Hong Kong Institute of
Certified Public Accountants
香港會計師公會

Hong Kong's
CPA Qualification
香港會計師專業資格

Module Preparation Seminar (Part I)

for

Module D on Taxation

Speaker
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Stamp duty

Trend analysis

Dec 2011	Jun 2012	Dec 2012	Jun 2013	Dec 2013
1) Consideration – exchange of properties 2) S. 45 relief 3) Lease and calculation 4) Assignment on liquidation (17 Marks)	1) Head 2(1) 2) Consideration 3) Calculation (6 marks)	1) Special Stamp duty 2) Exempt (6 marks)	1) Head 1(2)(b) 2) Right vs license 3) Adjudication (6 marks)	1) Head 2(1) 2) S. 45 relief 3) Head 2(3) 4) S. 27(5) 5) Adjudication (13 marks)

A. Overview

1. Stamp duty is a tax on instruments or documents levied under the Stamp Duty Ordinance ('SDO') and is made up of nine parts with Section 1 to 68 and five schedules.

2. An instrument which falls within one of the following Heads of charge will be stampable, whether or not that instrument was executed in or outside Hong Kong:

   Head 1 Immovable property in Hong Kong

   Head 2 Hong Kong stock

   Head 3 Hong Kong bearer instrument

   Head 4 Duplicates and counterparts of chargeable instruments under Heads 1, 2 and 3

3. SDO or other Ordinances requiring a document to be made for stamping:-
   - all conveyance of land/buildings must be by way of deed;
   - a sale and purchase agreement of immovable property must be evidenced in writing;
   - a lease of immovable property for a period exceeding three years must be in writing;
   - in the case of sale and purchase of Hong Kong stock, the buyer and the seller or their brokers are required under s.19 to execute contract notes (sold note for the seller, bought note for the buyer) for stamping.

4. The Stamp Office is not responsible for ascertaining the legality of any document or instrument before stamping. An illegal document (e.g. a lease agreement for subletting a flat owned by the Housing Authority) may still be stamped. On the other hand, instruments not properly stamped will not be acted upon, filed or registered by any public officer or body corporate.

B. Scope of charge

1. Chargeable instruments:-

Head	Instrument	Stamp duty
1 (1)	Conveyance on sale	\$100 or 0.75 - 4.25% on the higher of consideration and market value
1(1AA)	Conveyance on sale chargeable with Special Stamp Duty	5% - 15% on the higher of consideration and market value
1(1A)	Agreement For Sale of residential property	\$100 or 0.75 - 4.25% on the higher of consideration and market value
1(1B)	Agreement For Sale chargeable with Special Stamp Duty	5% - 15% on the higher of consideration and market value
1(2)	Lease of immovable property:	
	With premium only	Same as conveyance on sale (\$100 or 0.75 - 4.25% on the higher of consideration and market price)
	With premium and/or rent	4.25% on premium and/or
	Lease term not specified	0.25 % on average yearly rent, or
	Lease term ≤ 1 year	0.25 % on total rent payable
	Lease term > 1 year but ≤ 3 years	0.5% on average yearly rent
	Lease term > 3 years	1% on average yearly rent
	An agreement for lease executed in pursuance of a duly stamped AFS	\$3

Head	Instrument	Stamp duty
2(1)	Contract note, not jobbing business	0.2% (0.1% on bought note, 0.1% on sold note)
2(2)	Contract note, jobbing business	$5
2(3)	Instrument of transfer for voluntary disposition *inter vivos*	$5 + 0.2% on value of stock
2(4)	Instrument of transfer of any other kind	$5
3(1)	Hong Kong bearer instrument	3% on market value
3(2)	Instrument in substitution for duly stamped instrument under Head 3(1)	$5
4	Duplicates and counterparts of any chargeable instrument	$5

2. Stampable consideration

i. Levied on the value of consideration which may be made up of money, money's worth, debts assigned or waived, securities, commodities or services performed.

ii. Consideration consisting of <u>stock</u>
Section 22(1) of the SDO - where the consideration or any part of the consideration for a conveyance on sale consists of any stock, stamp duty is chargeable by reference to the value of the stock on the date of conveyance or transfer.

iii. Consideration consisting of <u>security not being stock</u>
Section 22(2) of the SDO - where the consideration or any part of the consideration for a conveyance on sale consists of any security not being stock, stamp duty is chargeable by reference to the amount due on the date of conveyance or transfer for the principal and interest upon the security.

iv. Consideration consisting of <u>debts payable by the transferee</u>
Section 24(1) of the SDO - provides that debts, including contingent ones, payable by the transferee are treated as part of the consideration for a conveyance of immovable property or transfer of stock that is chargeable to stamp duty.

v. Consideration in the form of <u>debts waived</u>
- Section 24(1) of the SDO - debts waived by the transferee are treated as part of the consideration for a conveyance of immovable property or transfer of stock.

- If the debt consideration exceeds the value of the property conveyed or stock transferred, stamp duty is chargeable based on the higher amount of the debt to be settled by the immovable property or stock.
- Section 24(2) of the SDO, the person liable for the stamp duty may apply to have the stamp duty payable based on the lower value of the immovable property or stock. In such case, the chargeable instrument (the conveyance or contract note) has to be adjudicated.

vi. Consideration in the form of debts assigned

Section 24(3) of the SDO - when there is a transfer of a beneficial interest in a body corporate and the transferee will incur liability in respect of any indebtedness of the body corporate, the amount of the indebtedness will form part of the consideration for the transfer.

vii. Consideration consisting of periodic payments - stamp duty charged under Section 23 as follows:-

- Payable for a definite period not exceeding 20 years - by reference to the total amount payable.
- Payable for a definite period exceeding 20 years or in perpetuity or for any indefinite period not terminable with life - by reference to an amount equal to the total amount which will or may, according to the terms of sale, be payable during the period of 20 years after the date of the conveyance or contract note.
- Payable periodically for a life or lives - by reference to an amount equal to the total amount which will or may, according to the terms of sale, be payable during the period of 12 years after the date of the conveyance or contract note.

viii. Consideration expressed in foreign currency

- For the purpose of calculating the stampable value, the consideration is translated into Hong Kong dollars at the rate of exchange prevailing on the date of the instrument.
- Section18(2) of the SDO, the 'rate of exchange' means the buying rate for the currency in question, as determined by the Monetary Authority, for telegraphic transfers at the commencement of business on the date of the instrument or, if that date is a Sunday or a general holiday, on the business day immediately preceding that date.

ix. Contingency principle

(a) If the consideration under an instrument is unascertainable at the time of execution, no stamp duty can be assessed.

(b) If the consideration is uncertain but the instrument contains a clause on the amounts of maximum and minimum consideration payable, stamp duty is assessed on the maximum amount payable. Any duty paid will not be refunded even though the consideration payable at a later date is less than the maximum amount stated.

(c) If the consideration is uncertain but the instrument contains a clause on the amount of minimum consideration payable, stamp duty is assessed on the minimum amount payable. Further duty cannot be assessed even though the consideration payable at a later date is more than the minimum amount stated.

Stamp Office Interpretation Practice Note 3 - guidance on deemed consideration under Section 24 and examples as to the practical application of Section 24.

C. Immovable property in Hong Kong (Head 1)

1. The stamping of immovable property is governed by Head 1 in the First Schedule:

1	Immovable property in Hong Kong Conveyance on sale
1(1)	Conveyance on sale
1(1AA)	Conveyance on sale chargeable with SSD
1(1A)	Agreement for sale
1(1B)	Agreement for sale chargeable with SSD Lease
1(2)	Lease

2. There are normally three instruments involved in the sale of immovable property, namely:-

   a. a provisional (temporary) Agreement for Sale (AFS);
   b. a formal AFS; and
   c. a conveyance on sale.

