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STAMP DUTY ISSUES IN SINGAPORE CORPORATE PRACTICE

A new dimension to the determination and computation of stamp duties payable in corporate transactions has been introduced due to the additional conveyance duties ("ACD") regime. For companies with significant residential property holdings, liability to pay ACD potentially extends to all transactions involving the issuance, transfer or cancellation of equity interests. This article considers the impact of ACD on several common corporate transactions in Singapore, addressing the risks practitioners may face in being blindsided by potential tax liabilities. Besides highlighting potential pitfalls, this article explores the use of advance rulings and preferring debt financing over equity financing for tax optimisation.

Vincent **OOI***
BA (Oxon);
Lecturer of Law, School of Law, Singapore Management University;
Research Fellow, Centre for Cross-Border Commercial Law in Asia.

I. Introduction

1 The determination and computation of stamp duties in the context of corporate practice has traditionally never been too complicated. If real properties are involved, one simply pays the necessary buyer's stamp duty ("BSD"),[1] additional buyer's stamp duty ("ABSD")[2] and/or seller's stamp duty ("SSD"),[3] taking care to note the

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1 Stamp duties are taxes levied on instruments prescribed in the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed) ("SDA"). Under Art 3(*a*)(ii) of the First Schedule to the SDA, buyer's stamp duty ("BSD") for non-residential property is levied as follows: 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%. As of 20 February 2018, BSD for residential property is levied as follows: the first $180,000 of the value of the property is taxed at 1%, the next $180,000 at 2%, the next $640,000 at 3% and the rest at 4%.

2 See Art 3(*bf*) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed): additional buyer's stamp duty is only levied on residential properties. Depending on the status of the buyer (*eg*, Singaporean, permanent resident, foreigner or entity) and the number of Singapore residential properties held at the time of purchase, it can range from 0% to a maximum of 15%.

3 See Art 3(*bg*)(*b*) of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed). Seller's stamp duty is levied on both residential and industrial

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differences between residential, industrial and mixed-use properties. If there is a need to transfer shares, one pays the 0.2% stamp duty on the transfer of shares,[4] unless the company in question is listed, in which case no stamp duty needs to be paid at all. Where applicable, one applies for the relevant stamp duty reliefs on the reconstruction or amalgamation of companies,[5] or on the transfer of assets between associated entities.[6] Finally, one has to remember to pay the duty on the odd mortgage in the deal (capped at $500).[7] Regardless of whether the corporate transaction involved mergers, acquisitions, initial public offerings, secondary offerings, equity financing, or debt financing, the range of relevant stamp duties applicable rarely extended beyond those mentioned above. Rather, in a significant number of corporate transactions, stamp duty issues would often not even arise.

2 This happy position has been significantly altered by the introduction of additional conveyance duties ("ACD") on 10 March 2017.[8] Under the new ACD regime, where a significant proportion of an entity's[9] assets are residential properties, the entity is classified as a "property-holding entity" or "PHE"[10] and additional duties are payable where there is a conveyance of an equity interest in the entity. This means that a multitude of corporate transactions involving such entities

properties. Depending on the length of time for which a property is held before it is sold, it ranges from 0% to 12% for residential properties and 0% to 15% for industrial properties. For the definitions of "residential", "industrial" and "mixed-use" properties, 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.

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

5 See s 15(1)(*a*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed) and Stamp Duties (Relief from Stamp Duty upon Reconstruction or Amalgamation of Companies) Rules (Cap 312, R 3, 2002 Rev Ed).

6 See s 15(1)(*b*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed) and Stamp Duties (Relief from Stamp Duty upon Transfer of Assets between Associated Permitted Entities) Rules 2014 (S 28/2014).

7 See Art 9 of the First Schedule to the Stamp Duties Act (Cap 312, 2006 Rev Ed).

8 This article assumes that readers have a basic familiarity with the additional conveyance duties ("ACD") regime and does not go beyond a very brief introduction. For a detailed breakdown of the ACD regime, see Vincent Ooi, "The New Additional Conveyance Duties Regime in the Stamp Duties Act" (2018) 30 SAcLJ 119.

9 "Entities" subject to the additional conveyance duties regime are companies, partnerships and property trusts. "Partnerships" include general partnerships, limited partnerships and limited liability partnerships. See s 23(21) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

10 "Property-holding entity" ("PHE") is defined in ss 23(13)(*a*) and 23(13)(*b*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed). At least 50% of the market value of an entity must be made up of residential properties (held directly or indirectly) before an entity may be classified as a PHE under the additional conveyance duties regime.

may now be potentially dutiable. A straightforward sale of shares in a PHE would now attract not only the 0.2% stamp duty payable on the transfer of shares, but also ACD that could reach a maximum of approximately 31% of the value of the residential property indirectly transferred.[11]

3 Furthermore, the ACD regime includes a very strong set of anti-avoidance rules that may affect a whole range of corporate transactions. Essentially, the Commissioner of Stamp Duties ("Commissioner") has the power to levy ACD on any transaction that results in an increase in equity interests owned by one person, and a decrease in equity interests owned by another.[12] This could potentially catch any corporate transaction involving the issuance, transfer or cancellation of equity interests. This article seeks to examine the potential far-reaching implications of the ACD regime and consider how ACD may apply to each of the types of common corporate transactions carried out in Singapore.

