair and unreasonable impacts on those purchasers who entered into provisional agreements before 20 November 2010, caused by the retrospective operation of the new legislation.

Should members of the Bills Committee have any enquiries, I am most happy to elaborate further on my views and the legal issues concerned.

Yours sincerely



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Senior Partner  
Chu & Lau, Solicitors & Notaries

cc. The Law Society of Hong Kong (Attn.: Ms. Christine Chu, Assistant Director of Practitioners Affairs)