

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

1. The Law Society's Property Committee ("*the Committee*") has made a total of 4 Submissions on the Stamp Duty (Amendment) (No. 2) Bill 2010 and the Committee Stage Amendments ("*CSAs*") to the Bill to the LegCo's Bills Committee, the last one being made on 15 April 2011. Copy of the Committee's April Submissions is attached at **Appendix A**.
2. The Administration responded to the Committee's April Submissions on 4 May 2011. Copies of the Administration's letter dated 4 May 2011 and the enclosed Administration paper are attached at **Appendix B**.
3. With a view to shorten the discussion process, the Committee has invited representatives of the Administration to attend a joint meeting on 13 May 2011 to discuss the Committee's outstanding concerns. As a result of the joint meeting, the Administration has provided The Law Society with its further responses on 16 May 2011. Copies of the Administration's letter dated 16 May 2011 and the enclosed Administration paper with the latest revised set of CSAs are attached at **Appendix C**.
4. We noted the Administration stated in their further responses dated 16 May 2011 to The Law Society that in respect of the issues discussed at the last Joint meeting, the Committee "*noted the Administration's position on these issues, and considered them agreeable.*" However, we would like to clarify that the Joint meeting was meant to seek clarifications from the Administration on the outstanding issues. Rather than considering the Administration's stance to be agreeable, the Committee has noted the Administration's latest policy, the latest CSAs, their assurance that they will update the Practice Notes and issue performance pledge.

Option to Purchase and Right of Pre-emption

5. The Committee noted the Administration's policy to exempt an instrument conferring an option to purchase or a right of pre-emption in respect of immovable property from payment of SSD. It has no further comment on this policy but would like to reiterate its position as stated in paragraph 7 of its submissions dated 22 March 2011 that it does not think the rationale for the proposed exclusion as put forward by the Administration to be legally sound.

Calculation of the Holding Period

6. The Committee has raised concern in its last submissions in April on the difficulty for parties to property transactions to ascertain under the amended legislation the "*date of acquisition*" of the property for the purpose of calculating the 24 months' holding period to determine whether SSD is payable in certain areas.

Mortgages in favour of non-financial institutions

7. The Administration proposed not to grant exemption from SSD to a "*non-financial institution*" for any enforcement action taken under a mortgage.
8. The Administration confirmed that despite paragraph (c) of the definition of "*agreement for sale*" in section 29A(1) of SDO could cover a genuine mortgage or charge in favour of "*non-financial institutions*", it will not charge SSD on such type of mortgage and will update the Stamp Office's Practice Notes to state this explicitly. As such, this type of mortgage is not a "*chargeable agreement for sale*" under the SDO and could not be regarded as the "*acquisition date*" for the purpose of SSD.
9. As to when the holding period should commence in respect of the enforcement action taken under such type of mortgage, the Administration advised in their letter dated 4 May 2011 to The Law Society that the holding period will count "*from the date when the property owner acquires the property to the date when the property owner disposes of the property*".
10. The Committee queries why the date the property owner (as opposed to the mortgagee) has acquired the property should be 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.

Whatever the final decision of the Administration in this regard, for the sake of certainty, the Committee believes that the “*acquisition date*” for this type of mortgagee enforcement actions for SSD purpose should be clearly spelt out in the legislation.

Exchange / Partition

11. The Committee has already pointed out in its last submissions the absurdity of the situation that payment of a HK\$1 equality money in a Deed of Exchange / Partition could produce very different results in term of payment of SSD as compared to the case where no equality money is payable.
12. The Administration confirmed the Committee’s interpretation in their reply dated 4 May 2011 and pointed out that the exchange of an immovable property for another immovable property or the partition of an immovable property is not common.
13. The Committee would like to point out that a Deed of Exchange is commonly used by different property owners to amalgamate their title, sometimes for redevelopment purpose. In the case of Surrender and Re-Grant, the Government may also require owners of adjacent lots to first unify their titles before the surrender and regrant.
14. The Committee does not think that whether equality money is payable or not should 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.

Transfer of bare sites and first-hand/re-developed residential flats

15. The Committee noted the Government’s policy on sale and purchase of bare sites and residential units subsequently built on the sites concerned. Effectively, if a developer/owner acquires a site and then demolishes the existing building, but for some reason before it rebuilds, it sells the bare site within 2 years, SSD is payable. But if another developer then acquires the already bare site and then constructs a new building thereon and sells the residential units within 2 years, it is exempted.
16. This is a policy matter on which the Committee has no particular comment. However, for the sake of certainty, the Bills Committee should ensure that the Administration’s position should be clearly embodied in the Bill.

17. The Committee has some drafting comments on the new S. 29CA(3A) and S.29DA(3A):

- (a) there are too many “*buildings*” in the new S. 29CA(3A) and S.29DA(3A), which are a bit confusing. The Administration should perhaps consider slightly amending S. 29CA(3A)(c) and S. 29DA(3A)(c) to contrast references to the new building to be constructed and the demolished building; and
- (b) the exemption to developers under the new S. 29CA(3A) and S.29DA(3A) is of limited use because it requires that under subsection 3A(a), the building “*is constructed*” when at the time of sale, the building is /are most likely to be ONLY “*in the course of being constructed*”.

Counting of the holding period of a property under the various exemption scenarios

- 18. The Committee noted the Administration’s position that 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 S. 29 CA (7) or (8), the date of that agreement for sale will nevertheless be the date of “*acquisition*” of the property for the purpose of determining SSD liability in respect of such disposal under the SSD regime.
- 19. The Committee queries whether the same policy will apply regarding the exemption scenarios mentioned in the existing S. 39 of the SDO.
- 20. The Committee would like to ascertain how this position has been reflected in the presently amended Bill. To avoid future dispute, express provisions should be included to explain clearly how the holding period for such type of cases should be counted.

Liability of Purchasers to pay Additional SSD

- 21. The Committee has raised concern on the liability of purchasers to pay additional SSD.
- 22. The Bill provides that the amount of SSD payable is based on the stated consideration for the transaction *or the market value of the property as assessed by the Collector of Stamp Revenue, whichever is the higher* and that both the

vendor and the purchaser will be held jointly and severally liable for payment of the SSD.

23. Whilst this is no different from the AVSD situation, this would work unduly harsh on the purchaser so far as SSD is concerned. Any person who fails to pay the SSD by the deadline for payment will be liable to penalties up to 10 times the amount of the SSD payable and evasion of SSD by fraudulent practices shall be a criminal offence. Under Section 15(1) of the Ordinance, i.e. any chargeable instrument which is not duly stamped is not admissible in evidence in any proceedings. Moreover, an instrument which has not been duly stamped will not be accepted for registration and this could affect the title of the property.
24. The Committee does not think the law in aiming to curb short term speculation by the “*vendor*” in a resale situation should penalize the purchaser. Solicitors will not be able to insert appropriate clauses for the protection of their purchaser client in the formal agreement if such provisions have not been included in the provisional agreement in the first place. Even if there are such provisions in the provisional agreement, they could hardly assist the purchaser should additional SSD be assessed by the IRD on a future date to the payable; it is very unlikely that the vendor could be traceable. Nor can the purchasers protect themselves by lodging the document with the IRD for adjudication of stamp duty given that the adjudication process would take time but the purchasers are subject to a time limit for registration in order for the transaction to gain priority.
25. The Committee therefore submitted that to be fair to the purchaser, if he is to be made liable for payment of SSD at all, (1) his liability to pay SSD should be limited to the stated consideration in the document; and (2) 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 the vendor’s personal liability to pay the additional SSD; and (3) there should be a time limit on the stamp duty adjudication process.
26. The Committee regretted to note that in response, the Administration only agreed to provide a performance pledge to assess additional SSD within 40 days after the submission of application for stamping.
27. As explained before, assessment of additional stamp duty after completion of

transaction could have adverse implications for purchasers unless appropriate provisions were included in the agreement to cater for this possible liability. Not only will they be liable to pay the additional stamp duty assessed when this should otherwise be the obligation of the vendor under the contract, it could also affect their ability to obtain mortgage loan for completion purpose as some mortgagee banks would require confirmation of payment of “all” stamp duty as a condition for loan drawdown on completion date.

