



**SUBMISSIONS OF THE LAW SOCIETY'S PROPERTY COMMITTEE ON
THE LATEST GOVERNMENT POSITION ON
THE STAMP DUTY (AMENDMENT) (NO.2) BILL 2010**

1. The Law Society's Property Committee (*"the Committee"*) has made a total of 4 Submissions on the Stamp Duty (Amendment) (No. 2) Bill 2010 and the Committee Stage Amendments (*"CSAs"*) to the Bill to the LegCo's Bills Committee, the last one being made on 15 April 2011. Copy of the Committee's April Submissions is attached at **Appendix A.** (LC Paper No. CB(1) 1946/10-11(01))
2. The Administration responded to the Committee's April Submissions on 4 May 2011. Copies of the Administration's letter dated 4 May 2011 and the enclosed Administration paper are attached at **Appendix B.** (LC Paper No. CB(1) 2080/10-11(04))
3. With a view to shorten the discussion process, the Committee has invited representatives of the Administration to attend a joint meeting on 13 May 2011 to discuss the Committee's outstanding concerns. As a result of the joint meeting, the Administration has provided The Law Society with its further responses on 16 May 2011. Copies of the Administration's letter dated 16 May 2011 and the enclosed Administration paper with the latest revised set of CSAs are attached at **Appendix C.**
4. We noted the Administration stated in their further responses dated 16 May 2011 to The Law Society that in respect of the issues discussed at the last Joint meeting, the Committee *"noted the Administration's position on these issues, and considered them agreeable."* However, we would like to clarify that the Joint meeting was meant to seek clarifications from the Administration on the outstanding issues. Rather than considering the Administration's stance to be agreeable, the Committee has noted the Administration's latest policy, the latest CSAs, their assurance that they will update the Practice Notes and issue performance pledge.

Option to Purchase and Right of Pre-emption

5. The Committee noted the Administration's policy to exempt an instrument conferring an option to purchase or a right of pre-emption in respect of immovable property from payment of SSD. It has no further comment on this policy but would like to reiterate its position as stated in paragraph 7 of its submissions dated 22 March 2011 that it does not think the rationale for the proposed exclusion as put forward by the Administration to be legally sound.

Calculation of the Holding Period

6. The Committee has raised concern in its last submissions in April on the difficulty for parties to property transactions to ascertain under the amended legislation the "*date of acquisition*" of the property for the purpose of calculating the 24 months' holding period to determine whether SSD is payable in certain areas.

Mortgages in favour of non-financial institutions

7. The Administration proposed not to grant exemption from SSD to a "*non-financial institution*" for any enforcement action taken under a mortgage.
8. The Administration confirmed that despite paragraph (c) of the definition of "*agreement for sale*" in section 29A(1) of SDO could cover a genuine mortgage or charge in favour of "*non-financial institutions*", it will not charge SSD on such type of mortgage and will update the Stamp Office's Practice Notes to state this explicitly. As such, this type of mortgage is not a "*chargeable agreement for sale*" under the SDO and could not be regarded as the "*acquisition date*" for the purpose of SSD.
9. As to when the holding period should commence in respect of the enforcement action taken under such type of mortgage, the Administration advised in their letter dated 4 May 2011 to The Law Society that 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*".
10. The Committee queries why the date the property owner (as opposed to the mortgagee) has acquired the property should be taken as the "*acquisition date*" for the purpose of calculating the holding period for the subsequent mortgagee enforcement action and how this will apply in refinancing situations.

Whatever the final decision of the Administration in this regard, for the sake of certainty, the Committee believes that the “*acquisition date*” for this type of mortgagee enforcement actions for SSD purpose should be clearly spelt out in the legislation.

Exchange / Partition

11. The Committee has already pointed out in its last submissions the absurdity of the situation that payment of a HK\$1 equality money in a Deed of Exchange / Partition could produce very different results in term of payment of SSD as compared to the case where no equality money is payable.
12. The Administration confirmed the Committee’s interpretation in their reply dated 4 May 2011 and pointed out that the exchange of an immovable property for another immovable property or the partition of an immovable property is not common.
13. The Committee would like to point out that a Deed of Exchange is commonly used by different property owners to amalgamate their title, sometimes for redevelopment purpose. In the case of Surrender and Re-Grant, the Government may also require owners of adjacent lots to first unify their titles before the surrender and regrant.
14. The Committee does not think that whether equality money is payable or not should be a reference point to determine the “*acquisition date*” for SSD purpose so as to lead to the very different results in the case of exchange of properties.

Transfer of bare sites and first-hand/re-developed residential flats

15. The Committee noted the Government’s policy on sale and purchase of bare sites and residential units subsequently built on the sites concerned. Effectively, if a developer/owner acquires a site and then demolishes the existing building, but for some reason before it rebuilds, it sells the bare site within 2 years, SSD is payable. But if another developer then acquires the already bare site and then constructs a new building thereon and sells the residential units within 2 years, it is exempted.
16. This is a policy matter on which the Committee has no particular comment. However, for the sake of certainty, the Bills Committee should ensure that the Administration’s position should be clearly embodied in the Bill.

