STAMP DUTY ON SHARE PURCHASE AGREEMENTS – THE PRACTICAL IMPACT OF RECENT CHANGES IN THE LAW

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The Stamp Duties (Amendment) Act 2017 (the "**Amendment Act**") was passed by Parliament on 10 March 2017 and came into effect on 11 March 2017. It was announced as introducing the Additional Conveyance Duty ("**ACD**"), which is a new stamp duty to be levied on acquisitions and disposals of equity interests in residential Property-Holding Entities ("**PHE**"), which may affect acquisitions or disposals of shares in an entity which directly or indirectly holds Singapore residential properties. One of the innovations in ACD is it seems to apply to agreements for the sale of shares in a foreign company that amounts to a PHE, whereas traditionally section 36(d) of the Stamp Duties Act (Cap. 312) (the "SDA") has exempted from Singapore stamp duty transfers of shares in a foreign company without a share register in Singapore. One means to avoid paying Singapore stamp duty on such an agreement, unless and until the document needs to be brought into Singapore, for example if it is needed to be produced in legal proceedings here, could be to execute and keep it outside Singapore.

The rest of this note focuses discussion on the changes introduced to section 22 of the SDA, which have implications generally for sales and purchase agreements regarding shares in a Singapore company (or in a foreign company with a share register in Singapore).

The Amendment Act deletes the words "and stocks and shares," from section 22(1)(b) of the SDA, in effect, removing the exception from stamp duty for contracts and agreements for the sale of stocks and shares.

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This seems to reflect an intention to treat shares in the same way as Singapore real estate so that stamp duty will be payable on any contract or agreement for the sale of shares. Prior to the Amendment Act, stamp duty was payable only on the execution of the instrument of transfer (being the share transfer form), and not on the contract or agreement for sale of shares. This effectively brings forward the point at which stamp duty is payable on sales of shares to the execution of the agreement for sale, rather than the transfer of shares that occurs on completion of the agreement in the case of unlisted shares

In the case of listed shares, IRAS on its website says that where there is no document executed for the transfer of scripless shares , stamp duty is not payable. This seems to mean that IRAS intends that unless a sale of scripless shares requires execution of a transfer on the register of the company, i.e. a transfer out of the CDP , transactions in listed shares still do not attract stamp duty. It would be helpful if IRAS would clarify this position as, on the wording on the SDA, it is not clear how agreements for sale of listed shares fall outside the charge to stamp duty.

Many sale agreements are conditional. The SDA and rules made under it provide for remission on stamp duty paid on conditional agreements that fail to complete but the list of specific reasons in the SDA are mostly not of practical application to transactions in shares and the rules on remissions, which are more widely worded, are limited to real estate transactions. It would be helpful for rules to be introduced to allow for remission of agreements for sale of shares that do not complete.

By way of comparison, the UK has a tax called stamp duty reserve tax ("**SDRT**") on agreements (which need not be in writing) to transfer chargeable securities for consideration in money or money's worth. If the agreement is conditional, the charge arises only when the agreement becomes unconditional. In the absence of any equivalent approach in Singapore, for the time being at least, it would seem parties to conditional agreements for sale of shares that do not complete because the conditions are not satisfied may be left to seeking to persuade IRAS to exercise a discretion to allow remission of stamp duty paid on the agreement (under section 74 of the SDA).

This raises the issue of whether a transaction can be structured to avoid a sale agreement and whether put and call options fall within or outside the scope of an agreement for sale for stamp duty purposes. A leading case on this question is Wm Cory & Son Ltd v IRC AC 1088, 1 All ER 917. An English taxing statute provided for stamp duty to be payable on an agreement for the sale of shares; but an agreement by which an option to purchase was granted was held not to come within that class, and accordingly did not produce the consequence that stamp duty was payable.

Clifford Development Pte Ltd v Commissioner of Stamp Duties SGHC 168 is a Singapore case concerning the availability of reconstruction relief from stamp duty. The issue was whether a joint venture agreement that had been entered into before the transfer in respect of which reconstruction relief was claimed meant the conditions for relief were not satisfied. The JVA was structured using put and call options over shares. The applicant contended that the facts and circumstances to be considered in determining the availability of relief were those as at the date of the execution of the instrument and cited the English case as authority.

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The Singapore judge decided the facts showed that the transfer of the properties was made for the purposes of or in connection with a joint venture between UOL and OUE to redevelop the properties and the intention behind the combined call and put options in the JVA was that all along UOL was to subscribe for 50% of the shares in the applicant, and therefore indirectly own 50% of the transferred properties for the purpose of UOL's joint redevelopment of the transferred properties together with OUE.

The judge referred to section 33A of the SDA, which enabled IRAS to look into the purpose or effect of any arrangement, and where the arrangement is effected, directly or indirectly to generally avoid duty, IRAS is enabled to make adjustments, which can include the amount of duty payable. An "arrangement" in section 33A is defined widely to mean "any scheme, trust, grant, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect". The judge noted that the UK stamp duty legislation, upon which the applicant's authority, WM Cory & Son Ltd v Inland Revenue Commissioners AC 1088 was based, did not have a similar antiavoidance provision like section 33A.

The judge said "With the combined call and put options in the JVA, the applicant and UOL had therefore agreed as a term of the JVA that the applicant was to allot and issue an additional 32,850,000 shares to UOL for a total consideration of $32,850,000 within 12 months. There was in effect no real option available to UOL because the applicant, through its put option, could compel UOL to take up these additional shares anyway on the same terms. In my view therefore, the parties to the JVA had agreed that UOL was legally bound to pay $65,700,000 for a total of 65,700,000 new shares of the applicant, to be executed in two tranches basically. It was only a question of timing, and no longer an option available to UOL whether or not they wished to acquire and pay for the balance of 32,850,000 shares at $1 per share." However it should be noted this case concerns whether the conditions for a relief from stamp duty had been met and not whether the agreement itself was a stampable instrument.

In an Irish case (Tanat v Medical Council IEHC 223) the Court adopted a similar approach to deciding a put option amounted to an agreement for a lease (in a case concerning regulation of leases not stamp duty).

The fact that IRAS seems to be in the practice of recognising put and call options in real estate transactions do not amount to a stampable sale agreement until there is an exercise of an option, may give some comfort that a similar approach to sales agreements for shares structured using put and call options will allow the point at which stamp duty is chargeable in practice to be deferred to the point the agreement can be completed. However, an observer might ask why, if IRAS takes this view on put and call options, did the government not amend the SDA to defer the charge on stamp duty on conditional sale agreements to the point they become unconditional?

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.

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