3. The following instruments are chargeable under Head 1(1):

   a. Deed of assignment for the sale and purchase of immovable property.

   b. Deed of gift of immovable property or conveyance operating as a voluntary disposition intervivos. Stamp duty is chargeable on the market value of the property: Section 27(1).

c. Foreclosure order relating to immovable property whereby the mortgaged property is conveyed to the mortgagee (the lender which is usually the bank) as the mortgagor (the borrower) is unable to repay the debt. Foreclosure is the process by which the right of a mortgagor to redeem the mortgaged property is terminated, and the mortgagee becomes the owner of the mortgaged property at law and at equity. A foreclosure order must be granted by court decree.

d. Deed of exchange for the exchange of immovable property. By virtue of Section 25(7) and 27, stamp duty is chargeable on any consideration paid or given for equality (i.e. equality money paid by one owner to the other owner) or the difference between the values of the exchanged properties, whichever is the higher.

e. Deed of partition in relation to immovable property. By virtue of Section 25(7) and 27, stamp duty is chargeable on any consideration paid or given for equality or the difference between the values of the partitioned properties, whichever is the higher.

f. Deed of family arrangement whereby a beneficiary takes immovable property in satisfaction of his pecuniary legacy.

g. The ad volerem rates of stamp duty on conveyance of sale of immovable property are as follows:-

Consideration/market value	Stamp duty
Up to $2,000,000	$100
$2,000,001 - $2,351, 760	$100 + 10% of the excess over $2,000,000
$2,351,761 - $3,000,000	1.5%
$3,000,001 - $3,290,320	$45,000 plus 10% of the excess over $3,000,000
$3,290,321 - $4,000,000	2.25%
$4,000,001 - $4,428,570	$90,000 plus 10% of the excess over $4,000,000
$4,428,571 - $6,000,000	3%
$6,000,001 - $6,720,000	$180,000 plus 10% of the excess over $6,000,000
$6,720,001 - $20,000,000	3.75%
$20,000,001 - $21,739,120	$750,000 plus 10% of the excess over $20,000,000
Over $21,739,120	4.25%

h. As an anti-avoidance measure, if a duty-payer wishes to enjoy the progressive rates rather than the maximum rate of 4.25%, he or she must include in the conveyance on sale a Section 29 certificate stating that the transaction does not form part of a larger transaction or a series of transactions, in respect of which the aggregate consideration or value exceeds the amount for that progressive rate.

i. In addition to the above ad valorem rates, the conveyance on sale of residential property may be subject to SSD (Head 1(1AA)) for residential property acquired by a vendor on or after 20 November 2010 and resold within 24 months, and no provisional AFS was entered into before that date.

4. Stamp duty on AFS of residential property

i. Each purchaser and vendor who enters into an agreement (written or unwritten) for the sale and purchase of immovable property (residential and non-residential) is required to execute an AFS containing a variety of specified matters.

ii. Rates of stamp duty

a. The rate of stamp duty for an AFS of residential property under Head 1(1A) is the same as that for a conveyance on sale of non-residential property under Head 1(1).

b. As with the conveyance on sale, if a duty- payer wishes to enjoy the progressive rates rather than the maximum rate of 4.25%, he or she must include in the AFS a Section 29G certificate stating that the transaction does not form part of a larger transaction or a series of transactions, in respect of which the aggregate consideration or value exceeds the amount for that progressive rate.

c. If stamp duty has already been imposed on an AFS (a provisional AFS or a formal AFS if it is executed within 14 days of signing the provisional AFS) of residential property, stamp duty payable on the conveyance on sale of the residential property which is executed in conformity with, or pursuant to, the duly stamped AFS, is $100. The table below summaries the charge of stamp duty for transfer of immovable property:-

	Purchase/Sale of residential property	**Purchase/Sale of non-residential property**
Provisional (Temporary) AFS	Ad valorem stamp duty under Head 1(1A), or nil if a formal AFS is executed within 14 days	No stamp duty
Formal AFS	$100, or ad valorem stamp duty under Head 1(1 A) if the formal AFS is executed within 14 days	No stamp duty
Conveyance (Assignment)	$100, or ad valorem stamp duty under Head 1(1) if the conveyance is not executed in conformity with a duty stamped AFS	Ad valorem stamp duty under Head 1(1)

d. In addition to the ad valorem rates, an AFS may be subject to SSD (Head 1(1B)) for residential property acquired by a vendor on or after 20 November 2010 and resold within 24 months.

iii. Series of AFS

a. In the case of a series of AFS between different parties for the same residential property, stamp duty is chargeable on each of the AFS and the conveyance on sale, resulting in additional costs to the property speculators.

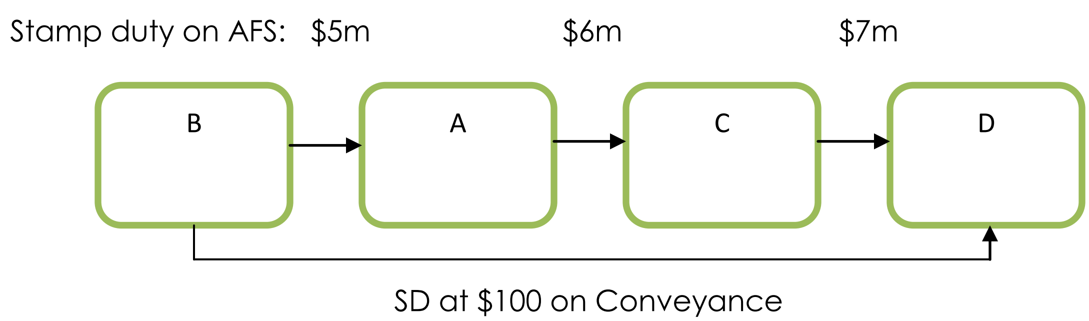
b. The Stamp Office will pass the information about the speculators to their colleagues in the IRD to consider imposing profits tax on the speculative gains.

Example QP (LP)

A acquired a property from B at $5 million and sold it to C for $6 million. C then sold the property to D for $7 million. The property was finally conveyed from B to D. Stamp duty will be imposed on:

(a) the AFS between B and A, based on the consideration of $5 million at 3%;
(b) the AFS between A and C, based on the consideration of $6 million at 3%; and
(c) the AFS between C and D, based on the consideration of $7 million at 3.75%.

Stamp duty payable on the conveyance on salebetween B and D executed in conformity with the duly stamped AFS will be $100.

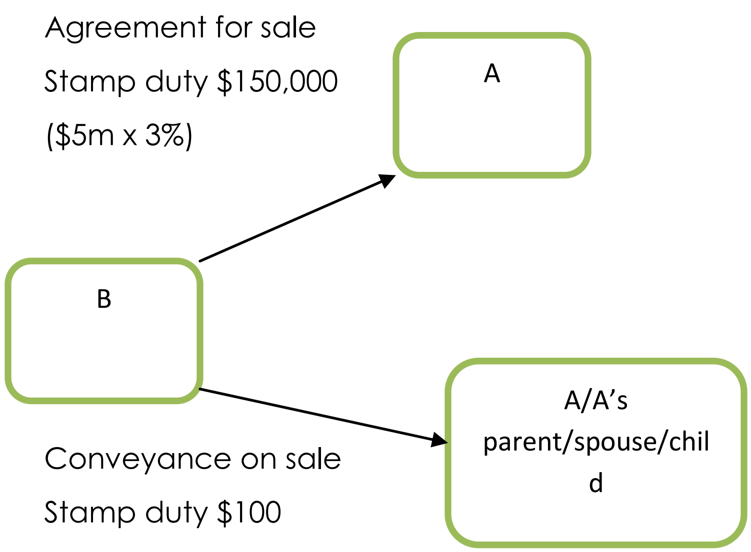


Based on the information provided by the Stamp Office, the IRD will raise enquiries on A and C. If there are badges of trade indicating that A and C are trading in properties, they will have to pay profits tax on their trading gains on disposal of the property.

Further ad valorem stamp duty is payable if a name is added to or deleted from an AFS. The stamp duty payable is proportional to the share of the ownership change under Section 29D(4) and (5). However, a parent, spouse or child of the purchaser will be regarded as the same person as the purchaser (Note 5 to Head 1(1A)); and no further duty is payable.

Example QP (LP)

A signed an AFS to purchase a residential property from B at $5 million, and stamp duty on the AFS was charged at 3% on $5 million. On conveyance, A admitted his parent, spouse and child as joint tenants of the property. In such circumstances, the stamp duty chargeable on conveyance will be $100 as A's parent, spouse and child are deemed to be the same person as A.



