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31 March 2011

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Clerk to the Bills Committee on Stamp Duty (Amendment) (No.2) Bill 2010  
 Legislative Council Secretariat  
 Legislative Council Building  
 8 Jackson Road  
 Central  
 Hong Kong

Attn: Mrs. Mary TANG/ Ms. Mandy POON

Dear Sirs,

**Re: Comments on the revised Committee Stage Amendments submitted by the Administration to the Bills Committee on 23 March 2011 ("Latest CSAs") on the Stamp Duty Amendment (No.2) Bill 2010 (the "Bill")**

We write on behalf of the members of the Hong Kong Association of Banks ("HKAB") further to our two earlier submissions dated 3 January 2011 ("First Submission") and 18 March 2011 ("Second Submission").

**1. Clarification on when a property is "acquired" and "disposed of"**

1.1 Since our Second Submission, it is noted that in the Latest CSAs, the Administration has specifically excluded "option to purchase" and "right of pre-emption" from the definition of "agreement for sale". They have also clarified in the paper on the Latest CSAs dated March 2011 ("the Paper") the rationale for excluding "option to purchase" and "right of pre-emption". According to paragraphs 8 and 12 of the Paper, these are not regarded as similar to other types of "agreement for sale" as the "equitable ownership" in the property does not pass from the vendor to a purchaser. We are advised that an option to purchase does create an equitable interest in land as the optionee has a right of specific performance upon his acceptance of the offer within the

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 秘書 黃美嫦



terms of the option.<sup>†</sup>

- 1.2 We are glad to note that "right to purchase" under item (b) of the definition of "agreement for sale" is now not excluded. This has therefore removed the ambiguity which we mentioned in paragraph 1.3(b) of our Second Submission.
- 1.3 Assuming that (regardless of our views on "option to purchase" set out in paragraph 1.1 above) you wish to exclude only "option to purchase" and "right of pre-emption", 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. In practice, the triggering event to show an exercise of an option or a right could well be a unilateral written notice by the optionee or the happening of a certain event (without anything in writing). Please clarify if the exercise of the option to purchase or right of pre-emption is automatic upon the happening of another event without any need for any written instrument or notice. Unless this is clarified, the effect could be that, by virtue of S.29CA(4)(b), the relevant date would be the date of the "conveyance". That may be not fair for the optionee who in fact had exercised the option or right earlier.
- 1.4 We recommend 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" for the following reasons:-
  - (a) if this is not clearly defined, there could be cases where a transaction is in substance an "option to purchase" or "right of pre-emption" but the term "option to purchase" or "right of pre-emption" is simply not used or labelled on the document; or
  - (b) definitions will help to categorise properly some agreements in grey areas (for example, a preliminary agreement for sale under the consent

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<sup>†</sup> Lau Suk Ching Peggy v. Ma Hing Lam (2010) 13HKCFA 226: A person who enters into a binding contract or exercises an option to purchase property is regarded as the purchaser of the property from that moment even though he has not yet completed the purchase by paying the purchase price and taking an assignment. The equitable interest in the property is vested in him, and as a matter of language that is sufficient to make him "the purchaser" and the contract a contract "to purchase". (at page 237)



scheme where the sale of an uncompleted flat is legally binding on the vendor but not on the purchaser, and if a purchaser does not proceed to execute the formal agreement for sale and purchase, the purchaser will lose a substantial preliminary deposit of 10% of the purchase price) and to make it clear whether it is an "option to purchase", or a "right of pre-emption" or another type of "agreement for sale".

- 1.5 It should be appreciated that such detailed definitions are not presently required under Section 29A(1) as the definition of "agreement for sale" is used in an all inclusive concept, and so documents which overlap will be caught by the definition. However, a distinction is essential if the present intention is to exclude certain types of transaction.

## **2. Enforcement of Mortgages**

- 2.1 We are glad to note that the Latest CSAs give certain exemptions to mortgagees.

- 2.2 Accordingly, for our members who are "financial institutions" within the meaning of Section 2 of the Inland Revenue Ordinance, the following should be exempted from SSD:-

- (a) a foreclosure order (as well as a sale pursuant to a foreclosure order);
- (b) sale by a mortgagee or receiver appointed by a mortgagee; and
- (c) sub-sales by a mortgagee under equitable mortgages.