28. The Committee suggests that either the liability to pay additional SSD should rest purely with the vendor as suggested previously or the Administration should liaise with and require estate agents to include appropriate provisions in the preliminary agreements to cater for payment of SSD. Otherwise, solicitors acting for the purchasers would have their hands tied at the formal agreement stage and the purchasers would be victimized.
29. For the 40 days pledge, the Committee suggested including a similar provision in the Ordinance as S. 4(5) of the SDO to set a time limit on the IRD for the recovery of additional SSD.

Deferment of Stamp Duty

30. At present, the Stamp Office still accepts application for deferred payment of stamp duty on agreements for sale and purchase of residential property the consideration of which does not exceed HK\$20,000,000. The Committee understands that no deferred payment of stamp duty will be allowed after passing of the Stamp Duty (Amendment) Ordinance. Does it mean that for those cases in which applications for deferred payment of stamp duty have been made before passing of the Ordinance, the stamp duty will become immediately payable after passing of the Ordinance?

**The Law Society of Hong Kong
The Property Committee
18 May 2011**



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

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

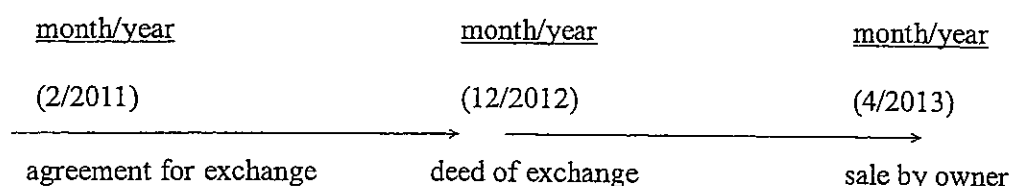
8. The Administration proposed not to grant any exemption from SSD to a “*non-financial institution*” for any enforcement action taken under a mortgage. However, where a “*non-financial institution*” takes such enforcement action, it is not clear when it has “*acquired*” the mortgaged property so as 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:-



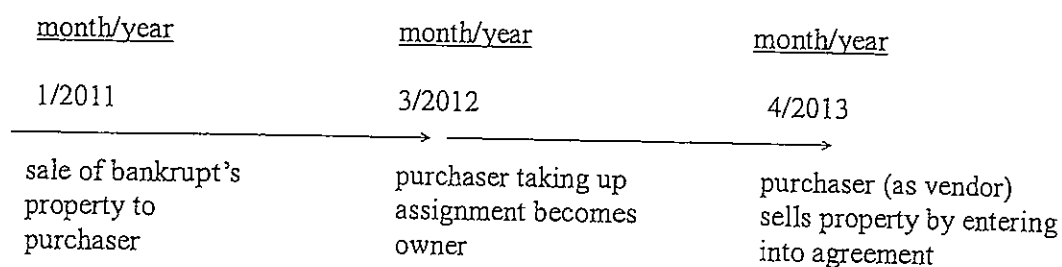
But if that magical HK\$1 dollar were not paid as equality money, the owner would have been required to pay 15% SSD, because he is regarded as having disposed of the property in 4/2013 which is only a few months after the date of conveyance (i.e. in 12/2012).

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**

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4 May 2011

By Fax

The Law Society of Hong Kong
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Hong Kong
(Attn. : Miss Christine W S Chu)

Dear Miss Chu,

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

Thank you for the letter of 15 April 2011 from the Hong Kong Law Society (the Law Society) to the Transport and Housing Bureau, which attached the Law Society's representation on the proposed revised Committee Stage Amendments (revised CSAs).

As regards the Law Society's views as set out in paragraph 3 of the representation, the Administration has responded vide its document "Summary of views submitted by organizations/individuals on the Stamp Duty (Amendment) (No. 2) Bill 2010 Government's Response to Further Written Submissions on the Bill" of 15 April 2011 to the Bills Committee. We attach a copy of the document for your reference.

The Administration has set out the original proposal in more explicit terms in the revised CSAs as to how the date of acquisition or disposal of residential property for the purpose of charging of Special Stamp Duty (SSD) should be determined. Premised on the principle that a person "acquires" or "disposes of" a property when equitable ownership or legal ownership of the property is passed, we have proposed in the revised CSAs that 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 (i.e. Assignment). Also, for the purpose of determining the date of

"acquisition" of and "disposal of" a property, chargeable agreements include those "agreements for sale" as defined in the existing Stamp Duty Ordinance, except an instrument conferring "an option to purchase immovable property" and "a right of pre-emption in respect of immovable property". Under the circumstances of "an option to purchase immovable property" and "a right of pre-emption in respect of immovable property", the date of signing the Agreement for Sale and Purchase (ASP) or, if there is no ASP, the signing date of the Assignment will be the date of acquisition of or disposal of the property.

Regarding the Law Society's concern as to how the dates of "acquisition" of and "disposal of" a residential property are to be determined under certain scenarios, premised on the proposal as set out in the Administration's revised CSAs that the acquisition and disposal dates of a property will be based on the signing date of the "chargeable agreement for sale" or the Assignment, our reply is set out below.

On the first scenario and as explained at the Bills Committee Meeting on 18 April 2011, all along, the Stamp Office takes the view that the definition of "agreement for sale" does not cover what might be called a usual mortgage (or charge). The Stamp Office has set out its view in the "Stamp Office Interpretation and Practice Notes No. 1 (Revised) - Stamping of Agreements for Sale and Purchase of Residential Property" (the Practice Notes). In accordance with the Practice Notes, the Stamp Office does not charge ad valorem stamp duty on a usual mortgage (or charge).

The Stamp Office will adopt the same principle aforementioned for SSD, that is, it will not charge SSD on a usual mortgage (or charge). When calculating the holding period of a mortgaged property, the date of a usual mortgage (or charge) is not a relevant consideration. The holding period will count from the date when the property owner acquires the property to the date when the property owner disposes of the property.

As for the second scenario, it concerns how to determine the dates of "acquisition" of and "disposal of" a property when there is an exchange of an immovable property for any other immovable property or the partition of an immovable property, and how SSD applies. We wish to point out that the exchange of an immovable property for another immovable property or the partition of an immovable property is not common. Also, under the tax avoidance provisions of the Stamp Duty Ordinance (SDO), the Stamp Office will conduct an assessment on all 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.

The third scenario is related to how to determine the date of "acquisition" of and "disposal of" a piece of land obtained through an Agreement and Conditions of Exchange, and how SSD applies. Under the SSD regime, SSD will be chargeable in respect of the disposal of a property which is acquired by the seller under a chargeable agreement for sale or under a conveyance. An Agreement and Conditions of Exchange is neither a chargeable agreement for sale nor a conveyance. It belongs to the same category as grants by the Government, Government leases and surrenders of such grants and leases which are instruments generally exempted from stamp duty under the SDO. The grantee obtains the land through an Agreement and Conditions of Exchange, and SSD is not applicable to the grantee when the grantee sells the land or the residential units constructed thereon to a third party. The third party buyer "acquires" the land or the residential units and when the third party sells the land or the residential units, the dates of the transaction will be taken as the dates of "acquisition" and "disposal of", and SSD will apply if the transaction takes place within 24 months.