A. Preliminary observations

4 There are a few preliminary observations which follow from a cursory look at the ACD regime. First, the ACD regime is both narrow and vast in scope at the same time. It is narrow in the sense that it only applies to transfers of equity interests in PHEs, which do not make up a very significant proportion of companies in Singapore. However, for those companies which are caught by the ACD regime, practically every corporate transaction relating to the issuance, transfer or cancellation of equity interests can potentially fall under the ACD regime. Second, ACD is an unusual tax in that it can be levied on a "non-party" to the corporate transaction. For instance, in a private placement, shares are issued to a new investor and the transaction is technically only between the issuing company and the investor. However, under the ACD regime, a majority shareholder holding 50% or more of the equity interests in the issuing company could potentially be liable to pay ACD, notwithstanding that he was technically a "non-party" to the transaction. Finally, ACD is particularly relevant where there are concentrated shareholdings. Where a company has no shareholder holding onto 50% or more of the equity interests,[13] it is very unlikely

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11 This is up to a maximum of approximately 19% payable by the transferee: see Arts 3A(1)(*a*), 3A(1)(*b*), 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) ("SDA"); and up to a maximum of 12% payable by the transferor: see Arts 3A(1)(*e*), 3A(1)(*f*), 3A(2)(*e*) and 3A(2)(*f*) of the First Schedule to the SDA.

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

13 The 50% figure is prescribed by s 23(11) of the Stamp Duties Act (Cap 312, 2006 Rev Ed) ("SDA"), referring to paras 4(1) and 4(2) of the Stamp Duties

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that ACD will have to be paid. On the other hand, if there is one such majority shareholder, he is likely to be liable to pay ACD on almost all transactions involving any issuance, transfer or cancellation of equity interests.

(1) Mergers and acquisitions – Asset sale or share sale

5 A target company may be acquired in two ways: (a) shares acquisition; or (b) assets acquisition. In shares acquisition scenarios, the main stamp duties payable are those on the transfer of shares, while for assets acquisition, BSD, ABSD and SSD may apply. Under the previous law, where a company holds a significant amount of property (especially residential property), it was generally considered to be more tax-efficient to effect a shares acquisition than an assets acquisition, given the considerable disparity in the stamp duty rates (0.2% *versus* potentially approximately 3% or, as of 20 February 2018, for residential property, 4%). The advent of ACD changes the calculus. Firstly, where the target company is a PHE, any tax advantage gained from effecting a share sale rather than an asset sale vanishes. Rather, the taxpayer is stuck with paying 0.2% on transfer of shares in addition to what he would have been liable to pay on the transfer of assets anyway.

6 Secondly, as noted above,[14] stamp duty reliefs are available in certain circumstances on the reconstruction or amalgamation of companies, or on the transfer of assets between associated entities, subject to conditions. Such stamp duty reliefs extend to both the transfer of shares and the direct transfers of property. Thus, if all the necessary conditions are met, the net stamp duty paid for an acquisition may in fact be $0, regardless of whether an asset or share acquisition is used. Currently, if an asset acquisition is used, the traditional stamp duty relief provisions should still apply, potentially reducing the duty payable. However, in a share acquisition, the stamp duty relief provisions are not applicable to the ACD payable.[15] Indeed, the Stamp Duties Act[16] ("SDA") actually provides that the relief "does not apply to an instrument that is executed for the purpose of or in connection with the transfer, conveyance or assignment of any equity interest in an entity that is chargeable with any duty under section 23". In other words, not only do the reliefs not apply to the ACD payable, they also do not apply to the

(Section 23) Order 2017 (S 100/2017) ("section 23 Order") is a piece of subsidiary legislation provided for by s 23D of the SDA. It allows quick variation of certain crucial values in the additional conveyance duties regime. Currently, the values prescribed under paras 4(1) and 4(2) of the section 23 Order are both "50% or more". This may be subject to change.

14 See para 1, at nn 5 and 6 above.

15 See ss 15(1A) and 15A(1AA) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

16 Cap 312, 2006 Rev Ed.

0.2% stamp duty for the transfer of shares. Thus, merger and acquisition or restructuring takes place, and one is confident that one can meet the conditions to qualify for relevant stamp duty reliefs; it is overwhelmingly more tax-efficient to use an assets acquisition rather than a shares acquisition procedure.