17. The Committee has some drafting comments on the new S. 29CA(3A) and S.29DA(3A):
- (a) there are too many “*buildings*” in the new S. 29CA(3A) and S.29DA(3A), which are a bit confusing. The Administration should perhaps consider slightly amending S. 29CA(3A)(c) and S. 29DA(3A)(c) to contrast references to the new building to be constructed and the demolished building; and
 - (b) the exemption to developers under the new S. 29CA(3A) and S.29DA(3A) is of limited use because it requires that under subsection 3A(a), the building “*is constructed*” when at the time of sale, the building is /are most likely to be ONLY “*in the course of being constructed*”.

Counting of the holding period of a property under the various exemption scenarios

18. The Committee noted the Administration’s position that where a person disposes of a residential property which he acquired under an agreement for sale that is not chargeable with SSD by virtue of the new S. 29 CA (7) or (8), the date of that agreement for sale will nevertheless be the date of “*acquisition*” of the property for the purpose of determining SSD liability in respect of such disposal under the SSD regime.
19. The Committee queries whether the same policy will apply regarding the exemption scenarios mentioned in the existing S. 39 of the SDO.
20. The Committee would like to ascertain how this position has been reflected in the presently amended Bill. To avoid future dispute, express provisions should be included to explain clearly how the holding period for such type of cases should be counted.

Liability of Purchasers to pay Additional SSD

21. The Committee has raised concern on the liability of purchasers to pay additional SSD.
22. The Bill provides that the amount of SSD payable is based on the stated consideration for the transaction *or the market value of the property as assessed by the Collector of Stamp Revenue, whichever is the higher* and that both the

vendor and the purchaser will be held jointly and severally liable for payment of the SSD.

23. Whilst this is no different from the AVSD situation, this would work unduly harsh on the purchaser so far as SSD is concerned. Any person who fails to pay the SSD by the deadline for payment will be liable to penalties up to 10 times the amount of the SSD payable and evasion of SSD by fraudulent practices shall be a criminal offence. Under Section 15(1) of the Ordinance, i.e. any chargeable instrument which is not duly stamped is not admissible in evidence in any proceedings. Moreover, an instrument which has not been duly stamped will not be accepted for registration and this could affect the title of the property.
24. The Committee does not think the law in aiming to curb short term speculation by the “*vendor*” in a resale situation should penalize the purchaser. Solicitors will not be able to insert appropriate clauses for the protection of their purchaser client in the formal agreement if such provisions have not been included in the provisional agreement in the first place. Even if there are such provisions in the provisional agreement, they could hardly assist the purchaser should additional SSD be assessed by the IRD on a future date to the payable; it is very unlikely that the vendor could be traceable. Nor can the purchasers protect themselves by lodging the document with the IRD for adjudication of stamp duty given that the adjudication process would take time but the purchasers are subject to a time limit for registration in order for the transaction to gain priority.
25. The Committee therefore submitted that to be fair to the purchaser, if he is to be made liable for payment of SSD at all, (1) his liability to pay SSD should be limited to the stated consideration in the document; and (2) for conveyancing purpose, document stamped up to the stated consideration in the document should be deemed to have been duly stamped for all purposes save and except the vendor’s personal liability to pay the additional SSD; and (3) there should be a time limit on the stamp duty adjudication process.
26. The Committee regretted to note that in response, the Administration only agreed to provide a performance pledge to assess additional SSD within 40 days after the submission of application for stamping.
27. As explained before, assessment of additional stamp duty after completion of

transaction could have adverse implications for purchasers unless appropriate provisions were included in the agreement to cater for this possible liability. Not only will they be liable to pay the additional stamp duty assessed when this should otherwise be the obligation of the vendor under the contract, it could also affect their ability to obtain mortgage loan for completion purpose as some mortgagee banks would require confirmation of payment of "all" stamp duty as a condition for loan drawdown on completion date.

28. The Committee suggests that either the liability to pay additional SSD should rest purely with the vendor as suggested previously or the Administration should liaise with and require estate agents to include appropriate provisions in the preliminary agreements to cater for payment of SSD. Otherwise, solicitors acting for the purchasers would have their hands tied at the formal agreement stage and the purchasers would be victimized.
29. For the 40 days pledge, the Committee suggested including a similar provision in the Ordinance as S. 4(5) of the SDO to set a time limit on the IRD for the recovery of additional SSD.

Deferment of Stamp Duty

30. At present, the Stamp Office still accepts application for deferred payment of stamp duty on agreements for sale and purchase of residential property the consideration of which does not exceed HK\$20,000,000. The Committee understands that no deferred payment of stamp duty will be allowed after passing of the Stamp Duty (Amendment) Ordinance. Does it mean that for those cases in which applications for deferred payment of stamp duty have been made before passing of the Ordinance, the stamp duty will become immediately payable after passing of the Ordinance?