As regards the fourth scenario which is related to how to determine the date of "acquisition" of and "disposal of" a property which is sold due to bankruptcy/involuntary winding up, the Law Society made reference to section 39(g) of the SDO which provides exemption for all instruments exempted under section 125 of the Bankruptcy Ordinance (Cap. 6) or section 281 of the Companies Ordinance (Cap. 32). Section 125 of the Bankruptcy Ordinance and section 281 of the Companies Ordinance adopt the wording "stamp duty shall not be payable". The Stamp Office is of the view that the agreement for sale mentioned in the Law Society's example is a chargeable agreement for sale and stamp duty is payable if not for the exemption provided in the Bankruptcy Ordinance and the Companies Ordinance. As such, in accordance with section

29CA(4)(a)(i) of the revised CSAs, the date of the agreement for sale is to be treated as the date of acquisition of the property for SSD purposes.

The Administration has carefully considered the further comments from the Law Society and has clarified above how the dates of "acquisition" of and "disposal of" residential properties are to be determined under the various scenarios raised by the Law Society. To sum up, the Administration considers that the revised CSAs proposed, which have taken the earlier comments of the Law Society into account, have set out the original proposal in clear terms as to how the dates of "acquisition" of and "disposal of" residential properties for the purpose of charging of SSD should be determined.

Yours sincerely



(Eugene Fung)

for Secretary for Transport and Housing

c.c.

Commissioner of Inland Revenue (Attn. : Mr Wong Kuen-fai)
Clerk to the Bills Committee on the Stamp Duty (Amendment) (No.2) Bill 2010
(Attn. : Ms Becky Yu)

**Summary of views submitted by organizations/individuals on the
Stamp Duty (Amendment) (No. 2) Bill 2010
Government's Response to Further Written Submissions on the Bill**

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- (B) To provide for exemptions for Special Stamp Duty (“SSD”)**
- (C) Comments about the additional SSD**
- (D) Other comments**

(A) Definition of the terms "acquire" and "dispose of"

Organization/Individual	Comments/Issues	Government's Response
<i>Hong Kong Institute of Estate Agents</i> (LC Paper No. CB(1)1672/10-11(03) 18.3.2011)	Proposed to add a clarification at appropriate places of the draft Committee Stage Amendments (CSAs) to show that where a chargeable agreement for sale is registered, the date of instrument shown on the land register is deemed to be the date that the transferor acquired the residential property. Where more than one chargeable agreement for sale has been registered, the date of instrument of the first such registered agreement shall be deemed the date of acquisition.	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 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 (i.e. Assignment). Also, for the purpose of the determination of the date of acquisition or disposal, chargeable agreements include those "agreements for sale" as defined in section 29A of the existing Stamp Duty Ordinance (SDO), except "an option to purchase immovable property" and "a right of pre-emption in respect of immovable property" referred to in the definition of "agreement for sale" in section 29A(1)(b) of the SDO. The Administration has taken into account the views of the Law Society of Hong Kong and other relevant bodies in working out the proposed CSAs.
<i>The Hong Kong Association of Banks</i> (LC Paper No. CB(1)1672/10-11(04) 18.3.2011)	To clarify – (a) the rationale for excluding the instrument in which a person confers, or has conferred on him: <ul style="list-style-type: none"> ➤ an option to purchase immovable property, or ➤ a right to purchase immovable property, or ➤ a right of pre-emption in respect 	In gist, under the proposed CSAs, when there is a signed Preliminary Agreement for Sale and Purchase (PASP), the signing date of the PASP, other than an instrument which confers an option to purchase or a right of pre-emption, will be the date of acquisition or disposal of the property

	<p>of immoveable property;</p> <p>(b) as an instrument above includes a "right to purchase", whether the exclusion will operate to exclude virtually all agreements for sale whereby a right to purchase is conferred by the vendor on the purchaser; and</p> <p>(c) where such an option to purchase or right to purchase or right of pre-emption is included in an instrument to which other part(s) of the definition applies, then would the entire document be considered for SSD purposes an "agreement for sale" under section 29A(1)(a) or be excluded as an instrument under section 29A(1)(b).</p>	<p>for the purpose of calculating the holding period of the residential property. For an instrument which confers an option to purchase or a right of pre-emption, the date of signing the Agreement for Sale and Purchase (ASP), or if there is no ASP, the signing date of the Assignment will be the date of acquisition or disposal of the property.</p> <p>The reason that the Administration proposes to exclude an instrument which confers an option to purchase or a right of pre-emption as mentioned above is that, according to legal advice, in such cases, "equitable ownership" does not pass 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. Under such circumstances, the date of signing of the ASP or, if there is no ASP, the signing date of the Assignment will be the date of acquisition or disposal of the property.</p>
<p><i>The Law Society of Hong Kong</i> (LC Paper No. CB(1)1689/10-11(02) 22.3.2011)</p>	<p>(a) Generally welcomed the proposed changes in the definitions of "acquire" and "disposes of" by making reference to "chargeable agreement for sale".</p> <p>(b) Expressed concern on the proposal to exclude the type of instrument as defined in section 29A(1)(b).</p>	<p>Although the transfer of properties between associated companies are exempted from SSD under the Bill, the property does undergo the process of "acquisition" and "dispose of". Therefore, the date on which the associated company obtained the property will be considered as the date of acquisition by that company.</p>

(a) 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.

(b) Recommended 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".

(c) To 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.

(B) To provide for exemptions for Special Stamp Duty ("SSD")

Organization/Individual	Comments/Issues	Government's Response
<i>The Hong Kong Association of Banks (LC Paper No. CB(1)1672/10-11(04) 18.3.2011)</i>	Exclusion or exemption is not granted to banks or financial institutions in an enforcement situation for SSD purposes.	Under the current Bill and the latest proposed CSAs, the Administration has proposed to grant exemptions to the disposal of residential properties acquired on or after 20 November 2010 and resold within 24 months or less under various specific circumstances, which include:
<i>The Hong Kong Association of Banks (LC Paper No. CB(1)1789/10-11(01) 31.3.2011)</i>	(a) "Financial institutions" within the meaning of section 2 of the Inland Revenue Ordinance (IRO) should be exempted from SSD under the following situations:	(a) Nomination of the spouse, parents, children, brothers and sisters to take up the assignment of the property, and sale or transfer of the property to spouse, parents, children, brothers and sisters.
	(i) a foreclosure order (as well as a sale pursuant to a foreclosure order); (ii) sale by a mortgagee or receiver appointed by a mortgagee; and (iii) sub-sales by a mortgagee under equitable mortgages.	(b) Addition/deletion of name(s) to/from a chargeable agreement for sale or Assignment if the person(s) is the spouse, parents, children, brothers and sisters of the original purchaser(s).
(b) Concerned about where a mortgagee is not a "financial institution", there is no exemption. Enforcement of mortgages or equitable mortgages		(c) Involuntary sale or transfer of properties made by the courts or pursuant to court orders (including all compulsory sale of residential properties under a Compulsory Sale Order granted under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) and foreclosure order obtained by mortgagees whether or not they fall under the definition of a

