# STAMP DUTY ORDINANCE

# (CAP 117)

## Introduction

### [Intro A] Historical introduction

#### 1. Invention of an amateur in 1623

Stamp duty was invented by a Dutch private citizen, Johannes van den Broeck, who was born in 1597. According to a description of a portrait of him, he was a slim person, with a moustache, a rugged pinched face, dressed in black and velvet dress with a white collar. In 1623 Broeck, in response to an offer of a prize to anyone who could suggest an effective means of raising revenue to pay for a war, informed the States General of the Netherlands that he had invented a means of obtaining money which would not be onerous to the inhabitants. After being heard by some of the delegates he was promised an annual allowance of 3,000 guilders if the States General adopted his proposal. The tax was introduced in part of Holland on 13 August 1624 and extended by the States General to all seven provinces of the Netherlands in 1635. This tax became known as stamp duty.

#### 2. Ordinance No 12 of 1866

Given its antecedents, it is hardly surprising that stamp duty is the oldest of the taxes administered by the Inland Revenue Department. It was introduced by Ordinance No 12 of 1866 in the face of dire predictions from the business community that it would cause widespread commercial ruin and be the end of business as it is known in Hong Kong today. The tax is much older than estate duty which was enacted in 1915, and taxation of income which was first introduced in 1941 as a temporary war-time emergency measure.

#### 3. Ordinances No 8 of 1921 and No 35 of 1911

By virtue of its origins, it also seems appropriate that the Hong Kong precursors to the present day Stamp Duty Ordinance 1981 (as amended) should be antiquated in form and content and contain a large number of historical anomalies. The relevant ordinances, the Stamp Ordinance of 1921 and the Stamp Duties Management Ordinance of 1911 (both of which were based on United Kingdom statutes of the same name enacted in 1891), were thankfully greatly simplified in 1978 when the scope of the charging heads was substantially reduced. Despite this major revision, the legislation still contained what the Financial Secretary described in his 1978 budget speech as 'unsatisfactory features'.

#### 4. Stamp Duty Ordinance 1981

Following a lengthy consultation period, a significantly revised ordinance, the Stamp Duty Ordinance (Cap 117) was enacted in 1981 to consolidate and amend the law relating to stamp duty. At the same time, the ordinances of 1921 and 1911 were repealed. Although practitioners still complain of the complexity of, and difficulty in advising upon, the Stamp Duty Ordinance, it is none the less fairly compact, well organised and perhaps deserving the epithet of the only modern piece of fiscal legislation enacted in Hong Kong.

This old tax, known as stamp duty, is thus the subject of this volume. Before examining its complexities, let us digress for the moment to the nineteenth century. It was said that when a friend observed that Doctor Johnson was not enjoying the performance of an inexpert violinist, his good nature prompted him to remark that playing the instrument was difficult. To this Johnson replied, 'Difficult do you call it, sir? I wish it was impossible!' There must still be many lawyers, accountants and others who often feel this way about stamp duty. Nevertheless, it is hoped that this volume will make this area of law – and the practice surrounding it – clearer and more easily accessible. In the process of trying to achieve this, the authors were fortified upon discovering that at the time of his death Johannes van den Broeck had not succeeded in collecting so much as a single struiver of the promised 3,000 guilders per annum; nor was his daughter any more successful after his death. Indeed, it seems his family was still trying to collect the promised reward as late as 1728. Perhaps the original agreement was not properly stamped!

### 5. Stamp Office

The Stamp Office, located at Revenue Tower, Gloucester Road, Wanchai, has about 80 members of staff. It comprises two subsections: the Assignment Subsection and the General Subsection. The main functions of the Stamp Office are as follows:

*a. Assignment subsection*

Essentially, this could be termed 'the property subsection' because its main duties relate to the stamping of instruments, the subject matter of which is immovable property in Hong Kong. Its specific functions involve: (1) initial stamping of assignments, and other instruments of sale and purchase relating to immovable property; (2) processing the Property Transfer Stamping Request Forms, keeping statistics thereon, initiating valuation reviews by the Department of Rating and Valuation and passing information to related Units of the Inland Revenue Department for taxation purposes; (3) assessing additional duty; (4) recovery of stamp duty; and (5) adjudication of documents involving deeds of gift, partition and exchange (valuing and assessing) as well as agreements, assignments and other instruments submitted for adjudication, including section 45 relief for intra-group transfers of immovable property.

*b. General subsection*

The main duty of this subsection is to assess and collect stamp duty on transfer of shares, leases, bearer instruments and miscellaneous documents. Its specific functions involve: (1) counter assessment service providing preliminary assessment on the following documents submitted for stamping and adjudication – contract





notes and instruments of transfer of listed and unlisted shares, leases, bearer instruments and unit trusts, and other documents submitted for adjudication (simple matters only); (2) collection of stamp duty through a Schroff service and from the Stock Exchange; (3) stamping and endorsement; (4) adjudication of documents in complicated cases relating to all section 45 claims involving intra-group transfer of Hong Kong stock, family arrangements, and miscellaneous documents such as a grant of a licence; (5) assessing additional duty on share transfers and leases; and (6) licensing franking machines. The general subsection also monitors and controls stock borrowing and lending exemptions. In this regard, specific functions involve: (1) registering stock borrowing and lending agreements; (2) examining stock borrowing and lending returns; as well as (3) stamping contract notes for options market maker jobbing business.

*c. Some questions and answers on document stamping*

The Inland Revenue Department's website <http://www.ird.gov.hk> under the heading 'Tax Information – Others – Stamp Duty' provides general and up-to-date guidance and information, and is a recommended resource.

*d. Performance pledges*

The Inland Revenue Department has entered into various performance pledges for the services it offers to the public. The pledges relevant to the Stamp Office are as follows:

**Documents Stamping**

| | *Standard response time* | *Performance targets* |
|---|---|---|
| • Stamping of assignments, sale and purchase agreements and lease agreements through GovHK | Payment by on-line mode<br>Stamp certificate issued instantly through GovHK after receipt of stamp duty | Instant: 99% |
| | Payment by offline-mode<br>Stamp certificate issued within two working days through GovHK after receipt of stamp duty | First two days: 99% |
| • Processing of requests for stamping of assignments and sale and purchase agreements | Within five working days after receipt of application | First five days: 98% |
| • Stamping of contract notes and lease agreements | Within same day of receipt of full information | Same day: 98% |

*[A longer time, varying with complexity, is required for property valuation cases.]*

| | | |
|---|---|---|
| • Processing of claims for exemption for transfer between group companies | Within three months of receipt of claim and substantive information | First three months: 85%<br>Next nine months: 10% |

**Written Enquiries**

| | Replies made within | Performance targets |
|---|---|---|
| • Simple matters | seven working days of receipt of enquiries | First seven days: 95%<br>Next two days: 4% |
| • Technical matters | 21 working days of receipt of enquiries | First 21 days: 98%<br>Next 21 days: 1% |

### [Intro B] Fiscal significance

#### 1. Yield

In terms of yield, stamp duty is extremely important in Hong Kong. In recent years stamp duty regularly accounts for more (and sometimes much more) than 10% of the total taxation revenue levied by the Hong Kong Government. Although the Ordinance can still be said to be based upon the main charging provisions contained in the United Kingdom Stamp Act 1891, it is now a less complicated tax than that currently in force in the United Kingdom.

#### 2. Incidence – a tax on wealth?

From the standpoint of tax policy, stamp duty operates mainly as a tax on wealth with the subject matter of the two major charging heads being interests in Hong Kong land and stock. Since the rates of duty under the Ordinance are relatively high, particularly for instruments transferring an interest in land, the liability to pay stamp duty can, in absolute terms, be onerous and it is no surprise to find that tax advisers and their clients pay attention to methods of mitigating duty.

#### 3. A tax on the use of documents evidencing transactions

In any introduction to stamp duty, a cardinal rule of stamp duty law is invariably stressed – stamp duty is a tax on instruments evidencing transactions; it is not a tax on transactions (*Carlill v Carbolic Smokeball Co* [1892] 2 QB 484; affd, on other grounds, [1893] 1 QB 256). However, legislation has been enacted to ensure that stampable instruments (ie chargeable documents) are brought into existence. This tension between the time honoured rules and legislative efforts to ensure the creation of a stampable instrument highlights the importance of the duty in terms of revenue yield and the creative methods used by lawyers to circumvent it (see further, [Intro H] para 7 *et seq*).

### [Intro C] Research

The primary source and research materials relating to Hong Kong stamp duty are set out below.





#### 1. Stamp Duty Ordinance 1981 (Ordinance No 31 of 1981, as amended; Cap 117)

Aside from machinery provisions in other statutes such as the Companies Ordinance (Cap 622), the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), the Bankruptcy Ordinance (Cap 6) and the Conveyancing and Property Ordinance (Cap 219), the Stamp Duty Ordinance is the sole statute dealing with liability to stamp duty in Hong Kong. All these Ordinances have been published in the looseleaf edition of *The Laws of Hong Kong* and are accessible electronically through the BLIS (Bilingual Laws Information System) database operated by the Department of Justice.

#### 2. United Kingdom legislation

Notwithstanding extensive revisions in 1978 and 1981 and, more recently in relation to instruments dealing with immovable property in 1992 and 2010 – 2014, the main charging and machinery provisions of the Ordinance are derived from equivalent provisions in the United Kingdom Stamp Act 1891 and Stamp Duties Management Act 1891. Although comparison and cross-referencing are obviously useful, it must be appreciated that the statutory provisions in Hong Kong *are* different and United Kingdom precedents and case law should only be relied upon with utmost caution.

#### 3. Practitioners' texts

Apart from this title, *Encyclopaedia of Hong Kong Taxation: Stamp Duty*, the leading practitioners' texts in the United Kingdom, *Sergeant and Sims on Stamp Taxes* and *Monroe and Nock on the Law of Stamp Duties* are also useful in the Hong Kong context. The former is a loose-leaf annotation of the United Kingdom legislation and updates are published periodically; the latter is also in loose-leaf format and has the added benefit of having specific chapters dealing with stamp duty planning. The caveat referred to at the paragraph above applies equally here.

#### 4. Clear statement of general principles

A concise and very well-written guide to stamp duty in the United Kingdom is found in *Pinson's Revenue Law*. Although now very dated, its discussion of the general principles of stamp duty law is excellent.

#### 5. Hong Kong materials

The most important source for Hong Kong stamp duty material is the Inland Revenue Department's website which, amongst other things, (1) sets out a general summary of stamp duty, (2) describes and explains the stamping procedures adopted by the Stamp Office and (3) allows easy access to all *Stamp Office Interpretation and Practice Notes*, various *Stamping Procedures and Explanatory*

*Notes* as well as the more important *Stamp Office Forms*: see <www.ird.gov.hk> under the heading 'Tax Information – Others – 'Stamp Duty'.

