

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

### **Administration's Response to Issues Raised by Members at the Bills Committee on 18 April 2011**

#### **Purpose**

The paper informs Members of the Administration's response to issues raised by Members at the Bills Committee meeting on 18 April 2011.

- (1) To provide a written response to the submission from The Law Society of Hong Kong and to provide response to further submissions from deputations**

The Administration's response to the Law Society of Hong Kong and further submissions from deputations are attached at **Annex A** and **Annex B** respectively.

- (2) To consider including in the speech to be delivered by the Secretary for Transport and Housing at the resumption of Second Reading debate on the Bill a clarification that a mortgage (whether in favour of a financial or non-financial institution) is not chargeable with stamp duty and special stamp duty (SSD).**

2. As explained at the Bills Committee Meeting on 18 April 2011, all along, the Inland Revenue Department's (IRD) takes the view that the definition of "agreement for sale" does not cover what might be called a usual mortgage (or charge). IRD has set out its view in the "Stamp Office Interpretation and Practice Notes No. 1 (Revised) - Stamping of Agreements for Sale and Purchase of Residential Property" (the Practice Notes). In accordance with the Practice Notes, IRD does not charge ad valorem stamp duty on a usual mortgage (or charge).

3. IRD will adopt the same principle aforementioned for SSD, that is, it will not charge SSD on a usual mortgage (or charge). When

calculating the holding period of a mortgaged property, the date of a usual mortgage (or charge) is not a relevant consideration. The holding period will count from the date when the property owner acquires the property to the date when the property owner disposes of the property.

**(3) To consider reviewing the need for SSD every two years**

4. The Administration has listened to the views of Members, and 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. In fact, the Administration will continue to review SSD from time to time. The Administration will go through the normal legislative process to amend the legislation when SSD is considered no longer necessary.

**(4) To advise the definition of residential property under the Stamp Duty Ordinance (Cap. 117). To also advise whether the definition covers properties that could be used for both residential and commercial purposes.**

5. "Residential Properties" is defined under section 29A(1) of the Stamp Duty Ordinance (SDO) as "any immovable property other than "non-residential property". "Non-residential property" is defined as immovable property which, under the existing conditions of –

- (a) a Government lease or an agreement for a Government lease;
- (b) a deed of mutual covenant within the meaning of section 2 of the Building Management Ordinance (Cap. 344); (Amended 27 of 1993 s. 45)
- (c) an occupation permit issued under section 21 of the Buildings Ordinance (Cap. 123); or
- (d) any other instrument which the Collector is satisfied effectively restricts the permitted user of the property,

may not be used, at any time during the term of the Government lease in respect of the property or during the term of the Government lease that has been agreed for in respect of the property (as is appropriate), wholly or partly for residential purposes.

6. The classification of premises in terms of “residential property” and “non-residential property” is by reference to their permitted use rather than actual use. In other words, it is only when a property cannot be used for residential purposes under the existing conditions of any of the aforementioned documents, is a non-residential property. When this is not the case, it is, by definition, a residential property.

7. In practice, the description of a property in an occupation permit (OP) will be recognised as specifying the only permitted use of the property at the time of issue of the OP. Accordingly, in the absence of any subsequent relevant instrument, the OP will be used for the purpose of deciding whether a property is “residential” or “non-residential”.

8 The aforementioned definitions of “residential property” and “non-residential property” were adopted in 1992 when the Administration amended the Stamp Duty Ordinance to require the payment of ad valorem stamp duty within 30 days after the entering into an “agreement for sale” for residential properties, rather than after the execution of the Assignment, as one of the measures to curb speculation in residential properties. The classification of “residential properties” and “non-residential properties” using “permitted use” forms an objective basis for IRD and the market to know with certainty whether a property is “residential” or otherwise. When the “actual use” of a site is found to be not in full compliance with its “permitted use”, the site may be subject to enforcement action by relevant Government departments to restore it back to its “permitted use”.