(2) Corporate finance – Debt versus *equity financing*

7 ACD is levied on conveyances of equity interests in PHEs. While this article will go on to consider precisely what "equity interests" mean in practice, it is likely that ACD will largely only apply to equity financing and not debt financing.[17] Commercially, there is a cost to financing: lenders putting up debt capital will need to be paid interest, while shareholders putting up equity capital will need to be paid dividends. However, it is clear that as a matter of Singapore law, while interest may be a tax-deductible expense, dividend payouts are strictly not tax-deductible,[18] making equity financing potentially more expensive, *ceteris paribus*. Accordingly, even before the introduction of the ACD regime, it was generally considered to be more tax-efficient to raise money through debt rather than equity financing. The introduction of ACD further tilts the equation in favour of debt financing, which may be an unintended distortion created by a statute that arguably was never intended to influence corporate financing decisions in the first place.

B. Basic overview of additional conveyance duties regime

8 ACD is the collective term for four kinds of stamp duties: duties A, B, C and D.[19] Duties A and C are analogous to BSD and ABSD, but levied on indirect transfers of residential property. Similarly, duties B and D are analogous to SSD. To determine the applicability of ACD, the SDA prescribes three common conditions which must be satisfied for all four kinds of duties: (a) there must be a conveyance of equity interests in an entity;[20] (b) the entity must be a PHE at the time of the conveyance;[21] and (c) the person potentially liable to pay the ACD

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17 It is possible to argue that additional conveyance duties may in fact apply to certain categories of debt financing such as preference shares. This is addressed in detail in para 28, at n 45 below.

18 See *BML v Comptroller of Income Tax* [2017] SGHC 118 and Inland Revenue Authority of Singapore, *IRAS e-Tax Guide – Income Tax Treatment of Hybrid Instruments* (19 May 2014) at para 2.1.

19 The relevant charging subsections are ss 23(2), 23(3), 23(5) and 23(6) of the Stamp Duties Act (Cap 312, 2006 Rev Ed) respectively.

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

21 See ss 23(2), 23(3), 23(5) and 23(6) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

must be a significant owner of the entity.[22] In relation to "equity interests", s 23(21)(*a*) of the SDA defines them as follows: "[W]here the entity is a company, an issued share in the company that is not a treasury share." As for the concept of a significant owner, it refers to a person who beneficially owns 50% or more of the equity interests in the PHE.[23] The SDA also provides for conditions that are unique to each of the four kinds of duties.

(1) Duty A – Grantee has no other related interests

9 The grantee is liable to pay duty A if he is a significant owner of the PHE either immediately before or after the execution of the conveyance.[24]

(2) Duty B – Grantor has no other related interests

10 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 of his acquisition of his interest in the PHE.[25] 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.[26]

(3) Duty C – Grantee has other related interests

11 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.[27] 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 PHE if it and 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.

22 See ss 23(2), 23(3), 23(5) and 23(6) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
23 As noted in para 4, at n 13 above, the 50% figure is prescribed by 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 (S 100/2017). Currently, the values prescribed under paras 4(1) and 4(2) are both "50% or more". This may be subject to change.
24 See s 23(2) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
25 See s 23(3) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
26 See s 23(4) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
27 See s 23(5) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

(4) Duty D – Grantor has other related interests

12 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 of his acquisition of his interest in the PHE.[28] 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.[29] 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 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.

(5) Multiple heads of additional conveyance duties on same instrument

13 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.[30] 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.

(6) Quantum

14 For duties A and C, the ACD payable is the BSD and ABSD rate levied on the value of the change in beneficial ownership of all PIPs indirectly owned by the PHE (apportioned by percentage of ownership). For duties B and D, the ACD payable is the SSD rate levied on the value of the change in beneficial ownership of all prescribed immovable properties ("PIPs") indirectly owned by the PHE (apportioned by percentage of ownership).

C. Catching artificially-split transactions

15 A taxpayer may attempt to reduce ACD liability by artificially splitting a transaction. For example, an individual seeking to purchase 100% of a PHE may do so in a single transaction and pay ACD based on 100% of the equity interests acquired. He may instead choose to purchase 49.9% of the PHE first, paying no ACD on the transaction (since he is not a significant owner at that point), and then subsequently

28 See s 23(6) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
29 See s 23(7) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
30 See s 23(9) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

purchasing the remaining 50.1%. The taxpayer may think that under this arrangement, ACD is only payable on the remaining 50.1%. However, ACD will be payable on the difference between the equity interests owned after the transaction and the lowest amount of equity interests owned at any time since 11 March 2017. Thus, the taxpayer will be taxed on the full 100% of the equity interests acquired if all the equity interests were acquired after 11 March 2017.

16 In addition to this general position, artificially split transactions will be caught in the specified cases,[31] since ACD is charged on prescribed arrangements[32] that include, *inter alia*, any scheme and all steps by which it is carried into effect.[33] Thus, the two transactions can be viewed as a single arrangement and ACD accordingly levied on the full 100% transfer of equity interests.