The *Hong Kong Law Journal* (particularly for the period prior to 1981) contains several articles still relevant today. *Law Lectures for Practitioners*, an annual publication produced by the Hong Kong Law Journal, (particularly for the period prior to 2005) often contains an update on recent developments in revenue law and a specific section is invariably devoted to stamp duty. A journal devoted to Hong Kong revenue law is the *Asia-Pacific Journal of Taxation* (published by the Taxation Institute of Hong Kong and The Hong Kong Polytechnic University). Case law is scattered – the older cases are found in the *Hong Kong Law Reports*; cases decided more recently (mid-1960s to date) are published in *Hong Kong Tax Cases*, *Hong Kong Cases* and *Hong Kong Law Reports & Digest*. As stamp duty appeals are initially heard by the District Court, several cases (particularly the older ones) are only reported in the *District Court Law Reports*. The Hong Kong Judiciary <www.judiciary.gov.hk> and the Hong Kong Legal Information Institute <www.hklii.org> websites both provide electronic access to modern decisions of the superior courts in Hong Kong. The Collector occasionally issues practice directions which are distributed in circulars issued by *The Law Society of Hong Kong* and, more recently, *Stamp Office Interpretation and Practice Notes* and *Stamping Procedures and Explanatory Notes* (these circulars and notes are reproduced in Division III of this volume and are available electronically from the Inland Revenue Department's website). A very useful reference work is the multi-volume CCH publication *Hong Kong Revenue Legislation*, containing the full text of the Stamp Duty Ordinance, the Practice Notes and recent cases concerning stamp duty appeals.

**6. Commonwealth case law**

This can also be useful since relevant jurisdictions (particularly the various states in Australia as well as Singapore and Malaysia), like Hong Kong, originally based their stamp duty legislation on the United Kingdom Stamp Act 1891. For comparative purposes, *Australian Stamp Duties Law* (a loose-leaf service published by LexisNexis Butterworths) is comprehensive.

## [Intro D] Stamp Duty Ordinance 1981

The only statute imposing liability to stamp duty in Hong Kong is the Stamp Duty Ordinance (Ordinance No 31 of 1981, as amended; Cap 117). Machinery provisions are found in other statutes. The most important of these are contained in the Companies Ordinance (Cap 622), the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), the Bankruptcy Ordinance (Cap 6) and the Conveyancing and Property Ordinance (Cap 219). Practitioners must be aware of the important general definitions contained in the Interpretation and General Clauses Ordinance (Cap 1).





The following three paragraphs describe the important systemic changes made to the Ordinance since 1981. It is no coincidence that they all relate to Hong Kong's most valuable natural resource – land.

Initially, stamp duty upon instruments dealing with immovable property was generally only imposed upon the assignment or conveyance. In 1992, in order to curb speculation in the residential property market, agreements for sale of residential property became dutiable. Thus, it was no longer possible to avoid duty prior to the conveyance by entering into another contract with a new buyer or by cancelling the agreement in consideration of a cancellation fee or by nominating a new buyer to be the assignee under the conveyance.

In 2010–2013, in order to further curb rising prices flowing from what Government considered an 'overheated residential property market', two additional duties, special stamp duty (which generally applies when residential property is disposed of within a short time after acquisition) and buyer's stamp duty (which generally applies to a purchase of residential property, except where the buyer is a permanent resident of Hong Kong acting on his or her account in acquiring the property), were introduced. These duties are summarised at [Intro Q] para 15 and 16.

Most recently, following the enactment of the Stamp Duty (Amendment) (No 2) Ordinance 2014 (Ordinance No 14 of 2014), significant changes were made to the Ordinance to harmonise, at least in part, the way in which instruments dealing with immovable property are stamped. Specifically, with effect from 23 February 2013, agreements for sale of immovable property, whether residential or non-residential, became dutiable. (Previously, as noted above, only agreements for sale dealing with residential property were dutiable). This harmonisation did not substantially affect special stamp duty and buyer's stamp duty which, where applicable, continue to impose additional layers of duty on chargeable instruments dealing with residential property. In addition, subject to certain exceptions, this Ordinance significantly increased the scale of *ad volorem* duty on such agreements (or on the conveyance on sale where a chargeable agreement was not properly stamped). The most important exception to the increased rates of *ad volorem* duty applies to an agreement for sale or a conveyance on sale of residential property where the purchaser or transferee is a permanent resident of Hong Kong acting on his or her own behalf and who does not own any other residential property in Hong Kong at the time of acquisition. The two scales of *ad volorem* duty, and the circumstances in which they apply, are explained at [Intro Q] para 3.

## [Intro E] Fixed and ad valorem duties

The Ordinance imposes two distinct types of duty, namely (1) fixed duty and (2) *ad valorem* duty. Fixed duty does not depend upon the consideration expressed in the instrument or the value of the property transferred by the instrument (eg under head 2(4) of the First Schedule, transfers of Hong Kong stock where no beneficial interest in the stock passes are only subject to duty of $5). Conversely, *ad valorem* duty varies according to the consideration expressed in the instrument or the value of the property transferred by the instrument (eg under head 2(1) of the First

Schedule, contract notes for the sale and purchase of Hong Kong stock are liable in total to duty of $2 per $1,000 of the amount or value of the consideration provided).

As noted above, for the purposes of head 1(1) (dealing with conveyances on sale of immovable property) and head 1(1A) (dealing with chargeable agreements for sale of immovable property), one of two different scales of *ad valorem* duty apply (Scale 1 and the less onerous Scale 2).

The Ordinance also imposes two additional types of duty which, where applicable, are charged on certain instruments dealing with residential property. Those duties are special stamp duty (SSD) and buyer's stamp duty (BSD) (see [Intro F] para 3, c. and d. and respectively). The duties are, however, *ad valorem* in nature. In other words, the amount of SSD and BSD payable depends upon the amount or value of the consideration expressed in the chargeable instrument or the value of the residential property transferred, whichever is the greater.

## [Intro F] Heads of charge – an overview

### 1. The basic structure of the Ordinance

The basic structure of the Ordinance is best understood by examining the terms of, and inter-relationship between, section 2(1) and section 29A(1), section 4 and the First Schedule. Section 2(1) sets out the basic definitions applicable for the purposes of the Ordinance. Section 29A(1) contains definitions relevant for charging stamp duty on instruments dealing with immovable property. Both provisions are of crucial importance. It should also be appreciated that the definitions contained in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) are equally important. Not only does this section set out definitions for general words and phrases contained in the Ordinance, but also certain key terms such as 'immovable property' – which forms the subject matter of the charge imposed by head 1 of the First Schedule to the Ordinance – are specifically defined.

### 2. The general charging provision

The general charging provision imposing stamp duty is set out in section 4(1). That section expressly states that it is only those instruments specified in the First Schedule which are subject to stamp duty 'and that the headings, notes and explanations in that Schedule shall have effect accordingly'. The combined effect of these provisions is to (1) impose liability for duty on specified instruments, (2) set time limits within which those instruments must be stamped and (3) specify the person or persons liable to pay the duty. 'Stamp duty' is defined in section 2(1). It includes special stamp duty and buyer's stamp duty (see see [Intro F] para 3, c. and d. respectively), but not penalty duty for late stamping which is imposed under section 9 (see [Intro I] para 6, c.).





The heads of charge, which are contained in the First Schedule, are set out below.

### 3. Head 1: Immovable property in Hong Kong

The following instruments are subject to duty:

*a. Head 1(1): Conveyance on sale*

The crucial definitions of 'conveyance' and 'conveyance on sale' are contained in section 2(1); 'immovable property' and 'property' are both defined in section 3 of the Interpretation and General Clauses Ordinance. Other relevant definitions, including 'transferor' and 'transferee' are contained in section 29A(1). The duty is *ad valorem* and the maximum rate is 8.5% of the amount or value of the consideration provided for the conveyance (see paragraph (k) of Scale 1). A lower rate (imposed under Scale 2) applies in certain cases, the most important of these being where the transferee of 'residential property' is a 'Hong Kong permanent resident' (both terms are defined in section 29A(1)), or a tenant or authorised occupant of the Housing Authority who acquires the residential property under the Tenants Purchase Scheme, who does not own any other residential property in Hong Kong at the time of acquiring the property and who acts on his or her own behalf. A fixed rate of duty of $100 applies to a conveyance executed in conformity with a chargeable agreement for sale on which *ad valorem* duty has been charged under the provisions of Part IIIA and head 1(1A) of the First Schedule to the Ordinance ([Intro T] para 11). In short, unless an exemption or special provision applies, head 1(1) covers virtually all instruments which convey a beneficial interest in land in Hong Kong. Head 1(1) should be read together with Part IIIA which contains or incorporates most of the necessary interpretation and general and specific provisions relating to stamping conveyances on sale of immovable property.

In addition to *ad valorem* duty imposed under head 1(1), a conveyance on sale of 'residential property' (defined in section 29A(1)) may also be liable to 'special stamp duty' (defined in section 2(1); see [Intro I] para 3, c.) and 'buyer's stamp duty' (also defined in section 2(1); see [Intro I] para 3, d.).

*b. Head 1(1A): Agreement for sale*

Crucial definitions such as 'agreement for sale', 'unwritten sale agreement', 'vendor', 'purchaser', 'residential property' and 'non-residential property' are contained in section 29A(1). As is the case under head 1(1), duty under head 1(1A) is imposed under one of two separate rate scales ([Intro F] para 3, a. and [Intro Q] para 3). Where an agreement is stamped at *ad valorem* rates under head 1(1A), any conveyance executed in conformity therewith is only liable to a fixed duty of $100. In short, unless an exemption or special provision applies, head 1(1A) covers all agreements for sale under which a beneficial interest passes in immovable property in Hong Kong. Head 1(1A) should be read together with Part IIIA which contains or incorporates most of the necessary interpretation and machinery provisions relating to stamping agreements for sale of immovable property. Finally, lease takes effect as a voluntary disposition *inter vivos*. It is not necessary that either or both the transferor and transferee are incorporated in Hong Kong for the exemption to apply.

There is no Hong Kong equivalent to the stamp duty relief specifically provided in the United Kingdom for instruments used in connection with schemes for reconstruction or amalgamation of companies. This is so notwithstanding that the revamped Companies Ordinance (Cap 622), which took effect on 3 March 2014, provides a court-free procedure for amalgamating wholly-owned companies within a group. The stamp duty implications arising from such amalgamations, and the likelihood of an exemption applying under sections 27(5) and 45, are considered in the Division II annotations to those sections.

