

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

**List of follow-up actions arising from the discussion
at the meeting on 17 December 2010**

- (1) To advise the circumstances/consequences if the commencement date in clause 1(2) is repealed or amended.
- (2) To consult the Development Bureau regarding the consequential amendments to the Land Titles Ordinance (Cap. 585) under clauses 17 and 18.
- (3) To review the existing mechanism to ensure the timely release of information on the property market for reference by the public.
- (4) To advise the measures which the Administration has considered before deciding to, inter alia, impose a special stamp duty (SSD) and introduce the prudential supervisory measures for mortgage lending. To also advise the other measures which the Administration may consider if the aforesaid measures are not effective in curbing property speculation.
- (5) To advise how the Administration could assist genuine home buyers who have difficulties in securing mortgage as a result of the prudential supervisory measures for mortgage lending. To also advise the prevailing mortgage policy of The Hong Kong Mortgage Corporation Limited in respect of private residential properties.
- (6) To advise the bases upon which the threshold of 24 months and the various regressive rates for SSD are arrived at. To also advise whether consideration would be given to only holding the seller liable for SSD.
- (7) To consider extending the scope of the Bill to cover commercial properties to deter the spread of speculative activities to the commercial sector.
- (8) To consider expanding the exceptions for SSD to include financial hardship and substantial changes of circumstances, as well as providing an appeal mechanism on SSD. To also advise whether similar relief had been provided for the obsolete estate duty or in current tax legislation.

- (9) To evade SSD, some people may choose to set up property-holding shell companies to conduct speculation through transfer of shares of these companies. To advise whether there is an increase in the number of shell companies and property transactions through these companies after announcement of SSD on a monthly basis while the Bills Committee is in session. To also advise whether there is a question of double taxation if the profits incurred from both transfer of shares of companies and their property transactions would be subject to tax.
- (10) To provide experience in overseas jurisdictions, such as the Mainland and Australia, in preventing property bubble.
- (11) To explain the application of the terms “acquire” and “dispose of” in cases of partition deed, deed poll, vesting order, order of court and mortgage (legal or equitable), and whether the application of the two terms is different from that in the existing scheme for stamp duty under the Stamp Duty Ordinance (Cap. 117). To also provide a written response to the letters in Appendices I and II.
- (12) To advise whether SSD would apply to Provisional Sale and Purchase Agreements even if no Sale and Purchase Agreements are subsequently signed.
- (13) To advise the feasibility of including a sunset clause for SSD.
- (14) To advise whether rents in the private residential property market will rise since people tend not to buy properties as a result of SSD.
- (15) To provide all the Administration’s responses to questions raised by stakeholders at various forums.

ONC Lawyers

柯伍陳律師事務所

Web www.onc.hk
Email onc@onc.hk
DX 009167 Central 1
Tel (852) 2810 1212
Fax (852) 2804 8311

香港中環德輔道中30號·東亞銀行大廈15樓
15/F, The Bank of East Asia Building
10 Des Voeux Road Central, Hong Kong
香港中環皇后大道中九號1510室
Unit 1510, No. 9 Queen's Road Central, Hong Kong

Your Ref :
Our Ref : 16887/AL/ACL
Please reply to : Mr. Albert Leung (9 QRC Office) / Mr. Ludwig Ng (BEA Office)
Direct line : 2815 3316 / 2107 0315
Email : albert.leung@onc.hk / ludwig.ng@onc.hk
Date : 3rd December 2010

BY POST
Ms. Margaret Ng
Room 116,
New Henry House,
10 Ice House Street,
Central, Hong Kong

Dear Madam,

Re : Introduction of the Special Stamp Duty

We are writing to raise our concerns regarding the proposed introduction of the Special Stamp Duty (SSD) on transactions in residential properties acquired on or after 20 November 2010 and resold within 24 months after acquisition.

According to the announcement of the Government and the open letter from the Inland Revenue Department to the Law Society dated 19 November 2010, the vendor and the purchaser are jointly and severally liable for the SSD and the SSD is calculated based on the stated consideration for the transaction or the market value of the property, whichever is higher.

While the SSD may be effective in curbing property speculation, it meanwhile creates a number of potential problems to both the intended property purchasers and also legal practitioners. From a practical legal aspect we have identified the following concerns:-

1. Inadequate Consideration

Before the introduction of SSD, the stamp duty is usually, as agreed in the Sale and Purchase Agreement, paid by the purchaser. After the introduction of SSD, the situation may change as the SSD may be partially/wholly paid by the vendor, subject to their agreement. In case the stated consideration for the transaction is considered as inadequate, the Government could impose extra SSD on both the purchaser and vendor. As the vendor may no longer be able to be located after the transaction, it creates difficulty in enforcing the payment of the extra SSD. This may lead to an undesirable situation that the purchaser would have to bear the extra SSD while having no obligation to pay for the SSD under the Sale and Purchase Agreement.

