

## THE NEW ADDITIONAL CONVEYANCE DUTIES REGIME IN THE STAMP DUTIES ACT

The new additional conveyance duties regime has gone beyond attempting to achieve tax neutrality between direct transfers of residential property and indirect transfers through the use of property-holding entities. It taxes an entirely new tax base and raises issues such as: the extremely broad concept of an “associate” relationship; definition of “unit in a property trust”; anti-avoidance provisions; liability for providing false information; tax neutrality; and the considerable flexibility that the section 23 Order provides the Government. This article analyses the regime in detail and considers the implications of various changes to the prescribed values in the section 23 Order.

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### I. Introduction

1 The Stamp Duties (Amendment) Bill<sup>1</sup> (“the Bill”) was passed on 10 March 2017 as an urgent bill. The Bill introduced a new additional conveyance duties (“ACD”) regime, designed to levy stamp duties on transfers of interests in property-holding entities (“PHEs”) and equalise the treatment between direct transfers of real property and indirect transfers through the use of PHEs. While the ACD regime was introduced partly in response to tax-avoidance measures, its effect is not so confined. The ACD regime levies a tax on an entirely new tax base, catching numerous situations that would not have fallen within the pre-amendment stamp duties regime.<sup>2</sup>

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1 Bill 18 of 2017.

2 As the provisions of the pre-amendment stamp duties regime are still in force alongside the new ACD regime, this article will call them the “direct stamp duties regime”.

2 This article seeks to explain the highly complex mechanism of the ACD regime, first by considering the context in which the Bill was passed<sup>3</sup> and laying out the key concepts.<sup>4</sup> This will provide the necessary clarity to proceed on to the next Part of the article, which will go through the various components of the ACD regime in detail,<sup>5</sup> including the supporting provisions like anti-avoidance measures and liability for providing false information.<sup>6</sup> The article will then comment on various parts of the framework that may be of particular interest to the reader.<sup>7</sup> In particular, the extremely broad concept of an “associate”, the definition of “unit in a property trust”, and tax neutrality will be considered. The article will then address the potential implications of changes to the section 23 Order,<sup>8</sup> a piece of subsidiary legislation that provides considerable flexibility to the ACD regime.<sup>9</sup>

### A. Stamp duties and residential property

3 Stamp duty is a tax on particular instruments that are specified in the First Schedule to the Stamp Duties Act<sup>10</sup> (“SDA”).<sup>11</sup> It is a tax levied on instruments and not transactions; thus, transactions that can be conducted without writing will not be subject to stamp duties.<sup>12</sup> In the context of residential property transactions, the transfer of proprietary interests must be in writing if the agreement is to be enforceable by the parties.<sup>13</sup> The relevant stamp duties in residential property transactions include: (a) buyer’s stamp duty (“BSD”);<sup>14</sup> (b) additional buyer’s stamp duty (“ABSD”);<sup>15</sup> and (c) seller’s stamp duty (“SSD”).<sup>16</sup>

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3 See paras 3–8 below.

4 See paras 9–27 below.

5 See paras 28–44 below.

6 See paras 45–54 below.

7 See paras 55–82 below.

8 Stamp Duties (Section 23) Order 2017.

9 See paras 83–91 below.

10 Cap 312, 2006 Rev Ed.

11 Leung Yew Kwong & Tan Kay Kheng, *LexisNexis Annotated Statutes of Singapore: Stamp Duties Act 2015* (LexisNexis, 2015) at pp 19–20.

12 Leung Yew Kwong & Tan Kay Kheng, *LexisNexis Annotated Statutes of Singapore: Stamp Duties Act 2015* (LexisNexis, 2015) at pp 20–21.

13 Leung Yew Kwong & Tan Kay Kheng, *LexisNexis Annotated Statutes of Singapore: Stamp Duties Act 2015* (LexisNexis, 2015) at p 21; see also s 6(d) of the Civil Law Act (Cap 43, 1999 Rev Ed).

14 See Art 3(a)(ii) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

15 See Art 3(bf) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

16 See Art 3(bg)(b) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

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4 There have been numerous tax-planning attempts to reduce the amount of stamp duties payable in residential property transactions. In *UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties*<sup>17</sup> (“*UOL Development*”) the taxpayer attempted to argue that the *en bloc* sale of 53 properties involved 53 separate contracts. This would have resulted in savings in stamp duties if successful.<sup>18</sup> In *Lai Ling Wan v Commissioner of Stamp Duties*<sup>19</sup> (“*Lai Lily*”), the taxpayer attempted a similar approach to that in *UOL Development* in the *en bloc* purchase of 83 strata units. In both cases, the Commissioner of Stamp Duties (“the Commissioner”) applied s 33A of the SDA, a general anti-avoidance rule that empowered the Commissioner to counteract any reduction of duty payable where the purpose of an arrangement had the reduction of duty as one of its main purposes. The High Court came to two different conclusions, holding the taxpayer’s arrangement in *UOL Development* had no sound commercial basis but finding *bona fide* commercial reasons for the arrangement in *Lai Lily*.

5 When the taxpayers in *UOL Development* and *Lai Lily* were attempting their schemes, there was no ABSD or SSD. When these new duties were introduced, there were considerable incentives for taxpayers to attempt to circumvent the payment of stamp duties. While the maximum rate of BSD was 3%, ABSD could reach a maximum of 15% and SSD could reach 16%. Naturally, new tax-planning schemes evolved. One widely discussed tax-planning arrangement involved the transfer of the shares of a property-holding company rather than the property itself. While the transfer of a property could potentially attract BSD, ABSD and SSD, the transfer of the shares in a property-holding company would only attract stamp duties on share transfers, payable at the rate of 0.2%.<sup>20</sup>

6 Stamp duties are not only used for revenue collection in Singapore but also as a tool for socio-economic policy,<sup>21</sup> in particular to curb speculation in residential properties. If properties could be transferred indirectly through property-holding companies, the effectiveness of stamp duties in regulating the residential property

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17 [2008] 1 SLR(R) 126.

18 Under Art 3(a)(ii) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed), the first \$180,000 of the value of the property is taxed at 1%, the next \$180,000 at 2% and the rest at 3%. By splitting the *en bloc* transaction into 53 separate contracts, the taxpayer hoped to be able to take advantage of the lower 1% and 2% rates 53 times rather than just once.

19 [2011] 4 SLR 845.

20 See Art 3(c)(ii) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

21 Leung Yew Kwong & Tan Kay Kheng, *LexisNexis Annotated Statutes of Singapore: Stamp Duties Act 2015* (LexisNexis, 2015) at pp 11–15.

market would be seriously compromised. In January 2013, *The Business Times* published an article noting that estate agents were promoting the use of property special purpose vehicle as a means to circumvent ABSD.<sup>22</sup> The Inland Revenue Authority of Singapore promptly responded to the article, making it clear that it intended to use the s 33A SDA general anti-avoidance rule to counteract such schemes.<sup>23</sup> It was in this context that the Bill was drafted.

### **B. Purpose of the Bill**

7 The Explanatory Statement to the Bill states that its purpose is “primarily to introduce new ad valorem duties for conveyances of equity interests in property-holding entities (PHE) that are computed on the basis of their underlying immovable properties”.<sup>24</sup> While the Bill may have been inspired by the desire to counteract the tax-planning measures referred to above, the Explanatory Statement makes it clear that the ACD regime is not so confined. In light of the Inland Revenue Authority of Singapore’s recent successes in applying general anti-avoidance rules in *Comptroller of Income Tax v AQQ*<sup>25</sup> (“AQQ”) and *GBF v The Comptroller of Income Tax*<sup>26</sup> (“GBF”), there is good reason to think that the s 33A of the SDA would have sufficed to quash such blatant tax avoidance schemes without the need to introduce a new (and highly complicated) ACD framework.