The section is subject to detailed anti-avoidance provisions designed to ensure that relief is not obtained in circumstances in which the real purpose of a disposition is to convey immovable property or to transfer shares free of stamp duty to a corporation which is not a member of the group. The following conditions must be satisfied if the relief is to apply:

(1) The effect of the relevant instrument must be to convey or transfer a beneficial interest in immovable property or Hong Kong stock from one body corporate to another. The exemption does not apply where an individual conveys or transfers property to a company which he owns.

(2) The bodies corporate must be associated, that is to say, either:

   (a) one of the bodies must be the beneficial owner of not less than 90% of the issued share capital of the other; or

   (b) a third body corporate must be the beneficial owner of not less than 90% of the issued share capital of each.

   It is not sufficient that the shares in the relevant companies are owned by the same individual. Ownership, which must be beneficial, may, however, be direct or through other bodies corporate, or partly direct and partly through other bodies corporate. The rules for determining the proportion of share capital held directly and indirectly for the purposes of intra-group transfers are contained in the Third Schedule. For example, if A Ltd owns 95% of the issued capital of B Ltd which owns 91% of the issued capital of C Ltd, A Ltd owns only 86.4% of C Ltd and section 45 relief is not available for chargeable instruments made between A Ltd and C Ltd, although it is available between A Ltd and B Ltd and between B Ltd and C Ltd.

(3) The relevant instrument must not have been executed 'in connection with an arrangement' under which:

   (a) any part of the consideration was to be provided or received directly or indirectly by a person other than an associated corporation of the transferor or the transferee; or

   (b) the beneficial interest in the immovable property or Hong Kong stock was previously transferred directly or indirectly by a person other than an associated body corporate of the transferor or the transferee; or





   (c) the transferor and the transferee were to cease to be associated by reason of a change in the percentage of the issued share capital of the transferee in the beneficial ownership of the transferor or a third corporation.

   For these purposes an 'arrangement' means a plan or scheme under which any of the so-called disqualifying events referred to in (a), (b) or (c) above have been or are to be done (*Shop and Store Developments Ltd v IRC* [1967] 1 AC 472, 493–494). The arrangement need not be in the form of a binding contract. If there is an arrangement for a disqualifying event, relief will be refused even though there is little likelihood that it will happen. The words 'in connection with' have been construed in the United Kingdom

   equivalent legislation to be wide in scope. For instance, in *Escoigne Properties Ltd v IRC* [1958] AC 549 there was a gap of four years between the arrangement being made and the event taking place.

(4) An instrument to which section 45 applies will not be 'duly stamped' unless it has been adjudicated under section 13 and stamped exempt from duty.

(5) In practice the Collector will require any application for relief from duty under section 45 to be accompanied by a statutory declaration made by a responsible officer of the parent company, often a director or the secretary, or by the solicitor having conduct of the transaction, setting out in detail the facts and circumstances relevant to the claim.

(6) The associated corporation status of the transferor and transferee must not cease by reason of a change in the issued share capital of the transferee in the beneficial ownership of the transferor or a third corporation within two years of the date of executing the instrument for which the exemption is claimed. If these corporations cease to be so associated within this period any relief granted will be withdrawn and the stamp duty liability arising must be settled within 30 days of the date of the cessation (section 45(5A) and (7)).

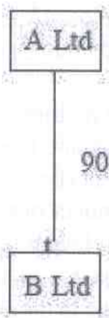
Provision of consideration from outside a group strictly will exclude relief where loan finance for the purchase is obtained (section 45(4)(a)). Provided, however, that the transaction is not to be followed by a sale of the property to a person outside the group the relief will normally be allowed, particularly where the loan was made by a bank or deposit-taking company in the ordinary course of its business (see Law Society of Hong Kong Circular No 1/83, reprinted in Willoughby and Halkyard, *Encyclopaedia of Hong Kong Taxation: Stamp Duty*, vol 1, III [48]). Even if a sale outside the group takes place, the relief may be allowed if stamp duty is to be paid on that transaction because this indicates that there was no arrangement and that the intra group transfer and the subsequent transfer out of the group are independent transactions. In general where loans are obtained the Stamp Office will usually wish to consider all the facts particularly where loan finance is not on usual commercial terms.

Dissociation or demerger of the transferee company was a frequently used avoidance device in the United Kingdom. In other words instead of selling relevant property (typically immovable property) in specie outside the group the shares of the transferee company were simply sold outside the group. This is prevented by section 45(4)(c) where there is an arrangement ([Intro Z] para 5 (3)(c) above) and, whether or not there is an arrangement, by section 45(5A) if the corporations cease to be associated within two years of the instrument of transfer by reason of a change in the percentage of the issued share capital of the transferee in the beneficial ownership of the transferor or a third body corporate.

The onus of proving that the conditions of section 45 have been satisfied is upon the person claiming the relief (*Littlewoods Mail Order Stores Ltd v IRC* [1963] AC 135, 150).

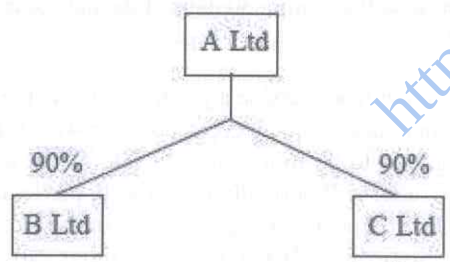
*Examples*

*Parent and subsidiary companies*




A Ltd and B Ltd can transfer Hong Kong immovable property or stock between each other with the benefit of the section 45 exemption.

*Parent and sister companies*

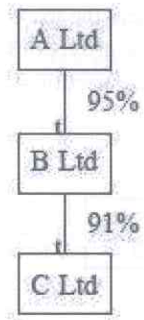



A Ltd can transfer Hong Kong immovable property or stock between itself and B Ltd or C Ltd *and* transfers between B Ltd and C Ltd will also qualify for section 45 relief.



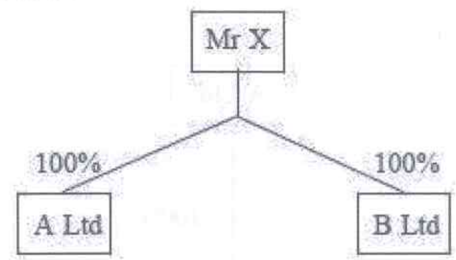


*Vertical structures: Third Schedule*




Under the Third Schedule A Ltd is not associated with C Ltd because its beneficial ownership of the shares in C Ltd is only 86.45% and not 90%. A Ltd is associated with B Ltd and B Ltd is associated with C Ltd. A transfer from A Ltd to B Ltd followed immediately by a transfer from B Ltd to the newly incorporated C Ltd would appear to satisfy the criteria for section 45 exemption. However, a subsequent yet pre-planned transfer to D Ltd (the shares of which are, say, 90% owned beneficially by C Ltd) would almost certainly reflect an arrangement resulting in loss of the exemption under section 45(4).

*Companies not associated*

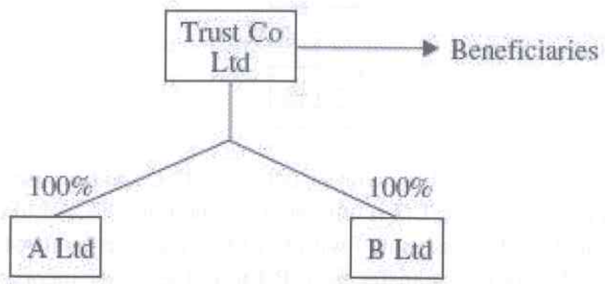



The companies must be associated either vertically or through a common corporate parent as shown in the previous examples. Common ownership by an individual is not enough.

*Leases*

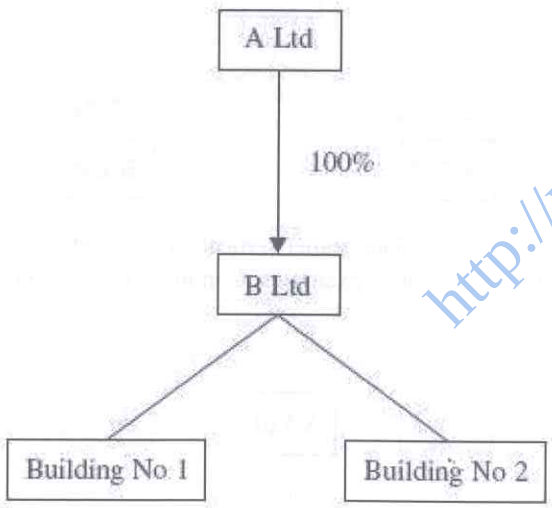
Section 45 relief does not apply to leases even where the lease is granted at a premium. The only exception is where the lease operates as a voluntary disposition *inter vivos* and is thus subject to the provisions of section 27(1) and head 1(1) of the First Schedule. Even in this case section 45 does not apply to any lease duty charged under head 1(2).

*Trusts*




Shares must be beneficially owned. Trust Co Ltd holds shares in A Ltd and B Ltd for the beneficiaries of the trust. Section 45 relief is not available where the beneficiaries are individuals or where the beneficiary is a body corporate holding less than a 90% interest in specie in the trust assets, ie the shares in A Ltd and B Ltd.

*Company reorganizations*

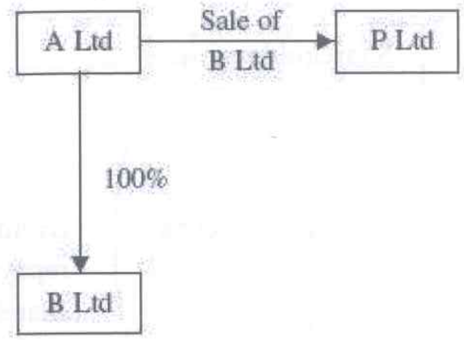



If it is intended to sell Building No 2 to Purchaser Ltd (a company outside the group), this is best done by transferring Building No 1 to A Ltd (section 45 applies) and for A Ltd to then sell its shares in B Ltd, thereby attracting a lower rate of stamp duty.





*Parent and subsidiary transfer*




If property is transferred by A Ltd to B Ltd before the sale of shares in B Ltd to a person outside the group, the transferee will be leaving the group and the section 45 relief on the transfer between A Ltd and B Ltd will be refused, if there is an arrangement, or lost retrospectively if the shares in B Ltd are sold within two years of the transfer between A Ltd and B Ltd.

If the transfer is from B Ltd to A Ltd and then the shares in B Ltd are sold, the transferor will be leaving the group and the relief is not lost (see example above).

the postponed duty will be ensured. In this regard, concrete security (most commonly a bank guarantee) will be required by the Collector; it will not be enough simply to convince the Collector that the person assessed has the capability to pay. If the parties agree to postponement, the appeal would then proceed in the normal manner.

