

香港特別行政區政府
The Government of the Hong Kong Special Administrative Region

運輸及房屋局
香港九龍何文田佛光街
33號



Transport and Housing Bureau
33 Fat Kwong Street, Ho Man Tin,
Kowloon, Hong Kong

本局檔號 Our Ref. HDCR4-3/PH/1-10/2
來函檔號 Your Ref.

電話 Tel No. 2761 5094
圖文傳真 Fax No. 2761 7444

香港中環昃臣道8號
立法會秘書處
《2010年印花稅(修訂)(第2號)條例草案》委員會
法案委員會秘書
余麗琮女士

[傳真：2869 6794]

余女士：

在二零一零年十二月十七日舉行的
《2010年印花稅(修訂)(第2號)條例草案》委員會會議

繼2010年12月17日首次法案委員會會議，現附上稅務局與地產代理監管局、香港律師會、香港稅務學會，以及主要地產代理業界代表，就額外印花稅事宜的書信供委員參考。

就首次會議所提到的其他跟進事項，我們會於稍後予以書面回覆。

運輸及房屋局局長

(馮建業  代行)

二零一零年十二月二十日



稅務局
香港灣仔告士打道5號
稅務大樓

INLAND REVENUE DEPARTMENT

REVENUE TOWER,
5 GLOUCESTER ROAD, WAN CHAI,
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File No.: SDO-11-10-1-4

Ms Rosanna HO (何潔芝)
Chairman,
Property Agents Association Ltd,
2/F, Eton Tower, 8 Hysan Avenue
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Tel. No.: 2594 3161

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Fax No.: 2519 6740

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Date of Issue:

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(Fax No. 3905 9893)

何主席:

有關修訂《印花稅條例》的建議

財政司司長剛宣布，政府將建議修訂《印花稅條例》。現將有關建議的主要部分列出，供貴會會員參考。

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印花稅署高級總監 康偉權 康偉權

2010年11月19日



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朱建蘭女士

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印花稅署高級總監 康偉權 康偉權

2010年11月19日

第678(1)號 (4/2006)

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Mr Tony KWOK (郭德亮),
Chairman,
Property Agencies Association Ltd,
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有關修訂《印花稅條例》的建議

財政司司長剛宣布，政府將建議修訂《印花稅條例》。現將有關建議的主要部分列出，供貴會會員參考。

(一) 在現有的從價印花稅之上，引入一項「額外印花稅」，適用於以個人或公司名義在2010年11月20日(即明日)或以後購入，並在購入後二十四個月內轉售的住宅物業交易。「額外印花稅」分三級稅率：六個月或以內轉售的交易，稅率為該轉售交易金額的15%；在超過六個月但在十二個月或以內轉售，稅率為10%；在超過十二個月但在二十四個月或以內轉售，稅率為5%。「額外印花稅」須在簽署買賣合約後30天內繳交，買賣雙方有共同法律責任繳付「額外印花稅」，所以假若賣方沒有履行責任繳付「額外印花稅」，稅務局亦可以向買方追討該稅款。

(二) 取消所有的住宅物業交易延遲繳交從價印花稅的安排，將於修訂法例生效後開發實施。

上述措施的具體安排和執行細節，請參閱本局網頁www.ird.gov.hk (常見問題)。如有查詢，可致電2594 3162與高青青或2594 3161與本人聯絡。

印花稅署高級總監 康偉權 康偉權

2010年11月19日

你提供的資料將用於稅務用途，本局亦可將部分資料交給法和稅務接收的其他人士，除上述人員外，不得轉交。另請的記你人，你亦應要求在大改正個人資料，有關申請請以書面向稅務局提出。
The Department will use the information provided by you for tax purposes and may give some of the information to other parties authorized by law to receive it. Subject to exemptions under the Personal Data (Privacy) Ordinance, you have the right to request access to or correction of personal data. Such request should be addressed to the Assessor.



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香港灣仔告士打道5號
稅務大樓

INLAND REVENUE DEPARTMENT
REVENUE TOWER,
5 GLOUCESTER ROAD, WAN CHAI,
HONG KONG.