If, instead of admitting his parent, spouse and child, A admitted his brother and sister as joint tenants, further ad valorem duty will be payable on the conveyance on sale in the amount of $100,000 ($5 million × 3% × 2/3).

iv. AFS involving residential and non-residential properties

a. According to SOIPN 1, the Collector's practice is as follows:

- The AFS is regarded as an AFS of a residential property and the whole consideration is liable to stamp duty.
- Stamp duty may be computed on the consideration for the residential units only, provided that:
  - the residential and non-residential units are separate and distinct properties; and
  - the respective considerations for the residential and non-residential units are separately set out in the AFS.

b. The stamp duty rate applicable will still be based on the total consideration for the whole transaction.

v. Deferring payment of stamp duty on AFS

a. Since 1 April 1999, an AFS that is cancelled, annulled or rescinded or is otherwise not performed - stamp duty will not be chargeable provided that the AFS is not rescinded under an arrangement for re-selling the property by the purchaser.

b. If stamp duty has been paid for an AFS which is not regarded as a chargeable AFS – may apply for refund to the Collector within two years after the cancellation, annulment or rescission of the AFS; or in the case where the AFS is not performed, two years after the agreed date of completion of the transaction.

D. Special stamp duty (Head 1(1 AA) and 1(1B))

1. To discourage speculation in residential properties - Special Stamp Duty (SSD) would be imposed on the disposal of residential properties which were acquired by an individual or a company (regardless of where it is incorporated) on or after 20 November 2010 and resold within 24 months from the date of acquisition - imposed on top of the ad valorem duty on a chargeable AFS of residential property under Section 29CA and Head 1 (1B); or a conveyance on sale under Section 29DA and Head 1(1AA), with a few exemptions available.

2. SSD - imposed on residential property transactions, not a charge on the gain on sale of the property. If the sale of property constitutes a trade, the seller will still be subject to profits tax on the profits earned, but the SSD is a tax deductible expense.

3. Rates of SSD
   i. Conveyance on sale or AFS is chargeable with SSD under Head 1(1 AA) and (1B);
   ii. The seller and the buyer are jointly and severally liable for paying the SSD;
   iii. Calculated based on the stated consideration or the market value, whichever is the higher, of the resold property at the following regressive rates, with higher rates for shorter holding periods:

Holding period	Duty rate
< 6 months	15%
> 6 months but <12 months	10%
>12 months but ≤ 24 months	5%

4. Counting of the holding period
    i. In counting the holding period, a person 'acquires' a residential property when equitable ownership or legal ownership of the property is passed to the person.
    ii. A person 'disposes of' a residential property when equitable ownership or legal ownership of the property passes from the person to another person.
    iii. The dates of acquisition and disposal of a property is based on the signing date of the chargeable AFS, or if no such chargeable AFS exists, the signing date of conveyance (i.e. assignment). For the purpose of determining the date of acquisition or disposal:
        - > one chargeable AFS between the same parties and on the same terms - the signing date of the earliest AFS will be taken as the date of acquisition or disposal of the property.
        - where a chargeable AFS or conveyance consists of two or more instruments - a principal instrument and supplemental instrument(s), the date of the first of those instruments is regarded as the date of acquisition or disposal.
    iv. Counting of holding period is based on calendar months. The period from any day in the month to the preceding day of the following calendar month is counted as one month.

5. Exchange or partition of residential properties

    i. The agreement for exchange or partition of residential properties is in essence an AFS;
    ii. The date of signing it is regarded as the date of 'acquisition' or 'disposal' of the properties concerned; and
    iii. SSD is calculated by reference to the 'equality money' payable for the exchange or partition.

Where the stated 'equality money' under an agreement for exchange or partition is less than the full difference in the values of the properties concerned, SSD is charged on the full difference.

If the dates of acquisition of the exchanged properties by the respective parties in the exchange are different, the earlier one will be taken for counting the holding period. Where a residential property is exchanged for a non-residential property, only the date of acquisition of the residential property in the exchange is relevant for counting the holding period.

6. Time for payment of SSD
   i. Heads 1(1 AA) and (1B) - a chargeable instrument is to be stamped with SSD at the same time as that for the ad valorem stamp duty, i.e. in general, within 30 days after the date on which the AFS is entered into or the conveyance is executed.
   ii. SSD is from 20 November 2010. In respect of AFS executed between 20 November 2010 and the date on which the new law comes into force (30 June 2011), any SSD has to be paid within 30 days of that date.
   iii. Where a residential property acquired by the seller on or after 20 November 2010 is disposed of or transferred on or after 30 June 2011 and the holding period of the property is within 24 months, SSD is payable within 30 days after the date of signing the chargeable AFS. If there is no chargeable AFS, SSD is payable within 30 days after the date of the conveyance.
   iv. Effective 30 June 2011, deferred payment will not be granted for chargeable AFS of residential property even if valued below HK$20million

7. Persons liable to pay SSD

   i. The vendor and the purchaser = are jointly and severally liable.

   ii. Heads 1(1 AA) and (1B) - all parties to the instruments chargeable with SSD, i.e. a chargeable AFS and a conveyance on sale, and all other persons executing the instruments are liable to pay the SSD.

   iii. All parties exclude persons signing the chargeable instruments in the capacity of witness (e.g. estate agents or solicitors) unless the person uses such an instrument, e.g. an estate agent suing the vendor/ purchaser for the agency fee based on a provisional AFS.

8. Refund of SSD

   i. If a chargeable AFS is cancelled, annulled or rescinded or is otherwise not performed, an application for refund of SSD can be made to the Collector within two years after the cancellation, annulment or rescission of the AFS, or in the case where the AFS is not performed, two years after the agreed date of completion of the transaction.

   ii. Likewise, an application for refund of the SSD on conveyance on sale can be made to the Collector within two years after the conveyance on sale is cancelled in accordance with Section 48.

9. Exemptions from SSD

   i. Payment of SSD is exempted in the following cases:

      (a) Nomination of a close relative (a parent, spouse, child, brother or sister) to take up the assignment of a residential property under an AFS (i.e. the assignment is treated as "in confirmatory with" an AFS). The IRD has indicated that it will accept persons who are blood-related, half-blood related, adopted or step-related;

      (b) Sale or transfer of a residential property to a close relative;

(c) Addition/deletion of a name to/from a chargeable AFS or a conveyance on sale of a residential property if the person is a parent, spouse, child, brother or sister of the original purchaser;

(d) Sale, transfer or vesting of a residential property made by the courts or pursuant to a court order (including a compulsory sales order made under the Land (Compulsory Sale for Redevelopment) Ordinance, and a foreclosure order made to a mortgagee, irrespective of whether the mortgagee is a FI within the meaning of Section 2 of the IRO), and the residential property was sold to/transferred to or vested in the seller by or pursuant to any decree or order of any court;

(e) Sale or transfer of a residential property that relates to the estate of a deceased person, and 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;

(f) The residential property sold relates solely to a bankrupt's estate or the property of a company which is being wound up by the court by reason of its inability to pay debts;

(g) Sale of mortgaged properties 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;

(h) Sale or transfer of a residential property to the Government; and

(i) Sale or transfer of a residential property between associated bodies corporate.

ii. It should be noted that under the above circumstances, only the payment of SSD is exempted; the underlying AFS or transfers remain chargeable AFS or transfers under which the purchasers or transferees 'acquired' the immovable properties. When the properties are further disposed of subsequently, any SSD liability will be determined by reference to such 'acquisition' dates (SOIPN 5, para 33).

iii. SSD does not apply to the sale of first-hand residential properties. Therefore, the following sale or transfer is not chargeable to SSD:

(a) Sale or transfer of residential units built on a bare site, regardless of whether the bare site has been acquired by the developer from the Government or from another developer;

(b) Sale or transfer of redeveloped residential units after demolition of the original properties acquired;

(c) Sale or transfer of a bare site after demolition of the original properties acquired; and

(d) Sale or transfer of a bare site acquired from the Government to another developer.

E. Lease (Head 1(2))

1. Covers leases of immovable property (excludes lease agreements for hiring of chattels such as cars, machines, ships, etc.)

2. To constitute a lease, the instrument must give the tenant the right to exclusive possession. If the right of the tenant is restricted, e.g. the right of a hotel guest, the instrument is a license and not a lease.

3. In general, the stamp duty on a lease of immovable property is shared by the landlord and tenant equally.

4. Lease with premium only (Head 1(2)(a))- it is the practice of the Stamp Office to treat an advance payment of more than one year's rent as a premium. Stamp duty is levied at the same rate as that under Head 1(1) for a conveyance on sale (i.e., $100 or 0.75 - 4.25%).