17 In the case of some corporate transactions, a string of transactions may be mandated by the relevant rules and one must be aware that just because a transaction is split, it does not mean that no ACD is payable on the transactions that took place before the owner became a significant owner. For example, a party may be forced to make a mandatory offer on obtaining *de facto* control of a company,[34] or on triggering the creeper rule.[35] Alternatively, there might be issues of compulsory acquisition if a party successfully acquires 90% or more of outstanding shares in a company.[36]

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31 See para 46, at n 64 below.
32 See s 23C(1) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
33 See s 23C(11) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
34 See r 14.1(a) of Securities Industry Council, *The Singapore Code on Take-Overs and Mergers* (25 March 2016): where "any person acquires whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry 30% or more of the voting rights of a company".
35 See r 14.1(b) of Securities Industry Council, *The Singapore Code on Take-Overs and Mergers* (25 March 2016): where "any person who, together with persons acting in concert with him, holds not less than 30% but not more than 50% of the voting rights and such person, or any person acting in concert with him, acquires in any period of 6 months additional shares carrying more than 1% of the voting rights".
36 See ss 215(1) and 215(3) of the Companies Act (Cap 50, 2006 Rev Ed). Section 215(1) provides that in such a case, the acquiring party may compulsorily acquire the shares of the dissenting shareholders. Section 215(3) provides that in such a case, the dissenting shareholders may require the acquiring party to acquire their shares on the same terms as those applicable to the approving shareholders.

D. Determining applicability of additional conveyance duties in practice

18 To determine whether ACD is applicable, there are two potentially extensive checks that must be done. First, one must determine if there is a significant owner of the entity in question. Second, one must determine whether the said entity is a PHE. While these two checks may not seem conceptually difficult, the actual process of conducting them may be quite complex. This Part will consider some implications and difficulties inherent in the following conditions.

(1) Significant owner

19 The condition of "significant ownership" means that ACD will only potentially be payable where there is a shareholder holding 50% or more of the shares in an entity.[37] Thus, ACD is less likely to be applicable where shareholdings in a company are fragmented (for instance, where a public company is involved). The difficulty in determining whether the "significant ownership" condition has been met arises from two issues. First, the percentage of share ownership is determined with reference to both direct and indirect ownership. Second, the holdings of "associates" have to be taken into account when determining the percentage of share ownership.

(a) Associates

20 Spouses, parents, grandparents, children, grandchildren and siblings of the taxpayer are deemed to be associates;[38] and 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.[39] Further, entities which a party owns to a significant extent are also considered as associates. "Significant extent" is defined as: at 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.[40] There are three ways in which an entity may hold the voting capital and voting power in another entity – (a) directly; (b) through a single chain; or (c) through multiple chains.[41]

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37 The 50% figure is prescribed by 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 (S 100/2017) ("section 23 Order"). Currently, the values prescribed under paras 4(1) and 4(2) of the section 23 Order are both "50% or more". This may be subject to change.

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

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

40 See para 6(8) of the Stamp Duties (Section 23) Order 2017 (S 100/2017).

41 See para 6(2) of the Stamp Duties (Section 23) Order 2017 (S 100/2017).

21 In practice, the test for the existence of an "associate relationship" may involve extensive due diligence into the structure of a business group, its relevant contracts and the family members of key shareholders. The fact that voting capital and voting power can be held directly and indirectly further necessitates a closer examination into the holdings of the business group.

(2) Property-holding entity

22 If there is no significant owner in a transaction, it is clear that ACD will not be payable (barring the invocation of any anti-avoidance rules). However, if the first check results in the identification of a significant owner, the next issue then becomes whether the entity in question is a PHE. Besides direct holdings, this determination needs to take into account all the indirect holdings of the entity whenever they are held by a subsidiary which the entity owns 50% or more of (a significant stake). The key question is whether the value of all residential properties directly and indirectly owned by the entity in question amounts to 50% or more of the value of all the assets owned by the entity and its subsidiaries ("the property-heavy condition"). If so, the entity in question is a PHE.

23 In practice, this would once again involve extensive due diligence. Valuations for all the residential properties held directly or indirectly by the entity would need to be examined. The entity and its subsidiaries would have to be valued as well. The computation is made more complex due to the fact that the residential properties held by associates will also have to be taken into account when determining if one has a significant stake in an entity. Thus, the entire process of calculating valuations would involve an assessment of the structure of the business group, relevant contracts and the holdings of family members of the key shareholders.

24 While the two checks can potentially be done rather swiftly where a business group has a lean and uncomplicated structure, the difficulty increases exponentially the more entities there are in the group and the more contracts the group enters into. Realistically, as part of most corporate transactions, a due diligence report will be required. The possibility that ACD may be payable may necessitate the production of a legal opinion on the issue, even if merely to produce a nil-return. Given the potential complexity of the two checks, this legal opinion may require considerable work and costs to produce.