網址 Web site: www.ird.gov.hk

來函請寄「香港郵政總局郵箱132號稅務局局長收」
ALL CORRESPONDENCE SHOULD BE ADDRESSED TO:—
COMMISSIONER OF INLAND REVENUE,
G.P.O. BOX 132, HONG KONG.

來函編號:

Your Ref.:

來函請註明本局檔案號碼

IN ANY COMMUNICATION PLEASE QUOTE OUR FILE NO.

檔案號碼:

File No.:

SDO-11-10-4-1(3)

Mr Raymond Ho,
Secretary General,
The Law Society of Hong Kong,
3rd Floor, Wing On House,
71 Des Voeux Road, Central,
Hong Kong.

電話:
Tel. No.: 2594 3161
傳真號碼:
Fax No.: 2519 6740
電郵:
E-mail:
發出日期:
Date of issue:

19 November 2010

(BY HAND)

Dear Mr Ho,

Stamp Duty Ordinance
Stamping of Agreements for Sale and Purchase / Assignment

I refer to the announcement made by the Financial Secretary today.

As you are aware, the Financial Secretary has proposed to introduce, on top of the current ad valorem stamp duty, a Special Stamp Duty (SSD) on transactions in residential properties for all values at the point of resale if the properties are acquired on or after 20 November 2010 and resold within 24 months after acquisition; and to cancel deferred payment of the current ad valorem stamp duty for all residential property transactions valued at \$20 million or below. A Bill to introduce these amendments will be tabled to the Legislative Council shortly. Pending the enactment of the legislative proposals, details of the proposed SSD as well as the procedures for stamping SSD on agreements for sale of residential properties (or on the conveyance on sale, if not preceded by a chargeable agreement for sale) and the arrangements on disallowing deferred payment of stamp duty are set out below for information and appropriate actions.

(1) Special Stamp Duty

(a) Persons liable to SSD and time for stamping

All residential properties acquired on or after 20 November 2010 and resold within 24 months will be subject to the SSD. Payment of the SSD, however, will only be required after the coming into force of the new law. The seller and the buyer will be jointly and severally liable for the SSD. In respect of chargeable agreements for sale executed between 20 November 2010 and the date of entry into force of the new law, any applicable SSD has to be paid within 30 days from the date of the entry into force. Parties to the agreements for sale (or conveyances on sale, if applicable) shall submit the executed

chargeable agreements (or assignments) for stamping of the SSD after the entry into force of the new law.

In respect of chargeable agreements executed after the entry into force of the new law, the time of stamping is 30 days of the execution of the chargeable agreement.

To protect the interest of the buyer, the solicitor representing the buyer may consider to stakehold part of the purchase money for the property to meet the impending SSD liability in case the seller agrees to bear the SSD liability.

(b) SSD rates

The SSD is calculated based on the stated consideration for the transaction or the market value of the property, whichever is higher, at the following rates for different holding periods by the seller before the transaction-

- (i) 15% if the property has been held for six months or less;
- (ii) 10% if the property has been held for more than six months but for 12 months or less;
- (iii) 5% if the property has been held for more than 12 months but for 24 months or less.

The holding period of a property is the period of time between the date of acquisition of the property and the date of disposal of the property. Subject to the drafting and passage of the amendment ordinance, the date of acquisition of a property is the date on which the interest in the property is acquired under any enforceable instrument providing for the sale and purchase or other disposition of the property. As a corollary, the date of disposal of a property is the date on which the interest in the property is disposed of under any enforceable instrument providing for the sale and purchase or other disposition of the property. In practice, such date(s) would generally be the date of the formal sale and purchase agreement.

(c) Exemptions

Exemptions for the SSD are proposed for the following cases: -

- (i) Nomination of a close relative to take up the assignment of a property under a sale and purchase agreement ("close relative" means parent, spouse or child);
- (ii) Sale or transfer of a property to close relatives;
- (iii) Sale or transfer of a property due to bankruptcy or involuntary winding up;
- (iv) Sale or transfer of a property between associated companies; and
- (v) Sale or transfer of a property to Government.

(d) Refund

In case the agreement for sale and purchase is cancelled (not because of further resale), the person who paid the SSD can apply for refund of the SSD within 2 years after the agreement has been cancelled.

