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

Administration's Response to Issues Raised by Members at the Bills Committee on 19 May 2011

Purpose

Further to the Administration's paper of 24 May 2011 which attached a set of the revised Committee Stage Amendments (CSAs), we provide the Administration's response to the other issues raised at the Bills Committee meeting on 19 May 2011. We also provide the Administration's response to the submission and proposed CSAs from a Bills Committee Member.

The Administration's interpretation of the term "the residential property concerned" in proposed section 29CA(2)

2. Special Stamp Duty (SSD) will be chargeable in respect of the disposal of the same 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. This is reflected in the proposed sections 29CA(2) and 29DA(2) of the Stamp Duty Ordinance (Cap. 117) (SDO) in clauses 8 and 10 of the Bill. At the request of the Bills Committee, the Administration proposed on 13 May 2011 to add in new sections 29CA(3A) and 29DA(3A) to set out clearly that it is not the policy intention to apply SSD to the sale of first-hand residential properties. For further clarity, we have proposed to add a new paragraph (b) under the proposed sections 29CA(3A) and 29DA(3A) in the revised CSAs submitted on 24 May 2011. In gist, the sale/transfer of residential units built on a bare site will not be SSD-chargeable, regardless of whether the developer has acquired the bare site from the Government or from another developer. Sale/transfer of redeveloped residential flats after demolition of the original properties acquired, and the sale/transfer of a bare site after demolition of the original properties acquired will also not be SSD-chargeable.

The application of SSD to the following cases

3. As reflected in the proposed sections 29CA(3A)(b) and 29DA(3A)(b), the sale/transfer of a bare site after demolition of the original building acquired within 24 months is not SSD-chargeable, as the bare site is not the same property as the original building acquired. However, if the developer acquires a building and sells/transfers the same building, the sale/transfer will be SSD-chargeable unless the sale/transfer is between associated companies.

4. If a buyer acquires a property, builds an additional storey and sells the property with the additional storey built thereon within 24 months of acquisition, SSD will be chargeable as appropriate.

Review on the need for SSD every two years

5. As stated in our previous papers to the Bills Committee, the Administration undertakes to review SSD from time to time. Having listened to further views from Members, the Administration is prepared to undertake to review SSD once every 24 months after the enactment of the Bill, or as circumstances require. The Administration will go through the normal legislative process to amend the legislation when SSD is considered no longer necessary.

Submission of 18 May 2011 from the Law Society of Hong Kong

6. The Administration's response to the submission of 18 May 2011 from the Law Society of Hong Kong is at **Annex**.

Submission of 25 May 2011 from a Bills Committee Member

Sale/transfer of bare sites

7. As set out in paragraph 2 above, the way that the Bill and the revised CSAs are drafted now have clearly shown that SSD is not chargeable generally to bare sites. It is only under the scenario when developer A acquires a bare site not from the Government and, instead of building on it, sells/transfers the bare site to developer B within 24 months that SSD will be chargeable. This is because under this scenario, developer A has "acquired" the bare site and subsequently "disposed of"

it. We have carefully considered the proposal to grant exemption to this scenario. Taking into account that the Administration has already proposed in the Bill that transfer (including bare sites) between associated companies be exempted from SSD, and having regard that we cannot rule out the possibility of speculation in this respect and that a specific exemption for this scenario can create loopholes, we consider it is not appropriate to do so. We consider that as long as the law is clearly drafted, developers should be able to flexibly adjust their business strategies and operation in the light of the new taxation environment when the Bill comes into effect, without affecting the supply of first-hand residential properties.

SSD not chargeable for transfer between associated companies but the date when Company A purchased the property rather than the date when its associated Company B purchased the property should be used for counting of the holding period for the purpose of SSD

8. We have proposed in the Bill that the transfer between associated companies will be exempted from SSD.

9. Regarding the counting of the holding period, where Company B disposes of the property which it has acquired from its associated company A, the date on which the property was transferred from Company A to Company B will be considered as the date of acquisition by Company B. This is because while the transfer of a property between associated companies is proposed to be exempted from SSD under the Bill, "acquisition" and "disposal of" the property has taken place through the execution of the relevant instrument. This principle generally applies to the other exemptions proposed under the Bill and the revised CSAs.