	<p>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.</p> <p>(c) Proposed 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.</p>	<p>financial institutions within the meaning of section 2 of the IRO).</p> <p>(d) Involuntary sale of mortgaged properties in various forms by a mortgagee which is a financial institution within the meaning of section 2 of the IRO, or by a receiver appointed by such a mortgagee.</p> <p>(e) Sale or transfer of a residential property by a person whose property is inherited from a deceased person's estate or is passed to that person under the right of survivorship.</p> <p>(f) Transfer between associated companies.</p>
<p><i>Hong Kong Chamber of Professional Property Consultants Ltd</i> (LC Paper No. CB(1)1672/10-11(01) 21.3.2011)</p>	<p>(a) To provide for exemptions for nomination of additional purchaser when signing the formal ASPs.</p> <p>(b) To review and enhance the policy by considering granting exemptions to those who signed PASPs two weeks before the announcement of SSD on 19 November 2010.</p> <p>(c) To provide for exemptions for those who may need to resell their properties within two years due to</p>	<p>(g) Sale of property due to bankruptcy/involuntary winding up.</p> <p>(h) Sale of property to the Government.</p> <p>As we have repeatedly emphasized, we consider that it is very important that the law should be clear and without ambiguity, and that any exemptions to be considered should not affect the effectiveness of SSD, and have to be fair and measurable in an objective manner, and the types of exemptions should be clearly set out in the Bill. Based on the aforementioned guiding principles, the Administration considers that the proposed exemptions have as far as possible addressed the</p>

	urgent matters.	Bills Committee and deputations' views in this regard. Exemptions on a case by case basis in the light of individual or personal circumstances such as financial hardship will not be practicable for implementation, and will likely create loopholes for speculators to circumvent the SSD, thereby undermining its effectiveness.
<p><i>The Law Society of Hong Kong</i> <i>(LC Paper No. CB(1)1784/10-11(02) 31.3.2011)</i></p>	<p>(a) To clarify the application of SSD to –</p> <ul style="list-style-type: none"> (i) Conditional Agreements; (ii) Supplemental Agreement or Confirmatory Assignment; (iii) Acquisition of property under right of survivorship. 	<p>Conditional Agreements</p> <p>Conditional agreements fall under the definition of “agreements for sale” under section 29A of the SDO. They are chargeable to Ad Valorem Stamp Duty (AVSD) and will be chargeable to SSD.</p> <p>Supplemental Agreement or Confirmatory Assignment</p> <p>Under the AVSD regime, stamp duty is chargeable on the principal agreement only and not on the Supplemental Agreement or Confirmatory Assignment. Therefore, SSD will not be applicable to Supplemental Agreements or Confirmatory Assignments.</p> <p>Acquisition of property under right of survivorship</p> <p>Both AVSD and SSD will not be applicable to the acquisition of a residential property by a person under the right of survivorship upon the death of the other joint owner, since no chargeable instrument will be involved. The Administration has proposed that the subsequent sale or transfer of such a property by that person be exempted from SSD.</p>

(C) Comments about the additional SSD		
Organization/Individual	Comments/Issues	Government's Response
<i>The Hong Kong Association of Banks</i> (LC Paper No. CB(1)1789/10-11(01) 31.3.2011)	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.	<p>It is a general principle that stamp duty is charged on executed instruments. The introduction of an adjudication mechanism in anticipation of upcoming transactions is not in line with the well established stamp duty principle. In particular, a proposed transaction with no exact execution date of instrument will make valuation of the property, which depends on the instrument date, impossible.</p> <p>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 will pledge 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.</p>
<i>The Law Society of Hong Kong</i> (LC paper No. CB(1)1784/10-11(02) 31.3.2011)	Liability of Purchasers to pay additional SSD assessed to be payable by the IRD after completion of the transaction.	
<i>The Hong Kong Association of Banks</i> (LC Paper No. CB(1)1789/10-11(01) 31.3.2011)	(a) Concerned about the arrangement that 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.	

	<p>(b) Introducing an adjudication mechanism for:</p> <ul style="list-style-type: none"> (i) the amount of stamp duty payable; and (ii) ascertaining whether SSD is payable in advance of a proposed transaction before an instrument is executed. 	
<p><i>The Real Estate Developers Association of Hong Kong (REDA) (LC Paper No. CB(1)991/10-11(01)</i></p>	<p>(a) SSD not to apply to –</p> <ul style="list-style-type: none"> (i) bare sites; (ii) disposal of units in an existing old building for redevelopment; or (iii) disposal of new units in a new development by a developer. <p>(b) For units acquired by a party pursuant to a joint development agreement, SSD will not apply in the subsequent disposal of the units by that party.</p> <p>(c) For intra-group transfer, SSD will not apply.</p>	<p>As we have repeatedly emphasized, we consider that it is very important that the law should be clear and without ambiguity, and that any exemptions to be considered should not affect the effectiveness of SSD, and have to be fair and measurable in an objective manner, and the types of exemptions should be clearly set out in the Bill. Too many exemptions will create loopholes.</p> <p>We have proposed in the Bill that transfer between associated companies be exempted from SSD.</p> <p>We have carefully considered the issues raised by REDA. We consider that such exemptions will create loopholes for speculation. We believe that as long as the law is clearly drafted, developers should be able to flexibly adjust their business strategies and operation without affecting the supply, in the light of the new taxation environment when the Bill comes into effect.</p>

(D) Other Comments		
Organization/Individual	Comments/Issues	Government's Response
Property Agencies Association <i>(LC Paper No. CB(1)1689/10-11(01) 23.3.2011)</i>	<p>(a) SSD and tightening mortgage lending were wrong measures and would affect the healthy development of the property market in the long term.</p>	<p>The Government has been monitoring developments in the private residential property market closely and remains vigilant on the risks of a property bubble. In February, April, August, October and November 2010, the Government introduced various measures in four areas to ensure the healthy and stable development of the property market. The four areas include increasing land supply to tackle the problem at source, combating speculative activities, enhancing the transparency of property transactions, and preventing excessive expansion in mortgage lending.</p> <p>The Government recognizes the importance of a stable home, and is fully aware of the people's wish to improve their quality of life and move up the social ladder through home ownership. The Government will, in collaboration with the Hong Kong Housing Society, introduce My Home Purchase Plan (MHPP) premised on the concept of "rent-and-buy". The MHPP will effectively target at households with the ability to pay mortgages in the long run, but who cannot immediately afford the down payment in the face of short-term property price fluctuations, and allow such potential home buyers some time to save up for their home purchase. Also, MHPP helps increase the supply of "no-frills" small and</p>
	<p>(b) Suggested that the Government should --</p> <ul style="list-style-type: none"> (i) increase land supply; (ii) provide more public housing unit and resume the home ownership scheme; (iii) continue to put up land with unit size restrictions for sale or tendering; (iv) continue to revitalize the secondary market of HOS; (v) re-launch the home starter loan scheme; (vi) develop a 5 to 10 years long-term housing policy; (vii) develop an appeal mechanism for SSD; (viii) study other more effective 	

measures to replace SSD and the measure of tightening mortgage lending.

medium-sized private residential flats.

MHPP, together with Government's commitment to address the housing needs of those low-income households who cannot afford private rental housing through the provision of Public Rental Housing, measures introduced to increase land supply, the revitalization measures for the Home Ownership Scheme (HOS) Secondary Market Scheme, and efforts to enhance the transparency and fairness of first-hand sales in the private sector, will increase choices to meet the different housing needs of the community in a sustainable manner.

On the proposal to set up an appeal mechanism, as the Administration has repeatedly emphasized, we consider that it is very important that the law should be clear and without ambiguity, and that any exemptions to be considered should not affect the effectiveness of SSD, and have to be fair and measurable in an objective manner, and the types of exemptions should be clearly set out in the Bill. The Administration is not able to accept the proposal for setting up an appeal mechanism to assess and decide on the applicability of SSD on a case by case basis in the light of individual or personal circumstances such as financial hardship, as it is a fundamental deviation from the present taxation system. The Administration also considers that the measure is not practicable and will likely create a big loophole for circumvention of SSD, thereby rendering it not effective.

