



**SUBMISSIONS OF THE LAW SOCIETY'S PROPERTY COMMITTEE ON
THE REVISED DRAFT COMMITTEE STAGE AMENDMENTS TO
THE STAMP DUTY (AMENDMENT) (NO.2) BILL 2010**

1. The Law Society's Property Committee (*"the Committee"*) has made submissions on the Draft Committee Stage Amendments to the Stamp Duty (Amendment) (No.2) Bill 2010 on 22 March 2011.
2. In response to the Committee's Submissions, the Administration revised the Draft Committee Stage Amendments on 23 March 2011 (*"revised CSAs"*) for the purpose of the Bills Committee meeting on 24 March 2011.
3. The Bills Committee met again on 1 April 2011 to discuss the revised CSAs. The Committee not having a meeting until mid-April, we have written on 31 March 2011 to inform the Bills Committee that the Committee would submit its comments on the revised CSAs after the mid-April meeting. In our letter, we also highlighted to the Bills Committee that the following concerns of the Committee have remained outstanding:
 - (a) Clarifications on whether Special Stamp Duty (*"SSD"*) will apply to:
 - (i) conditional agreements;
 - (ii) supplementary agreements or confirmatory assignments; and
 - (iii) acquisition of property by right of survivorship.
 - (b) Liability of Purchasers to pay additional SSD assessed to be payable by the Inland Revenue Department after completion of the transaction;
 - (c) Retrospective Legislation:
 - (i) the obligation of the parties to insert further particulars in the agreement/assignment as from 3 December 2010; and

- (ii) the obligation for the purchasers' solicitors to specify the date of acquisition of the property in the Stamping Request Form when they would have difficulty to verify this.
 - (d) Series of Transaction – the need for the parties to obtain a valuation report to apportion the sale price in the event that only part of the properties sold is subject to payment of SSD.
- 4 Members of the Committee since had the opportunity to meet and deliberate on the revised CSAs. The Committee also had the benefit of considering the submissions of the Hong Kong Association of Banks (“HKAB”) dated 31 March 2011 on the revised CSAs. The Committee supports the concerns raised by the HKAB in its 31 March 2011 submissions and would like to make the following further submissions:

Meaning of “acquired”

- 5. According to the revised CSAs, a transferor acquired and disposed of a residential property “on the date when (he) made a *chargeable* agreement for sale” or “the date of the conveyance” [see S.29CA(4) & (6) and S.29DA(7) & (9)]
- 6. For one reason or another, many agreements for sale are **not** “*chargeable*” with stamp duty. As a result, for some “disposals of property” under the new legislation, the corresponding “date of acquisition” of the property may not be ascertainable for the purpose of calculating the 24 months’ holding period to determine whether SSD is payable.
- 7. The following are some examples where problem may arise as the “*agreements for sale*” are not regarded under the Stamp Duty Ordinance, or by the Stamp Office, to be “chargeable” with stamp duty:-

<u>Examples</u>	<u>Sections</u>	<u>Nature of Instruments</u>	<u>Paragraphs</u>
(1)	S.29A(1)(c) S.13(1)	mortgages made in favour of non-financial institutions	(8) – (10)
(2)	S.29C(10)	agreements for exchange or partition at no payment of equality money	(11) - (14)
(3)	S.39(c)	Agreements and Conditions of Exchange granted by Government in favour of lessees	(15) – (16)

(4) S.125 sale of property of a bankrupt; (17)–(19)
Bankruptcy Ordinance
S.39(g)

or

S.281 sale of property of a company (17) – (19)
Companies Ordinance being wound up
S.39(g)

Example (1): mortgages in favour of non-financial institutions

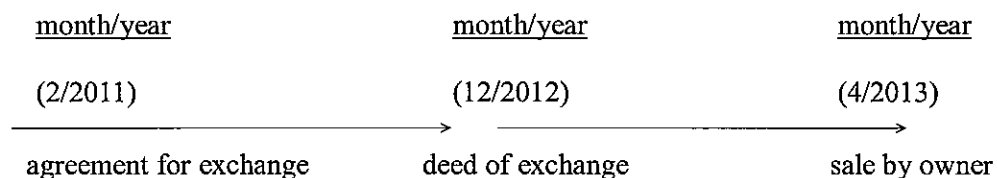
8. The Administration proposed not to grant any exemption from SSD to a “*non-financial institution*” for any enforcement action taken under a mortgage. However, where a “*non-financial institution*” takes such enforcement action, it is not clear when it has “*acquired*” the mortgaged property so as to determine whether SSD is chargeable.
9. S.29A(1)(c) provides that a mortgage in favour of a non-financial institution is “*an agreement for sale*”. It is the Stamp Office’s current practice to treat and adjudge under S.13(1) a mortgage made bona fide for valuable consideration to be not chargeable with stamp duty. The result is that the date of the mortgage cannot be treated as “*the date of acquisition*” for SSD’s purpose.
10. Since the Administration intends only to grant exemptions to financial institutions, we are not sure if the Stamp Office intends to cease its present practice to exempt mortgages in favour of non-financial institutions from payment of Stamp Duty so as to resolve the problem without one single stroke of the legislative pen. We do not think the Stamp Office should change its practice just for the SSD. However, if it does so, this will create rather than resolve the problem. For if the mortgage in favour of non-financial institutions were to be treated as “*chargeable agreement for sale*” for the purpose of SSD, a genuine home buyer who has executed an agreement for sale to purchase the property relying on the loan obtained from the developer’s finance company to finance the purchase would have “*disposed*” of the property when he executed a second equitable mortgage in favour of the developer’s finance company. As the execution of the second equitable mortgage will likely take place within a short time after the execution of the agreement for sale, the purchaser may have to pay SSD at the highest rate of 15% on the second mortgage.

