



BACK TO THE FUTURE ON STAMP DUTY ON SHARE PURCHASE AGREEMENTS? AND THE CONTINGENCY PRINCIPLE

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Back to the future on stamp duty on share purchase agreements? And the contingency principle: how post-completion price adjustments and deferred consideration and earn-outs impact stamp duty on a share sale and purchase transactions.

The Stamp Duties (Agreements for Sale of Equity Interest) (Remission) Rules 2018 (the “Remission Rules”)

The Remission Rules follow a little more than a year after The Stamp Duties (Amendment) Act 2017 (the “Amendment Act”), which, in deleting the words “and stocks and shares,” from section 22(1)(b) of the Stamp Duties Act (Cap. 312) (the “SDA”), in effect, removed the long-standing exception from stamp duty for contracts and agreements for the sale of stocks and shares. In our update on 1 May 2017, we commented: “Since these innovations are recent it may take a little time for the practice of IRAS in relation to these issues and the more detailed rules on how sale agreements for shares are stamped to become clearer.”

The Remission Rules provide for remission from duty, from the date they took effect (11 April

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2018), so far as concerns listed shares in the CDP system and unlisted shares in companies that are not “property holding entities”, on an “agreement for the sale of any stock or shares, or any interest in any stock or shares” under section 22(1) of the SDA, and, subject to certain conditions, on an aborted “agreement for the sale of equity interests” in any entity, executed on or after 11 March 2017. “Equity interest” has the meaning given in section 23(21) of the SDA, which defines it in this context as “an issued share in the company that is not a treasury share”.

The good news is the Remission Rules dispose of the complications the Amendment Act had introduced by subjecting to stamp duty ordinary sale and purchase agreements (“SPAs”) for shares in Singapore companies and, going forward we can go back to the hallowed practice of stamping only the share transfers delivered at completion. This means no longer having to worry about what happens where a SPA the purchaser paid stamp duty on does not complete (so long as the parties are willing to treat the SPA as aborted and the purchaser claims remission of duty within 6 months of the agreement being aborted, broadly speaking).

The not so good news is that the Remission Rules do not apply to section 22(2) of the SDA, which applies stamp duty to any assignment or sub-sale of shares subject of a SPA stamped under section 22(1), so any assignment or sub-sale agreement in relation to an SPA that happened to have been stamped during the period between 11 March 2017 and 10 April 2018 will itself be stampable (unless some relief were available such as reconstruction relief on an assignment within a group – even then it is not clear how reliance could be placed on section 22(3) to relieve the transfers on completion from duty, as that pre-supposes duty has been paid both on the SPA and the assignment. This looks like an issue that would need to be discussed with IRAS in any particular case).

The unexpected news is that, while there is no other indication of any intention on the part of IRAS to roll back the ambit of stamp duty further than it had extended before the Amendment Act, that seems to be the clear effect of the Remission Rules. The reason for saying this is that section 22(1) of the SDA is in fact in 2 parts, part (a) dealing with an agreement for sale of “any equitable estate or interest in any property”, and part (b) dealing with an agreement for sale of “any estate or interest in any property except property situated outside Singapore”. It is clear from the wording of the Remission Rules they are meant to apply to equitable interests under section 22(1)(a), in respect of which SPAs have traditionally been subject to stamp duty. Possibly this may present opportunities for stamp duty planning using trusts to hold shares (although bear in mind a declaration of trust that involves a transfer of a beneficial interest in shares is subject to *ad valorem* stamp duty).

In the remission for aborted SPAs, the Remission Rules use the defined term “equity interest” to define the scope of the remission of duty paid on aborted SPAs executed on or

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after 11 March 2017 (this term is not used in section 22(1) - it is used in section 23 to apply additional conveyancing duty to transfers of shares in property holding entities). It is not immediately obvious why this term is used in this part of the Remission Rules when the main remissions provided apply to agreements for sale of “any stock or shares, or any interest in any stock or shares” and what distinction, if any, is intended. Possibly the distinction intended is this remission does not apply to duty paid on agreements for sale of an “equitable estate or interest” in shares, as the intention always was for these to be stampable (until the Remission Rules)?

