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Hon James To Kun-sun
Chairman
Bills Committee on Stamp Duty (Amendment) (No. 2) Bill 2010
Legislative Council
Hong Kong SAR Government

4 January 2011

Dear Hon James To,

We refer to your letter dated 28 December 2010 inviting us to give submission on the Stamp Duty (Amendment) (No. 2) Bill 2010 ("Bill"). Our comments on the Bill and the proposed Special Stamp Duty ("SSD") are set out below for your consideration.

Persons liable for SSD

Under the current draft legislation, both the seller(s) and the buyer(s) are jointly and severally liable for paying the SSD. Given the objective of imposing the SSD is to curb speculation on residential properties, we consider that only the sellers (who are responsible for the speculation and make profits on the speculative transactions) should be liable for the SSD and that should be clearly stipulated in the SSD legislation. Although the SSD may ultimately be borne by the buyers depending on the market supply and demand, we believe restricting the SSD liability to the sellers under the legislation correctly reflects the legislative intent of imposing the SSD.

From a practical point of view, we understand that the Hong Kong SAR Government may be concerned about the enforcement or collection issue if only the sellers are liable for the SSD. In this regard, we suggest that a withholding mechanism be introduced together with the SSD. Under the withholding mechanism, the buyer (and in practice the conveyance lawyer representing the buyer) will have an obligation to withhold the SSD payable (if any) from the amount of consideration payable by the buyer. This should help address the situations where enforcement / collection of the SSD is an issue e.g. in cases where the seller is a non-resident or where the seller is in bankruptcy. We suggest that the SSD withholding obligation should only be imposed with respect to residential property transactions taking place on or after the enactment of the SSD legislation without any retrospective effect.

Adequacy of exemptions available

Since the announcement of the proposed SSD and the issuance of the Bill, there has been considerable amount of debate on whether the exemptions available under the current draft legislation are sufficient and adequate. Given the objective of imposing the SSD is to curb speculation on residential properties, we are of the view that one of the fundamental principles of the SSD legislation is not to adversely affect those who are not engaged in speculative transactions. There are situations where the sellers are, as a matter of fact, not being engaged in speculative activities despite disposing of a residential property within 24 months from acquisition. The exceptions available in the current draft legislation do not provide SSD relief for some of these situations. While we understand it is impractical to cover all situations in the legislation, we suggest that the following two situations be covered, in both cases the seller has no speculative motive:

1. Mortgagee in possession

Under the current draft legislation, if a mortgagee takes possession of a mortgaged residential property (i.e. the mortgagee "acquires" the property and takes legal ownership of it) by means of a foreclosure order on or after 20 November 2010 and resells the property within 24 months, the mortgagee will be subject to the proposed SSD. However, if the mortgagee only sells the pledged property on behalf of the default mortgagor by exercising the right granted under a mortgage deed without taking the legal ownership of the property, the mortgagee will not be subject to the proposed SSD.

We are of the view that the mortgagees should not be treated differently in the above two situations for the SSD purposes. We suggest that in the first situation where the mortgagee is a licensed bank or a licensed money lender and takes up the legal ownership of the mortgaged property by means of a foreclosure order, the date of acquisition of the mortgaged property by the mortgagee should be taken as the original date on which the mortgagor acquired the property. This approach is consistent with the one adopted by the current draft legislation in cases where a person acquires a residential property under a will, the law of intestacy or right of survivorship.

2. Disposal of matrimonial home in consequent to divorce

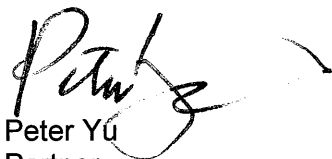
We also suggest that SSD exemption be available in cases where a residential property is disposed of within 24 months from acquisition if (1) the disposal is in consequent to a divorce and (2) the property has been jointly owned and occupied by the couple concerned as a matrimonial home.

Introducing a sunset clause in the Bill

As the Hong Kong SAR Government has indicated that the SSD is introduced to curb short-term speculation of residential properties, we are of the view that the proposed SSD should be a temporary / extraordinary measure for dealing with the current market situation and its continuation should be reviewed periodically in view of any change in the market condition. Therefore, we suggest that a sunset clause be incorporated into the Bill such that the levy of SSD can be reviewed every two years.

If you have any questions on our submission, please feel free to contact me at peter.sh.yu@hk.pwc.com or Mr Fergus Wong, our technical director, at fergus.wt.wong@hk.pwc.com.

Yours faithfully,
For and on behalf of PricewaterhouseCoopers Limited



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