II. Additional conveyance duties liability for corporate transactions

A. Gatekeeper provision

25 The starting point in analysing ACD in corporate transactions is the "gatekeeper provision" in s 23(21)(*a*) of the SDA, which limits the scope of the ACD regime to cases where there is a conveyance of an "equity interest". The SDA defines "equity interest" as "where the entity is a company, an issued share in the company that is not a treasury share". It follows that conveyances of non-shares are not chargeable with ACD.

(1) "Treasury shares"

26 While "treasury shares" are not defined in the SDA, the Companies Act[42] defines a "treasury share" as a share which "was (or is treated as having been) purchased by a company in circumstances in which section 76H [of the Companies Act] applies; and … has been held by the company continuously since the treasury share was so purchased".[43] In other words, treasury shares are those shares which have been acquired by a company in a share buyback.

B. Nature of a "share"

27 In defining "equity interest", the draftsman curiously chose to base the concept on "issued shares". This has interesting implications, given that, as will be argued,[44] the core focus of the ACD regime appears to be centred on the (indirect) *ownership* and control of residential properties. Following from this assumption, the ACD regime should apply only to those instruments which grant rights of ownership and control of a PHE to their holders, *viz*, equity, not debt, instruments. The exclusion of debt instruments is supported by the use of the term "equity interests". However, the exclusivity of the ACD regime is undermined by a reference to "issued shares", which may arguably include debt instruments like preference and redeemable shares.

28 Other legislation does not shed light on the definition of "share". The SDA does not define "share" in the context of companies. The Companies Act defines "share" in a decidedly vague and unhelpful manner as a "share in the share capital of a corporation and includes stock except where a distinction between stocks and shares is expressed

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42 Cap 50, 2006 Rev Ed.
43 Companies Act (Cap 50, 2006 Rev Ed) s 4(1).
44 See para 32, at n 51 below.

or implied".[45] The ambiguity in the definition of "share" raises serious concerns. First, a literal reading of the SDA would mean that debt instruments such as preference and redeemable shares would count as "equity interests" and would be caught by the ACD regime. Second, and more seriously, if "share" is not defined in any meaningful way, might a taxpayer be able to sidestep the ACD regime by tweaking the nomenclature of the instrument in question such that it is not labelled as a share?[46] Conceptually, it is unsatisfying that the paramount concept of "equity interest" should be defined as "an issued share" when there is no clear statutory or common law prescription as to the use of the term "share".

C. Parliamentary intention as to nature of a "share"

29 It is trite law that in Singapore, the courts are to apply a purposive interpretation in the construction of statutes.[47] This involves discerning parliamentary intention and interpreting the SDA to give effect to that intention. However, purposive interpretation of the SDA can be difficult. First, the ACD regime was introduced by way of an urgent bill. As there was no debate over the Bill in Parliament, Hansard provides us with no guidance as to Parliament's intentions. Second, the Explanatory Statement to the Amendment 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".[48] However, this statement merely begs the question of what an "equity interest" is. However, we may draw assistance from two other sources: (a) the SDA as a whole; and (b) the Inland Revenue Authority of Singapore ("IRAS") e-Tax Guide.[49]

(1) Interpreting Stamp Duties Act as a whole

30 It is an established principle that an act or other instrument must be read as a whole.[50] In s 23(21)(*b*) of the SDA, "equity interest" is

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45 See para 32, at n 51 below.

46 This point is addressed in detail in para 36, at n 52 below.

47 See s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed), applied in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183; *ABU v Comptroller of Income Tax* [2015] SLR 420; and *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373.

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

49 Inland Revenue Authority of Singapore, *IRAS e-Tax Guide – Stamp Duty: Additional Conveyance Duties (ACD) on Residential Property-Holding Entities (Second Edition)* (19 February 2018).

50 See *Bennion on Statutory Interpretation* (Oliver Jones ed) (LexisNexis, 6th Ed, 2013) at s 355, citing *Customs and Excise v Zielinski Baker & Partners Ltd* [2004]

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defined, "where the entity is a partnership, limited partnership or limited liability partnership, [as] a share in the partnership". In turn, "share" is defined in the same subsection as this:

> [In] relation to a partnership, limited partnership or limited liability partnership …
>
> > (*a*) the proportion of the partnership property that a partner is entitled to on the dissolution or winding up of the partnership, as specified in the partnership agreement; or
> >
> > (*b*) if none is specified, the proportion of the profits of the partnership that a partner is entitled to[.]

31 It is submitted that this evidences that the draftsman intended "equity interests" of a company to refer to those rights of ownership and control conferred by equity instruments, conventionally understood. The rights available to holders of an equity interest in the case of a partnership are in line with the rights of shareholders in a company and not debenture holders. Accordingly, an "issued share" in the gatekeeper provision should be interpreted to mean an equity instrument issued by the entity in question.

