

## **The Stamp Duty (Amendment) (No.2) Bill 2010**

### **Administration's Response to Issues Raised by Members and Deputations**

#### **Purpose**

This paper sets out the Administration's response to issues raised by Members and deputations at the meeting on 1 April 2011, and to other issues raised which were not covered in the Administration's previous papers.

#### **Administration's Response**

*Submissions from the Law Society of Hong Kong, the Hong Kong Association of Banks, the Real Estate Developers Association of Hong Kong, the Hong Kong Institute of Estate Agents, the Hong Kong Chamber of Professional Property Consultants Ltd and the Property Agencies Association*

2. Further to Paper CB(1) 1689/10-11(04), the Administration's response to further written representations made by deputations is at **Annex** for Members' reference.

*To consider making it clear in the CSAs that all involuntary sales of properties under orders of court should be exempted from the payment of SSD*

3. Having carefully listened to Members' views, we have agreed to delete the exclusion of a foreclosure order obtained by a mortgagee which falls outside the definition of a financial institution within the meaning of section 2 of Inland Revenue Ordinance (IRO) from the exemption to be granted to involuntary sale or transfer of properties made by the courts or pursuant to court orders, having regard that the risk of abusing court proceedings should be low. Members may wish to refer to paragraph 9 and Annex B of our paper submitted on 11 April 2011 for details.

*To further explore with the Development Bureau (DevB) the feasibility of exempting only minority owners who have unknowingly purchased a property which is subsequently put to compulsory sale within 24 months of the purchasers*

4. DevB has further considered the issue and remains of the view that the exemption should be an outright one. We have set out DevB's further considerations in paragraph 10 of our paper submitted on 11 April 2011.

*To consider extending the scope of exemptions from SSD to cover those who have to sell their properties within 24 months of acquisition due to severe illness*

5. As we have repeatedly emphasized, we consider that it is very important that the law should be clear and without ambiguity, and that any exemptions to be considered should not affect the effectiveness of SSD, and have to be fair and measurable in an objective manner, and the types of exemptions should be clearly set out in the Bill. Based on the aforementioned guiding principles, the Administration considers that the proposed exemptions have as far as possible addressed the Bills Committee and deputations' views in this regard. Exemptions on a case by case basis in the light of individual or personal circumstances such as financial hardship or health reasons will not be practicable for implementation, and will likely create loopholes for speculators to circumvent the SSD, thereby undermining its effectiveness.

*Documentation proof required by the Inland Revenue Department to ascertain if there is liability to SSD*

6. Under normal circumstances, the Inland Revenue Department (IRD) will take the dates of the acquisition and disposal of a property as declared in the application for stamping for the purpose of ascertaining if there is any liability to SSD. The Stamp office may however request for documentation proof of the underlying instruments such as the Preliminary Agreement for Sale and Purchase (PASP) or Agreement for Sale and Purchase (ASP) if in doubt.

*The application of SSD in cases where transactions have not been completed after the signing of PASP*

7. According to section 29C(5A)(a) of the Stamp Duty Ordinance (SDO), if an agreement for sale is cancelled, annulled or rescinded or is otherwise not performed, it will not be regarded as a chargeable agreement for sale, and no stamp duty liability (including SSD) will arise. If SSD has been paid for an agreement for sale which is not regarded as a chargeable agreement, an application for refund may be made to the Collector of Stamp Revenue within two years after the cancellation, annulment or rescission of the agreement, or in the case where the agreement is not performed, two years after the agreed date of completion of the transaction.

8. However, as an anti-tax avoidance measure, if the agreement is cancelled, annulled or rescinded or is otherwise not performed by reason of the occurrence of a specified event described in section 29C(5AA)(a) and (b) of the SDO, e.g. resale or disposal of the property by way of nomination or direction by the first purchaser, the agreement will continue to be regarded as a chargeable agreement for sale.