5. Lease with premium and/or rent (Head 1(2)(b))
   i. For a lease with a consideration comprising both a premium and/or rent,

      (a) premium will be charged with stamp duty at 4.25%, the same rate as the maximum rate for a conveyance on sale; and

      (b) the rent will be charged with stamp duty by reference to the term of the lease agreement and the amount of yearly or average yearly rent as follows:

Term of lease	Stamp duty
Not defined	25 cents for every $100 or part thereof of the yearly or average yearly rent (i.e. 0.25%)
≤ 1 year	25 cents for every $100 or part thereof of the total rent payable over the term of the lease (i.e. 0.25%)
>1 year but ≤ 3 years	50 cents for every $100 or part thereof of the yearly or average yearly rent (i.e. 0.5%)
> 3 years	$1 for every $100 or part thereof of the yearly or average yearly rent (i.e. 1%)

Note: Rent-free period is taken as part of the lease period for the purpose of determining the lease period.

6. Contingency Principle
   i. No stamp duty is assessed if the consideration is uncertain at the time of execution.
   ii. If the maximum or minimum amount of rent payable is stated in the lease agreement, stamp duty will be assessed on the maximum amount (or the minimum amount if the maximum monthly rental is not stated).

7. Lease executed in pursuance of a duly stamped agreement for lease (Head1(2)(c))

   i. The stamp duty payable on a lease executed in pursuance of a duly stamped agreement for lease is $3.

F. Hong Kong Stock (Head 2)

1. The stamping of Hong Kong stock is governed by Head 2 in the First Schedule:
   2(1) Contract note
   2(2) Contract note (jobbing business)
   2(3) Transfer as voluntary disposition
   2(4) Transfer of any other kind

2. Contract note, not being jobbing business (Head 2(1))
   i. 'Sale or purchase' of Hong Kong stock = any disposal or acquisition (other than by allotment) for valuable consideration, any exchange, and any transaction in respect of which an instrument is deemed to be a transfer by way of sale (Section 19(16)).
   ii. Head 2(1) - Contract notes for a sale or purchase of Hong Kong stock is stamped at the rate of $2 for every $1,000 (i.e. 0.2%: i.e. bought note at 0.1% and sold note at 0.1%) of the higher of the consideration or its value at the date on which the contract notes fall to be executed.
   iii. Stamp duty is charged in respect of each of the sale and sub-sale agreements between the intermediate parties, despite that only one set of bought and sold notes were executed by the original vendor and the ultimate purchaser: *Far East Consortium Ltd & Another v AG 2.*
   iv. Stock borrowing and lending transactions are not chargeable to stamp duty provided the following conditions are met:-
      a. The borrowed stock must have been used for one or more specified purposes (Section 19(6));
      b. A stock return must have been made in respect of the borrowed stock;
      c. The borrower must have complied with any demand made by the lender for the return of stock of the quantity and description as that was previously borrowed;

d. The borrower has to pay the lender equivalent amounts of the dividends paid on the borrowed stocks; and

e. The lender's risk of loss or opportunity for gain from the borrowed stocks is not reduced by the lending.

Note: 'Stock borrowing transaction' = where Hong Kong stock is borrowed by a stock-broker for the sole purpose of settling a sale of Hong Kong stock, with an undertaking to return the stock within a specified period.

'Stock return transaction' = where Hong Kong stock of the same quantity and description as that borrowed is returned within the specified period.

v. Deemed sale and purchase of stock

a. Section 19(1E) deems certain transactions in Hong Kong stock to be a sale and purchase of Hong Kong stock. SOIPN 4 sets out the current practice of the Collector in administering these provisions Contract notes of the deemed sales and purchase of stock are required to be made and executed, and stamp duty is payable on these notes under Head 2(1) by reference to the value of the stock transferred.

b. In order that Section19(1E)(a) may apply, the transaction in question must effectuate a transfer of beneficial interest in Hong Kong stock by any means, whether by electronic means or by means of an entry in any recording or bookkeeping system or otherwise, and whether under or through a recognized clearing house or any other person or organization such as stockbrokers, custodians, etc. providing a clearing or transfer service.

c. The deeming section does not apply where the transaction would, if it were effectuated by a transfer chargeable with stamp duty under Head 2(3), be a transfer of the kind exempted under Section 27(5). Section 27(5) exempts a transfer chargeable under Head 2(3) from stamp duty if the transfer is made:
   - for a nominal consideration for the purpose of securing the repayment of a loan; or
   - for effectuating the appointment of a new trustee; or
   - under which no beneficial interest passes in the property conveyed or transferred; or
   - to a beneficiary by a trustee or other person in a fiduciary duty under a trust.

3. Section 19(1E) would also not apply to a transaction which is exempted under any other provisions of the SDO such as Section 45 exemption for transactions between associated bodies corporate.

4. Contract note in respect of jobbing business (Head 2(2))
   i. 'Jobbing business' - any business carried on by an exchange participant which is specified as jobbing business by regulations made under Section 63.
   ii. Contract notes in respect of jobbing business are stamped at $5 each.

5. Transfer operating as a voluntary disposition *inter vivos*(Head 2(3))
   i. 'Instrument of transfer' means an instrument by means of which any Hong Kong stock is transferred, and includes a letter *of* renunciation.
   ii. Stamp duty on an instrument of transfer of Hong Kong stock operating as a voluntary disposition *inter vivos,* i.e. a gift during life time, is at $5 and $2 for every $1,000 (i.e. 0.2%) or part thereof of the value of the stock.
   iii. The donor and done are jointly and severally liable for the stamp duty.

6. Transfer of any other kind (Head 2(4))
   i. Other instruments of transfer will be charged at a fixed duty of $5.
   ii. With effect from 2003/04, instruments of transfer relating to the issue of units under unit trust schemes by fund managers or redemption of units under unit trust schemes are exempt from the fixed duty of $5.

G. Hong Kong bearer instrument (Head 3)

1. Head 3 – governs the stamping of Hong Kong bearer instruments.

2. 'Bearer instrument' - Any instrument to bearer by delivery of which any stock can be transferred, but does not include an instrument relating to stock which consists of a loan expressed in terms of currencies other than that of Hong Kong, except to the extent that the loan is repayable, or may at the option of any person be repaid, in the currency of Hong Kong.

3. 'Hong Kong bearer instrument' is also defined as a bearer instrument issued:
   (a) in Hong Kong; or
   (b) elsewhere by or on behalf of a body corporate formed, or an unincorporated body of persons established, in Hong Kong.

4. Hong Kong bearer instrument issued in respect of any stock (Head 3(1))

   Hong Kong bearer instruments issued in respect of any stock are stamped before issue at $3 per $100 or part thereof (i.e. 3% of the market value at the time of issue). An exemption applies in respect of any unit in a unit trust scheme where the terms of the scheme restrict the trust funds to investing in loan capital.

5. Hong Kong bearer instrument given in substitution for a duly stamped instrument (Head 3(2))

   Stamp duty on Hong Kong bearer instruments given in substitution for a like instrument duly stamped under Head 3(1) is at a fixed duty of $5.

H. Duplicates and counterparts (Head 4)

1. Head 4 governs the stamping of duplicates and counterparts.

2. Where the stamp duty on the original instrument is less than $5, the duplicate or counterpart will only attract the same amount of stamp duty as that on the original. In any other cases, stamp duty on the duplicate or counterpart of a dutiable instrument is at a fixed duty of $5.

I. Voluntary disposition inter vivos

1. Stamp duty cannot be avoided by stating a lesser amount of consideration in the instrument as Section 27 empowers the Collector to charge stamp duty on a conveyance of immovable property or transfer of Hong Kong stock as voluntary disposition inter vivos when:
   i. a conveyance or transfer not expressly worded as a gift has the effect of a gift, e.g. a conveyance or transfer without any consideration; and
   ii. a conveyance or transfer is for an inadequate consideration.

2. The consideration will be deemed to be inadequate if the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred.

3. Indeed, intentional understatement of consideration (contrast to selling at below market value) for the purpose of mitigating stamp duty payable is an offence under Section 59.

4. When Section 27(4) applies, the conveyance or transfer will be chargeable with stamp duty on the basis of the market value of the property or stock, rather than the amount specified in the relevant instrument. Even if the transaction is at arm's-length, in good faith and for valuable consideration, stamp duty will still be imposed on the market value. The criterion for voluntary disposition inter vivos is to see whether the conveyance or transfer confers a substantial benefit, which does not depend on the parties' intentions but upon an objective examination of the factual elements.

5. Chan Li Chai Medical Factory (Hong Kong)Ltd. vs Collector or Stamp Revenue
   Zung Fu Co Ltd vs Collector of Stamp Revenue

6. It should be noted that if marriage is the consideration for a conveyance of immovable property or a transfer of Hong Kong stock, the conveyance or transfer is not deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos. Thus, a conveyance or transfer is not chargeable with stamp duty if marriage is the consideration. However, the conveyance or transfer has to be adjudicated.