(e) Sanctions

Upon the entry into force of the new law, any liable person who fails to pay the SSD on time shall be liable to penalties up to 10 times the amount of the SSD payable, and any unpaid SSD and penalty shall become a civil debt due to the Collector of Stamp Revenue. Evasion of SSD by fraudulent practices shall be a criminal offence, same as for the existing stamp duty.

(2) *Cancellation of deferred payment of stamp duty*

For residential property transactions valued at \$20 million or below, the option to defer payment of stamp duty chargeable on the agreements for sale and purchase of residential property executed on or after the entry into force of the new law will be withdrawn.

- (a) Where a provisional agreement executed before the entry into force of the new law is superseded by a formal agreement made on or after the entry into force of the new law, and the latter is made within 14 days from the date of the former, deferred payment of stamp duty is not applicable as the formal agreement is executed on or after the entry into force of the new law.
- (b) Where a provisional agreement executed before the entry into force of the new law is superseded by a formal agreement made on or after the entry into force of the new law but outside the period of 14 days from the date of the provisional agreement, the former will continue to be chargeable with stamp duty. Deferred payment of stamp duty is still applicable to the provisional agreement provided that the application is made within 30 days from its date of execution.
- (c) Where only one agreement for sale and purchase is executed under section 29B of the Stamp Duty Ordinance, be it provisional or formal, deferred payment of stamp duty is not applicable if the agreement is executed on or after the entry into force of the new law.

(3) *Stamping procedures*

A: From 20 November 2010 onwards up to the date before the date on which the amendment ordinance came into force

Chargeable documents relating to residential properties will continue to be submitted to the Stamp Office for stamping as under the existing practice (including e-stamping service). Deferment for the stamp duty payments can also be applied in appropriate

cases (and will be approved) as usual. The Stamp Office will record cases in which the property was acquired on or after 20 November 2010 and resold within 24 months. Once the amendment ordinance enters into force, the parties to such transactions will have to pay the applicable SSD within 30 days of the in-force date, failing which penalties will apply. The Stamp Office will also remind the handling solicitors about the SSD liability (with copies to the parties concerned).

B: As from entry into force of the amendment ordinance

Under section 11 of the Stamp Duty Ordinance, all the facts and circumstances affecting the liability of any instrument to stamp duty, or the amount of the stamp duty chargeable on an instrument, are to be fully and truly set forth in the instrument. Therefore, any chargeable document relating to residential properties shall clearly state therein the date of acquisition of the property by the vendor, the date of disposal of the property (which is not necessarily the date of the document presented for stamping), and the holding period of the property. If any SSD is payable on the instrument, both the basic ad valorem stamp duty and the SSD must be paid before the instrument will be accepted for stamping by the Stamp Office. The stamp requisition form (or the e-stamping screens in the case of the e-stamping service) will also be amended to facilitate the stamping process. More detailed guidelines will be issued nearer the time.

If you or your Members have any further enquiries, please feel free to contact Ms KO Ching-ching at 2594 3162, or the undersigned at 2594 3161.

Yours sincerely,



(HONG Wai-kuen)
for Collector of Stamp Revenue



THE

LAW SOCIETY
OF HONG KONG

香港律師會

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WEBSITE (網頁) : www.hklawsoc.org.hkOur Ref :
Your Ref :
Direct Line :PPTY
SDO-11-10-4-1(3)

BY FAX (25196740) AND BY POST

23 November 2010

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王桂壠

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Secretary General

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Raymond C.K. Ho

何志強

Deputy Secretary General: No.139299

副秘書長

Heidi K.P. Chu

朱潔冰

Mr. Hong Wai-kuen,
Office of the Collector of Stamp Revenue,
Inland Revenue Department,
Revenue Tower,
5 Gloucester Road,
Wanchai,
Hong Kong.

Dear Mr. Hong,

Stamp Duty Ordinance

Stamping of Agreements for Sale and Purchase/Assignment

Thank you for your letter dated 19 November 2010 advising of the Government's proposed new policy to, inter alia, introduce a Special Stamp Duty ("SSD") on transactions in residential properties for all values at the point of resale if the properties are "acquired" on or after 20 November 2010 and resold within 24 months after acquisition. We have circulated your letter to our members for information.