Example (2): agreements for exchange or partition

11. Where two owners enter into an agreement for exchange (or partition) with no

payment of equality money, such agreement, though falling within the definition of “*an agreement for sale*”, is under S.29C(10) not regarded as a chargeable agreement for sale.

12. One may argue that in such circumstances, we can rely on the “*deed of exchange (or partition)*”, which will be executed subsequent to the agreement, as the date of acquisition of the relevant property in the case of subsequent resale by any party in the “*deed of exchange (or partition)*”; particularly when such deed is regarded as a “*conveyance*” which is capable of being adopted as “*the date of acquisition*” under S.29CA(4)(b)(i).
13. But one or both of the parties to the agreement for exchange (or partition) may subsell the subject property before the execution of the deed of exchange (or partition). In this event, though somehow somebody have definitely disposed of certain property acquired lately, what will be the reference point to determine the date of acquisition of the property for SSD purpose if reference cannot be made to the agreement for exchange (or partition)?
14. The problem of regarding the date of Deed of Exchange (or Partition) as the date of acquisition of the property in cases where there is no equality money payable is made more pronounced when one compares this situation with the case where the equality money of HK\$1.00 is payable, so that the agreement for exchange (or partition) becomes a chargeable agreement for sale under S.29C(10). Assuming that the subsequent conveyance vide deed of exchange (or partition) is only executed 20 months after the agreement for exchange (or partition), and that one of the parties resells his property more than 4 months but within 6 months after the conveyance, the vendor in the case where a HK\$1 equality money is payable will **not** be required to pay any SSD. The reason being that a period of more than 24 months has elapsed at the time of resale, as illustrated by the diagram below:-



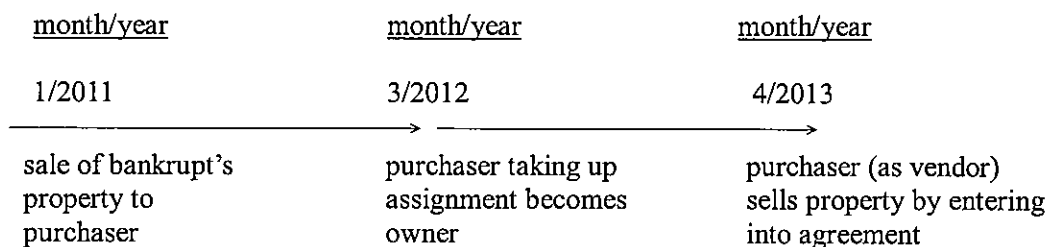
But if that magical HK\$1 dollar were not paid as equality money, the owner would have been required to pay 15% SSD, because he is regarded as having disposed of the property in 4/2013 which is only a few months after the date of conveyance (i.e. in 12/2012).

Example (3): Agreements & Conditions of Exchange

- 15. It is normal practice for the Government, in consideration of a landowner surrendering one or more piece(s) of land (usually plus payment of premium) to it, to grant to the landowner as lessee a new piece of land under an Agreement & Conditions of Exchange (“CE”). The CE is, to quote the Government, a “*Memorandum of Agreement*” under which a landowner (as purchaser) contracts to purchase a property. As such, it is an agreement for sale under S.29(1)(a) and would have been chargeable with stamp duty if not for S.39(C), which exempts “*all grants by the Government*” from payment of stamp duty.
- 16. Typically, a one assignment clause will find its way into the CE, so as to allow the landowner to dispose of the land in its entirety before attending to any development work. When such disposal happens, again the Stamp Office cannot, for SSD’s purpose, ascertain the date of acquisition, because the CE is **not** a chargeable agreement for sale.

Example (4): sale of bankrupt’s or company’s property

- 17. S.39(g) and the relevant enabling Ordinances exempt payment of stamp duty on an “*agreement for sale*” to which a bankrupt or a company in the course of being wound up is the vendor. Again, adopting the same logic alluded to above in the first 3 examples, the date of the agreement for sale cannot be regarded as the date of acquisition.
- 18. It is the Committee’s understanding that a restriction on resale before assignment is usually imposed under the “*agreement for sale*” in respect of such property. The following diagram helps to illustrate the chronology of events in respect of sale and resale of such property:-



- 19. In the above situation, according to the existing provisions of S.29CA(4)(a)(i) and S.29DA(7)(a)(i), the date of agreement (i.e. 1/2011) is disregarded. Instead, the date of conveyance (under S.29CA(4)(b)(i) and S.29DA(7)(b)(i)) is regarded as

the date of acquisition, with the result that SSD will be payable when the property is disposed of in 4/2013, which is more than 2 years after the purchaser has entered into the agreement for sale.

20. The above examples are only some of the problem areas that have come to the mind of the Committee concerning the proposed definition of “*date of acquisition*” of a property for the purpose of SSD. The Administration should conduct a thorough review of its proposal on various scenarios to ensure that the new legislation will not cause unnecessary confusion to the property market.

**The Law Society of Hong Kong
The Property Committee
15 April 2011**