**The Law Society of Hong Kong
The Property Committee
18 May 2011**

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The Government of the Hong Kong Special Administrative Region

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16 May 2011

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,

At the meeting on 13 May 2011 when the representatives from the Inland Revenue Department (IRD), the Department of Justice (DOJ), and the Transport and Housing Bureau (THB) met the Chairman and some Members of the Property Committee of the Law Society of Hong Kong (the Law Society), the Administration explained to the Property Committee that it is not the policy intention of the Administration to charge Special Stamp Duty (SSD) on the sale of first-hand residential properties, that the definition of "agreement for sale" in section 29A(1) of the Stamp Duty Ordinance (Cap. 117) (SDO) has no application in respect of a bona fide mortgage or charge, how the holding period of a property will be counted under the various exemption scenarios, and IRD's pledge to complete adjudication cases involving SSD within a prescribed period of time.

The Property Committee noted the Administration's position on these issues, and considered them agreeable. For clarity, we set out our position in greater detail in the paragraphs below.

Application of SSD on the sale of first-hand residential properties

As explained at the meeting with the Law Society on 13 May 2011, it is not our policy intention to apply SSD to the sale of first-hand residential properties. We attach the Administration's paper of 13 May 2011 to the Bills Committee which sets out, among other things, that:

- (a) when a developer purchases a bare site, builds on it, and then sells the flats built thereon within 24 months, SSD is not applicable regardless of whether the developer purchases the piece of land from the Government or from another developer; and
- (b) the sale/transfer of redeveloped residential flats on a piece of land after demolition of the original properties acquired thereon will not be SSD-chargeable.

As mentioned in paragraph 11 of the aforementioned paper to the Bills Committee, the Administration has added new sections 29CA(3A) and 29DA(3A) into the Stamp Duty (Amendment) (No. 2) Bill (the Bill) to set out clearly our aforementioned position for Bills Committee's consideration. The full set of the latest Committee Stage Amendments (CSAs) to the Bill is at Annex to the paper (attached).

Bona fide mortgage or charge

As explained at the meeting with the Law Society on 13 May 2011, IRD has consistently taken the view that paragraph (c) of the definition of "agreement for sale" in section 29A(1) of SDO has no application in respect of a bona fide mortgage or charge. This kind of instrument confers no immediate or automatic right of sale of property. Instead, the mortgagee will exercise its rights only in the case of a mortgagor's default. As such, a bona fide mortgage or charge is not considered as an agreement for sale as defined and is therefore not chargeable with ad valorem stamp duty. IRD will update the Stamp Office Interpretation and Practice Notes No.1 (Revised) – "Stamping of Agreements for Sale and Purchase of Residential Property" upon the enactment of the Bill, to state explicitly that a bona fide mortgage or charge is not considered as an agreement for sale as defined and is therefore not chargeable with SSD. We have set this out in paragraphs 12 – 14 of the aforementioned paper to the Bills Committee.

IRD's pledge to complete adjudication cases involving SSD within a prescribed period of time

We note the Law Society's concern about the uncertainty of liability to the buyer/seller in the case of additional SSD in a transaction. 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 has pledged to complete adjudication cases involving SSD within 40 days after the submission of application for stamping, including issuing the assessment demanding further duty for cases which the Stamp Office considers the stated consideration inadequate.

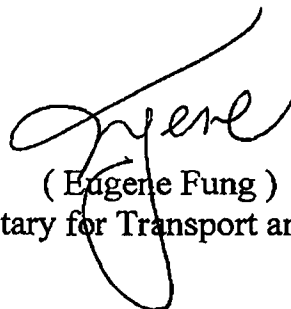
Counting of the holding period of a property under the various exemption scenarios

Under the proposed sections 29CA(2) and 29DA(2) of SDO in clauses 8 and 10 of the Bill, SSD will be chargeable in respect of the disposal of a residential property within 24 months beginning on the day on which the property is acquired by the vendor under a chargeable agreement for sale or under a conveyance. Under the Administration's proposed CSAs submitted to the Bills Committee, when there is more than one chargeable agreement for sale in a transaction, the signing date of the earliest agreement will be taken as the date of acquisition or disposal of the property.

The proposed section 29CA(7) and (8) in clause 8 of the Bill as amended by the CSAs provides that SSD does not apply to those chargeable agreements for sale as set out in that section. The applicable exemptions include SSD does not apply to (i) the 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; (ii) involuntary sale or transfer of properties made by the courts or pursuant to court orders; (iii) involuntary sale of mortgaged properties in various forms by a mortgagee which is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap. 112), or by a receiver appointed by such a mortgagee; (iv) the 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; and (v) the sale of property due to bankruptcy/involuntary winding up.

If a person disposes of a residential property which he acquired under an agreement for sale that is not chargeable with SSD by virtue of section 29CA(7) or (8), for the purpose of determining SSD liability in respect of such disposal under the SSD regime, the date of that agreement for sale will nevertheless be the date of "acquisition" of the property.

Yours sincerely,



(Eugene Fung)

for Secretary for Transport and Housing