(2) Inland Revenue Authority of Singapore e-Tax Guide

32 IRAS has expressed its view that: "[the] purpose is to address the stamp duty rate differential between direct acquisition/disposal of residential properties and indirect acquisition/disposal of residential properties via an entity".[51] It is worth noting that as a matter of legislative procedure, IRAS would have been consulted on the proposed bill and would arguably have a good understanding of the aims driving the amendments.

33 IRAS's view is telling in that it establishes clearly that the focus of the ACD regime is to catch indirect "acquisitions/disposals" of residential property. It is submitted here that the key focus of the ACD regime is on the transfers of *ownership*, and to a lesser extent, control of residential properties. While transfers of equity instruments issued by an entity would give a holder some degree of control over residential property, the transfer of a debt instrument gives a creditor no such control. To impose ACD where a debt instrument is conveyed would thus be completely beyond the contemplation of Parliament when they

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1 WLR 707; [2004] 2 All ER 141; [2004] UKHL 7 and *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605; [1998] 1 All ER 495.

51 Inland Revenue Authority of Singapore, *IRAS e-Tax Guide – Stamp Duty: Additional Conveyance Duties (ACD) on Residential Property-Holding Entities (Second Edition)* (19 February 2018) at para 2.1.

enacted the amendments. A creditor cannot be said to have acquired residential property in any way, directly or indirectly.

(3) "Over-inclusive" and "under-inclusive"

34 If we adopt a purposive interpretation of the SDA and attempt to give effect to the intention of Parliament, it is arguable that a literal reading of the gatekeeper provision that defines shares as equity interests may be both over and under-inclusive. It arguably catches more than it was intended to, in that debentures such as preference shares are potentially caught by the ACD regime. On the other hand, other forms of non-share equity instruments may not be caught even though they potentially transfer ownership and control over residential properties.

D. Re-labelling instruments

35 If the gatekeeper provision levies ACD only in cases where there is a conveyance of "issued shares" and there is no conclusive definition of a "share", there is decidedly a temptation on the part of the taxpayer to attempt to label an equity instrument as something other than a share.

(1) Possible responses by tax authority

36 In such a case, IRAS may well decide to invoke the specific anti-avoidance rules ("SAAR") in s 23C of the SDA. Under s 23C(1) of the SDA, where one of the prescribed arrangements[52] 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. 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.[53] The same applies if one of the prescribed arrangements has the effect of a person's decrease in equity interests in an entity.[54] However, this SAAR may fail to catch even the most blatant avoidance schemes because it begs the question of what "equity interests" are. If the instrument in question is not an "equity interest", it follows that s 23C(1) cannot apply to levy ACD on its issuance, transfer or cancellation.

37 Alternatively, IRAS may choose to invoke another SAAR in the form of s 23C(10) of the SDA. This subsection has more teeth, for it

52 See s 23C(3) of the Stamp Duties Act (Cap 312, 2006 Rev Ed), addressed in detail in paras 50–62, at nn 66–75 below.
53 Stamp Duties (Section 23) Order 2017 (S 100/2017).
54 See s 23C(2) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

provides that 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. For instruments which the Commissioner thinks effect or are evidence of an equivalent arrangement, the ACD regime will similarly apply.[55] The section 23 Order has not made any such prescription for now. 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".[56] This SAAR sidesteps the issue of the definition of "equity interest", for regardless of whether "equity interest" extends to equity instruments, the Commissioner may still levy ACD on the issuance, transfer or cancellation of equity instruments if he invokes the section 23 Order.

38 Thus, if the understanding of the parliamentary intention behind the enactment of the ACD regime as expressed in this article is correct, IRAS already possesses an adequate legislative framework to give effect to parliamentary intention. It can choose to grant an administrative concession and forgo levying ACD on conveyances involving preference shares and other "shares" of a debt nature. It can also invoke the section 23 Order to impose ACD on the issuance, transfer or cancellation of equity instruments, even if they are not shares.

(2) Possible response of courts

39 Fundamentally, however, there is something deeply unsatisfying about the tax authority having to rely on an administrative concession and a SAAR to carry out what was arguably Parliament's intention in the first place. A more attractive solution would be for the courts to judicially clarify the scope of the SDA by applying a purposive interpretation to give effect to Parliament's intention in defining "equity interest". While "equity interest" is defined in the SDA as being an issued share that is not a treasury share, it is noted that nowhere in the SDA is the term "share" defined in the context of companies. As referenced above, even the definition of "share" in the Companies Act is not particularly instructive on this point. This provides the courts with the opportunity to interpret "share" as an equity instrument granting rights of ownership and control of a PHE. The problem here is that the courts will not get to rule on this point until the issue is litigated, and the intervening uncertainty for both IRAS and the taxpayer would not be ideal. Parliament may well wish to make its intentions clear by amending the SDA to remove all doubt.