8 The aim of the new ACD framework seems to be to ensure tax neutrality between direct transfers of real property and indirect transfers through the use of PHEs. This goes beyond preventing the abuse of a tax loophole; it attempts to tap into an entirely new tax base that has hitherto not been touched by the direct stamp duties regime.

## **II. Core concepts of the ACD regime**

### **A. The recurring theme**

9 Understanding this aim of tax neutrality is essential to deciphering the ACD framework. Numerous provisions in the statute

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22 “ABSD Hike May See More Investing in Property SPVs” *The Business Times* (24 January 2013).

23 See Claire Chua, “Residential Property of Firm Subject to Top ABSD Rate of 15%” (26 January 2013) <<https://www.iras.gov.sg/irashome/News-and-Events/Newsroom/Forum-Replies/2013/Residential-property-of-firm-subject-to-top-ABSD-rate-of-15-/>> (accessed 4 April 2017).

24 Stamp Duties (Amendment) Bill (Bill 18 of 2017) Explanatory Statement.

25 [2014] 2 SLR 847.

26 [2016] SGITBR 1.

have been drafted to express a simple concept: if the effort of a transaction or event is that one has or will gain substantial ownership of a residential property, even indirectly through layers of holding entities or through one's family, the transaction will be subjected to stamp duty as though it is a transfer of the residential property. The bulk of the legislative provisions relate to transforming this concept into a feasible system and attempting to pre-empt any potential tax avoidance schemes.

**B. *Primary and subsidiary legislation***

10 Legislation for the ACD regime is extremely comprehensive, with care taken to close any potential loopholes in the statute. As stamp duty is a tax that is very focused on the form of the transaction, the parliamentary draftsmen chose to expressly lay out the exact mechanism of the ACD regime rather than provide general principles and risk creating loopholes. The result is a particularly voluminous statutory framework that is by no means easy to decipher.

11 The ACD regime is designed for flexibility. At its core lies ss 23–23D and Art 3A of the First Schedule to the SDA. This primary legislation is supplemented by subsidiary legislation in the form of a “section 23 Order”<sup>27</sup> which allows quick variation of certain crucial values in the ACD regime. These values relate, *inter alia*, to factors such as holding-periods and the threshold percentages of ownership that would render one liable for ACD. The use of subsidiary legislation allows the Government considerable flexibility in operating the ACD regime, since the values prescribed by the section 23 Order can be swiftly varied to achieve different tax effects without the need to seek prospective parliamentary approval for each change.

**C. *PHEs***

12 PHEs are the focus of the ACD regime. As direct transfers of real property are already caught by the direct stamp duties framework, the ACD regime attempts to tax transfers of interests in entities which hold real property directly or indirectly. To understand the concept of a PHE, the phrase “property-holding entities” can be broken down into its constituent terms: (a) property, (b) holding, and (c) entity.

13 “Property”, in this context, refers to prescribed immovable properties (“PIPs”),<sup>28</sup> which correspond with the residential properties

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27 This is provided for by s 23D of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

28 Under para 5 of the Stamp Duties (Section 23) Order 2017, the zones are: “residential”; “commercial and residential”; “residential/institution”; “residential with commercial at 1st storey”; or “white”. Other specific provisions exist.

defined under the direct stamp duties regime. “Entities”, subject to the ACD regime, are companies, partnerships and property trusts.<sup>29</sup> “Holding” is a more complex concept. An entity is not a PHE simply because it holds residential property; there are requirements on how much it must hold. At least 50%<sup>30</sup> of the market value of an entity must be made up of PIPs before an entity may be classified as a PHE<sup>31</sup> under the ACD regime. This will be referred to as the “property-heavy” condition hereinafter.

(1) *Type 1 PHEs*

14 The property-heavy condition may be met directly, where the entity in question directly owns one or more PIPs. Such entities are classified as Type 1 PHEs under the ACD regime.<sup>32</sup>

(2) *Significant stake*<sup>33</sup>

15 An entity may hold shares in Type 1 PHEs and thus indirectly own PIPs. The concept of “significant stake” is crucial to the determination of indirect ownership of PIPs and whether the property-heavy condition has been met. An entity (“A”) is deemed to have a significant stake in another entity (“B”) if it owns at least 50%<sup>34</sup> of the equity in entity B or has at least 50%<sup>35</sup> of the voting power in entity B.<sup>36</sup>

(3) *Type 2 PHEs*

16 The property-heavy condition may also be met indirectly. Interests in “downstream” PHEs will have to be considered in determining if an entity is property-heavy. The market value of the PIPs owned by the downstream PHE is apportioned based on the holding

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29 See s 23(21) of the Stamp Duties Act (Cap 312, 2006 Rev Ed). The statute provides for a “partnership, limited partnership or limited liability partnership”. As it is generally uncommon for residential properties to be held using a partnership structure, this article will omit discussion of partnerships.

30 See ss 23(13)(a) and 23(13)(b) of the Stamp Duties Act (Cap 312, 2006 Rev Ed). Separate values are provided for Types 1 and 2 PHEs by paras 4(3) and 4(4) of the Stamp Duties (Section 23) Order 2017 and the values are subject to change. Both values are currently 50%.

31 These are either Type 1 or Type 2, depending on how the 50% condition is satisfied.

32 See s 23(13)(a) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

33 The definition of “significant stake” for property trusts may be more complicated: see paras 56–58 below.

34 This figure is provided for by para 4(1) of the Stamp Duties (Section 23) Order 2017 and is subject to change.

35 This figure is provided for by para 4(2) of the Stamp Duties (Section 23) Order 2017 and is subject to change.

36 See s 23(11) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

entity's stake in the downstream PHE. This value must be added to the value of PIPs directly held by the holding PHE. The same applies to the total value of all assets in the holding PHE. A property-heavy entity that has at least one downstream PHE is classified as a Type 2 PHEs under the ACD regime.<sup>37</sup>

17 When considering indirect holding of PIPs, there is no limit to the number of layers of entities which may separate the apex entity from the PIPs of the downstream entities. However, a downstream entity is only to be considered if its holding entity has a significant stake in it. Thus, an entity with 70% of its market value made up of PIPs and with a 30% stake in a single Type 1 PHE would not be a Type 2 PHE but a Type 1 PHE instead.

(4) *Group entities*

18 Calculation of the market value of PIPs owned by downstream PHEs is relatively straightforward if the entities are neatly layered in a single chain, with each entity holding a significant stake in the entity below it in the chain. The ACD regime takes a broad “group” approach when considering if an entity is property-heavy.<sup>38</sup> The significant stake requirement does not mandate that it is the entity directly above the downstream PHE that must have a significant stake. Instead, an apex entity may hold a significant stake in a downstream PHE through multiple chains of entities.

19 For example, an entity (level 1 entity) may own a significant stake in three other entities (level 2 entities), each of which owns one-third of a Type 1 PHE. Technically, none of the three level 2 entities has a significant stake in the Type 1 PHE. However, if all of the level 1 entity's holdings are considered as a group, it would have a significant stake in the Type 1 PHE. Thus, the value of the PIPs in the Type 1 PHE will have to be considered when determining if the level 1 entity is property-heavy. There does not need to be an unbroken chain of Type 1 and Type 2 PHEs from the apex entity to the PIP.