7. Moreover, Section 27 does not apply to a conveyance of immovable property or transfer of Hong Kong stock if no beneficial interest passes upon conveyance or transfer. This applies to a conveyance or transfer:
   i. made for a nominal consideration to secure the repayment of an advance or loan;
   ii. made to effect the appointment of a new trustee;
   iii. under which no beneficial interest in the property passes, e.g. a distribution in specie on liquidation of a company;
   iv. made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust.

J. Exemptions and reliefs

1. The following exemptions and reliefs are provided under Sections 39 to 44 and Section 46:
   (a) Conveyance on sale to the Government;
   (b) Leases and grants by the Government;
   (c) Instruments executed by the Housing Authority, Urban Council and Regional Council for the purpose of the relevant Ordinances;
   (d) Lease or agreement for lease made in respect of consular premises with exempted person;
   (e) Instruments exempted under the Bankruptcy Ordinance and Companies Ordinance;
   (f) Instruments executed by the Government or public officer for official purpose;
   (g) Instruments affecting immovable property made for new Government lease or exchange;
   (h) Transfer of units of constituent funds under MPF schemes;
   (i) Instruments of transfer relating to indirect allotment or redemption of units under unit trust schemes;
   (j) Gift of immovable property or Hong Kong stock to exempted charitable institutions.

2. The Government, any incorporated public officer or any person acting in the capacity of a public officer is exempt from payment of stamp duty. However, this does not mean that the instrument itself is exempt from stamp duty. The other party to the instrument, if any, and not being an exempted person, is still liable for payment of the full amount of duty chargeable.

3. For leases of consular premises or leases between the Government or incorporated public officer and another party, only 50% of the duty chargeable is payable by the other party.

4. An exempted charitable institution means a charitable institution or trust of a public character that are exempt from tax under Section 88 of the IRO. The gift must be an absolute gift, and the donor must not receive or retain any benefit from the transfer.

5. If it is not an absolute gift, the transfer will be treated as a voluntary disposition inter vivos and stamp duty will be chargeable on the market value.

K. Relief under Section 45/Section 29H(3)

1. Relief under Section 45 for conveyance of immovable property (Head 1(1)) and 1(1 AA)), or transfer of Hong Kong stock (Head 2(1) and 2(3)) between associated bodies corporate only applies when:
   i. one of the bodies corporate is the beneficial owner of not less than 90% of the issued share capital of the other; or
   ii. a third body corporate is the beneficial owner of not less than 90% of the issued share capital of each of the bodies corporate.

   Issued share capital refers to both ordinary and preference shares at par value; and Section 45 relief is available where ownership can be traced through shareholdings in another body corporate.

2. Place of incorporation – Not relevant for the purposes of Section 45 relief.

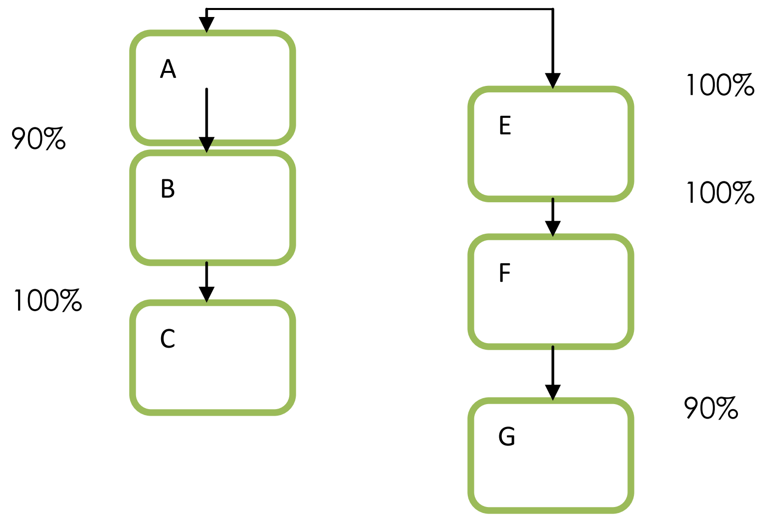
3. Section 29H(3) – same relief for AFS (residential properties under Head 1(1A) and 1(1B).

4. Not applicable to leases of immovable property between associated bodies corporate (Head 1(2)).

5. Subsequent condition - once relief is enjoyed, the transferor and transferee have to remain associated for at least 2 years. Otherwise, the relief is revoked and duty is payable within 30 days of the change under Section 45(4)(c) and (5A).

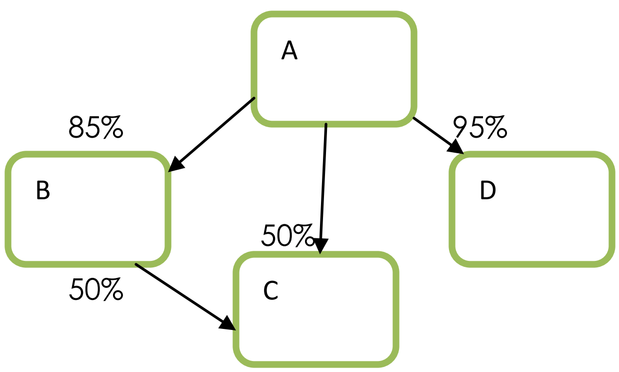
Example QP (LP)

A, B, C, D, E and F with the following group structure are associated bodies corporate eligible for the relief under s.45. A holds directly 90% of B and indirectly 90% of C. In addition, A effectively holds 90% or more of the shareholdings in D, E and F.



Example QP (LP)

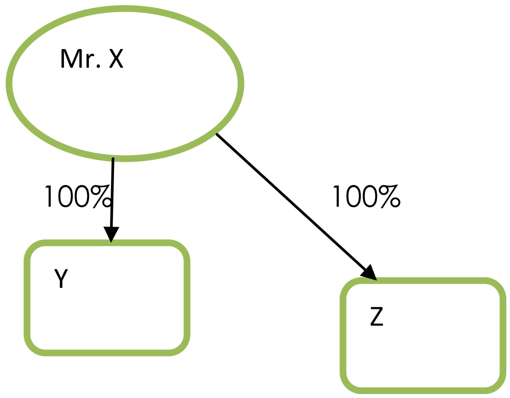
In the following group structure, A, C and D are associated bodies corporate eligible for the relief under s.45. A holds 95% of D and, directlyand indirectly, 92.5% of C (50% + 85% ×50%). However, A and B, B and C as well as B and D are not associated.



It should be noted that companies held by an individual (not a corporate owner) will not qualify for the relief under s.45, which only applies to associated bodies corporate.

Example QP (LP)

Although Mr. X holds 100% of Y and Z, Y and Z are notassociated bodies corporate eligible for the relief under s.45. This is because Mr. X is an individual, not a body corporate.



L. Other exemptions under Sections 47A and 47B

1. With effect from 1 December 2000, four specific types of unit transfers under MPF schemes are exempt from the requirements to pay the fixed stamp duty of $5 per instrument of transfer and to submit the instrument of transfer to the Collector for endorsement to the effect that it is not chargeable with ad valorem stamp duty.

2. The exempted transactions are:
   i. indirect allotment of units by Constituent Funds under MPF schemes to scheme members through the fund managers;
   ii. redemption of units in Constituent Funds by MPF scheme members;
   iii. indirect allotment of units by Approved Pooled Investment Funds to Constituent Funds under MPF schemes through the fund managers; and
   iv. redemption of units in Approved Pooled Investment Funds by Constituent Funds under MPF schemes.

M. Remission of stamp duty by Chief Executive

1. The Collector is conferred with the power to remit the whole or any part of the penalty imposed under Section 9 for late stamping, but he has no power to remit the stamp duty. Section 52 provides that the Chief Executive may remit, wholly or in part, the stamp duty payable; or refund, wholly or in part, the stamp duty paid.

N. Stamp duty administration

1. The major stamp duty administration issues relate to the methods of stamping, time limit and person liable for stamping, penalty for late stamping and failure to disclose relevant information, adjudication, appeal against assessment and effect of non-stamping.

2. Methods of stamping - the stamping of instruments generally takes place by denoting on the face of the instrument the payment of stamp duty when the instrument is presented to the Stamp Office for stamping. With the growth of e-commerce, the Government has also introduced an alternative way of stamping certain instruments in the form of an electronic record.