Under paragraph 1(b) of your letter, the holding period of a property is the period of time between the "date of acquisition" of the property and the date of disposal of the property. It is further stated that the date of "acquisition" of a property is the date on which the interest in the property is "acquired" under any enforceable instrument providing for the sale and purchase or other disposition of the property.

We understand that the Government will introduce a Bill on the proposed amendments for SSD and consult the views of Law Society on its provisions.

However, as the new legislation is intended to affect transactions "acquired" on or after 20 November 2010, pending enactment of the new legislation, we need to seek urgent clarification from the Government on the meanings of "acquired" and "date of acquisition" in your letter, i.e. at what point of time the parties are regarded to have "acquired" the property for the purpose of the new legislation?

.../P.2

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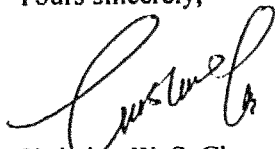
Incorporated in 1907 with limited liability

- 2 -

It appears from the last sentence of paragraph 1(b) of your letter that this should generally mean the date of "*formal sale and purchase agreement*" when as a matter of practice, the parties will usually enter into a "*binding*" preliminary agreement at the estate agent's office.

We shall appreciate your urgent clarification on the above as you will appreciate that the answer to the question raised is essential to enable our members to properly advise their clients of their rights and liabilities in conveyancing transactions.

Yours sincerely,



Christine W. S. Chu
Assistant Director of Practitioners Affairs

P.28

SDO-11-10-4-1(3)

Ms. Christine W. S. Chu
Assistant Director of Practitioners Affairs,
The Law Society of Hong Kong,
3rd Floor, Wing On House,
71 Des Voeux Road, Central,
Hong Kong.

2594 3161

2519 6740

26 November 2010

By Fax (2845 0387) and By Post

Dear Ms. Chu,

Stamp Duty Ordinance
Stamping of Agreements for Sale and Purchase / Assignment

I refer to your letter dated 23 November 2010.

For the purpose of determining the holding period so as to ascertain the liability of the proposed Special Stamp Duty (SSD), the Stamp Office's view is that a person "acquires" a property if he enters into a specifically enforceable agreement with a seller for the sale or purchase of that property – i.e. one that is binding on the seller to transfer the property, not one that allows the seller to renege on a return of the deposit with/without compensation. The reason is that under such a specifically enforceable agreement, the purchaser becomes the equitable owner of the purchased property. Hence, if there is no specific clause in the provisional agreement allowing the buyer a right to claim specific performance from the seller, it is not a binding agreement for the purpose of the SSD.

If you or your Members have any further enquiries, please feel free to contact Ms KO Ching-ching at 2594 3162, or the undersigned at 2594 3161.

Yours sincerely,



(HONG Wai-kuen)
for Collector of Stamp Revenue



稅務局
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稅務大樓

INLAND REVENUE DEPARTMENT

REVENUE TOWER,
5 GLOUCESTER ROAD, WAN CHAI,
HONG KONG.

網址 Web site: www.ird.gov.hk

來函請寄「香港郵政總局郵箱132號稅務局局長收」

ALL CORRESPONDENCE SHOULD BE ADDRESSED TO:—
COMMISSIONER OF INLAND REVENUE,
G.P.O. BOX 132, HONG KONG.

來函編號:

Your Ref.:

來函請註明本局檔案號碼

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檔案號碼:

File No.: SDO-11-10-1-4

Mrs Rosanne URE
Chief Executive Officer
Estate Agents Authority
Room 4801, 48/F, Hopewell Centre
183 Queen's Road East
Wanchai, Hong Kong

電話:

Tel. No.: 2594 3161

傳真號碼:

Fax No.: 2519 6740

電郵:

E-mail:

發出日期: 30 November 2010

Date of issue:

(BY FAX)

(Fax No. 2598 9596)

Dear Mrs Ure,

Re: Stamp Duty (Amendment) (No. 2) Bill 2010

I wish to advise that the Stamp Duty (Amendment) (No. 2) Bill 2010 relating to the proposed Special Stamp Duty (SSD) will be published in the Gazette on 3 December 2010, the coming Friday.

To facilitate the implementation of the SSD upon the enactment of the law and to make arrangements for the interim, we would like to propose a briefing session with the Administration of the Estate Agents Authority to explain the technical and procedural matters relating to the proposed SSD. Details of the meeting are:

Date: 3 December 2010 (Friday)

Time: 2:00 p.m. – 3:30 p.m.