**D. Unit in a property trust**

20 A property trust is defined as a “trust that holds or invests in prescribed immovable properties” or units in an entity which does.<sup>39</sup> In turn, a unit is defined as “a share in the beneficial ownership of the trust

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37 See ss 23(13)(b), 23(14), 23(15) and 23(19) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

38 See ss 23(18) and 23(19) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

39 See s 23(21) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

property, or a share in the profits, income or other payments or returns from the management of the property or operation of the business premised on the property”.<sup>40</sup> For the purposes of the section, a contract or agreement for the sale of the abovementioned interests also constitutes a unit.<sup>41</sup> Thus, one may be deemed to own a unit in a property trust even before the conveyance has been executed.

### ***E. Associates***

21 The concept of “associates”, as used in the ACD regime, is complex due to the numerous ways in which such a relationship can be drawn between parties. It is a concept of considerable importance in the ACD regime because the interests held by the associates of a taxpayer will be added to his own interests when determining: (a) if he has a significant stake in an entity;<sup>42</sup> and (b) the quantum of ACD payable.<sup>43</sup> The primary legislation itself provides for very straightforward conditions: (a) spouses, parents, grandparents, children, grandchildren and siblings of the taxpayer are deemed to be associates;<sup>44</sup> and (b) parties with whom the taxpayer has an arrangement (express or implied) with respect to the equity interests or voting rights in the entity being conveyed are also associates.<sup>45</sup>

22 The SDA also provides that the section 23 Order may prescribe when an “associate” relationship may arise between parties.<sup>46</sup> The definition of “associate” becomes very complicated here as there are four different types of “associate” relationships that may be established.<sup>47</sup>

#### ***(1) Significant extent***

23 The concept of “significant extent” is central to the determination of whether an “associate” relationship exists between two parties under the section 23 Order. “Significant extent” is defined as: at

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40 See s 23(21) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

41 See s 23(22) of the Stamp Duties Act (Cap 312, 2006 Rev Ed). This also applies to all other entities: a contract or agreement for the sale of equity interests is deemed to be part of the equity interests beneficially owned by a person, even before there has been a conveyance of the equity interests.

42 See s 23(12) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

43 See s 23(12) and Art 3A of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

44 See s 23(20)(a) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

45 See s 23(20)(c) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

46 See s 23(20)(d) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

47 See para 27 below.

least 75% of the voting capital of a company and at least 50% of the voting power of a company, or a unit in a property trust.<sup>48</sup>

24 It is noted that this is a very similar concept to that of “significant stake” as discussed above. The ACD regime has three terms with the word “significant” in them: “significant stake”, “significant extent” and “significant owner”. The three terms all have their own distinct meanings. “Significant stake” relates to the determination of whether the property-heavy condition has been met. “Significant extent” relates to the determination of whether an entity is an “associate” of another entity or person. “Significant owner” relates to the determination of the liability to pay ACD.

- (a) The concept of indirect ownership for voting capital and voting power

25 There are three ways in which an entity (“X”) may hold the voting capital and voting power in another entity (“Y”): (a) directly; (b) through a single chain; or (c) through multiple chains.<sup>49</sup> The method of determining indirect ownership in this context is very similar to that mentioned above in the context of PHEs. In calculating whether entity X has indirect ownership of entity Y, one must not only consider its own voting capital and voting power. Instead, the voting capital and voting power arising from its stake in entities which it owns to a significant extent must also be included (apportioned by percentage ownership).<sup>50</sup>

26 The aforesaid three ways of indirect ownership can be described as follows:

- (a) directly:

Entity X may beneficially own the voting capital and voting power in entity Y directly.<sup>51</sup>

- (b) through a single chain:

Entity X may beneficially own the voting capital and voting power in entity Y indirectly, through multiple layers of entities, with each entity owning the entity below it in the chain to a significant extent.<sup>52</sup>

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48 See para 6(8) of the Stamp Duties (Section 23) Order 2017. The definition of “significant extent” for property trusts may pose difficulties. See paras 59–60 below.

49 See para 6(2) of the Stamp Duties (Section 23) Order 2017; see also para 26 below.

50 See para 6(7) of the Stamp Duties (Section 23) Order 2017.

51 See paras 6(2)(a) and 6(5)(a) of the Stamp Duties (Section 23) Order 2017.

52 See paras 6(2)(b) and 6(5)(b) of the Stamp Duties (Section 23) Order 2017.

(c) through multiple chains:

For a multiple chain or “group” situation, the approach to be applied here is different from that applied in assessing property-heavy condition above. When determining indirect ownership of PIPs in the context of assessing the property-heavy condition, there is no requirement for a single chain of entities linking the apex entity to the PIPs. An apex entity may own a significant stake in a PHE through multiple chains of entities.

This is not the case when determining indirect ownership in the context of establishing an associate relationship. The section 23 Order currently provides that where there is more than one chain linking the apex entity to the PHE, each entity in the chain must directly own the entity beneath it in the chain to a significant extent. There cannot be any “broken chains” in the structure. There is one exception to this rule. The entity directly above the bottommost entity (a Type 1 PHE) need not beneficially own the voting capital and voting power of the bottommost entity directly and to a significant extent.<sup>53</sup> If this “multiple chain rule” is complied with, entity X may beneficially own the voting capital and voting power in entity Y indirectly through multiple layers of entities and chains.<sup>54</sup>

(2) *Types of “associate” relationships*

27 There are four different types of “associate” relationships that may be established under the section 23 Order.<sup>55</sup>

(a) entity–entity–entity:

An entity (“X”) is associated with another entity (“Y”) if a third entity (“Z”) beneficially owns the voting capital and voting power in both entities X and Y to a significant extent.<sup>56</sup>

(b) entity–entity:

An entity (“X”) is associated with another entity (“Y”) if entity X beneficially owns the voting capital and voting power in entity Y to a significant extent.<sup>57</sup>

(c) individual–entity:

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53 See paras 6(3) and 6(6) of the Stamp Duties (Section 23) Order 2017.

54 See paras 6(2)(b) and 6(5)(b) of the Stamp Duties (Section 23) Order 2017.

55 See para 6(1) of the Stamp Duties (Section 23) Order 2017.

56 See para 6(1)(a)(ii) of the Stamp Duties (Section 23) Order 2017.

57 See para 6(1)(a)(i) of the Stamp Duties (Section 23) Order 2017.

An individual is associated with an entity if he beneficially owns the voting capital and voting power in the entity to a significant extent.<sup>58</sup>

(d) individual–entity–entity:

An entity (“X”) is associated with another entity (“Y”) if an individual beneficially owns the voting capital and voting power in both entities X and Y to a significant extent.<sup>59</sup>

### **III. Framework of the ACD regime**

#### **A. Qualifying situations**

28 For a conveyance to be subject to ACD, it must fall within at least one of the four qualifying situations. The qualifying situations have two common requirements and then a specific requirement for each situation. The common requirements of all four qualifying situations are that: (a) there must be a conveyance of equity interests in a PHE (regardless of whether the conveyance was for consideration or whether it took place pursuant to a declaration of trust);<sup>60</sup> and (b) the entity in question must be a PHE at the time of the execution.<sup>61</sup> All four qualifying situations also make reference to the concept of a “significant owner”.

##### *(1) Significant owner*

29 The concept of a “significant owner” is crucial to the determination of whether a conveyance falls within any of the four qualifying situations. The ACD regime considers whether a grantor or grantee is a “significant owner” of the PHE to be conveyed. For companies, a significant owner is one who beneficially owns at least 50% of the equity or the voting power of a company.<sup>62</sup>

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58 See para 6(1)(b) of the Stamp Duties (Section 23) Order 2017.