PARTNERS

- 伍兆榮律師 * U.S., U.K.
- Ludwig NG U.S., U.K.
- 陳榮基律師 * U.S., U.K.
- Francis CHAN U.S., U.K.
- 張耀明律師 U.S.
- Raymond CHEUNG U.S.
- 廖均寧律師 * U.S., U.K.
- Shermen YAN U.S., U.K.
- 李展鵬律師 U.S.
- Ray LEE U.S.
- 陸敏新律師 U.S.
- Selma LUK U.S., U.K.
- 莊基浩律師 U.S.
- Kenneth CHONG U.S.

- 李思漢律師 * U.S., U.K.
- Hans LEE U.S., U.K.

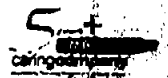
CONSULTANTS

- 梁耀明律師 * U.S.
- Albert K M LEUNG U.S.
- 林子超律師 * U.S., U.K.
- T Y LAM U.S., U.K.
- 梁耀賢律師 U.S.
- Teresa LEUNG U.S.
- 張達明教授 Professor Eric CHEUNG U.S.
- 趙廣海律師 Russell CHIU U.S.
- 楊麗潔律師 Lisa YANG U.S., U.K.

ASSOCIATES

- 鄭明昭律師 U.S.
- Anna CHENG U.S., U.K.
- 趙叔雅律師 U.S.
- Winnie CHIU U.S.
- 羅家偉律師 Grace KWAN U.S.
- 劉倩婷律師 Cynthia LAU U.S.
- 劉國強律師 Derek LAU U.S., U.K.
- 鄧俊傑律師 Michael LAU U.S.
- 劉潔潔律師 Wanda LAU U.S.
- 梁麗新律師 Irene LEONG U.S.
- 梁慧心律師 Wai-Sun LEONG U.S., U.K.
- 梁慧慈律師 Jia LEUNG U.S.
- 梁慧賢律師 Julie LEUNG U.S., U.K.
- 梁文宜律師 Marie LEUNG U.S.
- 盧致雄律師 Ian LO U.S.
- 伍鈞瑞律師 Ada NG U.S., U.K.
- 吳子備律師 Garold NG U.S.
- 吳嘉雯律師 Natalie NG U.S.
- 吳傑強律師 Piers NG U.S., U.K.
- 田文輝律師 Felix TIN U.S.
- 黃利文律師 Raymond WONG U.S., U.K.
- 朱敏怡律師 Sylvia ZEE U.S.

- * Accredited Mediator
- ◆ Chartered Patent Attorney (UK)
- ✦ China-Appointed Notary Public
- Notary Public



In this situation, the interest of the purchaser could hardly be protected. The insertion of an indemnifying clause in the Sale and Purchase Agreement would not assist the situation since the vendor may no longer be located after the transaction. Further, it is doubtful whether the legal representatives of the mortgagee which provides financing to the purchaser could safely advise the mortgagee that all stamp duties have been duly paid by the mortgagor before the mortgage loan is drawn down.

2. Registration of the Sale and Purchase Agreement

Registration of the Sale and Purchase Agreement is of vital importance to property purchasers for priority and protection of their interests. Under the current registration regime, registration of any agreement/assignment at the Land Registry could only be done upon the due payment of stamp duty. After the introduction of SSD, there is so far no clear indication that whether the SSD must be duly paid before the document could be registered.

If the payment of SSD is a pre-requisite of registration, in case the SSD is partially/wholly borne by the seller and the seller fails to pay the SSD, the purchaser would face a situation that the purchaser would need to make up the payment of SSD in order that he may register the agreement to preserve his priority and protect his interest. If the purchaser could not afford the SSD, which in this situation may not be within the purchaser's budget or contemplation, the purchaser would run the risk of losing priority or losing his interest in the property.

3. Cancelled Agreement

Since the SSD has to be paid within 30 days after the signing of the Sale and Purchase Agreement and deferred payment of stamp duty is not allowed anymore, if the agreement is cancelled before completion, the parties to the agreement must still bear the statutory obligation to pay the SSD first before applying for refund.

Similarly, in a situation where a party defaults in paying the SSD which entitles the innocent party to rescind the contract, the innocent party would still have a statutory obligation to pay the SSD first before the innocent party could apply for refund.