(2) An alternative procedure to postpone payment of duty can be invoked by a person intending to appeal against a stamp duty assessment. This involves making an application to the District Court under section 14(1B) for postponement on the grounds that payment would impose hardship on the intended appellant. This procedure applies prior to the notice of appeal being served under section 14(1). It could also be invoked where the Collector does not agree to postpone payment under section 14(1A) on terms satisfactory to the appellant (see further, *King Crown Decoration & Construction Ltd v CSR* DCSA 14/2009 (March 2010) where the court rejected a claim of financial hardship when the taxpayer had not made any application pursuant to either section 14(1A) or section 14(1B)). Section 14(1B)(b) seems to suggest (like section 14(1A)(c)) that the court should be satisfied that sufficient security is given to ensure payment of any duty postponed. However, section 14(1A)(a) seems to be drafted in the broadest terms and allows the court to postpone payment of all the duty 'as the court may consider reasonable in the circumstances of the case'. In the event, the provision of security is possibly not mandatory for the purposes of an application under section 14(1B), although in *Wan Wah Shing* [2005] 4 HKLRD 674 it was held that to meet the factors set out in section 14(1B), the applicant had to satisfy the court that payment of stamp duty assessed would impose hardship on him, that the non-payment of the stamp duty assessed was reasonable in all the circumstances of the case and that security to the court's satisfaction is given for the duty to be postponed.

(3) In *Wan Wah Shing* [2005] 4 HKLRD 674, Ng DJ held that the meaning of 'hardship' in section 14(1B) required the court to recognise and take into account a party's subjective stance in forming an objective view in all the circumstances of the case as to whether hardship was made out. The onus is on the party asserting hardship to establish the same. Ng DJ went on to hold that it was doubtful whether hardship suffered by a person other than the applicant was relevant for the purposes of section 14(1B) which refers to 'hardship on the person' who is necessarily 'the person intending to serve a notice under subsection (1)'. However, since the point was not argued, Ng DJ concluded that this matter should properly be left for future determination.

## [14.09] Section 14(1C): General note

The effect of this subsection, which applies where duty has been postponed under section 14(1A) or (1B), is that the Collector's endorsement upon the relevant instrument is similar in concept to the instrument being 'duly stamped' (see [2.23] *et seq*). The reasons for this are that, following such an endorsement, the instrument





(1) will be admissible in evidence in any proceedings; and (2) can be acted upon by the Land Registrar or company secretary, as the case may be, and can thus form part of a valid root of title for the property to which the instrument relates (see sections 15(1) and (2) respectively).

## [14.10] Section 14(2): The Collector shall ... state and sign a case and deliver the same to the person by whom it is required

These words do not specify the form or content of the case or impose any time limit on the Collector. In *Bangkok Capital Antique Co Ltd v Collector of Stamp Revenue* (1984) 2 HKTC 83, the Collector took six months to deliver the case stated. While the judge thought that the Collector should have acted with more despatch, bearing in mind that payment of stamp duty was a condition precedent to the stated case, there was no suggestion that the delay invalidated the stated case.

## [14.11] Section 14(2): And the case may, within 7 days thereafter ... be set down by such person for hearing

In contrast with the lack of any time limit imposed on the Collector for delivery of the stated case it has been held that the appellant must set the case stated down within seven days of its delivery to the appellant. The time limit is strictly applied and the court has no power to extend it by virtue of any inherent jurisdiction, section 72 of the Interpretation and General Clauses Ordinance or Order 3 rule 5 of the Rules of the High Court (*Bangkok Capital Antique Co Ltd v Collector of Stamp Revenue* (1984) 2 HKTC 83). The short time limit and strictness of its application helped provide a basis for allowing judicial review of a decision of the Collector in *Harvest Sheen Ltd v Collector of Stamp Revenue* [1997] HKLRD 889. Following the decision in the *Harvest Sheen* case, section 14(5B) was enacted, taking effect from 1 May 1998. Although that provision allows the court, in certain circumstances, to extend the one-month appeal period in section 14(1), it does not affect the operation of section 14(2). The seven-day time limit set out in section 14(2) must, therefore, continue to be strictly observed. This interpretation was upheld in *World Gain Limited v CSR* DCSA 1/2008 (May 2010).

The practice of the Collector of Stamp Revenue is to submit the draft case stated to the appellant and to invite comments within 28 days. The case stated will normally include all the relevant facts although oral evidence to supplement those facts may sometimes be admitted at the hearing (see at first instance *Speyer Bros v IRC* [1906] 1 KB 318; and *Holmleigh (Holdings) Ltd v IRC* (1958) ATC 406 as explained in *Sergeant and Sims on Stamp Duties* 9th ed at p 78). Where agreement is not reached as to the form of the stated case, it may be possible for the appellant to apply for an interlocutory injunction restraining the Collector from signing the case as well as an application for judicial review (compare *EIE Ocean BV v CSD (Qld)* 93 ATC 4280). Alternatively, if the appellant disputes the accuracy or completeness of the facts and circumstances of the stated case, precedents exist for courts to institute appropriate procedures suited to the circumstances of an individual case for the determination of any factual dispute and for the presentation of evidence by either party upon any factual matter relevant to a reconsideration of an assessment (see, eg, *Ingram v IRC* [1985] Ch 585 at 591; *CS (SA) v Telegraph Investment Co Pty Ltd* (1995) 70 ALJR 155 at 159–160 and *EIE Ocean*

*BV v CSD (Qld)* (1996) 34 ATR 366 where Pincus JA indicated that a taxpayer should be able to contest and seek to supplement what the Commissioner states as fact). Given the unsatisfactory nature of the case stated procedure whereby the Collector is both a party to the litigation and the fact finder, the clear trend of authority is that the court will not be bound by the facts stated by the Collector in the case and has jurisdiction to receive evidence or to find facts in addition to or contrary to those stated.

### [14.12] Section 14(3): Upon the hearing of the case

This subsection gives no guidance on the procedure to be followed by the court when considering appeals. It seems that the court's jurisdiction is confined to determining the question submitted by the Collector and assessing any stamp duty chargeable. However, whether the court should proceed by way of a complete rehearing or merely by way of a review of the Collector's decision is unclear (see *Tang Kam-charn v Collector of Stamp Revenue* [1993] HKLD D122). It was, however, held in *Guoji Transport Co Ltd v Collector of Stamp Revenue* [1997] HKLRD 1168 that section 14(3) made it clear that the jurisdiction of the court was to determine the question submitted and to assess the stamp duty chargeable thereon if the instrument was, in the opinion of the court, chargeable with stamp duty. In this regard, the court was not confined to the basis of assessment referred to by the Collector in his notice of assessment.

It is accepted practice that the appellant has the right to begin and also the right to reply. However, the Collector has the right of general reply *(Chandos v IRC* (1851) 6 Exch 464). The problems associated with the stated case procedure, particularly in the context of stamp duty appeals, are unfortunately not always understood by some judges more familiar with case stated procedure which follows a formal hearing by, for example, a magistrate's court or the Inland Revenue Board of Review (see *Harvest Sheen Ltd v Collector of Stamp Revenue* [1997] HKLRD 889 at 893C).

### [14.13] Section 14(3): The court shall assess the stamp duty chargeable thereon

The court, which means the District Court (section 14(6)), is given power to reassess the stamp duty chargeable. Although it is arguable that the court could increase the amount of duty assessed as chargeable by the Collector, it appears that its powers are restricted to reducing (section 14(4)) or confirming (section 14(5)) the duty assessed by the Collector (compare *Peko-Wallsend Ltd v CST (WA)* (1989) 20 ATR 823). In appeals against assessments based on the application of sections 27(4) or 29F (where the Collector alleges that a relevant instrument operates as a voluntary disposition *inter vivos*) the Court's power to intervene may be very restricted. Certainly this will be so if section 14(3) merely empowers the court to review the Collector's decision. Section 27(4), as construed by the Privy Council in *Lap Shun Textiles Industrial Co Ltd v Collector of Stamp Revenue* [1976] AC 530, effectively leaves all matters of fact to the opinion of the Collector. The Collector's opinion could be based on any information whether or not legally admissible as evidence in civil proceedings in court. If, on the other hand, the appeal is to take the form of a rehearing, the court is bound by the rules of evidence in civil proceedings and the result may be that the information on





which the Collector's opinion was formed is rejected. Alternatively, information favourable to the person chargeable with stamp duty may be rejected (see *Tang Kam-charn v Collector of Stamp Revenue* [1993] HKLD D122 per Downey DJ).

Appeals from the decisions of the District Court are to the Court of Appeal and are governed by section 63 of the District Court Ordinance (Cap 336).

### [14.14] Section 14(4): General note

If the appeal is successful, any duty paid, together with any penalty imposed, is repayable but without interest.

### [14.15] Section 14(5): General note

No annotation.

### [14.16] Section 14(5A): General note

This subsection was added in 1984 so as to enable the District Court to call upon the expertise of the Lands Tribunal when deciding stamp duty appeals. This is of particular importance in issues involving valuation of immovable property in relation to agreements or conveyances operating as voluntary dispositions *inter vivos* (see, eg, *Tang Kam-charn v Collector of Stamp Revenue* [1993] HKLD D122).

### [14.17] Section 14(5B): General note

This provision was enacted by the Stamp Duty (Amendment) (No 2) Ordinance 1998. It took effect on 1 May 1998 (see LN 214 of 1998). Although it mitigates the potentially harsh operation of section 14(1) when the one-month time limit is strictly enforced, it does not affect the seven-day time limit set out in section 14(2) (see *Bangkok Capital Antique Co Ltd v Collector of Stamp Revenue* discussed at [14.12]). The wording of section 14(5B), particularly in relation to the circumstances where the one-month time limit can be extended by the court, essentially follows that of section 66(1A) of the Inland Revenue Ordinance. Cross-reference should therefore be made to the annotation to that latter provision in Willoughby and Halkyard,*Encyclopaedia of Hong Kong Taxation: Taxation of Income,* vol 3 at at II [20614] *et seq*. Useful comparisons can also be made to the annotation to section 64(1) of the Inland Revenue Ordinance, which provides that the Commissioner can admit a late objection when satisfied that the person assessed was 'prevented' from objecting within the normal one-month period 'owing to absence from Hong Kong, sickness or other reasonable cause' (see Willoughby and Halkyard,*Encyclopaedia of Hong Kong Taxation: Taxation of Income,* vol 3 at II [20387]–[20390]). The analogy and analysis suggested in this paragraph, relating to the utility of considering the case law referable to sections 66(1A) and 64(1) of the Inland Revenue Ordinance in interpreting section 14(5B), was accepted by Chan DJ in *Diamond Dragon Finance Company v Collector of Stamp Revenue* DCSA 4/2004 (2 April 2004). In this case Chan DJ concluded that a delay of five months, caused by the company's concerns about legal fees and costs and the necessity to wait for legal advice, did not amount to a 'reasonable cause' that 'prevented' the company from lodging a timely appeal.