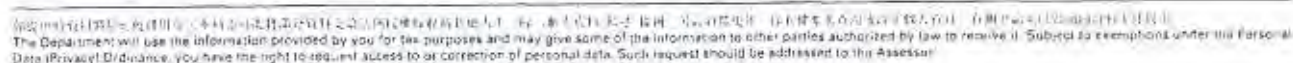
Venue: Conference Room 1, 36/F., Revenue Tower, 5 Gloucester Road, Wanchai

Please let me know the names and post titles of participants from your office via e-mail (taxsdo@ird.gov.hk) or fax (2519 6740) on or before 2 December 2010 for the necessary pre-meeting arrangements.

If you have any further enquiries, please feel free to contact Ms CHAN Ut-chan at 2594 3178, or the undersigned at 2594 3161.

Yours sincerely,

(HONG Wai-kuen)
for Collector of Stamp Revenue





THE
LAW SOCIETY
 OF HONG KONG
 香港律師會

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 WEBSITE (網頁) : www.hklawsoc.org.hk

Our Ref : PPTY
 Your Ref : SDO-11-10-4-1(3)
 Direct Line :

BY FAX (25196740) AND BY POST

1 December 2010

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 倪廣恒

Mr. Hong Wai-kuen,
 Office of the Collector of Stamp Revenue,
 Inland Revenue Department,
 Revenue Tower,
 5 Gloucester Road,
 Wanchai,
 Hong Kong.



URGENT

Dear Mr. Hong,

Stamp Duty Ordinance
Stamping of Agreements for Sale and Purchase/Assignment

Thank you for your letter dated 26 November 2010, which we have circulated for our members' attention.

We have received further queries from our members on the Government's new policy on Special Stamp Duty. You will appreciate that the Government's new policy, which is intended to have retrospective effect, has created difficulties for our members to give clear legal advice to parties to conveyancing transactions in their daily practice. Pending sight of the Amendments Bill, neither the Law Society nor its members is in a position to truly appreciate the implications of the impending legislation. In this regard, for the interest of the public, we have extracted the following queries from our members (which the Government may like to consider when drafting the Amendments Bill) and shall appreciate the Government's urgent clarifications:

1. "I refer to the letter dated 26th November 2010 from Collector of Stamp Revenue to you. It appears that the said letter tends to mess up (but not clarify) the matter. At common law, the court will grant a decree of specific performance against the defaulting party in the absence of any stipulation in the

.../P.2

Secretary General
 秘書長
 Raymond C.K. Ho
 何志強

Deputy Secretary General I: No.139299
 副秘書長
 Heidi K.P. Chu
 卡潔冰

Incorporated in 1907 with limited liability

同心展關懷
 caringorganisation
 2009/10
 Awarded by The Hong Kong Council of Social Service
 香港社會服務聯會頒發

agreement clearly operating to preclude the other party from claiming that remedy. Now, the Collector of Stamp Revenue tends to suggest that a provisional agreement is not binding for the purpose of special stamp duty unless the said agreement contains an express term as to right of specific performance. Please assist to clarify the matter."

2. "The reply of the Collector of Stamp Revenue dated 26th November 2010 circulated today is well noted. However, it appears that the reply has not taken into account of the scenario as set out in my earlier email, i.e. due to the mere fact that the terms and conditions of the Formal SP cannot be agreed upon between the parties' respective solicitors on or prior to the intended date (which is on or before 19th November 2010) of entering into of the Formal SP (which is very usual in actual conveyancing practice), and hence no Formal SP has ever been entered into, or the said Formal SP was only entered into after 19th November 2010 due to the aforesaid reason, but the transaction was nevertheless still completed according to the terms of the PASP after 19th November 2010. In such scenario, though the Formal SP has not been entered into or entered into only after 19th November 2010, the PASP is all along treated by the parties as a binding agreement.

I think the aforesaid practice is adopted by all practitioners in line with the judgments like Allied Asset Limited v Kenley Investment Limited (HCA 4614/98), Chu Wing Ning v Ngan Hing Cheung & Another (HCA 9409/91), etc. In fact, all purchasers in whom cases the Formal SP cannot be entered into on or prior to 19th November 2010 have been so advised. The Collector's different approach would create an extreme unjust result to such group of purchasers.