In either case, it would lead to the undesirable situation that the parties may have to pay the SSD which is not within their budget or contemplation.

4. Effect of Provisional Sale and Purchase Agreement

The following paragraph is stated in question 6 the Frequently Asked Question section of the Inland Revenue Department website¹:

"Q: Would it be unfair to apply SSD to buyers who have entered into provisional agreement before 20 November 2010 and signed formal agreement after that date?"

A: In general, the provisional agreement is not legally binding and the seller cannot transfer any interest in the property to the buyer through the provisional agreement. In law, there is no enforceable right in relation to the property at the date of the provisional agreement. However, if it is provided in the provisional agreement that legal action would

¹ <http://www.ird.gov.hk/enq/faq/ssd.htm>

be instituted against the party not completing the transaction, it will not be caught by the proposed amendment."

We do not agree with the above interpretation. The law is clear that a provisional agreement for sale and purchase is a binding agreement, unless and until it is superseded by the formal agreement for sale and purchase. *Godfrey J in Man Sun Finance (International) Corp v Lee Ming Ching Stephen [1993] 1 HKC 113 held that the parties having signed the usual form of provisional agreement will bring into existence an immediately binding agreement on the terms on which it expressly contains and, otherwise, on the terms of an open contract and that 'the existing agreement, so long as it contains all the essential terms of a contract for the sale of land ... stands on its own and is from that moment on specifically enforceable at the suit of either party'.*

The interpretation of the law in the Inland Revenue Department website is plainly wrong and unsupported by any legal authority.

5. Inheritance of Property

It appears that acquisition of property by inheritance also falls within the ambit of the SSD. However, the term "inheritance" is not clearly defined. Whether "inheritance" includes the acquisition of property by the personal representatives of the deceased upon the grants of probate/letter of administration is yet to be clarified.

6. Exemption

The proposed SSD does not provide exemption as to transfer of property by assent and by mortgagee action.

In the case of transfer by assent, the acquisition of property is by the operation of the law of succession. There seems to be no reason to impose SSD in such case.

Further, it is not clear whether the sale of property by a mortgagee in exercise of its power of sale under the mortgage is exempted. If it is not exempted, it remains doubtful as to which date should be used to define the date of acquisition by the mortgagee.

The concerns mentioned above are not meant to be an exhaustive list. The introduction of SSD is not simply an increase of tax rate but will undoubtedly have a huge impact on the unique property conveyancing system in Hong Kong.

We sincerely hope that you could relay our concerns to the government and related parties before the legislation is tabled to the Legislative Council.

Yours faithfully,

ONC Lawyers
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Appendix II



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Tony Kan & Co.

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Hong Kong Head Office: Suite 1806, 18th Floor, World-Wide House, No.18 Des Voeux Road Central, Hong Kong.
中環總行: 香港中環德輔道中18號環球大廈18字樓1808室
Tel/電話: (852) 3515 8388
Fax/傳真: (852) 2810 6288
Email/電郵: info@tonykan.com.hk
Website/網頁: www.tonykan.com.hk
DX No.: DX-009133 CENTRAL 1

Partners:

簡松年律師 太平紳士 * * *
TONY C.N. KAN BBS JP
許承成律師 * *
ALVIN C.S. CHUNG
張志華律師 *
CHEUNG CHI WAH
陳潔英律師 *
DAISY K.Y. CHAN

Consultants:

許文均律師 *
DAVIS C.K. HUI
關凡月律師 * T
SELENA K.Y. KWAN
查少輝律師
CHUNG SIU WAH
司徒樂律師
BESS K.L. SEATWO

Senior Associates:

梁兆榮律師 *
THOMAS S.T. LEUNG
嚴嘉輝律師
EDDIE K.F. CHUI

Associates:

溫達基律師
WALLEN T.K. WAN
茹天欣律師
WINNIE T. Y. YU
潘淑專律師
EMILY S.H. POON
羅汝傑律師
RONALD Y.H. KAN
盧子傑律師
HARRY T.K. LO
李寶君律師
SHIRLEY P.K. LEE

- a. China-Appointed Attesting Officer 中國委託公証人
* Notary Public 國際公証人
† Civil Celebrant of Marriages 婚姻註冊人

Central Branch: Suite 1401, 14th Floor, Euro Trade Centre, No. 21-23 Des Voeux Road Central, Hong Kong
中環分行: 香港中環德輔道中21-23號歐羅貿易中心14字樓1401室
Tel/電話: (852) 3515 9633