59 See para 6(1)(c) of the Stamp Duties (Section 23) Order 2017.

60 See s 23(1) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

61 See s 23(2)(b) of the Stamp Duties Act (Cap 312, 2006 Rev Ed), but an entity may be treated as if it were a property-holding entity under the conditions in ss 23(5) and 23(6) in the cases of duties C and D.

62 See s 23(11) of the Stamp Duties Act (Cap 312, 2006 Rev Ed), referring to paras 4(1) and 4(2) of the Stamp Duties (Section 23) Order 2017. While the additional conveyance duties framework does provide definitions for “significant stake” for companies and partnerships, it seems to have left property trusts out: see para 57 below.

(2) *The four qualifying situations*

30 The qualifying situations where ACD may be charged can be divided into four categories: (a) grantee has no other related interests; (b) grantor has no other related interests; (c) grantee has other related interests; and (d) grantor has other related interests. The grantee-side ACDs (duties A and C) mirror ABSD and BSD, while the grantor-side ACDs (duties B and D) mirror SSD.

(a) Grantee has no other related interests

31 The grantee is liable to pay duty A<sup>63</sup> if he is a significant owner of the PHE either immediately before or after the execution of the conveyance.<sup>64</sup>

(b) Grantor has no other related interests

32 The grantor is liable to pay duty B if he is a significant owner of the PHE and the conveyance takes place within three years<sup>65</sup> of his acquisition of his interest in the PHE.<sup>66</sup> However, where a grantor disposes of all his interests in the PHE and then subsequently becomes a significant owner of the PHE again, any conveyance executed in the interim will not be subject to duty B.<sup>67</sup>

(c) Grantee has other related interests

33 The grantee is liable to pay duty C if he is a significant owner of the PHE either immediately before or after the execution of the conveyance.<sup>68</sup> The difference from duty A is that in the determination of whether the target entity is a PHE, the other holdings of the grantee are taken into account. If the target entity would be a Type 2 PHE if it and

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63 The calculations for the determination of all four duties are addressed in paras 36-44 below.

64 See s 23(2) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

65 See s 23(8) of the Stamp Duties Act (Cap 312, 2006 Rev Ed). This figure is provided for by para 3 of the Stamp Duties (Section 23) Order 2017 and is subject to change. Note that s 23(8) provides that duty B is only payable on the parts of the interest in the property-holding entity that are disposed of within three years of acquisition. If the interest was acquired in parts and some parts were acquired more than three years prior to disposal, they would not be subject to duty B. Section 23(8) further provides that “where the grantor acquired the equity interests at different times, then the equity interests first acquired by the grantor are treated as being disposed of first by the grantor”.

66 See s 23(3) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

67 See s 23(4) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

68 See s 23(5) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

the other entities which the grantee has a significant stake in were a single entity, then the target entity is deemed to be a PHE.

(d) Grantor has other related interests

34 The grantor is liable to pay duty D if he is a significant owner of the PHE and the conveyance takes place within three years<sup>69</sup> of his acquisition of his interest in the PHE.<sup>70</sup> However, where a grantor disposes of all his interests in the PHE and then subsequently becomes a significant owner of the PHE again, any conveyance executed in the interim will not be subject to duty D.<sup>71</sup> The difference from duty B is that in the determination of whether the target entity is a PHE, the other holdings of the grantor are taken into account. If the target entity would be a Type 2 PHE if it and the other entities which the grantor has a significant stake in were a single entity, then the target entity is deemed to be a PHE.

(3) *Multiple heads of ACD on the same instrument*

35 The SDA makes it clear that both duties A and B, or both duties C and D, depending on the situation, may be charged on the same instrument and may be charged in addition to the stamp duty on conveyance of shares.<sup>72</sup> This mirrors the BSD, ABSD and SSD position, since duties A and C are levied on the buyer and duties B and D are levied on the seller.

## **B. Quantum of ACD**

36 In all calculations of the quantum of ACD, the interests owned by the grantor and grantee include those owned by their respective associates.<sup>73</sup> The calculation of the quantum of ACD due requires an understanding of two concepts: (1) change in beneficial interest; and (2) related entities.<sup>74</sup>

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69 See s 23(8) of the Stamp Duties Act (Cap 312, 2006 Rev Ed). This figure is provided for by para 3 of the Stamp Duties (Section 23) Order 2017 and is subject to change: see para 32, n 64 above.

70 See s 23(6) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

71 See s 23(7) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

72 See s 23(9) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

73 See s 23(12) and Art 3A of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

74 See paras 37–40 below.

(1) *Change in beneficial interest*

37 For duties B and D, the change in beneficial interest is simply the amount of equity interests that are comprised in the conveyance.<sup>75</sup> For duties A and C, a more complex calculation is required. The calculation of a change in beneficial interest requires the establishment of two reference values with which to calculate the change: a “before” value and an “after” value. Subtracting the “before” value of beneficial interests from the “after” value will determine the change in beneficial interests.

38 The “after” value is always fixed as the value immediately after the conveyance. However, the “before” point is based on the status of the grantee.<sup>76</sup> For a grantee who has never been a significant owner of the PHE since the ACD regime was enacted, the “before” value is the lowest amount of the beneficial interest he owns in the PHE between the enactment of the ACD regime and the conveyance.<sup>77</sup> For a grantee who is a significant owner of the PHE both before and after the conveyance, the change in value is the equity interest in the PHE conveyed by the conveyance.<sup>78</sup> For all other situations, the “before” value is the lowest value of the beneficial interest he owned in the PHE since he was last a significant owner of the PHE.<sup>79</sup>

(2) *Related entities*

39 The concept of related entities has two functions: (a) to determine if the conveyance falls within a qualifying situation; and (b) to determine the quantum of ACD payable. As noted above, in the determination of whether the target entity is a PHE, the other holdings of the grantor or grantee (related entities) are taken into account. If the target entity would be a Type 2 PHE if it and the related entities were a single entity, then the target entity is deemed to be a PHE. This function of “related entities” deals with whether there is ACD liability in the first place.

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75 See Arts 3A(1)(b) and (2)(c) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

76 See Arts 3A(1)(a)(i)(A), 3A(1)(a)(ii)(A), 3A(1)(a)(iii), 3A(2)(a)(i)(A), 3A(2)(a)(ii)(A), 3A(2)(a)(iii), 3A(2)(b)(i)(A), 3A(2)(b)(ii)(A) and 3A(2)(b)(iii) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

77 See Arts 3A(1)(a)(i)(B), 3A(2)(a)(i)(B) and 3A(2)(b)(i)(B) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

78 See Arts 3A(1)(a)(iii), 3A(2)(a)(iii) and 3A(2)(b)(iii) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

79 See Arts 3A(1)(a)(ii)(B), 3A(2)(a)(ii)(B) and 3A(2)(b)(ii)(B) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

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40 It is noted that while both the first and second functions apply to duty C, only the first function applies to duty D. Thus, calculation of the quantum of ACD payable under duty D is done in exactly the same way as for duty B (as expressed below).