Sunset clause

10. We consider a sunset clause/extension mechanism will undermine the effectiveness of the SSD as speculators would know or speculate on the time frame when the SSD lapses. In any case, we consider it is not possible to pre-determine a date when the SSD is deemed no longer necessary to curb speculation and any attempt to do so will send a wrong message and add volatility to the market.

11. As mentioned in paragraph 5 above, having listened to further views from Members, the Administration is prepared to undertake to review SSD once every 24 months after the enactment of the Bill, or as

circumstances require. 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
27 May 2011

Annex

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

Government's Response to Written Submissions by Organizations/Individuals on the Stamp Duty (Amendment) (No. 2) Bill 2010

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Organization/Individual	Comments/Issues	Government's Response
The Law Society of Hong Kong *(LC Paper No. CB(1)2232/10-11(01) 18.5.2011)*	Questioned the rationale for excluding the Options to Purchase and Right of Pre-emption from the definition of "agreement for sale"	➢ As explained in previous meetings, 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 Committee Stage Amendments (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. For the purpose of determining the date of acquisition or disposal, chargeable agreements include those "agreements for sale" as defined in section 29A(1) of the existing Stamp Duty Ordinance (SDO), except an instrument which confers "an option to purchase immovable property" or "a right of pre-emption in respect of immovable property" as referred to in paragraph (b) of the definition of "agreement for sale" in that section. The reason that the Administration proposes to exclude an instrument which confers an option to purchase or a right of pre-emption is that, according to legal advice, in such cases, "equitable ownership" does not pass

Organization/Individual	Comments/Issues	Government's Response
		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. ➢ The Bills Committee expressed concern that such exclusions would create possible loophole for speculators to avoid the SSD in future. Having carefully considered the Bills Committee's views, the Administration is prepared to remove the exclusion of "an option to purchase immovable property" and "a right of pre-emption in respect of immovable property". We have reflected this in the revised CSAs which we submitted to the Bills Committee on 24 May 2011.
	Why the date the property owner (as opposed to the mortgagee) has acquired the property is 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. .	➢ We have set out how the date of "acquisition" and "disposal of" a property should be determined under the four types of scenarios in our letter of 4 May 2011 to the Law Society of Hong Kong (the Law Society), which we have copied to the Clerk to the Bills Committee (LC Paper No. CB(1)2080/10-11(04)). ➢ As explained in the Administration's letters of 4 May 2011 and 16 May 2011 to the Law Society and the Administration's response dated 13 May 2011 to the Bills Committee (LC Paper No. CB(1)2183/10-11(02)) respectively, IRD has consistently taken the view that paragraph (c) of the definition of "agreement for sale" in section 29A(1) of the Stamp Duty Ordinance (SDO) has no application in respect of a bona fide mortgage or charge, regardless of whether or not the mortgagee is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (IRO). This kind of instrument confers no immediate or automatic right of sale of

Organization/Individual	Comments/Issues	Government's Response
		the property. 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. Instead, the mortgagee will exercise its rights only in the case of a mortgagor's default. ➢ IRD conveyed the above view to the Law Society in 1993 and stated the same in the "Stamp Office Interpretation and Practice Notes No. 1 (Revised) - Stamping of Agreements for Sale and Purchase of Residential Property" (Practice Note). The position of IRD is well understood by the profession. So far, no practicable difficulties have been encountered. ➢ Paragraph (c) in the definition of "agreement for sale" in section 29A(1) of the SDO is an anti-tax avoidance provision with the purpose of catching any "agreement for sale" which is disguised as a mortgage (incorporating an irrevocable power of attorney) and which does not merely provide security for money advanced but gives, expressly or impliedly, an immediate and automatic right of disposal of a residential property. The Administration is of the view that it is not appropriate to amend that paragraph lest the amendment may create loopholes for tax avoidance. IRD will update the Practice Note 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.