In such circumstances, I would urge the Law Society to address the Collector on the aforesaid point and let practitioners have a further clarification as soon as possible."

3. "I refer to your Circular to members today regarding the above inviting members to give comments.

As you may read in the newspapers last week, Mr. David Webb opined that the new arrangement may be against the Basic Law of HKSAR in, inter alia, fettering property owners' right to acquire or dispose of their property.

.../P.3



- 3 -

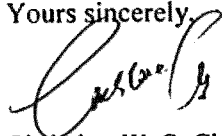
I think this query may be worth exploring further by the Law Society. Apart from this query, I may also bring forth another query, i.e. whether such proposed legislation may constitute the taking of "retrospective" effect (and thus open to challenge in the Courts in the future) in that acquirers of property prior to 20.11.2010 may consider trading their property subsequently, and the legislation would have frustrated such intention. Had they known of the hurdle in the shape of SSD imposed on the parties, they might not have acquired the property before 20.11.2010 in the first place, and may have invested in other areas such as stock market etc. without such hurdle.

Certain exemptions from SSD are allowed for close relatives etc. What about the position of sale by Mortgagee within 24 months? Is the Mortgagee liable to bear the SSD? What if the foreclosed property price cannot cover the Mortgage loan? Will this deter banks from advancing mortgage loans to "genuine" buyers who intend the property for their own residence purpose? This point was not canvassed from the letter of Mr. Hong Wai Kuen of IRD dated 19.11.2010. Moreover, the mortgagee may be a bank genuinely providing a mortgage loan, or a person/company related to the property acquirer. If the IRD is desirous of fine-tuning this aspect, will any distinction be made between licensed banks from private lender/mortgagees?"

4. *"If a mortgagee has taken possession of a mortgaged property by virtue of the mortgagor's default, will that constitute an acquisition of the mortgaged property and therefore the mortgagee's subsequent sale of the property is subject to the now Special Stamp Duty arrangement?"*

As we shall be issuing our weekly Circular to members on next Monday, your reply by this Friday noon will be appreciated.

Yours sincerely,



Christine W. S. Chu
Assistant Director of Practitioners Affairs

P.41



稅務局
香港灣仔告士打道5號
稅務大樓

INLAND REVENUE DEPARTMENT

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網址 Web site: www.ird.gov.hk

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G.P.O. BOX 132, HONG KONG.

來函編號: PPTY
Your Ref.: PPTY

來函請註明本局檔案號碼

IN ANY COMMUNICATION PLEASE QUOTE OUR FILE NO.

檔案號碼: SDO-11-10-4-1(3)

File No.:

Ms. Christine W.S. Chu,
Assistant Director of Practitioners Affairs,
The Law Society of Hong Kong,
3rd Floor, Wing On House,
71 Des Voeux Road, Central,
Hong Kong.

電話: 2594 3161

Tel. No.:

傳真號碼: 2519 6740

Fax No.:

電郵:

E-mail:

發出日期:

Date of Issue: 10 DEC 2010

BY FAX (2845 0387) & BY POST

Dear Sir/ Madam,

Stamp Duty Ordinance
Stamping of Agreements for Sale and Purchase / Assignment

I refer to your letter dated 1 December 2010 and our meeting on 3 December 2010 during which we have explained the technical and procedural matters relating to the proposed SSD to you and your members of the Property Committee.

Your members raised several queries on the proposed SSD in the said letter. I am going to address some of them relating to the technical and procedural matters below while for the others relating to the policy issue of the proposed SSD, I hope you will understand that it is beyond our scope to give you a reply.

(1) "Acquires" a property

For the purpose of the proposed SSD, a person "acquires" any residential property when equitable ownership or legal ownership of the property is passed to the person (whichever occurs first). The Stamp Office takes the view that a person "acquires" a property if he enters into a specifically enforceable agreement with a seller for the sale or purchase of that property. 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. Specific performance is a discretionary remedy and it will not be granted if it is considered that compensation would be an adequate remedy. Therefore, whether a provisional agreement is a specifically enforceable agreement in respect of the sale or purchase of the property or not depends on the terms stated in the agreement.