(a) Duty A: Grantee has no other related interests (mirrors BSD and ABSD)

41 The BSD and ABSD rates are levied on the value of the change in beneficial ownership of all PIPs indirectly owned by the PHE (apportioned by percentage of ownership).<sup>80</sup>

(b) Duty B: Grantor has no other related interests (mirrors SSD)

42 The SSD rate is levied on the value of the change in beneficial ownership of all PIPs indirectly owned by the PHE (apportioned by percentage of ownership).<sup>81</sup>

(c) Duty C: Grantee has other related interests (mirrors BSD and ABSD)

43 Duty C has two components, the first of which is simply duty A. The second component can be determined by applying the BSD and ABSD rate on the value of the change in beneficial ownership of PIPs indirectly owned by the related entities which are also indirectly owned by the PHE (apportioned by percentage of ownership).<sup>82</sup>

(d) Duty D: Grantor has other related interests (mirrors SSD)

44 Duty D has two components, the first of which is simply duty B. The second component can be determined by applying the SSD rate on the value of the change in beneficial ownership of PIPs indirectly owned by the related entities which are also indirectly owned by the PHE (apportioned by percentage of ownership).<sup>83</sup>

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80 See Arts 3A(1)(a) and 3A(1)(b) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed): the rates for buyer's stamp duty are 1% for the first \$180,000, 2% for the next \$180,000, and 3% on the rest of the value of the property; and for additional buyer's stamp duty, the rate is 15% on the value of the property.

81 See Art 3A(1)(e) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed): for seller's stamp duty ("SSD"), there is a 12% flat rate on the value of the property if the property is sold within three years of acquisition. Note that this is higher than the typical SSD payable for the sale of properties, which ranges from 12% to 0%, tapering off by 4% per year since acquisition.

82 See Arts 3A(1)(c), 3A(1)(d), 3A(2)(c) and 3A(2)(d) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

83 See Arts 3A(1)(e), 3A(1)(f), 3A(2)(e) and 3A(2)(f) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

## IV. Supporting provisions

### A. *Anti-avoidance*

45 Given the context in which the ACD regime arose, it is unsurprising that it contains extensive anti-avoidance provisions. Some key features are highlighted below.

#### (1) *Transfers of equity interests*

46 Where one of the prescribed arrangements<sup>84</sup> has the effect of a person's ("X's") increase in equity interests in an entity, and the conveyance would have been chargeable with ACD or stamp duties if it had been conveyed to X, the arrangement is treated as a conveyance of equity interests to X.<sup>85</sup> The Commissioner is empowered to charge ACD and/or stamp duties on an instrument evidencing such a transfer or on a notice prescribed in the section 23 Order. The same applies if one of the prescribed arrangements has the effect of a person's ("Y's") decrease in equity interests in an entity.<sup>86</sup> However, if the Commissioner is of the opinion that that effect could not reasonably have been prevented by any person who is liable to pay ACD or stamp duties, he may waive the duty.<sup>87</sup>

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84 The arrangements prescribed under s 23C(3) of the Stamp Duties Act (Cap 312, 2006 Rev Ed) are:

- (a) an acquisition by an entity of its equity interest;
- (b) an issue by an entity of equity interests;
- (c) a cancellation or redemption of equity interests in an entity;
- (d) the conversion of —
  - (i) equity interests into instruments that are not equity interests;
  - (ii) instruments that are not equity interests into equity interests; or
  - (iii) equity interests from one class to another class;
- (e) the conversion of an entity to another type of entity;
- (f) a change of partners of a partnership, limited partnership or limited liability partnership;
- (g) an amalgamation of entities; and
- (h) any other arrangement that, in the Commissioner's opinion, has as its purpose or one of its purposes the effect mentioned in subsection (1)(a).

85 See s 23C(1) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

86 See s 23C(2) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

87 See s 23C(5) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

(2) *Change in tangible assets of an entity*

47 Where one of the prescribed arrangements<sup>88</sup> has the effect of an entity ceasing to be a PHE within one year<sup>89</sup> of a conveyance that could have been chargeable with duty A or B had the entity been a PHE, the duties are chargeable on that instrument regardless.<sup>90</sup> However, if the Commissioner is of the opinion that that the arrangement was not (whether solely or partly) carried out for the purpose of avoiding the liability to pay that duty, he may waive the duty.<sup>91</sup>

48 This is a reverse purpose test. The burden does not lie on the Commissioner to show that the purpose of the arrangement was to avoid tax. Instead, the taxpayer must show that the purpose was not to avoid tax. Given the term “whether solely or partly”, it is very unlikely that this defence will ever succeed. Tax will almost always be a consideration in part for a transaction.

(3) *Equivalent arrangement*

49 The section 23 Order may prescribe certain arrangements as “equivalent arrangements” if their purpose or effect is to (directly or indirectly) alter the incidence or quantum of duty under the ACD regime.<sup>92</sup> For instruments which the Commissioner thinks effect or are evidence of an equivalent arrangement, the ACD regime will similarly apply.<sup>93</sup> The section 23 Order has not made any such prescription for now.

(4) *Bona fide commercial reason not a defence*

50 The SDA expressly provides that the Commissioner may still exercise his anti-avoidance powers on an arrangement even if it “is carried out for a bona fide commercial reason”.<sup>94</sup> This is a considerable departure from the design of the general anti-avoidance provision<sup>95</sup> under the direct stamp duties regime, which provides that the section

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88 The two prescribed arrangements under s 23C(7) of the Stamp Duties Act (Cap 312, 2006 Rev Ed) are:

- (a) a change in the composition of the tangible assets of an entity; and
- (b) any other arrangement that, in the Commissioner’s opinion, has as its purpose or one of its purposes such an effect ...

89 This figure is provided for by the Stamp Duties (Section 23) Order 2017 and is subject to change.

90 See s 23C(6) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

91 See s 23C(8) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

92 See 23C(10) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

93 See 23C(9) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

94 Stamp Duties Act (Cap 312, 2006 Rev Ed) s 23C(11).

95 See s 33A of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

shall not apply to “any arrangement carried out for bona fide commercial reasons and [which] had not as one of its main purpose the avoidance or reduction of duty”.<sup>96</sup> The “bona fide commercial reasons” test may be considered to be one of the key safeguards of general anti-avoidance rules and it is significant that the ACD regime has expressly excluded it. This is further evidence that the ACD regime is not a mere response to attempts to avoid the payment of stamp duties, but is an attempt to tap into an entirely new tax base.

### ***B. Liability for providing false or misleading information***

51 If the grantee of a conveyance of equity interests asks the grantor whether the entity is a PHE or for any information concerning the PHE’s underlying property and the grantor provides false or misleading information resulting in underpayment of ACD, the grantor shall be liable for up to four times the amount of duty unpaid.<sup>97</sup> It is a defence for the grantor to prove on a balance of probabilities that the grantor had used reasonable efforts in finding the required information, and in verifying the truth of the information before providing it to the grantee.<sup>98</sup> This corrects an information problem, which is that grantees may not know that there is a PHE issue and may end up underpaying ACD. Parliament appears to have reasonably assumed that grantees will ask about the status of the property. The grantee has the responsibility to pay the full ACD, even if not informed that the entity is a PHE, thus, the grantee can be expected to do his due diligence.

52 But this not only applies to the grantor but to an associate of a grantor or grantee. If a grantor or grantee asks an associate of the grantor or grantee for information on the equity interests in the entity which the associate beneficially owns and the associate provides false or misleading information to the grantor or grantee resulting in underpayment of ACD, the associate shall be liable for up to four times the amount of duty unpaid.<sup>99</sup> It is noted with some surprise that there is no similar provision for the defence of using reasonable efforts for associates.<sup>100</sup>

53 This may strike some as rather harsh. There does not seem to be any requirement of an intention to provide false information or even recklessness. A negligent statement may be sufficient to land one in trouble. Further, the person potentially liable in this case is a mere

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96 Stamp Duties Act (Cap 312, 2006 Rev Ed) s 33A(3)(b).