3. The Collector may, upon application made through submission of a paper form or electronically, issue a stamp certificate in paper form or as an electronic record via the internet; and the payment of the stamp duty can be made on-line or through existing payment channels. The electronic stamping system is available only in respect of property transactions stamped within the normal time limits, although late stamping and payment of penalties in respect of instruments which are not more than 4 years late and which do not involve a request for remission of penalty can also be undertaken through the electronic stamping system.

4. The following cannot be dealt with under the electronic stamping system:
   i. adjudication cases;
   ii. cases involving an application for exemption or relief or through the exercise of the Chief Executive's discretion pursuant to Section 52; and
   iii. stock transactions.

5. Moreover, a stamp duty assessment will be issued by the Collector:
    i. where the value of the immovable property or stock being transferred cannot be ascertained at the time of presentation of the instrument for stamping; and
    ii. when the market value of property or stock transferred exceeds the stated consideration.

6. Time limit and person liable for stamping
    i. All dutiable instruments must be stamped either before execution or within a certain period of time after execution, as follows:

Instrument	**Time limit**	**Person liable**
Conveyance on sale and AFS of immovable property in Hong Kong	30 days after execution	All parties (usually payable by the purchaser)
Conveyance on sale and AFS of immovable property in Hong Kong chargeable with SSD	30 days after execution	All parties (usually payable by the purchaser)
Lease and agreement for lease of immovable properly in Hong Kong	30 days after execution	All parties
Contract notes (bought and sold notes) of Hong Kong stock	2 days after the sale or purchase if effected in Hong Kong; or 30 days after the sale or purchase if effected outside Hon Kong	Agent / principal

Instrument	**Time limit**	**Person liable**
Transfer as voluntary disposition of Hong Kong stock	7 days after execution if executed in Hong Kong; or 30 days after execution if executed outside Hong Kong	Transferor/ transferee
Instrument of transfer of Hong Kong stock	Before execution; or 30 days after execution if executed outside Hong Kong	Transferor/ transferee
Hong Kong bearer instrument	Before issue	Issuer/agent
Duplicates and counterparts of chargeable instruments	7 days after execution or such longer period as the time for stamping the original instrument would allow	Per original document

7. Penalty for late stamping

   i. Any dutiable instrument not stamped within the specified time limit may be subject to a penalty for late stamping as follows:

Period late for stamping	**Penalty**
≤ 1 month	2 times the duty
> 1 month but ≤ 2 months	4 times the duty
> 2 months	10 times the duty

ii. If a disclosure is made voluntarily and the delay is not deliberate, the Collector normally adopts the following formula in calculating the reduced penalty, subject to a maximum of $500:

Penalty = 14% x stamp duty payable x no. of days of delay / 365 days

iii. Subject to a time limit of six years, the Collector may take legal proceedings against any person or persons liable for the payment of duty for recovery of the unpaid duty and any penalty for late stamping.

8. Penalty for failure to disclose relevant information

i. Section 11(1) requires that all facts and circumstances which affect the liability of an instrument to stamp duty, or the amount of stamp duty chargeable on the instrument, are to be disclosed in that instrument. Any person who with intent to defraud the Government executes an instrument in which all relevant facts and circumstances are not set out, or who is employed or involved in the preparation of such an instrument neglects to set out all relevant facts and circumstances, commits an offence (Section 11(2)) and is liable to a fine at level 6 (i.e. $100,000) and one year imprisonment (Section 60)). The Collector is also empowered to refuse to stamp the instrument or to stamp it subject to such conditions as he thinks fit (Section 11(4)).

ii. Before the commencement of criminal proceedings in relation to the offence, the Collector has the power to compound any such offence (Section 11 (3)). However, no criminal proceedings can be instituted by the Collector after the expiration of two years from the discovery of the offence or six years from the commencement of the offence, whichever is the earlier (Section 61).

O. Adjudication

1. A person may, upon the payment of an adjudication fee, request the Collector to adjudicate an instrument. Adjudication is a procedure under which the Collector adjudicates (i.e. determines) whether an instrument is chargeable to stamp duty and, if so, the amount of stamp duty payable.

2. After adjudication, if the Collector is of the opinion that the instrument is not chargeable with stamp duty, the instrument will be stamped with a stamp denoting that it is not chargeable with stamp duty. Otherwise, the Collector will assess the instrument for stamp duty. He will issue a notice of assessment of stamp duty to the person who requires the Collector to express an opinion or who is liable for stamping such instrument. If no appeal is made against the assessment, the assessment shall, after the expiration of a period of one month, be final and conclusive.

3. If the Collector finds that the amount of stamp duty so assessed is excessive within one month from the assessment, he may cancel the assessment and make another assessment in substitution as he may deem proper.

4. Although a Declaration of Trust is not chargeable with stamp duty, it is a common practice in Hong Kong to have a Declaration of Trust adjudicated at the time of its execution so as to obviate the problem of proving the authentication of the document at the time of executing a transfer deed from the trustee to the beneficiary.

5. Importance of adjudication - adjudication is important for the following reasons:
   i. An adjudicated instrument will satisfy any third party as to the correctness of stamping.

ii. Certain instruments will not be regarded as properly stamped unless adjudicated (e.g. deeds of gift).
iii. Adjudication is part of the process of appeal in any dispute as to liability to stamp duty.
iv. There is doubt as to the chargeability or amount of stamp duty payable.

6. Compulsory adjudication - compulsory in the following cases:
   i. An AFS, a conveyance or transfer operating as a voluntary disposition inter vivos under Section 27;
   ii. An instrument conveying or transferring property in contemplation of sale which is treated as a conveyance or transfer operating as a voluntary disposition inter vivos under Section 27;
   iii. An instrument claimed to be exempt from duty under the provisions of Section 45 relating to certain transfers between associated bodies corporate;
   iv. An instrument (or duplicate or counterpart) claimed to be specifically exempt from stamp duty or where it is claimed that no person is liable for the payment of the stamp duty;
   v. A conveyance or contract note to which Section 24(2) applies (i.e. a transaction in consideration of a debt where the consideration would otherwise exceed the value of the property);
   vi. An instrument to which Section 44 applies (i.e. gifts to exempted institutions);
   vii. A foreclosure order; and
   viii. An appeal against a stamp duty assessment under Section 14.

P. Appeal against stamp duty assessment

1. Any person who is dissatisfied with the assessment raised by the Collector after adjudication may:
   i. within a period of one month from the date on which the assessment is made or within such further period as the Court may allow if the Court, on application made by the person, is satisfied that the person was prevented by illness or absence from Hong Kong or other reasonable cause from bringing the appeal within the time limit;
   ii. subject to any order of the Court, on payment of the stamp duty in conformity therewith or; where payment of the stamp duty or any part thereof is allowed to be postponed, on payment of the part (if any) of the stamp duty which is not allowed to be postponed; and
   iii. by notice served on the Registrar of the District Court;

   appeal against the assessment to the District Court. The District Court will determine the correctness of the assessment. If the person is not satisfied with the determination of the District Court, further appeals may be made to the Court of Appeal (application for leave to appeal needs to be made within fourteen days of the judgment or order) and finally, to the Court of Final Appeal.

2. Stamp duty generally must be paid first. However, upon application in writing by the person liable for payment of stamp duty within fourteen days from the date on which the assessment is made and provision of satisfactory security, the Collector may postpone payment of stamp duty, wholly or in part. The Court may also allow an appeal to the Court without payment of the stamp duty or with part payment only, upon provision of satisfactory security, if it considers the payment of the duty would impose hardship on the person.

Possible grounds for stamp duty appeals include:

- whether a transaction is to be regarded as a voluntary disposition inter vivos;
- whether there is any change in beneficial ownership;
- whether the instrument is exempt from stamp duty;
- whether a conveyance on sale forms part of a larger transaction or a series of transactions;
- the valuation of immovable property; and
- the valuation of private company shares.

3. Pursuant to Section 14(5A), the District Court may call upon opinions from members of the Lands Tribunal in respect of the valuation of immovable property.

4. Upon hearing, the Court will decide if the instrument is dutiable and if so, the quantum of stamp duty payable. If the amount assessed by the court is less than the amount assessed by the Collector, the excess will be refunded along with any excess penalty paid. If the amount assessed by the Collector is not excessive, the Court will make an order confirming the assessment.