<p><i>The Law Society of Hong Kong</i> (LC Paper No. CB(1)1784/10-11(02) 31.3.2011)</p>	<p>(a) The obligation of the parties to insert further particulars in the agreement/assignment as from 3 December 2011.</p> <p>(b) The obligation of purchasers' solicitors to specify the date of acquisition of the property in the Stamping Request Form when they would have difficulty in verifying this.</p>	<p>The Administration has proposed CSAs to set out clearly how the date of acquisition or disposal of a property for the purpose of charging of SSD should be determined.</p> <p>Under normal circumstances, IRD will take the dates of the acquisition and disposal of a property as declared in the application for stamping for the purpose of ascertaining if there is any liability to SSD. The Stamp office may however request for documentation proof of the underlying instruments such as PASP or ASP if in doubt.</p>
<p><i>The Law Society of Hong Kong</i> (LC Paper No. CB(1)1784/10-11(02) 31.3.2011))</p>	<p>The need for the parties to obtain a valuation report to apportion the sale price in the event that only part of properties sold is subject to payment of SSD.</p>	<p>Under the Bill, the proposed Note 2(b) to head 1(1B) of the First Schedule to the SDO requires the parties to a chargeable agreement for sale to indicate the consideration of the part of the residential property that is disposed of within 24 months after acquisition for the purpose of calculating the SSD chargeable in respect of that part. The parties should apportion the consideration to the best of their knowledge/information. They may decide whether a valuation report is needed for the purpose.</p>

- ENDS -

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The Government of the Hong Kong Special Administrative Region

政府總部
運輸及房屋局

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16 May 2011

The Law Society of Hong Kong
3/F, Wing On House
71 Des Voeux Road Central
Hong Kong
(Attn: Miss Christine W S Chu)

Dear Miss Chu,

At the meeting on 13 May 2011 when the representatives from the Inland Revenue Department (IRD), the Department of Justice (DOJ), and the Transport and Housing Bureau (THB) met the Chairman and some Members of the Property Committee of the Law Society of Hong Kong (the Law Society), the Administration explained to the Property Committee that it is not the policy intention of the Administration to charge Special Stamp Duty (SSD) on the sale of first-hand residential properties, that the definition of "agreement for sale" in section 29A(1) of the Stamp Duty Ordinance (Cap. 117) (SDO) has no application in respect of a bona fide mortgage or charge, how the holding period of a property will be counted under the various exemption scenarios, and IRD's pledge to complete adjudication cases involving SSD within a prescribed period of time.

The Property Committee noted the Administration's position on these issues, and considered them agreeable. For clarity, we set out our position in greater detail in the paragraphs below.

Application of SSD on the sale of first-hand residential properties

As explained at the meeting with the Law Society on 13 May 2011, it is not our policy intention to apply SSD to the sale of first-hand residential properties. We attach the Administration's paper of 13 May 2011 to the Bills Committee which sets out, among other things, that:

- (a) when a developer purchases a bare site, builds on it, and then sells the flats built thereon within 24 months, SSD is not applicable regardless of whether the developer purchases the piece of land from the Government or from another developer; and
- (b) the sale/transfer of redeveloped residential flats on a piece of land after demolition of the original properties acquired thereon will not be SSD-chargeable.

As mentioned in paragraph 11 of the aforementioned paper to the Bills Committee, the Administration has added new sections 29CA(3A) and 29DA(3A) into the Stamp Duty (Amendment) (No. 2) Bill (the Bill) to set out clearly our aforementioned position for Bills Committee's consideration. The full set of the latest Committee Stage Amendments (CSAs) to the Bill is at Annex to the paper (attached).

Bona fide mortgage or charge

As explained at the meeting with the Law Society on 13 May 2011, IRD has consistently taken the view that paragraph (c) of the definition of "agreement for sale" in section 29A(1) of SDO has no application in respect of a bona fide mortgage or charge. This kind of instrument confers no immediate or automatic right of sale of property. Instead, the mortgagee will exercise its rights only in the case of a mortgagor's default. 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. IRD will update the Stamp Office Interpretation and Practice Notes No.1 (Revised) – "Stamping of Agreements for Sale and Purchase of Residential Property" 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. We have set this out in paragraphs 12 – 14 of the aforementioned paper to the Bills Committee.

IRD's pledge to complete adjudication cases involving SSD within a prescribed period of time

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 to complete adjudication cases involving SSD within 40 days after the submission of application for stamping, including issuing the assessment demanding further duty for cases which the Stamp Office considers the stated consideration inadequate.

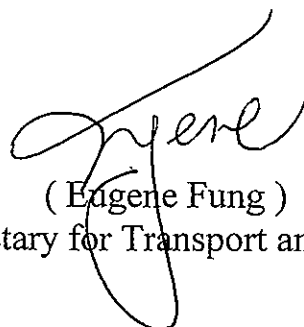
Counting of the holding period of a property under the various exemption scenarios

Under the proposed sections 29CA(2) and 29DA(2) of SDO in clauses 8 and 10 of the Bill, SSD will be chargeable in respect of the disposal of a 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. Under the Administration's proposed CSAs submitted to the Bills Committee, when there is more than one chargeable agreement for sale in a transaction, the signing date of the earliest agreement will be taken as the date of acquisition or disposal of the property.

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 chargeable agreements for sale as set out in that section. The applicable exemptions include SSD does not apply to (i) the nomination of the spouse, parents, children, brothers and sisters to take up the assignment of the property, and sale or transfer of the property to spouse, parents, children, brothers and sisters; (ii) involuntary sale or transfer of properties made by the courts or pursuant to court orders; (iii) involuntary sale of mortgaged properties in various forms by a mortgagee which is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap. 112), or by a receiver appointed by such a mortgagee; (iv) the sale or transfer of a residential property by a person whose property is inherited from a deceased person's estate or is passed to that person under the right of survivorship; and (v) the sale of property due to bankruptcy/involuntary winding up.

If a person disposes of a residential property which he acquired under an 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 agreement for sale will nevertheless be the date of "acquisition" of the property.

Yours sincerely,



(Eugene Fung)

for Secretary for Transport and Housing

c.c. (w/o encl)

Commissioner of Inland Revenue	(Attn: Mr Wong Kuen-fai)	2877 1082
Department of Justice	(Attn: Mr Cheung Man-yiu)	2868 1068
	(Attn: Ms Phyllis Ko)	2845 2215
	(Attn: Mr Manuel Ng)	2845 2215

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

Administration's Response to Issues Raised by Members at the Bills Committee on 5 May 2011

Purpose

The paper informs Members of the Administration's response to issues raised by Members at the Bills Committee meeting on 5 May 2011.

(1) To explain the policy intent on the application of special stamp duty (SSD) on sale/transfer of bare sites (whether these are under Government leases or not) and residential units subsequently built on the sites concerned. To refine the drafting of proposed sections 29CA(2) and (3) as well as 29DA(2) and (3), where applicable, to reflect the policy intent.

2. At the Bills Committee meeting on 5 May 2011, the Administration clarified that it was not the policy intention to apply the Special Stamp Duty (SSD) to the sale of first-hand residential properties, and that the way the Bill and the revised Committee Stage Amendments (CSAs) were drafted should ensure that first-hand residential properties would generally not be affected.