97 See s 23A(1) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

98 See s 23A(2) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

99 See s 23A(3) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

100 See s 23A(3) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

associate of the grantor, a relationship which, as noted above, can be very broadly construed indeed. An associate who has not received legal advice may well hold the view that his holdings are none of the questioner's business. Relying on prosecutorial discretion or judicial discretion to lower the penalty may not be a sufficient safeguard for an offence with such a low threshold.

### **C. Valuation**

54 It is noted that the Commissioner now has the power to require a person to obtain a valuation of property by an independent qualified valuer.<sup>101</sup> This may be tricky in cases where there is no clear market value. This is particularly so in the context of trusts, where a valuation may need to be sought for interests such as life interests and remainders. It is unclear how this power will affect section 37 of the SDA, which allows a person to apply to the Commissioner to adjudicate on the value upon which duty is chargeable.

## **V. Comments on the framework**

### **A. “Significant” gaps in the framework for property trusts**

55 The three “significant” concepts of (1) significant stake, (2) significant extent, and (3) significant owner do not seem to pose difficulties when the ACD framework is applied to companies or partnerships. However, the definitions of these three concepts set the threshold values in terms of percentages, which tend not to work particularly well when property trusts are concerned.

#### *(1) Significant stake*

56 The threshold value of beneficial ownership of equity interests for an entity to have a significant stake in another is defined in the SDA as “not less than the percentage prescribed in the section 23 Order as the significant stake percentage”;<sup>102</sup> this is currently 50%.<sup>103</sup> However, the division of the beneficial interest in a trust is considerably more flexible as compared with the shares of a company. The beneficial ownership of trust property can be divided into percentage shares, but other interests such as life interests, remainders and conditional gifts also exist. The ACD regime does not seem to have contemplated these other interests

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101 See s 71 of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

102 Stamp Duties Act (Cap 312, 2006 Rev Ed) s 23(16).

103 See para 4(5) of the Stamp Duties (Section 23) Order 2017.

that are a lot less amenable to being expressed as a percentage of the trust property.

57 If the draftsmen intended that the interests should be valued and then expressed as a percentage of the total value of the trust property, it would greatly enhance clarity if this were expressly stated. Otherwise, it is certainly arguable that some “units in a property trust” cannot constitute a significant stake since they might not be understood to be a percentage of ownership of the trust property. This might have the unintended effect of excluding indirect holdings of property held through property trusts when calculating if the property-heavy condition has been met.

58 Since the concept of a significant stake is crucial to the definition of a PHE, it is arguable that ACD cannot be levied where the PHE is a trust.

(2) *Significant extent*

59 The section 23 Order defines “significant extent” to mean at least 75% of voting capital and at least 50% of voting power.<sup>104</sup> The same paragraph provides that in the context of property trusts, voting capital refers to a unit in the property trust. This is not particularly helpful for determining if an entity owns another entity to a significant extent. First, a beneficial owner’s voting power in an entity is a concept that is completely foreign to trusts. In the law of trusts, the beneficiaries have no voting power unless they are also trustees (and even then, whilst in a different capacity).<sup>105</sup>

60 Secondly, voting capital may have been defined as a unit in the property trust but this provides no guidance as to when a unit comprises of at least 75% of the units in a property trust. Again, if the draftsmen intended that the interests should be valued and then expressed as a percentage of the total value of the trust property, this should be expressly stated. In any case, since ownership to a “significant extent” requires the threshold percentages for *both* voting capital and voting power to be met, the inapplicability of the concept of voting power in the concept of a property trust may make it impossible for one to ever own a property trust to a significant extent.

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104 See para 6(8) of the Stamp Duties (Section 23) Order 2017.

105 There may be some voting power under very limited circumstances, like in the exercise of a power under the rule in *Saunders v Vautier* (1841) 4 Beav 115.

(3) *Significant owner*

61 Section 23(11) of the SDA defines a “significant owner” as:

[A] person who beneficially owns a percentage of the equity interests in the entity —

(a) that is equal to or more than the percentage prescribed in the section 23 Order as the equity-owning percentage; or

(b) that carries voting power in the entity that is equal to or more than the percentage prescribed in the section 23 Order as the voting power percentage.

Such a definition may pose problems when it comes to its application in the case of property trusts. As noted above, the concept of the beneficiaries having voting power is largely foreign to the law of trusts and it is arguable that where a PHE is a property trust, s 23(11)(b) will not be applicable. However, it is less clear whether the alternative definition in s 23(11)(a) may be applicable. Again, interests in trusts are not always easily expressed as a percentage of the trust property and if the draftsmen intended that the interests should be valued and then expressed as a percentage of the total value of the trust property, then this should be expressly stated. Otherwise, since the concept of significant ownership is crucial to the determination of whether ACD is payable, it is arguable that ACD cannot be levied where the PHE is a trust.

(4) *Fixing all three gaps*

62 All three gaps in the ACD regime for property trusts highlighted above can be easily addressed by modifying the section 23 Order as they relate to values/concepts that are to be prescribed by the Order. Such a modification of subsidiary legislation would not require any action on the part of Parliament. As such, one can expect the situation to be remedied very soon.

**B. Unclear terms**

(1) *About the same time*

63 Section 23(12)(b) of the SDA provides:

[I]n determining whether a grantee becomes a significant owner of an entity upon the execution of a conveyance, equity interests beneficially owned by each of the grantee’s associates in the entity, including those conveyed, transferred, assigned or agreed to be sold to any of the grantee’s associates *at or about the same time* as the time of execution

of the conveyance, are treated as beneficially owned by the grantee. [emphasis added]

The issue is that “at or about the same time” is not defined anywhere in the SDA or the section 23 Order, giving rise to an ambiguity as to what it actually means. It is very important for this point to be clear since different interpretations could affect whether a grantee becomes a significant owner or not, and consequently, whether or not he will have to pay duty A or C.

### **C. Scope of the ACD regime**

#### **(1) Unit**

64 Section 23(21) of the SDA defines a “unit” in a property trust as:

- (a) a share in the beneficial ownership in the property subject to the trust; or
- (b) a share in the profits, income or other payments or returns from the management of the property or operation of the business premised on the property.

The definition is exceedingly broad, covering not only the beneficial ownership of trust property but also shares of the trust income. The absence of an express *de minimis* provision is worrying given the scope of the definition. It is unclear what kind of beneficial interest in the property will suffice to be considered as a “unit”. Further, in determining if parties have an “associate” relationship, “significant extent” is defined in the context of a property trust to be “a unit”.<sup>106</sup> Thus, there is a very significant risk of the broad definition of “unit” resulting in unexpected “associate” relationships springing up between numerous parties. As noted above, an “associate” relationship has serious ramifications, affecting both the liability to ACD and the quantum payable.

65 “Equity interest” is defined in the SDA as “where the entity is a property trust, a unit in the trust”.<sup>107</sup> This issue is that “trust” is a very broad concept that includes express trusts, resulting trusts and constructive trusts. The latter two trusts are not expressly excluded from the definition of “trust” in the SDA and this may give rise to unexpected complications. This may particularly be an issue in the case of constructive trusts, where it is conceivable that a share from “operation of the business premised on the property” may be held on constructive trust for another. This would depend on whether the definition of

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106 See para 8 of the Stamp Duties (Section 23) Order 2017.