Q. Effect of non-stamping

1. In the case of a legal proceeding, Section 15(1) stipulates that, subject to court orders or an endorsement of the Collector, no unstamped instruments can be accepted in evidence in any proceedings except in:
   i. criminal proceedings; or
   ii. civil proceedings instituted by the Collector to recover stamp duty and/or penalty.

2. The court may order that an instrument not duly stamped be received in evidence in civil proceedings upon the personal undertaking of a solicitor to pay the stamp duty and penalty thereon.

3. The Collector will endorse an instrument not duly stamped if he has approved the postponement of payment of the stamp duty or that the court has made an order allowing an appeal against the stamp duty assessment without payment of the stamp duty or with part payment only.

4. Filing, registration, brokerage, commission and dividends
   i. No instrument chargeable with stamp duty shall be acted upon, filed or registered by any public officer or body corporate unless such instrument is duly stamped; or endorsed by the Collector when the stamp duty is under appeal. Therefore,
      (a) the Land Registrar at the Land Registry cannot register an unstamped assignment of immovable property.
      (b) the registrar of a company cannot register the change of shareholders upon the presentation of an unstamped instrument of transfer.
      (c) the court cannot give judgment on the recovery of outstanding rent under an unstamped lease.

5. Any public officer who, or body associate which, fails to comply with Section 15(2) incurs a penalty at level 2 (i.e. $5,000).

6. No broker or agent can legally claim any charge for brokerage or commission for the sale or purchase of Hong Kong stock if he failed to comply with Section 19 to execute the contract notes.

7. The unregistered shareholders are not entitled to any divided, bonus or rights issues in respect of the shares bought.

Any questions please email vanessa@corexams.com
Admin queries please email pass@corexams.com

R. Anti-avoidance measures

1. In the absence of general anti-avoidance provisions in the SDO, if the Collector wishes to disregard a transaction for the avoidance of payment of stamp duty, he can rely on the *Ramsay* principle as enunciated by the House of Lords in *W T Ramsay Limited v IRC* [(1982) AC300].

2. The *Ramsay* principle enables the Court to disregard a pre-ordained series of transaction containing steps that are self-cancelling or without commercial substance. It applies when:
   (a) there is a pre-ordained series of transactions or a single composite transaction; and
   (b) there are steps inserted which have no commercial or business purpose apart from the avoidance of a liability to tax.

   If the above conditions exist, the inserted steps are to be disregarded for fiscal purposes and the court must then look at the end result.

3. *CSR v Arrowtown Assets Limited (2003)* - the Court of Final Appeal applied the *Ramsay* principle to counter a transaction intended to avoid stamp duty, and held that *Ramsay* is a decision that the court is entitled, for fiscal purposes, to disregard intermediate steps as having no commercial purpose as a consequence of an orthodox exercise of purposive statutory construction.

   By applying *Ramsay*, the Court of Final Appeal ruled that the s.45 relief was not available to the transaction carried out in *Arrowtown Assets*.

7. Stamp duty planning

   There are no general anti-avoidance provisions under the SDO. The principle of fiscal nullity may apply in aggressive avoidance cases, as in *CSR v Arrowtown Assets Limited* [(2003) HKRC 90–129].

To defend possible challenges from the Stamp Office, schemes or arrangements without commercial substance should be avoided in stamp duty planning.

The following are common methods used to reduce the exposure to stamp duty:

(a) No document, not duty;

No document, no duty - Stamp duty is levied on documents, not on transactions. If a transaction can be effected verbally or by conduct, such as in the case of a lease of immovable property not exceeding three years, no stamp duty is chargeable.

(b) Holding immovable property in the name of a corporation;

Holding immovable property in the name of a corporation - There is a significant difference in the rates of stamp duty on contract notes on transfer of Hong Kong stock (0.2%) and conveyances of immovable property (maximum 4.25%).

By disposing of the shares in a property holding company instead of selling the immovable property held by that company, liability to stamp duty can be reduced.

Disadvantage of acquiring the shares in a property holding company - there may be undisclosed hidden liabilities of the company such as undercharged tax, penalty, guarantees etc. and lower valuation, higher interest rates and handling charges from banks for mortgage loans, and the cost of setting up and maintaining a company.

However, the biggest problem exists when a property is held as trading stock in the books of the company at its original cost and the purchaser of the company buys the shares at a premium, reflecting the market price of the property. Although the seller will be making a tax free gain on disposal of the shares in the company, when it is time for the buyer to sell the property, the subsequent buyer of the property may not wish to buy the shares in the company.

The buyer of the company will then have to sell the property; and to foot the tax bill of the company based on the difference between the original book cost and the final sales price of the property.

In effect, he will be paying the tax of the original purchaser of the property.

(c) Purchasing immovable property by an exchange of property;
If the purchase of immovable residential/non-residential properties can be effected by an exchange of properties between the seller and the purchaser, stamp duty is chargeable on any consideration paid or given for equality or the difference between the values of the exchanged properties, whichever is the higher.

As stamp duty is not paid on the total value of the two properties conveyed, liability to stamp duty can be reduced.

(d) Transferring shares in a non-Hong Kong holding company;

One usual method to reduce the exposure to stamp duty is to use a non-Hong Kong company to hold shares in a Hong Kong company. Shares in the Hong Kong company will be transferred through the change in shareholdings of the immediate holding company, which is incorporated in a jurisdiction with no stamp duty on share transfer and has a share register outside Hong Kong.

(e) Undertaking share allotment; and

There is no stamp duty on newly issued shares and share allotment can be used to reduce the exposure to stamp duty.

(f) Utilising Section 45 relief.

Section 45 relief is available for the sale or transfer of immovable property or Hong Kong stock between associated bodies corporate. It is possible to make arrangements so as to utilise the relief.

QPD – December 2012

CASE

Dr. A operates a medical practice in his own name in Hong Kong. Apart from treating patients from the general public, he was also contracted by Company B to provide medical services to its employees. With the implementation of the Mainland and Hong Kong Closer Economic Partnership Arrangement, Dr. A has also been engaged as a visiting doctor at a Mainland hospital.

In the accounts for the year ended 31 December 2011, Dr. A recorded, among others, the following income and expenses for his medical practice:

(1) Income

- (a) Consultation fees of RMB100,000 from the Mainland hospital ("the Consultation Fees"). To earn the Consultation Fees, Dr. A provided medical treatment to a patient in the Mainland. At the patient's request, he also prepared in Hong Kong a medical report for the purpose of an insurance claim.
- (b) Compensation payment of HK$1 million for the termination of Dr. A's service contract with Company B ("the Compensation Payment"). The Compensation Payment was determined with reference to the consultation fees that Dr. A would have derived during the remaining period of the contract. According to past records, the service fees derived from this service contract would account for about 10% of Dr. A's annual income.

(2) Expenses

- (a) Medical expenses of HK$250,000 in relation to Dr. A's injuries in a traffic accident;
- (b) Additional tax of HK$5,000 imposed under s.82A of the Inland Revenue Ordinance ("IRO") due to late submission of tax return; and
- (c) Expenditures of HK$300,000 on the renovation of the existing clinic and HK$500,000 on the initial decoration of a new branch clinic. Both clinics are located in office buildings in prime locations.

Dr. A entered into an agreement to purchase Flat C as the sole owner on 1 February 2011. Under the agreement, Dr. A was required to settle the consideration within one year, and was permitted to live in the flat during that year. On 1 March 2011, Dr. A obtained an equitable mortgage loan to pay part of the consideration. He commenced to repay the loan (with interest of HK$10,000 per month) on 1 April 2011, and moved into Flat C with his family on 1 June 2011. On 1 November 2011, Dr. A settled the balance of the consideration, and nominated his wife, Mrs. A, to take up the assignment of Flat C and the related mortgage loan with him as joint tenants. The relevant assignment and mortgage deed were also executed on that day.

Dr. A also entered into an agreement to purchase another residential flat, Flat D, as the sole owner on 1 March 2011. He nominated Company E to take up the assignment of Flat D on 1 October 2011. Company E is a corporation of which Dr. A and Mrs. A are the only shareholders and directors. It incurred a significant loss from share dealing in 1997, and has been left dormant since then.

Dr. A and Mrs. A have a son of 7 years old. The son has been residing in the US with Mrs. A's parents, who are aged 65 and emigrated there more than 20 years ago. During the year ended 31 March 2012, the son and Mrs. A's parents did not visit Hong Kong, whilst Dr. A contributed US$5,000 per month to support their living expenses in the US. Mrs. A did not have any income chargeable to tax, and it is advantageous for her and Dr. A to elect for personal assessment.