3. Members of the Bills Committee requested that the Administration should further explain how the Bill and the revised CSAs have reflected this policy intention. Under the proposed sections 29CA(2) and 29DA(2) of the Stamp Duty Ordinance (Cap. 117) (SDO) in clauses 8 and 10 of the Bill, SSD will be chargeable in respect of the disposal of a 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 means that the vendor will have to "acquire" the property and then "dispose of" the same property within 24 months after acquisition. As the Administration explained at the Bills Committee on 5 May 2011, generally speaking, the sale of first-hand flats will not be SSD-chargeable. We set out the details in the following paragraphs.

Sale/transfer of residential units built on a bare site acquired

4. As stated in paragraph 2, it is the policy intention not to charge SSD on sale of first-hand residential properties. Furthermore, the units built on a bare site are not the same residential property concerned as the bare site acquired by the developer. When a developer purchases a bare site, builds on it, and then sells the flats built thereon within 24 months, SSD is not applicable regardless of whether the developer purchases the piece of land from the Government or from another developer.

5. In the case when a developer acquires a bare site from Government, builds residential units on the bare site, and then sells the residential units to the public, the sale of the residential units thereon is not SSD-chargeable even if the duration falls within 24 months. Under the SSD regime, SSD will be chargeable in respect of the disposal of a property which is acquired by the vendor under a chargeable agreement for sale or under a conveyance. 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 by the developer will not be SSD-chargeable. The individual buyers of the residential units thereon “acquire” the residential units and when the individual buyers sell their units, the dates of transaction will be taken as the dates of “acquisition” of and “disposal of” the properties concerned, and SSD will apply if the transaction takes place within 24 months.

6. In the case when a developer acquires a bare site from another developer, builds residential units on it and then sells the flats, the flat sale will also not be SSD-chargeable even if the duration falls within 24 months. Under the SSD regime, SSD will apply if the residential property concerned is disposed of within 24 months beginning on the day on which the vendor under a chargeable agreement for sale or under a conveyance acquired the property. The units built on a bare site are not the same residential property concerned as the bare site acquired by the developer. The disposal of units built on the site is therefore not SSD-chargeable.

Sale/transfer of redeveloped residential units after demolishing the original properties acquired

7. Sale/transfer of redeveloped residential flats after demolition of the original properties acquired will not be SSD-chargeable. Under the SSD regime, SSD will apply if the residential property concerned is disposed of within a period of 24 months beginning on the day on which the vendor under a chargeable agreement for sale or under a conveyance acquired the property. The flats built on a redeveloped site are not the same residential property concerned as the original properties acquired and demolished by the vendor. The disposal of the flats built on a redeveloped site is therefore not SSD-chargeable.

Sale/transfer of bare sites

8. As stated in paragraph 4, 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.

9. We consider that the way that the Bill and the revised CSAs are drafted have generally catered for situations relating 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 without affecting the supply, in the light of the new taxation environment when the Bill comes into effect after enactment.

Urban Renewal Authority and Mass Transit Railway Corporation Limited Projects

10. Some Members and deputations raised queries about the projects of the Urban Renewal Authority (URA) and Mass Transit Railway Corporation Limited (MTRCL). The Administration met with URA and MTRCL earlier to understand their mode of operation and to explain the details of SSD. We understand from URA that it has been adopting a flexible approach in handling units which remain unsold within the period as specified in the contract with developers, by allowing extension to the contractual disposal period upon mutual agreement of the URA and the developers concerned in order to provide more time for developers to market the units. Should its contractual interest not be compromised, URA is also prepared to continue holding the ownership of the unsold units for a longer period until the developer finds a purchaser. URA considers that the introduction of SSD should have no major impact on its residential development projects or its operational arrangements with developers. As regards the residential development projects of MTRCL, the introduction of SSD should have no particular implications on its projects in the light of its existing mode of operation.

11. Members noted the Administration's position and considered it generally agreeable. That said, we note that Members considered that the proposed sections 29CA(2) and (3) and 29DA(2) and (3) of the SDO in clauses 8 and 10 of the Bill as drafted were not sufficiently explicit in reflecting the aforementioned policy intention of the administration. Having carefully taken into account Members' views, we attach a new set of Committee Stage Amendments (new CSAs) at **Annex** by which we have added in new sections 29CA(3A) and 29DA(3A) to set out clearly our aforementioned position for Members' consideration.

(2) To consider amending the Bill to make it clear that both ad valorem stamp duty and SSD would not apply to a usual mortgage (or charge).

12. As explained in the Administration's response dated 4 May 2011 to the Bills Committee (LC Paper No. CB(1)2080/10-11(04)), the Inland Revenue Department (IRD) has consistently taken the view that paragraph (c) of the definition of "agreement for sale" in section 29A(1) of the SDO has no application in respect of what might be called a usual mortgage or charge. This kind of instrument confers no immediate or automatic right of sale of the property. Instead, the mortgagee will exercise its rights only in the case of a mortgagor's default. As such, a

usual mortgage or charge is not considered as an agreement for sale as defined and is therefore not chargeable with ad valorem stamp duty.

13. IRD conveyed the above view to the Law Society of Hong Kong 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” (the Practice Note). The position of IRD is well understood by the trade. So far, no practicable difficulties have been encountered.

14. Paragraph (c) in the definition of “agreement for sale” in section 29A(1) of the SDO is an anti-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 speculation. IRD will update the Practice Note upon the enactment of the Bill to state explicitly that a usual mortgage or charge is not considered as an agreement for sale as defined and is therefore not chargeable with SSD.

(3) To include in the speech to be delivered by the Secretary for Transport and Housing at the resumption of Second Reading debate on the Bill that the Administration will review the need for SSD on a regular interval (say every two years).

15. 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 provide a progress report to the LegCo Panel on Housing in 12 months time after the enactment of the Bill, and another progress report in not more than another 12 months time. The Administration will go through the normal legislative process to amend the legislation when SSD is considered no longer necessary.

(4) To advise whether the reference to parent, child, brother and sister in the proposed Committee Stage amendment to Note 2A of head 1(1B) in the First Schedule include those who are not blood-related/half blood-related/adopted.

16. The terms “parent”, “spouse”, “child”, “brother” and

“sister” are not specifically defined in the SDO or the Interpretation and General Clauses Ordinance (Cap. 1). Taking into account the need that the relationship has to be readily ascertainable, IRD will accept persons who are blood-related and half blood-related, and also persons who are adopted or step, as “parent”, “spouse”, “child”, “brother” and “sister” for SSD purposes. IRD will set out the aforementioned scope of application of those terms in the Practice Note upon the enactment of the Bill.

Transport and Housing Bureau
Inland Revenue Department
Department of Justice
13 May 2011

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

Committee Stage

Amendments to be moved by the Secretary for Transport and Housing

<u>Clause</u>	<u>Amendment Proposed</u>
Long title	In the English text, by deleting “with” and substituting “on”.
1(3)	By adding “14(2A), (2B), (2C), (2D) and (2E),” after “and (11),”.
4	By deleting the clause.
5(2)	In the proposed section 15(5), by deleting “(<i>amending section</i>) does not apply in respect of a chargeable agreement for sale within the meaning of section 29A(1) that was entered into before the date of commencement of the amending section” and substituting “does not apply in respect of a chargeable agreement for sale that was entered into before the date of commencement of that section”.
New	By adding— <div style="margin-left: 40px;"> <p>“6A. Section 29A amended (Interpretation and application of Part IIIA)</p> <p>(1) Section 29A(3A), after “and head 1(1A)”—</p> <p>Add</p> <p>“and (1B)”.</p> </div>

(2) Section 29A(4), after “head 1(1A)”—

Add

“and (1B)”.

(3) Section 29A(5), after “Head 1(1A)”—

Add

“and (1B)”.