The analysis suggested in the previous paragraph is supported by the decision of Ng DJ in *Wan Wah Shing* [2005] 4 HKLRD 674 who held that in determining whether an extension of time for appeal should be granted under section 14(5B), there is a three-step approach:

(1) the court has to be satisfied that the applicant suffered from illness, had been absent from Hong Kong or had any other reasonable cause;

(2) the applicant has to show that one or more of these prevented him from bringing an appeal within the statutory time limit; and

(3) even if the above two criteria are satisfied, the court has a residual discretion as to whether to grant an extension of time. In the exercise of its residual discretion, the court should not be fettered by the same consideration of, say, whether the applicant's illness prevented him from bringing an appeal within time. The court's residual discretion is unfettered, but it must be exercised judicially in all the circumstances of the case.

The application of section 14(5B) set out in *Wan Wah Shing* was followed in *King Crown Decoration & Construction Ltd v CSR* DCSA 14/2009 (March 2010) where it was held that the fact that the sole active director of a company was ill and the remaining directors either too old or too busy to attend to its affairs did not justify an extension of time for lodging a valid appeal, even though the delay in this case involved a period of less than a week. In this regard, Leung DJ stated at paragraph 12:

> 'Any person who consciously makes use of a corporate vehicle is bound by the consequence of the body being a separate entity. He cannot be heard to suggest that the corporate body could not operate because the persons in control of it choose to be absent from Hong Kong.'

## [14.18] Section 14(6): General note

This subsection defines the court to mean the District Court and therefore differs from the United Kingdom Stamp Act 1891 which required stamp duty appeals to be made to the High Court.

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## 15. Non-admissibility of instruments, etc not duly stamped

(1) Subject to subsection (1A) and section 15A, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except –

(a) criminal proceedings;

(b) (b) civil proceedings by the Collector to recover stamp duty or any penalty payable under this Ordinance,

or be available for any other purpose whatsoever, unless such





instrument is duly stamped. (Amended, 33 of 1998, s 4; 2 of 2014, s 5; 14 of 2014, s 3)

(1A) Notwithstanding anything in subsection (1), an instrument which is not duly stamped may be received in evidence in civil proceedings before a court if –

(a) the court so orders upon the personal undertaking of a solicitor to cause –

(i) such instrument to be stamped in respect of the stamp duty chargeable thereon; and

(ii) any penalty payable under section 9 in respect thereof to be paid; or

(b) the instrument is endorsed by the Collector under section 14(1C). (Added, 33 of 1998, s 4)

(2) Subject to subsection (3), 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 is endorsed by the Collector under section 14(1C); and any such public officer who or body corporate which fails to comply with this subsection shall incur a penalty at level 2 which shall be recoverable by the Collector as a civil debt due to the Government. (Amended, 70 of 1994, s 3; LN 338 of 1995, para (9); 33 of 1998, s 4; 12 of 1999, Sch 6)

(3) Subsection (2) does not apply in relation to the registration of –

(a) an instrument under the Land Registration Ordinance (Cap 128) if the instrument is stamped under section 5(1), 13(2) or 18E(1); or

(b) an instrument of transfer if the instrument is stamped under section 13(2),

but the registration does not affect the question of whether the instrument is duly stamped. (Replaced, 43 of 1991, s 4. Amended, 8 of 1992, s 8; 44 of 1999, s 15; 21 of 2003, s 7; 14 of 2011, s 4; 14 of 2014, s 3)

(4) If a public officer is empowered or required by law to act upon, file or register a duplicate or copy of any instrument, and if the original of such instrument would require to be duly stamped if acted upon, filed or registered by such public officer, it shall be lawful for such public officer to call for the production of the original instrument, or for evidence to his satisfaction that it is duly stamped, and no public officer shall act upon, file or register any such duplicate or copy

| | | |
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| 'specified payment' | . . . | S.19(16) |

## [21.02] Annotation

The effect of section 21 is to ensure that, with limited exceptions, only the registered owner of Hong Kong stock is entitled to claim payment or be paid any dividend or interest on that stock. The section thus facilitates collection of stamp duty on the transfer of Hong Kong stock (head 2 of the First Schedule) by prohibiting dividend or interest payments to unregistered holders.

No penalty is provided in the Ordinance for breach of this section. A breach is therefore not within the definition of 'offence' in section 3 of the Interpretation and General Clauses Ordinance. Nonetheless, unregistered holders of Hong Kong stock run the risk that a company will refuse to pay dividends or interest to any person other than one authorised by this section to claim payment.

The section, which is derived from section 31 of the former Stamp Ordinance, should be read together with section 15(2) of the SDO and sections 150 and 155(3) of the Companies Ordinance (Cap 622). Under section 150 a company cannot lawfully register a transfer of shares in (or debentures of) the company unless 'a proper instrument of transfer' has been delivered to the company. In relation to the comparable United Kingdom provision it was held in *Re Paradise Motor Co Ltd* [1968] 2 All ER 625 that the phrase 'proper instrument' does not necessarily mean an instrument complying with the company's articles of association; rather it means such an instrument as will, where appropriate, attract stamp duty (see also *Nisbet v Shepherd* [1994] 1 BCLC 300). Section 150 does not affect the power of a company to register as a share or debenture holder a person to whom the right to any shares or debentures has been transmitted by operation of law, such as the right accruing to a personal representative upon death of the deceased share or debenture holder.

Section 155(3) of the Companies Ordinance goes on to provide that a company need not complete share certificates in relation to any of its shares if stamp duty has not been paid in respect of any relevant transfer in respect of those shares. Section 323(3) of the Companies Ordinance is a complementary provision applying to the transfer of debentures. This latter provision could affect those comparatively rare cases where debentures qualify as (disguised) 'Hong Kong stock'.

Likewise, section 15(2) prohibits the registration, and therefore perfection of legal title, of Hong Kong stock transferred or dealt with by an unstamped or inadequately stamped instrument of transfer. Section 19(8) goes on to provide that an instrument of transfer of Hong Kong stock is not 'duly stamped' (defined in section 2(1)) unless properly endorsed by the Collector in respect of both sale and purchase. It has been suggested that the registration of an inadequately stamped transfer of shares could not operate to pass legal title to the transferee (*Re Indo-China Steam Navigation Co* [1917] 2 Ch 100). This does not, however, seem correct in light of the decision of the Privy Council in *Lap Shun Textiles Industrial Co v Collector of Stamp Revenue* [1976] AC 530 at 535 (see also *Nisbet v Shepherd* [1994] 1 BCLC 300).





## [21.03] Section 21(1): General note

The only persons entitled to claim the payment of a dividend or interest, directly or indirectly and whether in cash or in specie, on any Hong Kong stock are:

(a) The registered owner at the time of such claim. Section 21(1) may technically affect the right of an executor or administrator of a deceased person's estate to claim payment of any dividend or interest in respect of Hong Kong stock. Even though ownership of the stock devolves by operation of law upon the death of the deceased, the personal representative can only claim payment upon becoming the registered owner (compare *Lee Chai-cheong v Prudential Enterprise Ltd* [1992] 1 HKC 15, where the Court of Appeal relied upon a specific provision of a company's articles of association to conclude that the company was entitled to retain dividends due to a deceased shareholder's estate). Under section 153 of the Companies Ordinance a transfer of shares by a personal representative is, however, treated as valid even though the personal representative was not a member of the company at the time the instrument of transfer was executed. It follows that the transferee of shares from an unregistered personal representative can become the registered owner.

(b) A subsequent registered owner. This provision enables a purchaser or transferee of Hong Kong stock, or the personal representative (see (a) above), to claim payment after declaration of the dividend or the date interest became due, provided registration has been effected in the name of that person.

(c) A person entitled to payment (1) under a declaration of trust in favour of a specified person or (2) otherwise as beneficiary under a trust. This provision allows a claim for payment by the beneficial owner of Hong Kong stock where the entitlement to payment is derived from a trust relationship, eg where the registered owner is a nominee. A company cannot, however, enter on its share register notice of any trust, whether expressed, implied or constructive (Companies Ordinance, section 634). Furthermore, a company's articles of association usually deal with notice of trusts by providing that, except as required by law, no person shall be recognised as holding any share upon any trust (see Model Articles appended as Schedules to the Companies Ordinance (Cap 622)). Accordingly, even though a beneficiary of shares held upon trust is entitled to claim payment of dividends thereon in terms of section 21(1)(c), a company is generally entitled simply to treat every person on the register as the beneficial owner notwithstanding knowledge of the trust (*Simpson v Molsons' Bank* [1895] AC 270). In any event, payment normally could only be made indirectly through the trustee because, unless the articles of association provide otherwise, dividends are only payable to persons who are registered holders at the time they are declared.

(d) A person who has lent money on the security of Hong Kong stock and whose entitlement to payment arises from the terms of a loan agreement. This provision allows a claim for payment to be made by a lender, including an equitable mortgagee of Hong Kong stock (an equitable mortgage commonly arises from the deposit of the relevant certificates with the lender), provided that the entitlement to payment is authorised under the loan agreement. The practical problems in obtaining payment set out in (c) above apply equally to this case.

### [21.04] Section 21(2): General note

This subsection provides that no person shall, directly or indirectly, demand or accept payment of any dividend or interest on any Hong Kong stock unless that person is entitled under section 21(1) to claim such payment. No penalty attaches to any breach of this subsection.

### [21.05] Section 21(3): General note

This subsection provides that no person shall, directly or indirectly, pay any dividend or interest on any Hong Kong stock other than to a person entitled under section 21(1) to claim payment. No penalty attaches to any breach of this subsection.

### [21.06] Section 21(4): General note

Prior to the enactment of subsection (4), as a technical matter the terms of section 21 presented problems for borrowers and lenders under stock borrowing and lending agreements (see generally, [19.32]-[19.37] and [19.42]). Specifically, stock borrowing and lending agreements provide for payment of manufactured dividends, being payments equal to the amount of dividends on borrowed securities which the lender would have received had it been holding them. This type of provision is plainly inconsistent with section 21(2). While no criminal offence is created by section 21, it could be argued that any agreement which infringes the section is unenforceable. In light of section 15E of the Inland Revenue Ordinance (Cap 112) the Stamp Office was not concerned about this issue; however, the parties to the agreement were naturally concerned whether the stock borrowing and lending agreement was unenforceable as a whole or whether the clause providing for payment of a manufactured dividend was unenforceable. The solution was therefore to enact section 21(4). This provision essentially adds a further category of exemption, ie a stock borrowing and lending agreement which satisfies the requirements of section 19.