*Number of PASPs signed after the announcement of the introduction of SSD on 19 November 2010*

9. The Government does not have comprehensive information on the total number of PASPs signed. This is because not each and every PASP is stamped with IRD and registered with the Land Registry. Under SDO, when an ASP is signed within 14 days after the signing of the PASP, the ASP rather than the PASP should be submitted to IRD for stamping within 30 days from its execution. It is only when an ASP is signed 14 days or more after the signing of the PASP will the PASP be submitted to IRD for stamping within 30 days from its execution first, to be followed by the stamping of the ASP when ready. Given that the common market practice is that an ASP is usually executed within 14 days from the signing of the PASP to get the benefit of an extended period for stamping the ad valorem stamp duty, the number of PASPs stamped by IRD and registered with the Land Registry is not representative of the total number of PASPs signed.

10. With the caveat aforementioned, we understand from the Land Registry that there were 5 436 registered PASPs signed between the period from 20 November 2010 to 6 April 2011. Members should note that the actual number of PASPs signed during this period should be greater than the above figure.

*To undertake regular review of the need for SSD and revert the findings to the Legislative Council*

11. Some Members and deputations suggested that a sunset clause be included in the Bill. If a sunset clause is to be included in the Bill, we need to specify a date for the SSD-related provisions to lapse. It is not possible for the Administration to pre-determine a date when SSD is deemed no longer necessary to curb speculation. The proposal to include an extension mechanism in the Bill will undermine the effectiveness of SSD, as speculators may try to predict the time frame when SSD may lapse, which will add volatility to the market.

12. The Administration has taken careful note that Members would like to get an assurance from the Administration that it would review the need for SSD from time to time after the enactment of the Bill. In this regard, the Administration is prepared to undertake to keep SSD under regular review and to provide a progress report to the LegCo Panel on Housing in 12 month's time after the enactment of the Bill. The Administration will go through the normal legislative process to amend the legislation when SSD is considered no longer necessary.

Transport and Housing Bureau  
Inland Revenue Department  
Department of Justice  
April 2011

**Summary of views submitted by organizations/individuals on the  
Stamp Duty (Amendment) (No. 2) Bill 2010  
Government's Response to Further Written Submissions on the Bill**

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**Contents**

**Part**

- (A) Definition of the terms “acquire” and “dispose of”**
- (B) To provide for exemptions for Special Stamp Duty (“SSD”)**
- (C) Comments about the additional SSD**
- (D) Other comments**

**(A) Definition of the terms “acquire” and “dispose of”**

Organization/Individual	Comments/Issues	Government’s Response
<p><i>Hong Kong Institute of Estate Agents</i> (LC Paper No. CB(1)1672/10-11(03) 18.3.2011)</p>	<p>Proposed to add a clarification at appropriate places of the draft Committee Stage Amendments (CSAs) to show that where a chargeable agreement for sale is registered, the date of instrument shown on the land register is deemed to be the date that the transferor acquired the residential property. Where more than one chargeable agreement for sale has been registered, the date of instrument of the first such registered agreement shall be deemed the date of acquisition.</p>	<p>Premised on the principle as set out in the Bill that a person “acquires” or “disposes of” a property when equitable ownership or legal ownership of the property is passed, under the proposed CSAs, the acquisition and disposal dates of a property will be based on the signing date of the chargeable agreement for sale, or if no such chargeable agreement exists, the signing date of conveyance (i.e. Assignment). Also, for the purpose of the determination of the date of acquisition or disposal, chargeable agreements include those “agreements for sale” as defined in section 29A of the existing Stamp Duty Ordinance (SDO), except “an option to purchase immovable property” and “a right of pre-emption in respect of immovable property” referred to in the definition of “agreement for sale” in section 29A(1)(b) of the SDO. The Administration has taken into account the views of the Law Society of Hong Kong and other relevant bodies in working out the proposed CSAs.</p>
<p><i>The Hong Kong Association of Banks</i> (LC Paper No. CB(1)1672/10-11(04) 18.3.2011)</p>	<p>To clarify –</p> <p>(a) the rationale for excluding the instrument in which a person confers, or has conferred on him:</p> <ul style="list-style-type: none"> <li>➤ an option to purchase immovable property, or</li> <li>➤ a right to purchase immovable property, or</li> <li>➤ a right of pre-emption in respect</li> </ul>	<p>In gist, under the proposed CSAs, when there is a signed Preliminary Agreement for Sale and Purchase (PASP), the signing date of the PASP, other than an instrument which confers an option to purchase or a right of pre-emption, will be the date of acquisition or disposal of the property</p>