Shatin Branch: Suite 1512, Level 15, Tower II Grand Central Plaza, No. 138 Shatin Rural Committee Road, Shatin, New Territories.
沙田分行: 新界沙田鄉事會路138號新城市廣場二期15字樓1512室
Tel/電話: (852) 2868 1500
Fax/傳真: (852) 2864 9394

Guangzhou Office: 廣州辦事處:
Tel/電話: (86 20) 3335 0833
Fax/傳真: (86 20) 3331 1458

Shenzhen Office: 深圳辦事處:
Tel/電話: (86 755) 8378 1205
Fax/傳真: (86 755) 8301 7684

In Association with Messrs Williams, Ryman Wong Solicitors & Notary 聯德律師行 澳門總行
Williams Ryman Wong 律師行

Our Ref.:

AC/Office/SDD

Your Ref.:

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,
HNG KONG

Dear Christine,

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

I refer to the Stamp Duty (Amendment) (No.2) Bill 2010 regarding the implementation of the Special Stamp Duty (SDD) and would like to make the following submission.

1. Definition of the word "acquires" on or after 20 November 2010.

1.1 Although IRD has referred to the date of an "actionable" agreement for sale and purchase as the date on which a person acquires a residential property for the purpose the SDD, Section 29CA(4) of the Bill now provides that "(f)or the purposes of this section and head 1(1B) in the First Schedule, and subject to subsection (5), a person acquires any residential property when equitable ownership or legal ownership of the property is passed to the person (whichever occurs first)."

The question then goes to the precise definition of "when" the equitable ownership of a residential property is passed to a person and "who" has the final say on it.

1.2 If IRD still considers that equitable ownership is NOT passed unless the provisional agreement for sale and purchase (PASP) gives the purchaser a right

Date:

15th December 2010

Please contact:

Mr. Alvin Chung

Direct Line:

3515 8313

Direct Fax:



to seek for an order of specific performance and that a PASP does not generally give a purchaser any right to seek for an order of specific performance, we would like to draw IRD's attention to the following anomalies.

1.2 PASP without exclusion of Specific Performance

- 2.1 Since a decree of specific performance is an equitable remedy, it may only be granted at the discretion of the Court. As a general rule of law, the Court may always entertain an application for specific performance unless it is clearly shown that the parties had expressly excluded such remedy.
- 2.2 Accordingly, a party to a contract should only make sure that there is no contrary provision in the PASP to exclude his/her right to ask for specific performance, then he/she will be entitled to ask for such a remedy. Thus, there is no legal requirement, contrary to what IRD has indicated to the public, for an express provision in an agreement to institute legal action against the party not completing the transaction before a party is entitled to take such legal action. It follows that whether a legal or equitable remedy of an innocent party on a breach of contract is a matter of law to be determined by the Court, not a matter of contract to be determined by the contracting parties, and definitely not to be determined by a third party, like IRD.
- 2.3 In view of the above, I would strongly urge the IRD to re-consider its stance on the "enforceability" of a PASP.

3. PASP with express provision to exclude Specific Performance

- 3.1 If, however, a PASP expressly provides that "if the vendor shall fail to complete the sale in manner contained in the PASP, the vendor shall refund to the purchaser the initial deposit together with a sum equivalent to the initial deposit as compensation and the purchaser shall not claim for further damages and/or specific performance", then, the vendor may, of course, be entitled to rely on this "escape clause" to render "alternative performance" and the purchaser may not ask for specific performance of the PASP.



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- 3.2 If IRD considers that this type of PASP excludes a purchaser's right to ask for specific performance so that it does not confer "equitable ownership" of a residential property to the purchaser, IRD might not be correct in the legal perspective.
- 3.3 At common law, a purchaser is considered to be an "equitable or beneficial owner" once a binding contract has been signed and the vendor is considered to be a "constructive trustee". This legal principle is well established and has never been challenged on the ground that this principle will not be upheld unless the contract contains no provision to exclude a party's right for specific performance.
- 3.4 Further, even if a PASP contains an express "escape clause" to exclude a party's right to specific performance, such "escape clause" may not necessarily be exercised by the vendor. In our experience, a vendor seldom exercises this escape clause as it is quite difficult (if not impossible) to give extra benefit to the vendor after payment of compensation to the first purchaser. If no formal Agreement has been entered into between the parties, so long as such an "escape clause" has not been exercised and completion takes place, the PASP must be treated as a fully binding contract on the vendor at all times! It follows that when the legal status of a purchaser is being assessed on completion (when SDD becomes effective), such purchaser must be taken as having acquired an equitable ownership at the date of the PASP.
- 3.5 As a matter of contract, a condition which confers benefit to one party only may be waived by such party. The waiver may take place by conduct or by estoppel. IRD should be referred to the Court of Appeal case of *Lee Ming Ching Stephen v. Man Sun Finance (International) Corporation Limited* (CACV 203/1992). In that case, the vendor failed to enter into a formal Agreement for Sale and Purchase with the purchaser on the specified date (3rd April 1992) and tendered a double deposit on a later date (22nd April 1992) with a view to "escaping" from the PASP. It was held that the vendor's right to "escape" had extinguished.