107 See s 23(21) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

“share” requires that there must be some pre-fixed manner of determining the quantum of the beneficiary’s interest or whether it simply means that the beneficiary receives some of the proceeds from the trust. One can only expect complications to mount if Singapore jurisprudence proceeds down the path of recognising the remedial constructive trust.

66 There is some limitation on the concept of “unit in a property trust” in that the SDA provides that a property trust is defined as a “trust that holds or invests in prescribed immovable properties” or units in an entity which does.<sup>108</sup> However, the latter part of this definition is potentially problematic, that is, “or units in an entity which does”. With a broad definition of “units”, the concept of a property trust may unintentionally cover numerous unexpected situations. Again, this may give rise to unexpected “associate” relationships springing up between parties that may have significant ramifications.

(2) *Prescribed immovable property*

67 The scope of the definition of PIP is quite broad, encompassing zones under the Master Plan, which are: “residential”; “commercial and residential”; “residential/institution”; “residential with commercial at 1st storey”; or “white”.<sup>109</sup> However, the Bill has not expanded the classes of properties subject to residential property stamp duties. The definition under the ACD regime matches the definition of “residential property” under the current ABSD regime.<sup>110</sup>

**D. Other comments**

(1) *Company*

68 It is noted that the ACD regime defines “entity”, *inter alia*, as a company rather than a corporation.<sup>111</sup> Generally, under s 4 of the Companies Act,<sup>112</sup> “company” excludes foreign companies. However, the SDA defines “company” as “any company incorporated or registered under any law in force in Singapore or elsewhere”.<sup>113</sup> Thus, it is unlikely

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108 See s 23(21) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

109 Other specific provisions exist: see para 5 of the Stamp Duties (Section 23) Order 2017.

110 See Inland Revenue Authority of Singapore, *IRAS e-Tax Guide – Stamp Duty: Additional Buyer’s Stamp Duty (ABSD) on Purchase of Residential Properties: Revised Edition* (11 January 2013) at p 6.

111 See s 23(21) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

112 Cap 50, 2014 Rev Ed.

113 Stamp Duties Act (Cap 312, 2006 Rev Ed) s 2.

that taxpayers will be able to escape the ACD regime by using a foreign company as a PHE rather than a Singapore-incorporated company.

(2) *Tax on instruments*

69 In section I of this article, it was noted that stamp duty is a tax levied on instruments and not transactions.<sup>114</sup> The ACD regime may have somewhat weakened this concept. The SDA provides that the section 23 Order may require a person to give a notice relating to a prescribed arrangement in a specified form to the Commissioner.<sup>115</sup> The Commissioner may then treat the notice as an instrument and levy stamp duty on it.<sup>116</sup> Technically, this preserves the nature of stamp duty as a tax on instruments, though it might be said to be quite a technicality since it involves requiring a taxpayer to create an instrument solely for the purpose of levying stamp duty on it.

**E. Tax neutrality?**

70 While the aim of the ACD regime may be to ensure tax neutrality between direct transfers of real property and indirect transfers through the use of PHEs, it is not clear that this goal has been achieved in the post-amendment stamp duties regime.

(1) *Overlap of regimes*

71 Given that the ostensible purpose of the ACD regime is to ensure tax neutrality between direct and indirect transfers of residential property, one might expect both regimes to be mutually exclusive. However, the two regimes overlap in some situations, rendering the taxpayer liable to tax under both regimes.

(a) Companies

72 In the case of an indirect transfer of property through the sale of shares in a property-holding company, the parties to the transaction may not only be liable to pay duties under the ACD regime but may also have to pay an additional 0.2% on the consideration for the share transaction under the direct stamp duties regime.

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114 See para 3 above.

115 See s 23C(2)(b) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

116 See s 23C(12) of the Stamp Duties Act (Cap 312, 2006 Rev Ed), referencing para 7 of the Stamp Duties (Section 23) Order 2017.

(b) Partnerships

73 Section 32A of the SDA is a specific anti-avoidance provision that seeks to catch instances of partners avoiding the payment of stamp duty by transferring their interests in the limited liability partnership (“LLP”) instead of the immovable property itself. This provision treats an instrument effecting or evidencing a significant change in partners as a conveyance of immovable property, on which stamp duties are payable. There are detailed rules in s 32(2) detailing what constitutes a significant change in partners. A change in the composition of partners or an increase in the asset shares of partners may be considered to be a significant change. It is noted that s 32A is limited to LLPs and does not include general partnerships or limited partnerships.

74 A plain reading of the SDA suggests that there is nothing that would preclude s 32A and the ACD regime from simultaneously applying to a single transaction. If faced with the possibility of having to pay both duties on a single transaction, the taxpayer may wish to check with the Inland Revenue Authority of Singapore on whether they would be able to avail themselves of stamp duty remission for one of the duties.<sup>117</sup>

(c) Trusts

75 Under the ABSD framework, the property count system determines the quantum of ABSD payable. Higher rates of ABSD are levied the more properties a taxpayer beneficially owns. With the ACD regime in force, a person who purchases 50% of the beneficial interest of a property-holding trust will be simultaneously penalised by both the ABSD regime (with one additional property count) and the ACD regime (with the payment of duty A or C). This is in contrast to the purchase of 50% of the shares in a property-holding company, where 0.2% stamp duty will be charged on the transfer of shares and duty A or C, but no additions to the property count.

76 Trusts are commonly legitimately used for succession-planning where the intention may not be tax avoidance at all, but to control a “spendthrift heir”.<sup>118</sup> This distortion between trusts and companies may discourage people from using trust structures for legitimate reasons, which may be an unexpected and unfortunate side effect.

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117 This may be possible under s 74 of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

118 This explains the use of the term “spendthrift trust” in America.

(d) Conclusion on overlap of regimes

77 It would thus appear that regardless of which of the three kinds of entities subject to the ACD regime (companies, partnerships and trusts) that a taxpayer uses, there may be a potential overlap between the ACD regime and the direct stamp duties regime. Further, the tax consequences of the overlaps for each of the three kinds of entities are completely different. This may lead to distortions in taxpayer behaviour and encourage tax planning. Crucially, it is submitted that having any overlap at all is at odds with the purpose of the ACD regime in the first place, which is ostensibly to achieve tax neutrality between direct and indirect transfers of residential property. As things stand, the ACD regime cannot even achieve tax neutrality internally.

(2) *SSD under the ACD regime*

78 Under the direct stamp duties regime, SSD is charged at a tapering rate, with the SSD rate starting at 12% and tapering off year-by-year until it reaches 0% after four years.<sup>119</sup> The rationale for such a duty is clear, which is to prevent excessive speculation by penalising the quick resale of properties (flipping). Duties B and D are analogous to SSD. However, the rate for duties B and D remains at a fixed 12% if a conveyance takes place within three years of acquisition.<sup>120</sup> This is an inconsistent result if the intention of the ACD regime is to ensure tax neutrality.

(3) *Anti-avoidance*

79 The anti-avoidance provisions in the ACD regime have been discussed above. Notably, they provide a special, very strong set of anti-avoidance powers to the Commissioner that are limited to the specific context of conveyances of equity interests in PHEs (or “equivalent arrangements”). This is in contrast to the direct stamp duties regime, where the relatively more generous s 33A of the SDA applies.