(4) Section 29A(6), after “head 1(1A)”—

Add

“and (1B)”.

6B. Section 29B amended (Duty to execute agreement for sale)

After section 29B(5)(g)—

Add

“(ga) if the first such agreement referred to in paragraph (g) is an instrument conferring an option or a right of pre-emption referred to in paragraph (b) of the definition of *agreement for sale* in section 29A(1), a statement to that effect;”. ”.

7

By adding—

“(3A) Section 29C(5)(c)(i), Chinese text—

Repeal

“購買人等”

Substitute

“眾購買人的”.

7

By deleting subclause (4).

7(6)

By deleting “and” and substituting “or”.

- 7(7) In the proposed section 29C(5AA), by deleting “any residential” and substituting “immovable”.
- 7(7) In the proposed section 29C(5AA)(a)—
- (a) by adding “(or, only in so far as it relates to special stamp duty, a person who is a parent, spouse, child, brother or sister of the purchaser)” after “child of the purchaser”;
 - (b) in the Chinese text, by deleting “該物業” (wherever appearing) and substituting “該不動產”.
- 7(7) In the proposed section 29C(5AA)(b), by deleting “for the sale” and substituting “in respect”.
- 7 By deleting subclause (9).
- 8 In the proposed section 29CA, in the heading, by deleting “**Special stamp duty chargeable with**” and substituting “**Further provisions on special stamp duty chargeable on**”.
- 8 In the proposed section 29CA(2), in the Chinese text, by adding “有關” after “取得”.
- 8 In the proposed section 29CA(3), by deleting “acquired” and substituting “disposed of”.
- 8 In the proposed section 29CA, by adding—
- “(3A) For the purposes of subsections (2) and (3), head 1(1B) in the First Schedule does not apply to a chargeable

agreement for sale if the residential property disposed of by the vendor under the agreement, or part of the residential property, consists of any building or any part of a building (whether completed or uncompleted) and—

- (a) the building is constructed, or caused to be constructed, by the vendor;
- (b) the land on which the building is constructed was acquired by the vendor (irrespective of whether or not any building existed on the land before the construction commenced); and
- (c) the existing building (if any) was demolished, or caused to be demolished, by the vendor.”.

8

In the proposed section 29CA(4), by deleting everything after “First Schedule,” and substituting—

“the vendor acquired the residential property on—

- (a) subject to subsections (4A) and (6B)—
 - (i) the date on which the vendor made a chargeable agreement for sale (other than an instrument conferring an option or a right of pre-emption referred to in paragraph (b) of the definition of *agreement for sale* in section 29A(1)) that provided for the conveyance of the property to the vendor; or
 - (ii) (if the chargeable agreement for sale consisted of 2 or more instruments) the date on which the first of those instruments was made; or
- (b) in any other case—
 - (i) the date of the conveyance under which the property was transferred to or vested in the vendor; or
 - (ii) (if the conveyance consisted of 2 or more instruments) the date on which the first of those instruments was made.”.

8 In the proposed section 29CA, by adding—

“(4A) If more than one chargeable agreement for sale was made between the same parties and on the same terms in respect of a residential property, the vendor acquired the property on the date on which the first chargeable agreement for sale referred to in subsection (4)(a) was made.”.

8 By deleting the proposed section 29CA(5).

8 In the proposed section 29CA(6), by deleting everything after “First Schedule,” and substituting—

“the vendor disposes of the residential property on, subject to subsections (6A) and (6B)—

- (a) the date on which the vendor makes a chargeable agreement for sale (other than an instrument conferring an option or a right of pre-emption referred to in paragraph (b) of the definition of *agreement for sale* in section 29A(1)) that provides for the conveyance of the property from the vendor; or
- (b) (if the chargeable agreement for sale consists of 2 or more instruments) the date on which the first of those instruments is made.”.

8 In the proposed section 29CA, by adding—

“(6A) If more than one chargeable agreement for sale is made between the same parties and on the same terms in respect of a residential property, the vendor disposes of the property on the date on which the first chargeable agreement for sale referred to in subsection (6)(a) is made.

(6B) If a chargeable agreement for sale is made in respect of a residential property, and another chargeable agreement for sale is made in respect of all or any part of the property which is, under section 29C(5),

chargeable with stamp duty as if it were a conveyance on sale executed in pursuance of the first-mentioned agreement, the property or that part of the property was acquired, and is disposed of, on—

- (a) (if under that other agreement the purchasers are those referred to in section 29C(5)(c)(i)) the dates specified in section 29DA(9A) as if that other agreement were a conveyance on sale executed in pursuance of a chargeable agreement for sale as referred to in section 29D(4); or
- (b) (if under that other agreement the purchaser is that, or the purchasers are those, referred to in section 29C(5)(c)(ii)) the dates specified in section 29DA(9B) as if that other agreement were a conveyance on sale executed in pursuance of a chargeable agreement for sale as referred to in section 29D(5).”.

8 In the proposed section 29CA(7), by deleting “or child” and substituting “, child, brother or sister”.

8 In the proposed section 29CA(8), by deleting everything after “chargeable agreement for sale” and substituting—

“if—

- (a) the agreement is made pursuant to any decree or order of any court; or
- (b) the residential property in respect of which the agreement is made—
 - (i) was transferred to or vested in the vendor by or pursuant to any decree or order of any court;
 - (ii) relates solely to the estate of a deceased person;
 - (iii) was devised by or otherwise passed on the death of the deceased person under a will, the law of intestacy or right of survivorship to the vendor;
 - (iv) relates solely to a bankrupt’s estate;

- (v) relates solely to the property of a company being wound up under section 177(1)(d) of the Companies Ordinance (Cap. 32); or
- (vi) is the subject of a sale by a mortgagee (being a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap. 112)) or a receiver appointed by such a mortgagee.”.

8 In the proposed section 29CA(9), in the English text, by deleting
“with a” and substituting “on a”.

9 By adding before subclause (1)—

“(1A) Section 29D(1)—

Repeal

“or issue a stamp certificate in respect of the conveyance on sale”.”.

9 By adding—

“(3A) Section 29D(4)(a), after “head 1(1)”—

Add

“and (if applicable) (1AA)”.”.

9(4) In the proposed section 29D(4)(b)(i), by adding “on sale” after
“conveyance”.

9 By adding—

“(4A) Section 29D(5)(a), after “head 1(1)”—

Add

“and (if applicable) (1AA)”.”.

- 9(5) In the proposed section 29D(5)(b)(i), by adding “on sale” after “conveyance”.
- 9 By adding—
- “(6) Section 29D(6)(c)(ii), after “child of that person”—
- Add**
- “(or, only in so far as it relates to special stamp duty, a parent, spouse, child, brother or sister of that person)”.”.
- 10 In the proposed section 29DA, in the heading, by deleting “**Special stamp duty chargeable with**” and substituting “**Further provisions on special stamp duty chargeable on**”.
- 10 In the proposed section 29DA(1), by adding “on sale” after “under the conveyance”.
- 10 In the proposed section 29DA(2)—
- (a) by adding “on sale” after “under the conveyance”;
- (b) in the Chinese text, by adding “有關” after “取得”.
- 10 In the proposed section 29DA(3), by deleting “acquired” and substituting “disposed of”.
- 10 In the proposed section 29DA, by adding—
- “(3A) For the purposes of subsections (2) and (3), head 1(1AA) in the First Schedule does not apply to a conveyance on sale if the residential property disposed of by the transferor under the conveyance on sale, or part of the residential property, consists of any building

or any part of a building (whether completed or uncompleted) and—

- (a) the building is constructed, or caused to be constructed, by the transferor;
- (b) the land on which the building is constructed was acquired by the transferor (irrespective of whether or not any building existed on the land before the construction commenced); and
- (c) the existing building (if any) was demolished, or caused to be demolished, by the transferor.”.