	<p>of immovable property;</p> <p>(b) as an instrument above includes a “right to purchase”, whether the exclusion will operate to exclude virtually all agreements for sale whereby a right to purchase is conferred by the vendor on the purchaser; and</p> <p>(c) where such an option to purchase or right to purchase or right of pre-emption is included in an instrument to which other part(s) of the definition applies, then would the entire document be considered for SSD purposes an “agreement for sale” under section 29A(1)(a) or be excluded as an instrument under section 29A(1)(b).</p>	<p>for the purpose of calculating the holding period of the residential property. For an instrument which confers an option to purchase or a right of pre-emption, the date of signing the Agreement for Sale and Purchase (ASP), or if there is no ASP, the signing date of the Assignment will be the date of acquisition or disposal of the property.</p> <p>The reason that the Administration proposes to exclude an instrument which confers an option to purchase or a right of pre-emption as mentioned above is that, according to legal advice, in such cases, “equitable ownership” does not pass from the vendor to the purchaser upon the granting of such an option or a right of pre-emption. In other words, the purchaser is not considered under the Bill as having “acquired” the property. Under such circumstances, the date of signing of the ASP or, if there is no ASP, the signing date of the Assignment will be the date of acquisition or disposal of the property.</p> <p>Although the transfer of properties between associated companies are exempted from SSD under the Bill, the property does undergo the process of “acquisition” and “dispose of”. Therefore, the date on which the associated company obtained the property will be considered as the date of acquisition by that company.</p>
<p><i>The Law Society of Hong Kong</i> (LC Paper No. CB(1)1689/10-11(02) 22.3.2011)</p>	<p>(a) Generally welcomed the proposed changes in the definitions of “acquire” and “disposes of” by making reference to “chargeable agreement for sale”.</p> <p>(b) Expressed concern on the proposal to exclude the type of instrument as defined in section 29A(1) (b).</p>	

<p><i>The Hong Kong Association of Banks (LC Paper No. CB(1)1789/10-11(01) 31.3.2011)</i></p>	<p>(a) The latest CSAs do not provide for when and under what event or instrument following the exercise of an “option to purchase” or “right of pre-emption” will be considered as the date of an “acquisition” or “disposal” of the property for SSD purposes.</p> <p>(b) Recommended that “option to purchase” and “right of pre-emption” be defined by reference to the substance of the transaction so as to distinguish them from other types of “agreement for sale”.</p> <p>(c) To clarify that the date of acquisition for a transferee company in an associated company transfer should be the date of the acquisition by the transferor.</p>	
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**(B) To provide for exemptions for Special Stamp Duty (“SSD”)**