Transport and Housing Bureau  
Inland Revenue Department  
Department of Justice  
4 May 2011

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運輸及房屋局

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4 May 2011

*By Fax*

The Law Society of Hong Kong  
3/F., Wing On House  
71 Des Voeux Road Central  
Hong Kong  
(Attn. : Miss Christine W S Chu)

Dear Miss Chu,

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

Thank you for the letter of 15 April 2011 from the Hong Kong Law Society (the Law Society) to the Transport and Housing Bureau, which attached the Law Society's representation on the proposed revised Committee Stage Amendments (revised CSAs).

As regards the Law Society's views as set out in paragraph 3 of the representation, the Administration has responded vide its document "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" of 15 April 2011 to the Bills Committee. We attach a copy of the document for your reference.

The Administration has set out the original proposal in more explicit terms in the revised CSAs as to how the date of acquisition or disposal of residential property for the purpose of charging of Special Stamp Duty (SSD) should be determined. Premised on the principle that a person "acquires" or "disposes of" a property when equitable ownership or legal ownership of the property is passed, we have proposed in the revised CSAs that 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 determining the date of

“acquisition” of and “disposal of” a property, chargeable agreements include those “agreements for sale” as defined in the existing Stamp Duty Ordinance, except an instrument conferring “an option to purchase immovable property” and “a right of pre-emption in respect of immovable property”. Under the circumstances of “an option to purchase immovable property” and “a right of pre-emption in respect of immovable property”, 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 of or disposal of the property.

Regarding the Law Society’s concern as to how the dates of “acquisition” of and “disposal of” a residential property are to be determined under certain scenarios, premised on the proposal as set out in the Administration’s revised CSAs that the acquisition and disposal dates of a property will be based on the signing date of the “chargeable agreement for sale” or the Assignment, our reply is set out below.

On the first scenario and as explained at the Bills Committee Meeting on 18 April 2011, all along, the Stamp Office takes the view that the definition of “agreement for sale” does not cover what might be called a usual mortgage (or charge). The Stamp Office has set out its view in the “Stamp Office Interpretation and Practice Notes No. 1 (Revised) - Stamping of Agreements for Sale and Purchase of Residential Property” (the Practice Notes). In accordance with the Practice Notes, the Stamp Office does not charge ad valorem stamp duty on a usual mortgage (or charge).

The Stamp Office will adopt the same principle aforementioned for SSD, that is, it will not charge SSD on a usual mortgage (or charge). When calculating the holding period of a mortgaged property, the date of a usual mortgage (or charge) is not a relevant consideration. The holding period will count from the date when the property owner acquires the property to the date when the property owner disposes of the property.

As for the second scenario, it concerns how to determine the dates of “acquisition” of and “disposal of” a property when there is an exchange of an immovable property for any other immovable property or the partition of an immovable property, and how SSD applies. We wish to point out that the exchange of an immovable property for another immovable property or the partition of an immovable property is not common. Also, under the tax avoidance provisions of the Stamp Duty Ordinance (SDO), the Stamp Office will conduct an assessment on all property transactions (including transactions which do not have equality money payable). If the Stamp Office considers that the consideration stated in the instrument does not reflect the value of the property, it

will use the market value of the property instead of the stated consideration to assess the additional ad valorem stamp duty and the additional SSD.

For an exchange of an immovable property for any other immovable property or the partition of an immovable property which involves the payment of equality money, the agreement for exchange or partition is regarded as a chargeable agreement for sale, and the date of signing will be regarded as the date of “acquisition” of and “disposal of” the property. For an exchange of an immovable property for any other immovable property or the partition of an immovable property which does not involve the payment of equality money, the agreement for exchange or partition is not regarded as a chargeable agreement for sale. As such, the date of signing the Assignment will be regarded as the date of “acquisition” of and “disposal of” the property.