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- 3.6 In practice, there are far too many cases where the parties could not compromise the terms of a formal Agreement but the further deposits were duly paid as usual and completion took place according to the terms of the PASPs. In all such cases, the vendors had not exercised the "escape clauses" or the "escape clauses" had been extinguished by continued performance by the parties.
- 3.7 In light of the above, if IRD shall be allowed to determine the date of equitable ownership arbitrarily on the basis of the mere presence or absence of a right to ask for specific performance in a PASP, it will definitely create injustice to many cases and possibly litigation on the liability of the SDD.
- 4. Double Jeopardy**
- 4.1 Although implementation of the SDD was announced on 19th November 2010, the law is to become effective on a much later date. The new amendment to the Stamp Duty Ordinance will of course take effect retrospectively. A law with retrospective effect must be quite an exceptional exception and should not be passed lightly so as to avoid injustice to those who might have fallen into the trap unknowingly.
- 4.2 One may say that the new law would only affect the purchasers who are not regarded by IRD as having acquired an equitable ownership before 20th November 2010, they would not incur any unexpected financial obligation so long as these victims of the new legislation hold on the properties for two years. But this is not the whole picture! There is possibly another batch of victims who could have committed to the SDD unknowingly before the announcement on 19th November 2010 and they will incur the totally unexpected financial obligation when the new legislation becomes effective. Here is one of the examples :-



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4.3 Here is the chronology of a transaction :

1.	1/10/2010	A entered into a PASP(1) (with escape clause and exclusion of specific performance) to sell a residential property to B. Formal Agreement was to be entered on or before 14/10/2010 and completion was to take place on 1/12/2010.
2.	14/10/2010	A and B failed to enter into any Formal Agreement but further deposit was paid and received.
3.	17/11/2010	Before completion under PASP(1), B entered into another PASP(2) (with escape clause and exclusion of specific performance) to sell the same residential property to C. Formal Agreement was to be entered into on or before 3/12/2010 and completion was to take place on 31/12/2010. <u>C as usual undertook to pay "all" stamp duty on the transaction under PASP(2).</u>
4.	19/11/2010	Government announced implementation of SDD.
5.	20/11/2010	SDD became effective.
6.	1/12/2010	A and B had failed to enter into any formal Agreement but nevertheless completed the transaction. B became owner of the residential property.
7.	3/12/2010	B and C entered into a Formal Agreement.
8.	31/12/2010	B and C completed the sale and purchase transaction.

4.4 If IRD considers that the PASP(1) between A and B did not confer equitable ownership on B, then B would only be regarded as having acquired legal ownership after 20th November 2010, i.e., on 1st December 2010.

4.5 It follows that the PASP(2) between B and C would not also be regarded by IRD as having conferred equitable ownership of the residential property to C.

4.6 That being the case, SDD would be payable when B entered into the Formal Agreement with C on 3rd December 2010. Much to his surprise, C, having agreed to pay "all" stamp duty on the transaction before the announcement of the implementation of SDD, will be required to pay a substantial amount which



he knew nothing when he entered into the very first PASP(2) on 17th November 2010!

- 4.7 It is submitted that if a law of retrospective effect is an evil, a law of retrospective effect which gives rise to retrospective damage to an innocent person must be avoided at all cost.

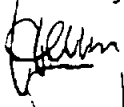
5. **Conclusion**

- 5.1 Given that there is a large variety of PAsPs in the property market and that IRD is not and should not be a tribunal of law, it is submitted :-

- 5.1.1 IRD should not be given the role of the Court to interpret the law on when the equitable ownership is passed to a person.
- 5.1.2 The new legislation should not have the effect to alter an innocent party's right or liability already committed prior to 20th November 2010.
- 5.1.3 The new legislation should not have any retrospective effect to all binding PAsPs executed prior to 20th November 2010, whether or not a party thereto has the right to ask for specific performance.

- 5.2 You will note that if ALL PAsPs will be considered to confer equitable ownership, it would avoid causing double jeopardy to those innocent purchasers as illustrated in paragraph 4.3 above.

Yours Sincerely,


Alvin Chung
Partner

Tony Kan & Co., Solicitors & Notaries