## 22. Stamp duty chargeable where consideration in respect of immovable property consists of stock or security other than stock

(1) Where the consideration or any part of the consideration for a conveyance on sale consists of any stock, the conveyance shall be chargeable with stamp duty by reference to the value of the stock on the date of the conveyance.

(2) Where the consideration or any part of the consideration for





a conveyance on sale consists of any security not being stock, the conveyance shall be chargeable with stamp duty by reference to the amount due on the date of the conveyance for principal and interest upon the security.

### [22.01] Definitions

| | | |
|---|---|---|
| 'conveyance on sale' | . . . | S.2(1) |
| 'stock' | . . . | S.2(1) |
| 'conveyance' | . . . | S.2(1) |
| 'chargeable' | . . . | S.2(1) |
| 'stamp duty' | . . . | S.2(1) |

### [22.02] Cross References

Section 29C(9).

### [22.03] Annotation

**[Note: where residential property acquired on or after 20 November 2010 is disposed of shortly after acquisition, special stamp duty (SSD) can be imposed under head 1(1AA) of the First Schedule on the conveyance on sale or, more commonly, under head 1(1B) on a chargeable agreement for sale. In addition, where residential property is acquired on or after 27 October 2012 by any person other than a permanent resident of Hong Kong acting on his or her own behalf, buyer's stamp duty (BSD) can be imposed under head 1(1AAB) on the conveyance on sale or, more commonly, under head 1(1C) on a chargeable agreement for sale. Section 22 applies to both special stamp duty and buyer's stamp duty, which are explained in detail in the annotations to sections 29CA and 29DA and heads 1(1AA) and 1(1B), and sections 29CB and 29DB and heads 1(1AAB) and 1(1C), respectively.]**

Section 22 applies to the calculation of *ad valorem* duty for the purposes of head 1(1) and 1(1A) of the First Schedule (section 29C(9)). The section also applies to SSD and BSD, as stated above. Under head 1(1) the instrument chargeable to stamp duty is a 'conveyance on sale' of immovable property. Head 1(1A) charges to duty an 'agreement for sale' of immovable property. [Historical note: from 1992 when Part IIIA was enacted until 23 February 2013, head 1(1A) only applied to a chargeable agreement for sale of 'residential property'.]

Under common law, the word 'sale' connotes a price in money (*Simpson v Connolly* [1953] 1 WLR 911). Section 22 provides, however, that where the consideration for a conveyance on sale or an agreement for sale consists of stock (whether Hong Kong stock or otherwise) or any security, duty under the relevant part of head 1 is calculated by reference to the value of that stock or principal and interest due on that security as at the date of the conveyance or agreement. Such a provision converts a transfer of immovable property in consideration of stock or any security into a sale for stamp duty purposes (*John Foster & Sons Ltd v IRC* [1894] 1 QB 516, 528).

The section is substantially equivalent to section 55 of the United Kingdom Stamp Act 1891. Unlike the United Kingdom provision, section 22 specifically states that the value of the stock or security on which conveyance on sale duty under head 1(1) of the First Schedule is calculated must be ascertained as at the date of the conveyance. In the normal case, where the consideration for the conveyance is a price in money, the Collector's practice is to assess duty by reference to the higher of (1) the consideration or (2) the value of the immovable property as at the date of the earliest binding contract for sale and purchase rather than the date of the conveyance to the purchaser. This practice is explained in *Zung Fu Co Ltd v Collector of Stamp Revenue* (1973) 1 HKTC 853, 856. It follows that in cases to which section 22 applies, delay in completing the conveyance can affect the amount of duty chargeable under head 1(1), but not, as is more commonly the case, where the conveyance is executed in conformity with a chargeable agreement for sale (which is liable to *ad valorem* duty under head 1(1A)).

The following example illustrates the operation of this section.

> A agrees to sell non-residential property in Kowloon to B in exchange for the transfer by B to A of listed shares in C Ltd, a company incorporated in Hong Kong. The values of the property and the shares at the time of the agreement are identical.
>
> In this case (1) the agreement for sale is stamped in accordance with head 1(1A) rates on the value of the shares as at the date of the agreement (*Note*: (a) depending upon the value, a section 29G certificate may be given to reduce the rate of duty below the maximum *ad valorem* rates set out in the appropriate Scale prescribed by head 1(1A); (b) for section 22 purposes it is irrelevant whether the shares are Hong Kong stock: the consideration need only fall within the definition of 'stock' in section 2(1)); (2) the instrument of share transfer is stamped at $5 under head 2(4); (3) as there is a disposal and acquisition of Hong Kong stock for valuable consideration, it appears that there is a sale and purchase of such stock (see definition of 'sale or purchase' in section 19(16)), contract notes for the sale and purchase need to be prepared, and *ad valorem* duty will be charged under head 2(1) by reference to the value of the property as at the date of transfer; and (4) the conveyance from A to B in conformity with the chargeable agreement for sale is only liable to a fixed duty of $100 (section 29D(2), (6) and (7)). [Note: if the immovable property was residential property, liability to special stamp duty and buyer's stamp duty would also need to be considered.]

If the values of the property and the shares at the time of the agreement are not the same, the Collector may consider that a substantial benefit is conferred on one of the parties and, to that extent, raise additional duty under sections 29F or 27(4) on either the agreement or the share transfer as appropriate. In this case, sections 29F(2) and 27(3) provide that the relevant instrument will not be duly stamped until adjudicated by the Collector under section 13(3)(b).







### [22.04] Section 22(1): Where the consideration ... for a conveyance on sale consists of any stock

This provision operates where the consideration (or any part thereof) for a conveyance on sale (ie instruments chargeable under head 1(1) of the First Schedule) consists of 'stock'. For the purposes of section 22, stock is widely defined in section 2(1) and includes, for instance, shares in both Hong Kong and offshore companies, units in a unit trust, and debentures and notes whether or not denominated in Hong Kong currency. The exclusions set out in the definition of stock do not apply to section 22. [Note: as indicated above, section 29C(9) extends the application of section 22 to chargeable agreements for sale of immovable property for the purposes of Part IIIA and head 1(1A) of the First Schedule.]

### [22.05] Section 22(1): The conveyance shall be chargeable with stamp duty

Where section 22 applies, the conveyance or, more commonly, the agreement for sale, is chargeable at normal *ad valorem* rates under head 1(1) or head 1(1A) of the First Schedule. The maximum rate of *ad valorem* duty may be reduced if a certificate of value can be provided in accordance with the provisions of section 29 or section 29G.

### [22.06] Section 22(1): By reference to the value of the stock on the date of the conveyance

See [22.03].

In some cases, the consideration for a conveyance on sale or agreement for sale may consist of newly issued shares. The value of such shares for stamp duty purposes need not be the same as their paid-up value. As in the normal case of a sale and purchase of Hong Kong stock, duty is charged upon the stated consideration or actual value, whichever is the greater (*Carlyon Estate Ltd v IRC* (1937) 16 ATC 339).

### [22.07] Section 22(2): General note

This provision operates where the consideration or any part thereof for a conveyance on sale or agreement for sale consists of any security other than stock. In this case, stamp duty will be charged on the amount due for principal and interest upon the security as at the date of the conveyance or agreement for sale. The meaning of the term security is not defined in the SDO. The normal requirements of a security are that it is in written form and records the liability for payment of money (*Independent Television Authority v IRC* [1961] AC 427). Given the wide definition of stock for the purposes of section 22, examples of such consideration are hard to envisage but would include, for instance, assignment by the purchaser of the benefit of a covenant for the payment of money together with interest thereon.

## 23. How consideration consisting of periodical payments to be charged

(1) In the case of a conveyance on sale or a sale or purchase of Hong Kong stock, where the consideration or any part of the consideration consists of money payable periodically for a definite period not exceeding 20 years so that the total amount to be paid can be previously ascertained, the conveyance or contract note shall be chargeable with stamp duty by reference to a consideration of such total amount.

(2) In the case of a conveyance on sale or a sale or purchase of Hong Kong stock, where the consideration or any part of the consideration consists of money payable for a definite period exceeding 20 years or in perpetuity or for any indefinite period not terminable with life, the conveyance or contract note shall be chargeable with stamp duty by reference to a consideration of 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.

(3) In the case of a conveyance on sale or a sale or purchase of Hong Kong stock, where the consideration or any part of the consideration consists of money payable periodically for a life or lives, the conveyance or contract note shall be chargeable with stamp duty by reference to a consideration equal to the 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.

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### [23.01] Definitions

| | | |
|---|---|---|
| 'conveyance' | ... | S.2(1) |
| 'conveyance on sale' | ... | S.2(1) |
| 'stock' | ... | S.2(1) |
| 'Hong Kong stock' | ... | S.2(1) |
| 'sale or purchase' | ... | S.19(16) |
| 'year' | ... | S.3 Cap 1 |
| 'conveyance' | ... | S.2(1) |
| 'contract note' | ... | S.2(1) |
| 'chargeable' | ... | S.2(1) |
| 'stamp duty' | ... | S.2(1) |

### [23.02] Cross References

Section 29C(9).





### [23.03] Annotation

**[Note: where residential property acquired on or after 20 November 2010 is disposed of shortly after acquisition, special stamp duty (SSD) can be imposed under head 1(1AA) of the First Schedule on the conveyance on sale or, more commonly, under head 1(1B) on a chargeable agreement for sale. In addition, where residential property is acquired on or after 27 October 2012 by any person other than a permanent resident of Hong Kong acting on his or her own behalf, buyer's stamp duty (BSD) can be imposed under head 1(1AAB) on the conveyance on sale or, more commonly, under head 1(1C) on a chargeable agreement for sale. Section 23 applies to both SSD and BSD, which are explained in detail in the annotations to sections 29CA and 29DA and heads 1(1AA) and 1(1B), and sections 29CB and 29DB and heads 1(1AAB) and 1(1C), respectively.]**

This section is derived, with modifications, from section 56 of the United Kingdom Stamp Act 1891. The section deals with the question of how stamp duty is chargeable in a case where the consideration for (1) a conveyance on sale, (2) an agreement for sale of immovable property (section 29C(9)) or (3) the sale or purchase of Hong Kong stock, consists of money payable over varying periods of time. In other words, section 23 applies to duty chargeable in accordance with heads 1(1), 1(1A) and 2(1) of the First Schedule in those cases where the consideration (for a conveyance on sale, chargeable agreement for sale of immovable property or a sale or purchase of Hong Kong stock) amounts to a price in money. Section 23 also applies to SSD and BSD, as stated above. Four situations are dealt with in the section, ie where the consideration consists of money payable (1) periodically for a definite period not exceeding 20 years, (2) for a definite period exceeding 20 years, (3) in perpetuity or for any indefinite period not terminable with life and (4) periodically for a life or lives.