10 By deleting the proposed section 29DA(4), (5) and (6).

10 In the proposed section 29DA(7), by deleting everything after “First Schedule,” and substituting—

“the transferor acquired the residential property on—

- (a) subject to subsections (7A), (9A) and (9B)—
 - (i) the date on which the transferor made a chargeable agreement for sale (other than an instrument conferring an option or a right of pre-emption referred to in paragraph (b) of the definition of *agreement for sale* in section 29A(1)) that provided for the conveyance of the property to the transferor; or
 - (ii) (if the chargeable agreement for sale consisted of 2 or more instruments) the date on which the first of those instruments was made; or
- (b) in any other case—
 - (i) the date of the conveyance under which the property was transferred to or vested in the transferor; or
 - (ii) (if the conveyance consisted of 2 or more instruments) the date on which the first of those instruments was made.”.

10 In the proposed section 29DA, by adding—

“(7A) If more than one chargeable agreement for sale was made between the same parties and on the same terms in respect of a residential property, the transferor acquired the property on the date on which the first chargeable agreement for sale referred to in subsection (7)(a) was made.”.

10 By deleting the proposed section 29DA(8).

10 In the proposed section 29DA(9), by deleting everything after “First Schedule,” and substituting—

“the transferor disposes of the residential property on, subject to subsections (9A) and (9B) and section 29CA(6), (6A) and (6B)—

- (a) the date of the conveyance on sale of the property under which the property is transferred or divested from the transferor; or
- (b) (if the conveyance on sale consists of 2 or more instruments) the date on which the first of those instruments is made.”.

10 In the proposed section 29DA, by adding—

“(9A) In the case of a conveyance on sale of residential property executed in pursuance of a chargeable agreement for sale as referred to in section 29D(4), the person named in the agreement as the purchaser (*that purchaser*)—

- (a) acquired the property on—
 - (i) the date on which that purchaser made a chargeable agreement for sale (other than an instrument conferring an option or a right of pre-emption referred to in paragraph (b) of the definition of *agreement for sale* in section 29A(1)) that provided for the conveyance of the property to that purchaser; or

- (ii) (if the chargeable agreement for sale consisted of 2 or more instruments) the date on which the first of those instruments was made; and
 - (b) disposes of the proportion of the property to be vested in the other person not named in the agreement as a purchaser as referred to in section 29D(4) on—
 - (i) the date on which the conveyance on sale is executed; or
 - (ii) (if the conveyance on sale consists of 2 or more instruments) the date on which the first of those instruments is made.
- (9B) In the case of a conveyance on sale of residential property executed in pursuance of a chargeable agreement for sale as referred to in section 29D(5), a person named in the agreement as one of the purchasers (*that person*), if the conveyance on sale is not executed in favour of that person—
- (a) acquired that person's proportion of the property on—
 - (i) the date on which that person, together with the other person or persons named in the agreement as a purchaser or purchasers as referred to in that section, made a chargeable agreement for sale (other than an instrument conferring an option or a right of pre-emption referred to in paragraph (b) of the definition of *agreement for sale* in section 29A(1)) that provided for the conveyance of the property to that person and that other person or persons; or
 - (ii) (if the chargeable agreement for sale consisted of 2 or more instruments) the date on which the first of those instruments was made; and
 - (b) disposes of that person's proportion of the

property on—

- (i) the date on which the conveyance on sale is executed; or
- (ii) (if the conveyance on sale consists of 2 or more instruments) the date on which the first of those instruments is made.”.

10 In the proposed section 29DA(10), by deleting everything after “transferred under the conveyance” and substituting “on sale is a parent, spouse, child, brother or sister of the transferor under the conveyance on sale.”.

10 In the proposed section 29DA(11), by deleting everything after “conveyance on sale” and substituting—

“of residential property if—

- (a) the conveyance on sale is, or is executed pursuant to, any decree or order of any court; or
- (b) the property—
 - (i) was transferred to or vested in the transferor by or pursuant to any decree or order of any court;
 - (ii) relates solely to the estate of a deceased person;
 - (iii) was devised by or otherwise passed on the death of the deceased person under a will, the law of intestacy or right of survivorship to the transferor;
 - (iv) relates solely to a bankrupt’s estate;
 - (v) relates solely to the property of a company being wound up under section 177(1)(d) of the Companies Ordinance (Cap. 32); or
 - (vi) is the subject of a sale by a mortgagee (being a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap. 112)) or a receiver appointed by such a mortgagee.”.

- 10 In the proposed section 29DA(12)—
- (a) in the English text, by deleting “with a” and substituting “on a”;
 - (b) by adding “on sale” after “the conveyance”.

- 10 In the proposed section 29DA, by adding—
- “(13A) Paragraphs (a), (b), (c) and (d) of section 29D(6) also apply for the purposes of this section.”.

- 10 In the proposed section 29DA(14), by adding “on sale” after “the conveyance”.

- New By adding—
- “11A. **Section 44 amended (Relief in case of gift to exempted institution)**
- Section 44(1)—
- Repeal**
- “or head”
- Substitute**
- “or (1AA) or ”.”.

- 12 By deleting everything after “Section” and substituting—
- “45(1)—
- Repeal**
- “, 2(1) and 2(3)”
- Substitute**
- “or (1AA) or 2(1) or (3)”.”.

- 14(2) In the proposed head 1(1AA), in Note 1, by deleting “section” and

substituting “sections 29D and”.

- 14(2) In the proposed head 1(1AA), in paragraph (a) of Note 2, by adding “on sale” after “the conveyance”.
- 14(2) In the proposed head 1(1AA), in paragraph (b) of Note 2—
- (a) in the English text, by deleting “with” (wherever appearing) and substituting “in respect of”;
 - (b) by adding “on sale” after “the conveyance”.
- 14(2) In the proposed head 1(1AA), by deleting Note 3.
- 14 By adding—
- “(2A) First Schedule, head 1(1A), paragraph (B)—
Repeal
“section 29C(11) and”.
 - (2B) First Schedule, head 1(1A), Note 2, paragraph (a)—
Repeal
“but subject to section 29C(11)”.
 - (2C) First Schedule, head 1(1A), Note 2, paragraph (b)—
Repeal
“, or is endorsed under section 29C(13)(a)”.
 - (2D) First Schedule, head 1(1A), Note 3, paragraph (b)—
Repeal
“, or is endorsed under section 29C(13)(a)”.
 - (2E) First Schedule, head 1(1A), Note 3, paragraph (b)(ii)—
Repeal
“and section 29C(11)”.

- 14(3) In the proposed head 1(1B), in Note 1, by deleting “section” and substituting “sections 29C and”.
- 14(3) In the proposed head 1(1B), in the English text, in paragraph (b) of Note 2, by deleting “with” (wherever appearing) and substituting “in respect of”.
- 14(3) In the proposed head 1(1B), by adding—
- “Note 2A
A nomination made, or a direction given, by a purchaser as referred to in paragraph (h) of the definition of *agreement for sale* in section 29A(1) in favour of one, or more than one, person who is a parent, spouse, child, brother or sister of the purchaser (whether or not also in favour of the purchaser) is not chargeable with special stamp duty”.
- 14(3) In the proposed head 1(1B), in Note 3, by adding “; but a person and a brother or sister of that person are also to be treated as the same person for the purposes of special stamp duty” after “under head 1(1A)”.