Dr. A is considering to carry on his medical practice through Company E. He consults his accountant as whether it is a good idea from a tax perspective.

Question 4 (6 marks – approximately 11 minutes)

Explain whether and, if so, how the following instruments are chargeable with special stamp duty:

(a) the agreement dated 1 November 2011 under which Dr. A nominated Mrs. A to take up the assignment of Flat C with him as joint tenants. (2 marks)

(b) the agreement dated 1 October 2011 under which Dr. A nominated Company E to take up the assignment of Flat D. (4 marks)

Answer 4(a)

Under this nomination agreement, the nominee (i.e. Mrs. A) is the wife of the nominator (i.e. Dr. A). By virtue of s.29CA(10) of the Stamp Duty Ordinance ("SDO"), the nomination agreement is exempted from special stamp duty.

Answer 4(b)

Dr. A entered into an agreement to purchase Flat D on 1 March 2011.

By entering into the nomination agreement on 1 October 2011, Dr. A is regarded as having sold the flat to Company E on that date.

The period between 1 March 2011 and 1 October 2011 is 7 months and 1 day.

Since the holding period is more than 6 months but less than 12 months, the nomination agreement will be chargeable with special stamp duty at 10% of the consideration stated therein (if any) or the market value of Flat D on 1 October 2011, whichever is the higher, under head 1(1B)(b) in the First Schedule to the SDO.

QPD – December 2013

CASE

A Ltd. is a company incorporated and listed in Singapore. It has a wholly-owned subsidiary, B Ltd., which is incorporated in Hong Kong. B Ltd. engaged in two profitable lines of business, namely (a) trading of listed securities in Hong Kong, and (b) management of listed securities in Hong Kong for clients in Hong Kong and the Mainland of China ("the Mainland"). The securities trading was undertaken by B Ltd. on its own, whilst the securities management services were provided through its wholly-owned subsidiary, C Ltd. C Ltd. was incorporated in Hong Kong in 2000 and all its shares had been held by B Ltd. since incorporation. A Ltd., B Ltd. and C Ltd. closed their accounts on 31 December each year.

A Ltd. decided to restructure its business operations in the Greater China region. In this regard, B Ltd. sold all the shares in C Ltd. at a profit to A Ltd. Then, B Ltd. went into voluntary liquidation and the liquidator distributed to A Ltd. all the listed Hong Kong shares, which had been included in the trading stock of B Ltd., upon liquidation. The whole restructuring process was completed on 31 December 2012. For the purpose of liquidation, B Ltd. paid service fees of HK$2 million to the liquidator.

C Ltd. established a representative office in Shanghai to solicit Mainland clients for its securities management services. After concluding the management agreements in the Mainland, the representative office would pass the relevant information to the Hong Kong office for opening accounts and managing the clients' listed securities in Hong Kong. For the service fees received in RMB, the representative office would normally place them on 7-day call deposit in a Mainland bank with the intention of obtaining more favourable exchange rates for remittance to Hong Kong. In the year ended 31 December 2012, there was a remittance which, due to an unexpected fluctuation of the exchange rate, gave rise to an exchange loss of $100,000.

Dennis had been employed by C Ltd. as its Chief Executive Officer in Hong Kong for 10 years. After the above restructuring exercise referred to in the second paragraph, Dennis requested for his old employment contract to be terminated and for A Ltd. to re-employ him for secondment to the same position in C Ltd. immediately thereafter. For the termination, Dennis was neither provided with any written notice nor severance payment pursuant to his old employment contract. The new contract was negotiated and signed in Hong Kong, under which he was required to report to the board of directors of C Ltd. His remuneration package under the new contract was the same as that under the old contract. However, there was also a provision for an award of shares in A Ltd. Dennis was granted the relevant shares and became the registered shareholder of A Ltd. upon the commencement of his new employment contract on 1 January 2013. He was, however, restricted from selling the shares within the next 5 years.

Question 2 (13 marks – approximately 23 minutes)

A Ltd. had engaged E & Co. to advise on the stamp duty implications before the implementation of the restructuring exercise. Assuming that you were a tax manager of E & Co., draft an advisory letter to A Ltd. analysing the stamp duty implications in respect of the following transactions:

(a) B Ltd.'s sale of shares in C Ltd. to A Ltd.; and

(b) the distribution of the listed Hong Kong shares to A Ltd. by B Ltd. upon liquidation.

Answer 2

[Draft]

[Date]

A Ltd.
[Address]

[Our Reference]

Dear Sir/Madam,

Stamp duty implications of the intended business restructuring

Introduction

1. We refer to your recent engagement with this firm for advice on the stamp duty implications of certain share transactions between A Ltd. and B Ltd. pursuant to the intended business restructuring ("the Transactions"). In particular, you are concerned about whether the instruments for effecting the Transactions are chargeable with ad valorem stamp duty.

The facts

2. As we understand, the basic facts of the Transactions are as follows:
   (a) B Ltd. is a wholly-owned subsidiary of A Ltd.;
   (b) A Ltd. decided to restructure its business operations in the Greater China region. In this regard, B Ltd. will first sell all its shares in C Ltd., a company incorporated in Hong Kong, to A Ltd. ("Transaction 1");
   (c) Then, B Ltd. will go into a voluntary liquidation;
   (d) Upon the liquidation, the liquidator will distribute all the listed Hong Kong stocks held by B Ltd. in specie to the only shareholder, i.e. A Ltd. ("Transaction 2").

Our analysis

3. Having regard to the relevant legal principles and the provisions of the Stamp Duty Ordinance ("SDO"), we are of the view that the Transactions will not be subject to any ad valorem stamp duty. Our reasons are as follows:

Transaction 1

(a) The shares in C Ltd. are Hong Kong stocks as defined under s.2 of the SDO because C Ltd. is a company incorporated in Hong Kong and the transfer of its shares should be required to be registered in Hong Kong. By virtue of s.19(1) of the SDO, A Ltd. and B Ltd. have to make and execute contract notes for Transaction 1 ("the Contract Notes") and cause the Contract Notes to be stamped under head 2(1) in the First Schedule of the SDO.

(b) However, as A Ltd. holds all the shares in B Ltd., these two companies are associated bodies corporate within the meaning of s.45(2) of the SDO. Hence, the Contract Notes effecting Transaction 1 should be exempted from stamp duty under head 2(1) pursuant to s.45(1) of the SDO.

(c) Although B Ltd. will be liquidated after Transaction 1, this will not lead to the revocation of the stamp duty exemption pursuant to s.45(5A) of the SDO as there is no change in the percentage of the issued share capital of the transferee (i.e. A Ltd.).

Transaction 2

(d) Except for the provision of s.27(5) of the SDO, Transaction 2 will be deemed to be a voluntary disposition inter vivos by virtue of s.27(4) of the SDO because it lacks any valuable consideration. The instrument of transfer effecting such a transaction ("the Instrument") will be chargeable with stamp duty under head 2(3) in the First Schedule of the SDO.

(e) Nevertheless, being a distribution in specie of B Ltd.'s assets to its shareholder, A Ltd., upon liquidation, Transaction 2 did not involve any change of beneficial interest in stocks transferred: see Wigan Coal & Iron Co. Ltd. v IRC [1945] 1 All ER 392. As such, s.27(5) will be applicable and the Instrument will not be chargeable with stamp duty under head 2(3).

Conclusion

4. The above only provides our initial assessment on the stamp duty chargeability of the Contract Notes and the Instrument, and it may not reflect the actual determination by the Collector. To play safe and obviate any problem of registering the Hong Kong stocks concerned, you are advised to submit the Instrument for adjudication by the Collector at a fee pursuant to s.13(1) of the SDO. For the Contract Notes, adjudication is compulsory by virtue of s.45(3) of the SDO and no adjudication fee will be payable.

5. Indeed, subject to other considerations, you may consider refining your business restructuring exercise by simply liquidating B Ltd. and arranging both the shares in C Ltd. and the listed Hong Kong stocks held by B Ltd. to be distributed in specie to A Ltd. Such refinement will involve less steps, whilst the stamp duty consequence can remain the same.

6. We hope this advice can be of assistance. Should you have any question, please feel free to contact me at [telephone number] or Mr. / Ms. Y, Tax Manager of this office, at [telephone number].

Yours sincerely,
Tax Manager E & Co.