Organization/Individual	Comments/Issues	Government’s Response
<p><i>The Hong Kong Association of Banks (LC Paper No. CB(1)1672/10-11(04) 18.3.2011)</i></p>	<p>Exclusion or exemption is not granted to banks or financial institutions in an enforcement situation for SSD purposes.</p>	<p>Under the current Bill and the latest proposed CSAs, the Administration has proposed to grant exemptions to the disposal of residential properties acquired on or after 20 November 2010 and resold within 24 months or less under various specific circumstances, which include:</p>
<p><i>The Hong Kong Association of Banks (LC Paper No. CB(1)1789/10-11(01) 31.3.2011)</i></p>	<p>(a) “Financial institutions” within the meaning of section 2 of the Inland Revenue Ordinance (IRO) should be exempted from SSD under the following situations:</p> <ul style="list-style-type: none"> <li>(i) a foreclosure order (as well as a sale pursuant to a foreclosure order);</li> <li>(ii) sale by a mortgagee or receiver appointed by a mortgagee; and</li> <li>(iii) sub-sales by a mortgagee under equitable mortgages.</li> </ul> <p>(b) Concerned about where a mortgagee is not a “financial institution”, there is no exemption. Enforcement of mortgages or equitable mortgages</p>	<p>(a) Nomination of the spouse, parents, children, brothers and sisters to take up the assignment of the property, and sale or transfer of the property to spouse, parents, children, brothers and sisters.</p> <p>(b) Addition/deletion of name(s) to/from a chargeable agreement for sale or Assignment if the person(s) is the spouse, parents, children, brothers and sisters of the original purchaser(s).</p> <p>(c) Involuntary sale or transfer of properties made by the courts or pursuant to court orders (including all compulsory sale of residential properties under a Compulsory Sale Order granted under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) and foreclosure order obtained by mortgagees whether or not they fall under the definition of a</p>

	<p>by developers or their finance vehicles who finance second mortgages will not be exempted, even though they are not speculators and are bona fide mortgagees for valuable consideration.</p> <p>(c) Proposed exemption should also be given to those mortgagees which used to be a “financial institution” under section 2 before the revocation of its Authorised Institution status but continue to serve the existing mortgage customers.</p>	<p>financial institutions within the meaning of section 2 of the IRO).</p> <p>(d) Involuntary sale of mortgaged properties in various forms by a mortgagee which is a financial institution within the meaning of section 2 of the IRO, or by a receiver appointed by such a mortgagee.</p> <p>(e) Sale or transfer of a residential property by a person whose property is inherited from a deceased person’s estate or is passed to that person under the right of survivorship.</p> <p>(f) Transfer between associated companies.</p> <p>(g) Sale of property due to bankruptcy/involuntary winding up.</p> <p>(h) Sale of property to the Government.</p>
<p><i>Hong Kong Chamber of Professional Property Consultants Ltd</i>  <i>(LC Paper No. CB(1)1672/10-11(01) 21.3.2011)</i></p>	<p>(a) To provide for exemptions for nomination of additional purchaser when signing the formal ASPs.</p> <p>(b) To review and enhance the policy by considering granting exemptions to those who signed PASPs two weeks before the announcement of SSD on 19 November 2010.</p> <p>(c) To provide for exemptions for those who may need to resell their properties within two years due to</p>	<p>As we have repeatedly emphasized, we consider that it is very important that the law should be clear and without ambiguity, and that any exemptions to be considered should not affect the effectiveness of SSD, and have to be fair and measurable in an objective manner, and the types of exemptions should be clearly set out in the Bill. Based on the aforementioned guiding principles, the Administration considers that the proposed exemptions have as far as possible addressed the</p>

	urgent matters.	Bills Committee and deputations' views in this regard. Exemptions on a case by case basis in the light of individual or personal circumstances such as financial hardship will not be practicable for implementation, and will likely create loopholes for speculators to circumvent the SSD, thereby undermining its effectiveness.
<p><i>The Law Society of Hong Kong</i>  (LC Paper No. CB(1)1784/10-11(02) 31.3.2011)</p>	(a) To clarify the application of SSD to – <ul style="list-style-type: none"> <li>(i) Conditional Agreements;</li> <li>(ii) Supplemental Agreement or Confirmatory Assignment;</li> <li>(iii) Acquisition of property under right of survivorship.</li> </ul>	<p><b>Conditional Agreements</b></p> <p>Conditional agreements fall under the definition of “agreements for sale” under section 29A of the SDO. They are chargeable to Ad Valorem Stamp Duty (AVSD) and will be chargeable to SSD.</p> <p><b>Supplemental Agreement or Confirmatory Assignment</b></p> <p>Under the AVSD regime, stamp duty is chargeable on the principal agreement only and not on the Supplemental Agreement or Confirmatory Assignment. Therefore, SSD will not be applicable to Supplemental Agreements or Confirmatory Assignments.</p> <p><b>Acquisition of property under right of survivorship</b></p> <p>Both AVSD and SSD will not be applicable to the acquisition of a residential property by a person under the right of survivorship upon the death of the other joint owner, since no chargeable instrument will be involved. The Administration has proposed that the subsequent sale or transfer of such a property by that person be exempted from SSD.</p>