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55 See s 23C(9) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
56 Stamp Duties Act (Cap 312, 2006 Rev Ed) s 23C(11).

III. Implications of broad definition of "share"

40 If, however, the above mechanisms do not work to limit "issued shares" to equity instruments, and "issued share" adopts the broader definition that encompasses debt instruments, like preference shares and redeemable shares, there may be the following implications.

A. Equity capital markets

41 The limited definition of a treasury share, coupled with the exceedingly vague definition of "share" in s 4 of the Companies Act effectively means that almost any kind of issued share (of a PHE) is capable of falling within the ACD regime and potentially catches the entirety of instruments that can be issued in equity capital markets practice.

B. Debt capital markets

42 In the pre-2014 Companies Act,[57] a preference share was defined as a share which does not entitle the holder thereof to vote at a general meeting or to participate beyond a specified amount in any distribution, whether by way of dividend, or on redemption, in a winding-up, or otherwise. This has since been removed in the 2014 amendments and not replaced. There is no equivalent definition in English or Australian law and with the removal of the definition of "preference share" in the Companies Act, it appears that the term is no longer a legal term of art.[58] This in itself is problematic, for a preference share would appear to be caught by the ACD regime, yet no one seems to be able to definitely say what it is, and importantly, whether it is a form of debt or equity financing. Nevertheless, the traditional understanding of a preference share is that it is a debenture rather than a share.[59] If the interpretation of parliamentary intention proposed in this article is correct, it would have been completely beyond the contemplation of Parliament to impose ACD on the issuance, transfer or cancellation of preference shares.

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57 That is, Companies Act (Cap 50, 2006 Rev Ed).

58 Although, oddly, s 70 of the Companies Act (Cap 50, 2006 Rev Ed) does provide for the power to issue redeemable preference shares which are "liable to be redeemed" by the company, no definition of "preference share" is provided.

59 See *Inland Revenue Commissioners v Pullman Car Co Ltd* [1954] 1 WLR 1029.

C. Hybrids and convertibles

43 In practice, the multitude of financial instruments available means that it is often difficult to definitively say whether an instrument is equity or debt in nature. This is particularly a problem if the gatekeeper provision is read literally, for then whether ACD is imposed would have nothing to do with the true nature of the instrument in question, but merely whether it is labelled as a share. In light of IRAS's expressed views in its e-Tax Guide,[60] it is likely to seek to levy ACD on transactions involving equity instruments, regardless of their nomenclature.

(1) Inland Revenue Authority of Singapore e-Tax Guide

44 IRAS's approach to the decision on whether an instrument has "equity interests" will in all probability be heavily influenced by their existing e-Tax Guide on the income tax treatment of hybrid instruments.[61] It is thus useful to understand the framework laid out by IRAS, even though the courts are likely to refer to the common law instead should the issue be litigated.

45 The starting point for IRAS is to characterise the instrument in question based on its legal form, examining the legal rights and obligations created by the instrument. For IRAS, an instrument is likely to be characterised as equity if its legal terms indicate ownership interests.[62] However, if the legal form of a hybrid instrument is not indicative or does not reflect the legal obligations and rights, IRAS will consider the following non-exhaustive factors: (a) nature of the interest acquired (shareholding and residual interest); (b) right to participate in the issuer's business; (c) voting rights; (d) obligation to repay the principal amount; (e) payout (periodic and/or cumulative distribution); (f) investor's right to enforce payment; (g) classification by other regulatory authority; and (h) ranking for repayment in the event of liquidation or dissolution.[63] Broadly speaking, this is a good framework for assessing whether an instrument is debt or equity in nature. It is noted that IRAS is already adept at applying this classification, since it is currently used to determine the income tax treatment of financial instruments. It would not take too much effort to use this framework to

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60 This is as discussed in para 32, at n 51 above.

61 Inland Revenue Authority of Singapore, *IRAS e-Tax Guide – Income Tax Treatment of Hybrid Instruments* (19 May 2014).

62 Inland Revenue Authority of Singapore, *IRAS e-Tax Guide – Income Tax Treatment of Hybrid Instruments* (19 May 2014) at para 5.2.

63 Inland Revenue Authority of Singapore, *IRAS e-Tax Guide – Income Tax Treatment of Hybrid Instruments* (19 May 2014) at paras 5.2 and 5.3.

determine the applicability of the ACD regime to various financial instruments.

D. Specified cases

46 ACD is levied on the conveyance, transfer, or assignment of equity interests or a contract or agreement for the sale of equity interests.[64] On a plain reading of the SDA, all three terms seem to suggest that ACD may be limited to a transfer of equity interests, potentially omitting situations where equity interests are issued or cancelled. The present author will call this the "general case" where ACD may be levied. In addition to the general case, s 23C(3) of the SDA lists some other arrangements where ACD may be levied. These arrangements caught by s 23C(3) go beyond a mere transfer of equity interests and include issuance and cancellation as well. The author will call them the "specified cases".