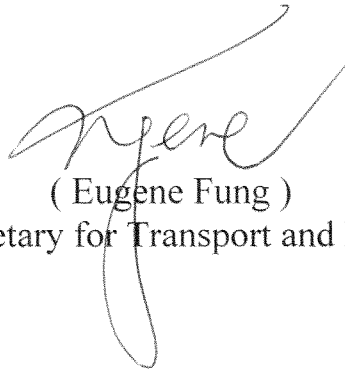
The third scenario is related to how to determine the date of “acquisition” of and “disposal of” a piece of land obtained through an Agreement and Conditions of Exchange, and how SSD applies. Under the SSD regime, SSD will be chargeable in respect of the disposal of a property which is acquired by the seller under a chargeable agreement for sale or under a conveyance. An Agreement and Conditions of Exchange is neither a chargeable agreement for sale nor a conveyance. It belongs to the same category as grants by the Government, Government leases and surrenders of such grants and leases which are instruments generally exempted from stamp duty under the SDO. The grantee obtains the land through an Agreement and Conditions of Exchange, and SSD is not applicable to the grantee when the grantee sells the land or the residential units constructed thereon to a third party. The third party buyer “acquires” the land or the residential units and when the third party sells the land or the residential units, the dates of the transaction will be taken as the dates of “acquisition” and “disposal of”, and SSD will apply if the transaction takes place within 24 months.

As regards the fourth scenario which is related to how to determine the date of “acquisition” of and “disposal of” a property which is sold due to bankruptcy/involuntary winding up, the Law Society made reference to section 39(g) of the SDO which provides exemption for all instruments exempted under section 125 of the Bankruptcy Ordinance (Cap. 6) or section 281 of the Companies Ordinance (Cap. 32). Section 125 of the Bankruptcy Ordinance and section 281 of the Companies Ordinance adopt the wording “stamp duty shall not be payable”. The Stamp Office is of the view that the agreement for sale mentioned in the Law Society’s example is a chargeable agreement for sale and stamp duty is payable if not for the exemption provided in the Bankruptcy Ordinance and the Companies Ordinance. As such, in accordance with section

29CA(4)(a)(i) of the revised CSAs, the date of the agreement for sale is to be treated as the date of acquisition of the property for SSD purposes.

The Administration has carefully considered the further comments from the Law Society and has clarified above how the dates of “acquisition” of and “disposal of” residential properties are to be determined under the various scenarios raised by the Law Society. To sum up, the Administration considers that the revised CSAs proposed, which have taken the earlier comments of the Law Society into account, have set out the original proposal in clear terms as to how the dates of “acquisition” of and “disposal of” residential properties for the purpose of charging of SSD should be determined.

Yours sincerely



( Eugene Fung )

for Secretary for Transport and Housing

c.c.

Commissioner of Inland Revenue (Attn. : Mr Wong Kuen-fai)

Clerk to the Bills Committee on the Stamp Duty (Amendment) (No.2) Bill 2010

(Attn. : Ms Becky Yu)

**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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Organization/Individual	Comments/Issues	Government’s Response
<p>Tai Hung Fai Enterprise Co Ltd <i>(LC Paper No. CB(1)2080/10-11(01) 18.4.2011)</i></p>	<p>Unification of titles of acquired properties held by different companies within the same group in the process of compulsory sale under the Land (Compulsory sale for Redevelopment) Ordinance (Cap. 545) should not be regarded as “acquisition” for the purpose of SSD.</p>	<ul style="list-style-type: none"> <li>➤ The transfer of properties among associated companies for unification of titles in the sale of properties under a Compulsory Sale Order granted under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) is not chargeable with ad valorem stamp duty (AVSD) by virtue of Section 45 of the Stamp Duty Ordinance (SDO) if the conditions provided therein are satisfied. Given that such transfer is not chargeable with AVSD, it will also not be subject to Special Stamp Duty (SSD).</li>   <li>➤ As for the sale/transfer of properties under the Compulsory Sale Order granted under Cap 545, the Administration has already proposed Committee Stage Amendments (CSAs) to the Stamp Duty (Amendment) (No.2) Bill 2010 (the Bill) to exempt the compulsory sale of residential properties under a Compulsory Sale Order from SSD.</li> </ul>