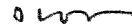
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(2) Sale by Mortgagee

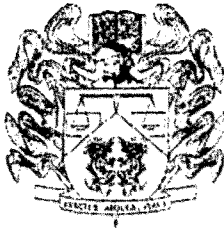
A mortgagee (licensed banks or private lender/mortgagee the same) takes possession of a mortgaged residential property by means of such as foreclosure order on or after 20 November 2010, and resold within 24 months will be subject to the proposed SSD. This is because the mortgagee acquires the property upon taking possession of it. Of course, if the mortgagee only sells the pledged property by exercising the right granted, say under a standard mortgage deed, which he only acts as the mortgagor's attorney and sells the property on behalf of the mortgagor. He will not be subject to the proposed SSD because he has not acquired the property.

If you have any further enquiries, please feel free to contact Ms CHAN Ut-chan at 2594 3178, or the undersigned at 2594 3161.

Yours faithfully,



(HONG Wai-kuen)
for Collector of Stamp Revenue



香港稅務學會

THE TAXATION INSTITUTE OF HONG KONG

(Incorporated in Hong Kong as a company limited by guarantee)

1 December 2010

BY HAND

Mr. Y.Y. Chu
Commissioner of Inland Revenue
Inland Revenue Department
Revenue Tower
5 Gloucester Road
Wanchai
Hong Kong

Dear Mr. Chu,

Special Stamp Duty

We write in response to the proposed tax measures announced by the Financial Secretary on 19 November 2010. In particular, we would like to set out our views on certain aspects of the Special Stamp Duty ("SSD") and to propose an alternative profits tax regime for the Government's consideration.

Legal and operational issues of the SSD

While we understand that the SSD proposal is subject to detailed legislative process, the Inland Revenue Department (the "IRD") has posted on its website guidance notes on the SSD, including an FAQ.

We refer to Q5 and Q6 of the FAQ. We understand from the responses to those questions that a buyer who signed a provisional agreement for sale and purchase of a property ("PSPA") before 20 November, 2010 (the "Relevant Date") and a formal agreement for sale and purchase ("formal agreement") after such date will be caught by SSD if he sells within 24 months from the date he signs the formal agreement.

The reason given by the IRD in Q5 and Q6 for not using the date of PSPA for the purposes for deterring "acquisition" is that IRD takes the view that the PSPA is not an enforceable or legally binding agreement and there is no enforceable right in relation to the property. It further says that IRD may consider that a PSPA is a legally binding

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agreement if it is provided in the PSPA that legal action would be instituted against the party not completing the transaction.

The Stamp Duty Ordinance (Cap. 117) ("SDO") provides that unless a formal agreement is signed within 14 days of the date of a PSPA, the PSPA is otherwise chargeable to *ad valorem* stamp duty. It is market practice that the parties to a property transaction will sign a PSPA arranged by the estate agents and then sign a formal agreement within 14 days prepared by their solicitors and pay *ad valorem* stamp duty on the formal agreement with the PSPA presented with the formal agreement to the Stamp Office. The IRD's stance of recognizing a formal agreement for the purposes of assessing SSD has the effect of retroactively imposing the SSD (for at least 2 weeks or even more before the Relevant Date in some circumstances).

Section 3 of the Property and Conveyancing Ordinance (Cap 219) provides that

"... no action shall be brought upon any contract for the sale or other disposition of land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorized by him for that purpose."

It is clear from the above provision that in order for a land contract to be enforceable and binding, the only additional requirement a land contract has to have when compared with other contracts is to have it made in writing and signed, in addition to the usual requirements for a simple contract including for example consideration and intention to create a legal relationship.

We believe that a PSPA is binding and enforceable until it is superseded by a formal agreement.

We believe it would create confusion if on the one hand the IRD recognizes a PSPA as a triggering point for the purposes of assessing stamp duty under the SDO but does not regard it to be binding or enforceable for assessing SSD.

To recognize the acquisition date as the date when a formal agreement is signed could be unfair to taxpayers who have signed a PSPA and a formal agreement which straddle the Relevant Date.

In addition, an exemption should be introduced for taxpayer who has been occupying the property as his sole principal residence even if he disposes of the property within 24 months.

