



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

1. The Law Society's Property Committee ("*the Committee*") made its Preliminary Submissions on the Stamp Duty (Amendment) (No. 2) Bill 2010 to the LegCo's Bills Committee on 4 January 2011.
2. The Committee has since met further to consider the Bill in more detail and the views received from the profession and would like to make further submissions on the proposed legislation as set out in this paper.

Retrospective Legislation

3. The Committee has expressed grave reservation in the Preliminary Submissions on the proposal to make the new legislation on Special Stamp Duty ("SSD") retrospective.
4. The constitutionality issue of retrospective legislation aside, the Committee submitted in paragraph 22 that it would not be appropriate, as a matter of policy, for SSD to apply to resale transactions retrospectively when the meanings of important concepts in the SSD legislation like "*acquired*" and "*dispose of*" have remained unclear. The inconsistent and confusing message that the Inland Revenue Department ("*IRD*") has given to the market since the announcement of the SSD policy on 19 November 2010 on the meanings of these important terms was elaborated in paragraphs 7 to 13 of the Committee's Preliminary Submissions.
5. The Committee would like to further highlight to the Bills Committee the undesirability of a retrospective policy on the SSD legislation.
6. Under Clause 13 of the Bill, a new Section 68 will be added to the Stamp Duty Ordinance to provide for a transitional arrangement as regards SSD. According

to this new Section 68, upon enactment of the new law, SSD payable for those chargeable cases during the interim period from 20 November 2010 to the date of the enactment of the new law (“*transitional period*”) will become payable within 30 days from the enactment of the new law.

7. Bearing in mind the following proposed arrangements under the new legislation, it will certainly be of the purchaser’s interest to ensure that the vendor will shoulder the liability to pay the SSD and has deposited a sufficient sum with the purchaser on completion to cater for future payment of the same:
 - (a) parties to the transaction will be jointly and severally liable for payment of the SSD;
 - (b) the amount of SSD payable can be substantial – depending on the period the vendor has held the property, this can go up to as much as 15% of the stated consideration for the transaction or the market value of the property, whichever is the higher; and
 - (c) SSD for the transitional period will be payable within 30 days from the enactment of the new legislation and any person who fails to pay the SSD within the prescribed period will be liable to penalties of up to 10 times the amount of the SSD payable.
8. In this regard, the IRD provided the following “*Practical hints*” on its webpage on SSD for the guidance of the purchasers:

“Practical hints

- (a) *To protect the interest of the buyer and the seller, the Stamp Office suggests that the following terms be specified in the provisional sale and purchase agreement as well as in the formal sale and purchase agreement:*
 - (i) *which party (the buyer or the seller) shall pay the stamp duty;*
and
 - (ii) *whether the stamp duty includes the SSD.*
 - (b) *In case the seller has agreed to pay the SSD, remind the buyer that he may need to specify in the agreement for sale (provisional and formal) to withhold part of the sale proceeds to pay for the SSD.”*
9. Whilst this may appear to be sound advice for the purchasers at first sight, the Committee has to submit that these so-called “*Practical hints*” are far from being practicable, at least so far as the chargeable cases during the transitional period

are concerned.

10. Pending the passage of the new law, there is a lack of legal basis at present on which the purchasers can require the vendors to withhold part of the sale proceeds to cater for the future liability to pay SSD. Committee members are not aware that any estate agencies have revised their standard preliminary agreement forms to provide for the payment of SSD. And if the parties have already signed a binding preliminary agreement at the estate agent's office without containing such a provision, it is unlikely that the purchaser's solicitors can include an appropriate provision as suggested by the IRD in the formal agreement for the protection of their clients; the vendor will simply argue that there is no legal basis to do so.
11. *Given the prejudicial effect retrospective legislation has on the purchasers and the lack of legal basis for the purchasers' solicitors in practice to require appropriate provisions to be included in the formal agreement for the protection of their clients, the Committee objects to the proposal to make payment of SSD retrospective. Instead, given the confusion the SSD policy has been and is still giving to the property market, consideration of this legislation should be given high priority by the Legislative Council.*

Inheritance and Survivorship Cases

12. The Committee has sought clarification in paragraph 15 of its Preliminary Submissions on whether acquisition of property under a will, the law of intestacy or right of survivorship by a person will be subject to payment of SSD. For example, if the deceased owner has "acquired" the property on or after 20 November 2010 and held the property for less than 24 months before the transfer of the property to a person through inheritance or acquisition of the property by way of survivorship, would stamp duty be jointly payable by the deceased estate and the personal representative / person inheriting the property / the surviving joint tenant?
13. *The Committee submits that SSD should not, as a matter of policy, be applicable to the scenarios mentioned in paragraph 12 when the "acquisition" or "disposal" of property under those situations, if they fall within the SSD definitions, is by way of operation of the law with no speculation element whatsoever being involved.*

14. *The Committee also objects to the proposed arrangements under the new Section 29DA(8) of the Stamp Duty Ordinance to regard the date on which deceased person acquired the property as the date of acquisition for the purpose of SSD in the case of subsequent resale by a stamp duty payer who has acquired the property under a will, the law of intestacy or right of survivorship. A personal representative may be obliged to sell the deceased's property to raise funds to settle liabilities of the estate and persons inheriting a property may find it unsuitable for his use and wish to sell it out; however, in neither of these cases will any speculation element be involved.*

Liability of Mortgagees to Pay SSD

15. The Mortgagee has various remedies for enforcing his security in the case of a Mortgagor's default, including appointment of a receiver, exercising the power of sale, taking possession of the mortgaged property, and foreclosure, etc.
16. In response to the Committee's enquiry as to the applicability of SSD to a Mortgagee, the IRD replied on 10 December 2010 as follows:

"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"

17. With respect, the IRD's reply in equating "foreclosure" with "taking possession of the property" when these are different remedies of a Mortgagee is confusing and incorrect.

18. The Committee could not appreciate the IRD's rationale in making a distinction between different types of enforcement actions by the Mortgagee, so far as payment of SSD is concerned.
19. A foreclosure order is, by virtue of s. 2 of the Stamp Duty Ordinance, defined as a "*conveyance on sale*", so unless exemption from SSD is granted, does it mean that if a foreclosure order is made within 2 years of the mortgagor's purchase of the property, then SSD is payable by the Mortgagee? Then, if the Mortgagee subsequently sells pursuant to the foreclosure order within 2 years, that is another "disposal" chargeable to SSD?
- 20 *The Committee submits that SSD should not be payable for any types of enforcement actions taken by the Mortgagee for again the very same reason that no speculation element is involved. For the legislation to provide otherwise would be prejudicial to the interests of both the mortgagee and the mortgagor, as any sale proceeds realized by the mortgagee will have to be reduced by the amount of SSD payable by it* (and ultimately any surplus back to the Mortgagor). Moreover, the impact on banks if there is no exemption to SSD will be that they may lend less in cases where they are financing a mortgagor's purchase in order to take into account this contingent liability within the first 2 years. That will affect real homebuyers.

**The Law Society of Hong Kong
The Property Committee
21 January 2011**