The contingency principle

Under the SDA, stamp duty is payable on a transfer of shares in a Singapore company (outside of the CDP book-entry system), assuming no relief is available (for example, reconstruction relief, which broadly applies to qualify transactions within a group). In many cases, the consideration (the price payable) for the transfer is determined under a SPA. Normally, the duty payable is computed by multiplying the dutiable amount (the higher of the consideration or the value of the shares) by the applicable stamp duty rate. If the amount of the consideration for the shares is fixed under the SPA, then this computation is a straightforward matter and the rate of duty is 0.2% of the dutiable amount (assuming the company in question is not a “property holding entity”, in which case the SDA provides for “additional conveyance duties”, which may be payable by the seller as well as by the purchaser). However, it is often the case that the final consideration under a SPA is not fixed until after completion (for example by reference to completion accounts), or additional deferred consideration is payable sometime after completion by reference to, say, the earnings of the target company for a certain period. In such cases, what is the dutiable amount that should be stamped in respect of the transfer and how do subsequent post-completion adjustments or earn-outs affect the stamp duty liability of the purchaser?

Deferred consideration

Deferred consideration is a portion of the price that is payable by the purchaser in the future, after completion of the purchase. Deferred consideration is used for a variety of reasons, including tax or cashflow optimisation, or for other commercial reasons.

Earn-out

A common subset of deferred consideration is an earn-out, which is a portion of the consideration that is payable at a later date by reference to, and contingent upon, either (i) the target group’s performance over a period of time after completion or (ii) certain

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developments in the market. The typical rationale for an earn-out is to incentivise the seller to continue to work in the target business for a period after the sale and to hand over a company that continues to be profitable after the sale.

Tax treatment for deferred consideration

Stamp duty is a once and for all tax. The duty is charged on the consideration ascertained (or ascertainable) at the time the document is executed. However, sometimes the amount of the consideration payable under the instrument is uncertain at the date of its execution. In these cases, and depending on the circumstances, IRAS may apply what is known as the contingency principle. The contingency principle is applied (through section 17 of the SDA, which is modeled on [section 57](#) of the [Stamp Act 1891](#) in the UK). Section 17 of the SDA reads as follows:

“How conveyance in consideration of debt or subject to future payment, etc., to be charged

17.—(1) When any property is conveyed to any person in consideration, wholly or in part, of any debt due to him or subject either certainly or contingently to the payment or transfer of any money or stock or other property whether being or constituting a charge or encumbrance upon the property or not, such debt, money, stock or other property shall be deemed to be the whole or part, as the case may be, of the consideration in respect of which the conveyance is chargeable with ad valorem duty.”

The principle is applied as follows:

- Where a definite minimum consideration is stated, or where a definite minimum can be calculated from the terms of the SPA, duty is due on the minimum amount.
- Where there is a definite maximum consideration stated or a definite maximum can be calculated from the terms of the SPA, duty is due on the maximum amount.
- If both a maximum and a minimum figure can be determined, duty is chargeable on the maximum amount.
- If there is no maximum or minimum, but a fixed basic amount, which can be varied up or down depending on future events, duty will be charged on this basic or fixed amount.
- If future consideration might be payable but is genuinely unascertainable at the date of the instrument because no basic amount is stated and there is no formula that indicates a maximum or minimum, in theory, the duty cannot be charged on the further consideration. In practice, this often occurs where payments are computed by

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reference to a formula without any basic figure being stated. However, abuse of this beneficial treatment may lead to an attack by IRAS, which might seek to impose stamp duty based on an assessment of the value of the transfer.

Upstamping

Hence it is normal in the situation where the consideration is to be adjusted by reference to completion accounts, to provide in the SPA for an estimated consideration to be payable at completion and for an adjustment to be made subsequently once the completion accounts are settled and the adjustment is determined. The transfer will be stamped according to the estimated consideration. Once the final consideration is known, if there is an upward adjustment in the consideration, the transfer is “upstamped” online via the e-Stamping portal within 14 days of the determination of the increase in the consideration. Where there is a decrease in consideration upon final adjustment, a refund of part of the stamp duty paid may be applied for under section 75 of the SDA within 6 months of the over-payment, although IRAS has the discretion to extend the period. In such cases, it may be preferable for the transfer form to refer to the consideration clause in the SPA, so as to avoid the transfer needing to be amended once the final consideration is known.

Where stamp duties have been paid on the maximum consideration, but the actual consideration that becomes payable under an earn-out is less than the maximum, there is no statutory provision for refund of the difference. However, an appeal can be made to IRAS, either through the online portal or in writing to IRAS, and IRAS may consider it, on a case-by-case basis.

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