80 As noted above, the ACD anti-avoidance provisions provide for a reverse purpose test, requiring the taxpayer to show that the purpose of a prescribed arrangement was not to avoid tax.<sup>121</sup> The section 23 Order may further provide that certain arrangements are “equivalent arrangements” that are subject to ACD. Finally, ACD may still be levied on an arrangement even if it “is carried out for a *bona fide* commercial

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119 See Art 3(bg)(b) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

120 See Arts 3A(1)(e), 3A(1)(f), 3A(2)(e), and 3A(2)(f) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

121 See s 23C(7) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

reason<sup>122</sup>. These provisions disadvantage the taxpayer significantly and can have considerable bearing on the tax consequences of an arrangement. As the system currently stands, their applicability is solely determined by whether the taxpayer chooses to transfer property directly or indirectly. This is a massive obstacle to tax neutrality.

(4) *Industrial property*

81 The focus of the ACD regime is clearly on residential property. However, since it does not cover industrial property, there remains an incentive for taxpayers to prefer indirect transfers of industrial property to direct transfers. While ABSD does not apply to transfers of industrial property, BSD and SSD do apply. The duties payable can still be very significant. As noted above, the maximum rate of BSD is 3% and this applies to industrial property as well. Further, SSD is levied on the transfer of industrial property at a tapering rate, starting at a maximum of 15%.<sup>123</sup>

(5) *Conclusion*

82 It would seem that the ACD regime does not always provide for tax neutrality. A few provisions suggest that the ACD regime is actually considerably harsher to indirect transfers of property than the direct stamp duties regime is to direct transfers of property.

## **VI. Values in the section 23 Order**

83 The section 23 Order allows the Government to quickly vary certain crucial values in the ACD regime. Significantly, s 23D(3)(e) of the SDA provides a wide general power for the section 23 Order to prescribe “any other matter required or permitted to be prescribed by section 23 or 23C, or that are necessary or expedient for the purposes of giving effect to section 23, 23A, 23B or 23C”. Depending on how broadly “necessary or expedient” is interpreted, the section 23 Order may be able to change the ACD regime in significant and unexpected ways. This section highlights some key values which are currently provided for by the section 23 Order and assesses the potential implications if they are changed.

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122 See s 23C(11) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

123 The rate of 15% applies if an industrial property is sold within one year, 10% if sold between one and two years, 5% if sold within two to three years, and 0% if sold after three years: see Art 3(bd) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

**A. Associate relationships**

84 Currently, the section 23 Order provides for four ways by which an “associate” relationship may be established between parties.<sup>124</sup> However, the section 23 Order may prescribe other ways as well,<sup>125</sup> which may make it easier to establish this “associate” relationship. This would have considerable implications, since the interests held by the associates of a taxpayer will be added to his own interests when determining: (a) if he has a significant stake in an entity,<sup>126</sup> and (b) the quantum of ACD payable.<sup>127</sup> Further, associates are exposed to potential liability arising from providing false information on PHEs.

**B. Significant extent (relevant in determining “associate” relationships)**

85 Currently, the section 23 Order defines “significant extent” to mean at least 75% of voting capital and at least 50% of voting power.<sup>128</sup> Both values must be met before an “associate” relationship can be established under the section 23 Order. As noted above, there is a “multiple chain rule” which provides that where there is more than one chain linking the apex entity to the PHE, each entity in the chain must directly beneficially own voting capital and voting power to a significant extent of each entity beneath it in the structure. As the voting capital value is above 50%, this means that there effectively cannot be a “multiple chain” structure under the current regime. At most, there can only be single chain structures.

86 This will change if the value for voting capital falls to “at least 50%” or below. In that situation, there may be more than one chain in the structure, greatly complicating the determination of whether entities are “associated” with one another. The lower the values for voting capital and voting power as prescribed in the section 23 Order, the more chains there can potentially be in a group structure.

**C. The property-heavy condition (relevant in determining if an entity is a PHE)**

87 As referred to above, the property-heavy condition determines whether an entity can be classified as a PHE. For the sake of simplicity,

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124 See para 6 of the Stamp Duties (Section 23) Order 2017.

125 See s 23(20)(d) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

126 See s 23(12) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

127 See s 23(12) and Art 3A of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

128 See para 6(8) of the Stamp Duties (Section 23) Order 2017.

this concept was expressed as having a single value: 50% under the current ACD regime. The SDA makes a distinction between the property-heavy condition for Types 1 and 2 PHEs, with separate values to be applied depending on the type of PHE concerned.<sup>129</sup> Currently, both values are 50%, but the section 23 Order could change one or both of these values.

88 If the property-heavy condition is reduced to below 50%, more entities will qualify as PHEs, resulting in the ACD regime applying to more situations. A possible trigger for lowering the property-heavy condition might be avoidance attempts by taxpayers. It might be possible that taxpayers would shift other non-PIP assets into entities to dilute the percentage value of the PIPs in the property. In that case, the Government may well reduce the property-heavy condition value to reflect this.

**D. Significant stake (relevant in determining the property-heavy condition)**

89 The current significant stake value is 50%,<sup>130</sup> requiring an entity to own at least 50% of the equity interests in a downstream entity for the latter entity's assets to be taken into consideration when determining if the property-heavy condition has been met. Naturally, if the significant stake value is reduced, more downstream entities will have to be considered, potentially resulting in a greater number of PHEs overall. The current 50% value means that at most two entities can have a significant stake in a single downstream entity. This may no longer be the case if the value is reduced.

**E. Significant owner (relevant in determining ACD liability)**

90 The concept of significant owner determines whether a conveyance falls within the scope of one or more qualifying situations. The current regime provides that to be a significant owner, one must either have at least 50% of the equity owning percentage or at least 50% of the voting power percentage.<sup>131</sup>

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129 See ss 23(13)(a) and 23(13)(b) of the Stamp Duties Act (Cap 312, 2006 Rev Ed), referencing paras 4(3) and 4(4) of the Stamp Duties (Section 23) Order 2017 respectively.

130 See s 23(16) of the Stamp Duties Act (Cap 312, 2006 Rev Ed), referencing para 4(5) of the Stamp Duties (Section 23) Order 2017.

131 See s 23(11)(a) and 23(11)(b) of the Stamp Duties Act (Cap 312, 2006 Rev Ed), referencing paras 4(1) and 4(2) of the Stamp Duties (Section 23) Order 2017.

91 These values have a direct impact on the total amount of ACD revenue collected. If they are reduced, more conveyances will fall within the scope of qualifying situations, potentially increasing ACD revenue collection. At the current 50% values, there can be at most four significant owners of a PHE: two with 50% of equity ownership and another two with 50% of voting power. This works out to a maximum of eight persons potentially being liable for ACD for a single conveyance: four grantors and four grantees. If the significant owner percentages are reduced, the maximum number of parties being potentially liable for ACD will increase rapidly.

## VII. Conclusion

92 The ACD regime builds on the direct stamp duties framework while introducing several new concepts and tapping into an entirely new tax base. It has been carefully drafted to ensure tax neutrality between direct transfers of property and indirect transfers through the use of PHEs, though the net result may be that indirect transfers are treated less generously. The strong anti-avoidance provisions in the new regime make it exceedingly difficult for tax planning, which may boost the effectiveness of stamp duties as a tool for socio-economic policy. However, this may have come at the cost of additional complexity and uncertainty, since the ACD regime is not the easiest to understand and can be changed very quickly with an alteration to the section 23 Order.

93 One of the main concerns will be attempting to understand how the ACD regime interacts with the current stamp duties framework. While the ACD regime may be attempting to tax a different tax base from the current stamp duties framework, the two systems overlap significantly. As noted above, an example would be the transfer of a beneficial interest in a property-holding trust. A purchaser of such an interest would be simultaneously penalised by both the ABSD regime (with one additional property count) and the ACD regime (with the payment of duty A or C). There may be other similar traps in the SDA, which may take some time to discover.

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