<b>(C) Comments about the additional SSD</b>		
Organization/Individual	Comments/Issues	Government's Response
<i>The Hong Kong Association of Banks (LC Paper No. CB(1)1789/10-11(01) 31.3.2011)</i>	Any additional SSD should not be attached as a liability for the purchaser owner (and hence a mortgagee) of the property or affect title generally or the interest of banks who take up mortgages.	<p>It is a general principle that stamp duty is charged on executed instruments. The introduction of an adjudication mechanism in anticipation of upcoming transactions is not in line with the well established stamp duty principle. In particular, a proposed transaction with no exact execution date of instrument will make valuation of the property, which depends on the instrument date, impossible.</p> <p>In order to let the buyer and seller of a transaction which involves SSD know as early as possible the total amount of SSD involved, the Stamp Office will pledge that where an instrument is liable to SSD, the assessment to additional SSD will be made within 40 days after the submission of application for stamping.</p>
<i>The Law Society of Hong Kong (LC paper No CB(1)1784/10-11(02) 31.3.2011)</i>	Liability of Purchasers to pay additional SSD assessed to be payable by the IRD after completion of the transaction.	
<i>The Hong Kong Association of Banks (LC Paper No. CB(1)1789/10-11(01) 31.3.2011)</i>	(a) Concerned about the arrangement that any additional SSD based on the market value of the property at the time of disposal will be informed by IRD within 40 days as to whether there is any reassessment for additional SSD payment, and thereafter the payment needs to be made within 30 days.	

	<p>(b) Introducing an adjudication mechanism for:</p> <p>(i) the amount of stamp duty payable; and</p> <p>(ii) ascertaining whether SSD is payable in advance of a proposed transaction before an instrument is executed.</p>	
<p><i>The Real Estate Developers Association of Hong Kong (REDA)(LC Paper No. CB(1)991/10-11(01)</i></p>	<p>(a) SSD not to apply to –</p> <p>(i) bare sites;</p> <p>(ii) disposal of units in an existing old building for redevelopment; or</p> <p>(iii) disposal of new units in a new development by a developer.</p> <p>(b) For units acquired by a party pursuant to a joint development agreement, SSD will not apply in the subsequent disposal of the units by that party.</p> <p>(c) For intra-group transfer, SSD will not apply.</p>	<p>As we have repeatedly emphasized, we consider that it is very important that the law should be clear and without ambiguity, and that any exemptions to be considered should not affect the effectiveness of SSD, and have to be fair and measurable in an objective manner, and the types of exemptions should be clearly set out in the Bill. Too many exemptions will create loopholes.</p> <p>We have proposed in the Bill that transfer between associated companies be exempted from SSD.</p> <p>We have carefully considered the issues raised by REDA. We consider that such exemptions will create loopholes for speculation. We believe that as long as the law is clearly drafted, developers should be able to flexibly adjust their business strategies and operation without affecting the supply, in the light of the new taxation environment when the Bill comes into effect.</p>