It is irrelevant for the purposes of section 23 that money is only payable upon certain conditions being satisfied. For example, in consideration for a conveyance of non-residential property, a company agrees to pay out of its net profits for an indefinite period a sum equal to 3% of its paid-up capital after paying to its shareholders a 5% dividend. In this case duty will be calculated, by virtue of section 23(2), on 20 times 3% of the company's paid-up capital as at the date of the chargeable instrument (typically, the agreement for sale and purchase), notwithstanding the possible insufficiency of profits to pay the dividend (*Underground Electric Rys Co of London Ltd v IRC* [1906] AC 21; see also *Independent Television Authority v IRC* [1961] AC 427 and *Hill 50 Gold Mine NL v CST (WA)* 93 ATC 4880). Where, however, no fixed consideration which may become payable can be ascertained at the time of execution of the relevant instrument, and provided also that there is no maximum or minimum amount payable, the traditional view is that *ad valorem* duty cannot be charged (*Underground Electric Rys Co of London Ltd and Glyn, Mills, Currie & Co v IRC* [1914] 3 KB 210 at 220; affd [1916] 1 KB 306; compare *Harbour Centre Development Ltd v Collector of Stamp Revenue* (1968) 1 HKTC 822). However, the Collector has indicated that if the transaction has the effect of conferring a substantial benefit on the transferee, he will invoke section 27(4) (or in the case of an agreement for sale, section 29F(3)(a)). [Note: where the immovable property in the above example is residential property, potential liability to SSD and BSD would also have to be considered.]

the property to those purchasers in equal undivided shares; *(Amended, 14 of 2014, s 18)*

(b) if the agreement for sale is not so stamped –

(i) the Collector may refuse to stamp the conveyance on sale. *(Replaced, 14 of 2011, s 9)*

(ii) *(Repealed, 44 of 1990, s 20)*

(iii) *(Repealed, 44 of 1990, s 20)*

(6) For the purposes of this section –

(a) a conveyance on sale shall be deemed to be a conveyance on sale of residential property unless it contains a statement certifying that the immovable property subject to the conveyance is non-residential property within the meaning of section 29A(1);

(b) a conveyance on sale that contains such a statement may be shown to be a conveyance on sale of residential property;

(c) a conveyance on sale is not executed in conformity with an agreement for sale unless the conveyance on sale –

(i) is of the whole or part of the immovable property subject to the agreement for sale, and

(ii) subject to subsection (7), is in favour of the person or all persons named in the agreement for sale as the purchaser or purchasers and no other person; *(Amended, 2 of 2014, s 11; 14 of 2014, s 18)*

(d) a conveyance on sale is not executed in pursuance of an agreement for sale unless the conveyance on sale is of the whole or part of the immovable property subject to the agreement for sale and is not executed in conformity with the agreement for sale;

(e) a reference in subsection (3) to an agreement for sale includes a reference to an agreement for sale made before the commencement of the Stamp duty (Amendment) Ordinance 1992 (8 of 1992).

(7) For subsection (6)(c)(ii), if the property concerned is residential property –

(a) for the purposes of head 1(1) in the First Schedule, 2 or more persons are treated as the same person if, on the date of the conveyance concerned –





(i) they are closely related;

(ii) each of them is acting on his or her own behalf; and

(iii) the person, or each of the persons, in whose favour the conveyance is executed is not a beneficial owner of any other residential property in Hong Kong; and

(b) for the purposes of head 1(1AA) and (1AAB) in the First Schedule, 2 or more persons are treated as the same person if they are closely related. (Added, 14 of 2014, s 18)

(8) Despite section 71(3) and (4), a reference in subsection (3) to an agreement for sale includes an agreement for sale of non-residential property made before 23 February 2013. *(Added, 14 of 2014, s 18)*

(Added, 8 of 1992, s 4)

## [29D.01] Definitions

| | | |
|---|---|---|
| 'conveyance' | . . . | S.2(1) |
| 'conveyance on sale' | . . . | S.2(1) |
| 'immovable property' and 'property' | . . . | S.3 Cap 1 |
| 'residential property' | . . . | S.29A(1) |
| 'non-residential property' | . . . | S.29A(1) |
| 'Collector' | . . . | Ss.2(1) and 3 |
| 'chargeable agreement for sale' | . . . | S.29A(1) |
| 'agreement for sale' | . . . | S.29A(1) |
| 'unwritten sale agreement' | . . . | S.29A(1) |
| 'chargeable' | . . . | S.2(1) |
| 'instrument' | . . . | S.2(1) and S.3 Cap 1 |
| 'vendor' | . . . | S.29A(1) |
| 'duly stamped' | . . . | S.2(1) |
| 'stamped' and 'stamp' | . . . | S.2(1) |
| 'executed' | . . . | S.2(1) |
| 'stamp duty' | . . . | S.2(1) |
| 'purchaser' | . . . | S.29A(1) |
| 'person' | . . . | S.3 Cap 1 |
| 'closely related persons' | . . . | S.29AD |
| 'beneficial owner of residential property' | . . . | S.29AC |

## [29D.02] Cross References

Sections 5(1), 9, 13(2), 18E, 18F, 29A(1), 29A(3A), 29A(4), 29AC, 29AD, and 29B(1) and head 1(1), (1AA) and (1AAB) of the First Schedule.

## [29D.03] Annotation

Part IIIA proceeds on the basis that, unless an exemption or special provision applies, *ad valorem* duty is payable on each and every agreement for sale of immovable property and that only a fixed duty of $100 is payable on the conveyance on sale made in conformity with a chargeable agreement. Section 29D(2)(a) makes provision for this, the normal case. However, section 29D(2)(b) also applies to other cases where *ad valorem* duty has not been charged on the preceding agreement for sale. In this case, and subject to the power given to the Collector to refuse to stamp the conveyance on sale under section 29D(1) (this may occur, for instance, where the Collector believes that a transaction took place in relation to the property for which a chargeable agreement should have been properly prepared or stamped), the conveyance on sale is chargeable with *ad valorem* duty under head 1(1) of the First Schedule and, after the conveyance is stamped, the agreement for sale would be liable to the fixed duty of $100. The conveyance on sale may also be liable to a penalty for late stamping under section 9, calculated by reference to the date by which the earliest agreement for sale should have been presented for stamping.

[Historical notes: prior to 1992, an agreement for sale of immovable property, whether 'residential' or 'non-residential', was not liable to duty unless it was deemed to be a conveyance on sale by virtue of section 26 (now repealed). From 1992, when Part IIIA was enacted, until 23 February 2013, an agreement for sale of 'residential property' was liable to *ad valorem* duty in accordance with head 1(1A) of the First Schedule. This meant that *ad valorem* duty under head 1(1) applying to conveyances on sale of non-residential property could be deferred until execution of the formal assignment. With effect from 23 February 2013, Part IIIA was expanded to cover all chargeable instruments (agreements for sale and conveyances on sale) relating to 'immovable property', whether residential or non-residential. Unless otherwise indicated, the following annotations apply to the period from 23 February 2013 to the present day.]

The Collector has stated that the purpose behind the fixed duty stamping requirement is not solely to ensure that appropriate duty has been paid on the earlier agreement. It is also to facilitate verification by the Stamp Office that the subsequent assignment is 'between the same parties and on the same terms as' or 'executed in conformity with' the earlier duly stamped agreement (see respectively, section 29A(3A) and (4) and section 29D(2)(a), (6)(c) and (7), read together with relevant Notes to head 1(1A)). Thus, in the Collector's view, the fixed duty stamping requirement is consistent with the need to have the instruments presented to the Stamp Office for such verification (see letter from Commissioner to Inland Revenue to the Law Society of Hong Kong dated 4 January 1994, reprinted in Willoughby and Halkyard, *Encyclopaedia of Hong Kong Taxation: Stamp Duty*, vol 1, III [99]).

A conveyance on sale is not executed 'in conformity with' a chargeable agreement for sale unless the agreement is stamped and is in favour of exactly the same person or persons named in the agreement for sale as the purchaser or purchasers and the conveyance on sale is of the whole or part of the immovable property that is the subject matter of the agreement for sale (see SOIPN No 1 at paragraph 55 *et seq*). However, where the subject matter of the conveyance on sale is 'residential property' the same person requirement is relaxed by section 29D(7) to include a





person(s) who is 'closely related' within section 29AD. In this regard, it is important to appreciate that, in considering whether the 'in conformity with' requirement is satisfied, section 29D(7) sets out additional conditions applicable to *ad valorem* duty under head 1(1) as distinct from those applicable to SSD under head 1(1AA) and BSD under head 1(1AAB).

**With effect from 20 November 2010, section 29D also applies, where applicable, to special stamp duty (SSD) imposed under head 1(1AA). Furthermore, with effect from 27 October 2012, section 29D also applies, where applicable, to buyer's stamp duty (BSD) imposed under head 1(1AAB). The following annotations should be read accordingly.**

## [29D.04] Section 29D(1): General note

This section provides an important sanction where there has been failure to execute an agreement for sale under section 29B(1) or failure to stamp an agreement for sale because it empowers the Collector to refuse to stamp the conveyance on sale. Requests to stamp the conveyance with *ad valorem* duty and to stamp the relevant agreement with fixed duty of $100 in such cases will not normally be entertained (see Law Society of Hong Kong Circular to Members No 293/94 (PA) dated 26 September 1994, reprinted in Willoughby and Halkyard, *Encyclopaedia of Hong Kong Taxation: Stamp Duty*, vol 1, III [111] and SOIPN No 1 at paragraph 59). The result of this is that the purchaser will be unable to complete and register the instrument confirming his title to the immovable property in question.

## [29D.05] Section 29D(2): General note

This subsection provides for the general rule that where a conveyance on sale of immovable property is executed 'in conformity with' (see subsections (6)(c) and (7)) a stamped agreement for sale, the conveyance on sale is stampable with a fixed duty of $100. However, where the agreement for sale has not been stamped, and the Collector does not refuse to stamp the conveyance on sale under section 29D(1), the conveyance on sale is chargeable with *ad valorem* duty under head 1(1) and, where applicable, SSD under head 1(1AA) as well as BSD under head 1(1AAB) and the agreement for sale is then stampable with the fixed duty of $100. The 30-day time limit for stamping the conveyance on sale runs from the date of the earliest agreement for sale between the parties (section 29D(2)(b)(ii)). The effect of this provision may be that the conveyance on sale will be stampable out of time and liable to penalties under section 9(1).