Profits Tax on Property Speculation

The IRD is used to charging profits tax on property transaction where such transaction forms part of a trade, profession or business carried out in Hong Kong. While whether profits from property disposal are trading profits will depend on the circumstantial evidence and the original intention of the taxpayer who disposes the property, it would be relatively straightforward to impose profits tax (whether by issuing a new departmental interpretation and practice note or by amending the relevant sections of Inland Revenue Ordinance (Cap. 112)) on property disposals under a number of circumstances where a trading/speculative motive can be inferred (and the profits resulting from which will be subject to profits tax) for example:-

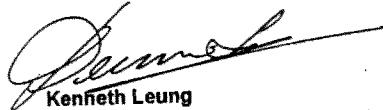
- (1) where a residential property is bought and sold within 24 months after the Relevant Date;
- (2) where a taxpayer buys and sells a second residential property after the Relevant Date; or
- (3) where an overseas company or non-resident individual buys and sells a residential property after the Relevant Date.

The alternative profits tax regime purpose could have the benefit of being more equitable to genuine home purchasers as it will only tax profits and could avoid any retroactive affects.

香港稅務學會
THE TAXATION INSTITUTE OF HONG KONG

We believe that the profits tax charge on property speculation together with other administrative and regulatory measures to curb property speculation should be effective to rationalize the residential property market in Hong Kong.

Yours sincerely,



Kenneth Leung
Chairman, Taxation Policy Committee

c.c. Mr. John Tsang – Financial Secretary, HKSAR



稅務局
香港灣仔告士打道5號
稅務大樓

INLAND REVENUE DEPARTMENT

REVENUE TOWER,
5 GLOUCESTER ROAD, WAN CHAI,
HONG KONG.

網址 Web site: www.ird.gov.hk

來函請寄「香港郵政總局郵箱132號稅務局局長收」

ALL CORRESPONDENCE SHOULD BE ADDRESSED TO:—
COMMISSIONER OF INLAND REVENUE,
G.P.O. BOX 132, HONG KONG.

來函編號：
Your Ref.:

來函請註明本局檔案號碼

IN ANY COMMUNICATION PLEASE QUOTE OUR FILE NO.

檔案號碼：

File No.:

SDO-11-10-1-4

Mr. Kenneth Leung
The Taxation Institute of Hong Kong
21/F., Kam Sang Building
255-257 Des Voeux Road Central
Hong Kong

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2594 5002

傳真號碼：

Fax No.:

2877 1082

電郵：

E-mail:

17 December 2010

發出日期：

Date of Issue:

Dear Mr. Leung,

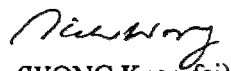
Re: Special Stamp Duty (SSD)

Thanks for your letter of 1 December 2010. Your views have been forwarded to the policy bureau for information and consideration.

On the question of a provisional sale and purchase agreement (PSPA), as SSD is premised on the short-term resale of a residential property, we would need to define a date on which the person acquires (and disposes of) the property. Whilst a PSPA in its usual form is "binding and enforceable" in the sense that it evidences the making of the contract (without which the contract would be unenforceable, as your rightly pointed out) and binds a party who defaults in completing the transaction to pay certain agreed damages, it falls short of providing the buyer with the right to claim for specific performance of the contract against the defaulting seller. Therefore, no beneficial interest in the property passes from the seller to the buyer under the agreement, with the result that the buyer could not be regarded as having "acquired" the property for SSD purposes. Our line of thinking is enshrined in new clauses 29CA(4) and 29DA(7) of the Stamp Duty (Amendment) (No. 2) Bill 2010, where it is provided in both cases that "a person acquires any residential property when equitable ownership or legal ownership of the property is passed to the person (whichever occurs first)".

Thanks again for your views.

Yours sincerely,


(WONG Kuen-fai)

for Commissioner of Inland Revenue

I.R. 表格第 678(1)號 (4/2006)
I.R. 678(1) (4/2006)

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The Department will use the information provided by you for tax purposes and may give some of the information to other parties authorized by law to receive it. Subject to exemptions under the Personal Data (Privacy) Ordinance, you have the right to request access to or correction of personal data. Such request should be addressed to the Assessor.