<b>(D) Other Comments</b>		
Organization/Individual	Comments/Issues	Government's Response
<p><i>Property Agencies Association</i> (LC Paper No. CB(1)1689/10-11(01) 23.3.2011)</p>	<p>(a) SSD and tightening mortgage lending were wrong measures and would affect the healthy development of the property market in the long term.</p> <p>(b) Suggested that the Government should –</p> <ul style="list-style-type: none"> <li>(i) increase land supply;</li> <li>(ii) provide more public housing unit and resume the home ownership scheme;</li> <li>(iii) continue to put up land with unit size restrictions for sale or tendering;</li> <li>(iv) continue to revitalize the secondary market of HOS;</li> <li>(v) re-launch the home starter loan scheme;</li> <li>(vi) develop a 5 to 10 years long-term housing policy;</li> <li>(vii) develop an appeal mechanism for SSD;</li> <li>(viii) study other more effective</li> </ul>	<p>The Government has been monitoring developments in the private residential property market closely and remains vigilant on the risks of a property bubble. In February, April, August, October and November 2010, the Government introduced various measures in four areas to ensure the healthy and stable development of the property market. The four areas include increasing land supply to tackle the problem at source, combating speculative activities, enhancing the transparency of property transactions, and preventing excessive expansion in mortgage lending.</p> <p>The Government recognizes the importance of a stable home, and is fully aware of the people's wish to improve their quality of life and move up the social ladder through home ownership. The Government will, in collaboration with the Hong Kong Housing Society, introduce My Home Purchase Plan (MHPP) premised on the concept of "rent-and-buy". The MHPP will effectively target at households with the ability to pay mortgages in the long run, but who cannot immediately afford the down payment in the face of short-term property price fluctuations, and allow such potential home buyers some time to save up for their home purchase. Also, MHPP helps increase the supply of "no-frills" small and</p>

	<p>measures to replace SSD and the measure of tightening mortgage lending.</p>	<p>medium-sized private residential flats.</p> <p>MHPP, together with Government's commitment to address the housing needs of those low-income households who cannot afford private rental housing through the provision of Public Rental Housing, measures introduced to increase land supply, the revitalization measures for the Home Ownership Scheme (HOS) Secondary Market Scheme, and efforts to enhance the transparency and fairness of first-hand sales in the private sector, will increase choices to meet the different housing needs of the community in a sustainable manner.</p> <p>On the proposal to set up an appeal mechanism, as the Administration has repeatedly emphasized, we consider that it is very important that the law should be clear and without ambiguity, and that any exemptions to be considered should not affect the effectiveness of SSD, and have to be fair and measurable in an objective manner, and the types of exemptions should be clearly set out in the Bill. The Administration is not able to accept the proposal for setting up an appeal mechanism to assess and decide on the applicability of SSD on a case by case basis in the light of individual or personal circumstances such as financial hardship, as it is a fundamental deviation from the present taxation system. The Administration also considers that the measure is not practicable and will likely create a big loophole for circumvention of SSD, thereby rendering it not effective.</p>
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<p><i>The Law Society of Hong Kong (LC Paper No. CB(1)1784/10-11(02) 31.3.2011)</i></p>	<p>(a) The obligation of the parties to insert further particulars in the agreement/assignment as from 3 December 2011.</p> <p>(b) The obligation of purchasers' solicitors to specify the date of acquisition of the property in the Stamping Request Form when they would have difficulty in verifying this.</p>	<p>The Administration has proposed CSAs to set out clearly how the date of acquisition or disposal of a property for the purpose of charging of SSD should be determined.</p> <p>Under normal circumstances, IRD will take the dates of the acquisition and disposal of a property as declared in the application for stamping for the purpose of ascertaining if there is any liability to SSD. The Stamp office may however request for documentation proof of the underlying instruments such as PASP or ASP if in doubt.</p>
<p><i>The Law Society of Hong Kong (LC Paper No. CB(1)1784/10-11(02) 31.3.2011)</i></p>	<p>The need for the parties to obtain a valuation report to apportion the sale price in the event that only part of properties sold is subject to payment of SSD.</p>	<p>Under the Bill, the proposed Note 2(b) to head 1(1B) of the First Schedule to the SDO requires the parties to a chargeable agreement for sale to indicate the consideration of the part of the residential property that is disposed of within 24 months after acquisition for the purpose of calculating the SSD chargeable in respect of that part. The parties should apportion the consideration to the best of their knowledge/information. They may decide whether a valuation report is needed for the purpose.</p>

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