It is the view of the Collector that where a conveyance on sale (ie an assignment) is executed 'in conformity with' a chargeable agreement for sale and the agreement is duly stamped or stamped in accordance with section 5(1) or 13(2), the conveyance on sale is chargeable with the fixed duty of $100 without the need for a denoting stamp. In his view the need for a denoting stamp arises only where the stamp duty chargeable on an instrument *depends* upon the stamp duty already paid in respect of another instrument. If the correctness of the $100 fixed duty on a conveyance on sale is in issue the solution is to submit the instrument for adjudication under section 13.

## [29D.06] Section 29D(3): General note

This subsection covers the situation where a conveyance on sale of immovable property is executed in 'conformity with' two or more agreements for sale relating to different parts of the immovable property in question. In such cases there might be a variety of permutations involving *ad valorem* duty in respect of different parts of the immovable property having been charged on either one or more agreements for sale or on the subsequent conveyance. This was particularly so where one or more of the agreements was executed (1) before 31 January 1992, the date when Part IIIA came into force (see section 29D(6) paragraph (e)) and (2) before 23 February 2013, when only agreements for sale of residential property were liable to *ad valorem* duty under head 1(1A) (see section 29D(8)). The subsection seeks to ensure that, ignoring penalties, the correct total amount of *ad valorem* and fixed duty is payable irrespective of how it is split between several agreements and the resulting conveyance on sale (see SOIPN No 1 at paragraphs 60–61).

## [29D.07] Section 29D(4) and (5): General note

SOIPN No 1 at paragraph 62 explains the context of section 29D(4) and (5) as follows:

> 'Where a conveyance on sale is not executed "in conformity with" a chargeable agreement for sale, it may be executed "in pursuance of" a chargeable agreement for sale eg the conveyance includes an additional new purchaser or only some purchasers named in the agreement for sale appear in the conveyance. Such conveyance is stamped in accordance with section 29D(4) or (5).'

The distinction between a conveyance on sale executed 'in conformity with' and 'in pursuance of' a chargeable agreement for sale is significant and thus, when considering the application of section 29D(4) and (5), reference should be made to the annotation to section 29D(6)(c), (d) and (7).

## [29D.08] Section 29D(4): General note

This subsection covers the situation where a conveyance on sale is executed 'in pursuance of' a chargeable agreement for sale in favour of the purchaser and a third party not named in the agreement. Where the agreement for sale has been stamped with *ad valorem* duty under head 1(1A), the conveyance on sale is also chargeable to *ad valorem* duty under head 1(1) on the value of the interest conveyed to the third party. This is calculated by charging *ad valorem* duty under head 1(1) on the consideration for the conveyance reduced by an appropriate fraction of the duty representing the proportion of the property vested in the person named as the purchaser in the agreement for sale. It should be noted that the full amount of duty paid on the agreement for sale is not set off against duty on the conveyance on sale but only a fraction of it. This is because a conveyance on sale of the kind envisaged really involves an unwritten agreement for sale between the purchaser and the third party, ie it is a form of concealed sub-sale. All the above is relevant where the agreement for sale has been stamped. If the agreement for sale has not been stamped, the conveyance on sale is chargeable with *ad valorem* duty under head 1(1) but the time for stamping runs from the date of the





first preceding agreement for sale and therefore there may be a risk of penalties becoming payable. The Collector may, however, refuse to stamp the conveyance on sale (section 29D(4)(b)) and may well do so if there has been a failure to execute or properly stamp a chargeable agreement for sale. Examples applying section 29D(4) are found in SOIPN No 1 at paragraph 63.

## [29D.09] Section 29D(5): General note

This subsection covers the converse situation to that set out in subsection (4). It applies where a conveyance on sale is executed pursuant to an agreement for sale but is in favour of only some of those who entered into the agreement for sale as purchasers. Where the agreement has been stamped, the conveyance on sale is also subject to *ad valorem* duty (under head 1(1) with a reduction in duty to cover the proportion of the property that was agreed to have been conveyed to the person or persons in whose favour the conveyance on sale was executed. Again what underlies the charge to duty on the conveyance is the concealed sub-sale, by one or more of the purchasers named in the agreement, of their equitable interest to those in whose favour the conveyance on sale was executed. Where the preceding agreement was not stamped the conveyance on sale bears the duty in full but the time for stamping runs from the date of the first preceding agreement with a consequential risk of penalties. As is the case under section 29D(4), the Collector may refuse to stamp the conveyance on sale (section 29D(5)(b)) and may well do so if there has been a failure to execute or properly stamp a chargeable agreement for sale. Examples applying section 29D(5) are found in SOIPN No 1 at paragraph 64.

## [29D.10] Section 29D(6): General note

Paragraph (a) is explained in SOIPN No 1 at paragraph 58. Although this provision will not have an impact after 23 February 2013 on determining liability to *ad valorem* duty under head 1(1) (as explained above, from that date onwards agreements for sale of immovable property, whether residential or non-residential, are liable to *ad valorem* duty under head 1(1A)), non-compliance could still affect (1) which scale of suty applies (in those cases where the more advantageous scale 2 notes only apply to conveyances on sale of residential property), and (2) liability to SSD under head 1(1AA) and to BSD under head 1(1AAB) (which only apply to conveyances on sale of residential property). Paragraph (b) requires no comment since the statement that property is non-residential is not conclusive.

Paragraphs (c) and (d) draw a distinction between conveyances on sale executed 'in conformity with' and conveyances on sale executed 'in pursuance of' chargeable agreements for sale (see SOIPN No 1 at paragraph 55 *et seq*). When considering liability to *ad valorem* duty applicable to a conveyance on sale, reference should be made to section 29D(2). That subsection provides that, in order for the conveyance on sale to attract fixed stamp duty of $100, it must be executed 'in conformity with' a chargeable agreement for sale. This phrase is interpreted in section 29D(6)(c) in a negative manner, namely, certain agreements are stated to be *not* in conformity. Thus, there may be scope for interpreting the phrase according to its normal and general meaning. However, given clear wording of 29D(6)(c) and considering also the equally strict terms of section 29A(3) and (4), it would seem that a conveyance on sale is only 'in conformity with' a chargeable agreement for sale if it (1) is made between the same parties actually named in both the instruments and (2) relates to the whole or part of the immovable property subject to the agreement. Notwithstanding this conclusion, it has been suggested that a conveyance on sale is made between the same persons, namely, the *actual* vendor and purchaser, even though one or both contract through agents or nominees. As a matter of general law, the agent or nominee is merely a conduit for the principal, whether disclosed or undisclosed. However, unless the agent or nominee, as well as the principal, are specifically named in the chargeable agreement for sale, this argument would be very difficult to sustain.

The 'same person' requirement set out in section 29D(6)(c) is relaxed in respect of residential property transactions involving specified family members. The provision allowing relief is contained in section 29D(7).

## [29D.11] Section 29D(7): General note

Section 29D(7) relaxes the same person requirement contained in section 29D(6)(c) for the purpose of determining whether a conveyance on sale is executed 'in conformity with' an agreement for sale. The provision only applies where the property concerned is '*residential property*'. For the purposes of conveyance on sale duty under head 1(1) of the First Schedule, two or more persons are treated as the same person if on the date of the conveyance (1) they are 'closely related' (section 29AD), (2) each of them is acting on his or her behalf and (3) the transferee(s) in whose favour the conveyance is executed is not a beneficial owner of any other residential property in Hong Kong. For the purposes of SSD under head 1(1AA) and BSD under head 1(1AAB), it is sufficient to satisfy the same person test if the relevant persons are 'closely related'.

In concrete terms, the effect of section 29D(7) in relation to the application of head 1(1) means that where another person is added as one of the transferees in the conveyance on sale after the original purchaser signed an agreement for sale, or a person who was one of the purchasers in an agreement for sale is no longer included as a purchaser in the conveyance on sale, the conveyance on sale in favour of the new transferee or the remaining purchasers, as the case may be, is not chargeable with *ad valorem* duty if on the date of the conveyance (1) all of the new transferee(s) and the original purchaser(s) or the withdrawn person(s) and the remaining original purchaser(s) are closely related within section 29AD, (2) each of them is acting on his or her own behalf, (3) each of them is not a beneficial owner of any other residential property in Hong Kong and (4) the other statutory requirement relating to the 'same property' in section 29D(6)(c)(i) is satisfied (see further, SOIPN No 1 at paragraph 65 and SOIPN No 8 at paragraph 42).

[Historical note prior to 23 February 2013: for the purpose of deciding whether the conveyance on sale was made 'in conformity with' a chargeable agreement for sale, a person and a parent, spouse or child of that person were treated as the same person: see the former version of section 29D(6)(c)(ii).]





## 29DA. Further provisions on special stamp duty chargeable on certain conveyances on sale

(1) Head 1(1AA) in the First Schedule applies to a conveyance on sale of any residential property acquired on or after 20 November 2010 by the transferor under the conveyance on sale.

(2) A conveyance on sale is chargeable with special stamp duty under head 1(1AA) in the First Schedule if the residential property concerned is disposed of within a period specified in the first column of that head beginning on the day on which the transferor under the conveyance on sale acquired the property. (Amended, 2 of 2014, s 12)

(3) If only part of the residential property is disposed of within a specified period, special stamp duty is chargeable only by reference to that part. (Amended, 2 of 2014, s 12)

(4) 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 –

- (a) any building or any part of a building (whether completed or uncompleted), and –
  - (i) the building is constructed, or caused to be constructed, by the transferor;
  - (ii) 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
  - (iii) the existing building (if any) was demolished, or caused to be demolished, by the transferor; or
- (b) any land, and –
  - (i) a building existed on the land when the land was acquired by the transferor;
  - (ii) the building was demolished, or caused to be demolished, by the transferor; and
  - (iii) there is no building on the land at the time of disposal by the transferor.

(5) For the purposes of this section and head 1(1AA) in the First Schedule, the transferor acquired the residential property on –

(a) subject to subsections (6), (8) and (9) –

(i) the date on which the transferor made a chargeable agreement for sale 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.

(6) 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 (5)(a) was made.

(7) For the purposes of this section and head 1(1AA) in the First Schedule, the transferor disposes of the residential property on, subject to subsections (8) and (9) and section 29CA(7), (8) and (9) –

(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.

(8) 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 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 that section 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.

(9) 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 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) Head 1(1AA) in the First Schedule does not apply to a conveyance on sale if the person to whom the residential property is vested or transferred under the conveyance on sale