<p>The Real Estate Developers Association of Hong Kong (LC Paper No. CB(1) 2080/10-11(02) 20.4.2011)</p>	<p>The sale and disposition of new units or the interest of a new development after a redevelopment should not attract any SSD as there is no element of speculation.</p>	<p>➤ The Administration takes the view that under the proposed Bill SSD would not be chargeable to such sales, because section 29CA(2) will apply "if <u>the residential property concerned</u> is disposed of within a period of 24 months beginning on the day on which the vendor under the agreement acquired <u>the property</u>." The sale and disposal of new units under a redevelopment project does not fall under section 29CA(2), and is therefore not SSD-chargeable.</p>
<p>Tai Hung Fai Enterprise Co Ltd (LC Paper No. CB(1) 2080/10-11(01) 18.4.2011)</p>		
<p>The Real Estate Developers Association of Hong Kong (LC Paper No. CB(1) 2080/10-11(02) 20.4.2011)</p>	<p>The sale / transfer of bare sites should be exempted from SSD.</p>	<p>➤ Under the SSD regime, SSD will be chargeable in respect of the disposal of a property which is acquired by the seller under a chargeable agreement for sale or under a conveyance. An Agreement and Conditions of Exchange is neither a chargeable agreement for sale nor a conveyance. It belongs to the same category as grants by the Government, Government leases and surrenders of such grants and leases which are instruments generally exempted from stamp duty under the SDO. The grantee obtains the land through an Agreement and Conditions of Exchange, and SSD is not applicable to the grantee when the grantee sells the land or the residential units constructed thereon to a third party. The third party buyer "acquires" the land or the residential units and when the third party sells the land or the residential units, the dates of the transaction will be taken as the dates of "acquisition" and "disposal of", and SSD will apply if the transaction takes place within 24 months.</p>

The Real Estate  
Developers Association  
of Hong Kong  
(LC Paper No. CB(1)  
2080/10-11(02)  
20.4.2011)

Distribution of unsold units to a party  
under a Development Agreement should  
be exempted from SSD.

- Under the SSD regime, SSD will be chargeable in respect of the disposal of a property which is acquired by the seller under a chargeable agreement for sale or under a conveyance. An Agreement and Conditions of Exchange is neither a chargeable agreement for sale nor a conveyance. It belongs to the same category as grants by the Government, Government leases and surrenders of such grants and leases which are instruments generally exempted from stamp duty under the SDO. The grantee obtains the land through an Agreement and Conditions of Exchange, and SSD is not applicable to the grantee when the grantee sells the land or the residential units constructed thereon to a third party. The third party buyer “acquires” the land or the residential units and when the third party sells the land or the residential units, the dates of the transaction will be taken as the dates of “acquisition” and “disposal of”, and SSD will apply if the transaction is within 24 months.
- We consider 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.
- We have met with the Urban Renewal Authority (URA) and Mass Transit Railway Corporation Limited (MTRCL) to understand their mode of operation and to explain the details of SSD. We understand from URA that it has been adopting a

		<p>flexible approach in handling units which remain unsold within the period as specified in the contract with developers, by allowing extension(s) to the contractual disposal period upon mutual agreement of the URA and the developers concerned in order to provide more time for the developers to market the units. Should its contractual interest not be compromised, URA is also prepared to continue holding the ownership of the unsold units for a longer period until the developer finds a purchaser. URA considers that the introduction of SSD should have no major impact on its residential development projects or its operational arrangements with developers. As regards the residential development projects of the MTRCL, the introduction of SSD should have no particular implications on its projects in the light of its existing mode of operation.</p>
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