Organization/Individual	Comments/Issues	Government's Response
	Whether "equality money is payable or not" should not 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.	➢ Under the anti-tax avoidance provisions of the SDO, the Stamp Office will conduct an assessment on 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. ➢ We do not envisage any practical difficulties in using the payment of equality money or otherwise to determine whether the instrument is a "chargeable agreement for sale" for SSD purpose.

Organization/Individual	Comments/Issues	Government's Response
	No particular comment on not to apply SSD to the sale of first-hand residential properties in order not to affect the supply of first-hand residential flats but the Administration's position should be clearly embodied in the Bill.	➢ Regarding the Law Society's specific comments on the proposed sections 29CA(3A) and 29DA(3A) of SDO in clauses 8 and 10 of the Bill, we have carefully considered them but do not consider it necessary to make amendments to those two sections. ➢ The Administration has proposed to add a new paragraph (b) under the proposed sections 29CA(3A) and 29DA(3A) of SDO respectively to state explicitly that sale/transfer of a bare site after demolition of the original properties acquired will also not be SSD-chargeable.
	Whether the counting of the holding period of a property applicable to situation 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 proposed sections 29CA (7) or (8) of the SDO will apply to the exemption scenarios in the existing section 39 of the SDO.	➢ As explained in the Administration's letter of 16 May 2011 to the Law Society, 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 <u>chargeable agreements for sale</u> (albeit they are still chargeable agreement for sale) as set out in that section. ➢ If a person disposes of a residential property which he acquired under a chargeable 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 chargeable agreement for sale will nevertheless be the date of "acquisition" of the property. ➢ For instruments generally exempted under section 39 of the SDO, section 39(c) relating to grants and leases by the Government and the surrenders of such grants and leases and section 39(g) relating to the instruments exempted under section 125 of the Bankruptcy

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		Ordinance or section 281 of the Companies Ordinance are relevant to SSD . ➢ The scenarios under section 39(c) are pertinent to the case when a developer acquires a bare site from the Government. As explained in the Administration's response of 13 May 2011 to the Bills Committee, Conditions of Sale (in the case of public auction/tender) or Conditions of Exchange (in the case of land exchange) is neither a chargeable agreement for sale nor a conveyance. For the purpose of SSD, there will therefore be no "acquisition" by the developer and the disposal of the first-hand residential properties, even within 24 months, by the developer will not be SSD-chargeable. ➢ As explained in the Administration's letter of 4 May 2011 to the Law Society, for the purpose of section 39(g), section 125 of the Bankruptcy Ordinance and section 281 of the Companies Ordinance adopt the wording "stamp duty shall not be payable". The Administration is of the view that the agreement for sale under section 39(g) is a chargeable agreement for sale and stamp duty is payable if not for the exemption provided in the Bankruptcy Ordinance and Companies Ordinance. As such, the date of the agreement for sale is to be treated as the date of acquisition of the property for SSD purposes.

Organization/Individual	Comments/Issues	Government's Response
	Liability to the buyer/seller in case of additional SSD	➢ Under the anti-tax avoidance provisions of SDO, the Stamp Office will conduct an assessment on 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. ➢ As explained, once a document is denoted as "duly stamped", IRD will not be able to chase for the outstanding payment from either the seller or the buyer, including registering a charging order against the debtor's property in the Land Registry, even if it is subsequently discovered that the stated consideration is inadequate. The proposal as mentioned in paragraph 25(2) of the Law Society's submission (i.e. 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 for the vendor's personal liability to pay the additional SSD) is a fundamental departure from the existing stamp duty regime. ➢ 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 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.

Organization/Individual	Comments/Issues	Government's Response
	Enquired whether cases in which applications for deferred payment of stamp duty made before enactment of the Bill will become immediately payable	➢ The existing SDO already disallowed deferred payment of stamp duty for residential property transactions valued more than $20 million. Provisions of the Bill which cancel the existing arrangements for deferred payment of stamp duty for residential property transactions valued at $20 million or below will come into effect on the date of publication of the Bill upon enactment, and will apply to those chargeable agreements for sale which are signed on or after that publication date. Chargeable agreements for sale which have been signed before the enactment of the Bill may, upon application and approval of deferred payment of stamp duty, pay the stamp duty in accordance with the approved extended time.

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