- 2.3 However, where a mortgagee is not a "financial institution", there is no exemption. This will mean enforcement of mortgages or equitable mortgages 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.

- 2.4 In addition, it should be noted that there are cases where a "financial institution" may have given up its Authorised Institution status, but is presently still permitted by the Hong Kong Monetary Authority to hold and serve its



existing mortgage portfolio until the redemption of such mortgages (though it cannot accept any new business). Such a "financial institution" may no longer be a "financial institution" under Section 2 of the IRO. In such circumstances, we propose 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.

### **3. Additional SSD based on value of property at time of disposal**

- 3.1 According to the indication given by the Administration to our members at a meeting on 23 March 2011, 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.

We have the following concerns:-

- (a) there is nothing in writing or legislation to reflect this commitment;
- (b) as SSD should be payable by the owner who is selling within the two year period to the purchaser/mortgagor (as opposed to ad valorem stamp duty, which by market practice is payable by the purchaser/mortgagor who remains the owner, and our customer), it will not be easy (if not impossible) to trace or ask the previous owner to pay after the transaction is completed;
- (c) banks will have to receive qualified title opinions from their solicitor where reassessment is still pending; and
- (d) this may effect drawdown or the amount which banks will (at least initially) allow to be drawn down by the purchaser/mortgagor, as consideration needs to be given to the fact that additional SSD may be payable, and the purchaser/mortgagor will either have to pay it himself or locate the previous owner to settle it.



We request that the Administration give further reconsideration to this.

**4. Transfer between associated companies under Section 45**

- 4.1 Some members are sometimes involved in financing of companies who, in the process of redevelopment of properties for the purpose of sale, may have just completed an internal transfer of properties as a result of corporate restructuring.
- 4.2 We note that SSD will not be applicable to certain transfer between associated companies under the amended section 45. In other words, if Company A acquired a residential property on Date X and subsequently transferred the property to its associated company, Company B on Date Y ("**the Transfer**"), assuming all the requirements of section 45 are satisfied for the Transfer, the Transfer will be exempted from the payment of ad valorem stamp duty. In addition, if the period between Date X and Date Y is less than 2 years, the Transfer will also be exempted from SSD under the amended Section 45.
- 4.3 However, the Bill does not deal specifically with the date of acquisition of the property by the transferee. Under the current Bill and based on the Latest CSAs, Company B will still be taken as having acquired the property on the later date of Date Y and not Date X. This "*re-counting of the date of acquisition*" will:
- (a) restrict a company's freedom to dispose of its properties after a group restructuring;
  - (b) create problems for companies which undergo a group restructuring under normal commercial circumstances; and
  - (c) affect banks' financial arrangements that often take place after such a restructuring, and banks will have to take into account this potential tax liability.
- 4.4 Since there is no element of property speculation in these circumstances, we propose that under the circumstances mentioned above, the date of "acquisition" of the property by the transferee company (i.e., Company B

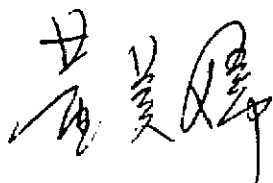
above) should still be taken as the original date of acquisition by the transferor company (i.e. Date X and not Date Y in the above example) for the purpose of assessment of SSD.

**5. Summary of our recommendations not dealt with and which remains of concern to our members**

- 5.1 Additional SSD payable - paragraph 3 above and paragraphs 3 and 4 of our First Submission. We request again that 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. This can be made clear in the legislation.
- 5.2 Associated company transfers — 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.
- 5.3 Adjudication — paragraph 6 of our First Submission — introducing an adjudication mechanism for:-
- (a) the amount of stamp duty which may be payable, and
  - (b) ascertaining whether SSD is payable in advance of a proposed transaction before an instrument is executed.

We thank this honourable Committee again for reviewing our submission. For any questions, please do not hesitate to contact our Manager, Ms. Caris Wan at 2521 1855.

Yours faithfully,



Eva Wong  
Secretary