47 The first issue is whether there is a difference in the way ACD is levied under the general and specified cases. Under the general case, the taxpayer has the responsibility for determining if ACD is payable and ensuring that the relevant instruments are duly stamped. This is a little more complicated under the specified cases, for s 23C(2) uses the following language:

> [ACD is] chargeable on the following instrument *as if it were such a conveyance*:
>
> > (*a*) any instrument that, *in the Commissioner's opinion*, effects (whether directly or indirectly and whether wholly or partially) or is evidence of the arrangement; or
> >
> > (*b*) in the absence of any such instrument, a notice prescribed in the section 23 Order for the purposes of this paragraph.
>
> [emphasis added]

The reference to the Commissioner's opinion naturally raises questions as to when the liability to pay ACD arises and whether there is a duty to seek the Commissioner's opinion. A few points are worth noting here. First, since the Commissioner's opinion is required, it may be argued that no liability to pay ACD arises in the absence of such an opinion. Second, there does not seem to be an express requirement to seek the Commissioner's opinion before going ahead with the conveyance. These factors lead one to wonder whether this provision would essentially only

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64 See ss 23(1), 23B(1) and 23B(2) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

be invoked in a tax audit, after the Commissioner has raised questions about the conveyance.

48 In many cases where s 23C of the SDA may be invoked, however, it is simply impractical to adopt a wait-and-see attitude with respect to whether the Commissioner will examine the transaction and decide that ACD is payable. The tax impact of the transaction is likely to have to be disclosed in many cases, for example, where there is a primary or secondary offering, or scheme of arrangement. Thus, even at the risk of "tipping off" the Commissioner, it is likely that his opinion will have to be sought.

49 It is further worth noting that s 23C(2)(*b*) of the SDA effects a major departure from the core principles of stamp duties. Stamp duties is a tax levied on instruments and not transactions. It follows that a transaction must have an instrument capable of being stamped if ACD is to be imposed. However, s 23C(2)(*b*) 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. The Commissioner may then treat the notice as an instrument and levy stamp duty on it.[65] 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.

(1) Acquisition by entity of its equity interests[66]

50 Essentially, share buybacks are potentially subject to the ACD regime. It is worth noting that it is not the entity in question that pays the ACD but the majority shareholders (holding 50% or more of the shares in the entity in question). As the current definition of a significant owner is one who owns 50% or more of the shares in an entity, there can at most be an absolute maximum of four significant owners at any given point of time (two owners owning 50% equity each and two owners holding 50% voting power each). In practice, there is almost always going to be only one significant owner (if any). Taxing the majority shareholder and not the entity also results in the rather rare situation where tax liability may be imposed on a non-party to a transaction. Of course, realistically, majority shareholders will almost always have a say (if not determine) in whether the transaction is to proceed or not.

65 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 (S 100/2017).
66 See s 23C(3)(*a*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

51 Liability to pay ACD on the part of majority shareholders may arise in two distinct ways. First, duty A or C may be payable if a majority shareholder ends up increasing his percentage of equity interests as a result of the share buyback. This may occur if the repurchased shares are immediately cancelled, resulting in a smaller overall pool of shares. Second, duty B or D may be payable if shares are directly repurchased from a majority shareholder. Since it is possible for multiple types of ACD duties to be paid on a single transaction, it is not impossible for a majority shareholder to end up having to pay some combination of the four duties on a single share buyback. This would occur when the majority shareholder participated in a share buyback exercise, but did not sell many shares. He would then have transferred equity interests but still end up with a higher percentage of equity interests than before the share buyback.

(2) Issue by entity of equity interests[67]

52 This provision covers both primary and secondary offerings of shares. The situation here is the inverse of that immediately considered above. Liability to pay ACD on the part of majority shareholders may arise in two distinct ways. Duty B or D may be payable if the majority shareholder ends up decreasing his percentage of equity interests due to the dilutive effect of the issuance of new shares. Duty A or C may also be payable if the majority shareholder has directly subscribed to the new shares. Once again, it is possible for a majority shareholder to end up having to pay some combination of the four duties on a single share issue.

53 On a plain reading of this section, it would appear that it is so broadly drafted that it seems that even where a sole shareholder injects money into his company and receives shares, that transaction may be caught under the ACD regime. Similarly, it would appear that in the case of a joint venture, if the partners make *pro rata* contributions of capital to the company, ACD will also have to be payable. However, IRAS has since made a very welcome clarification in its latest e-Tax Guide that "an issuance of equity interest for capitalisation purposes is not subject to ACD if there are no changes in the persons holding the equity interests and the respective holdings of equity interest, before and after the issuance".[68]

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67 See s 23C(3)(*b*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

68 Inland Revenue Authority of Singapore, *IRAS e-Tax Guide – Stamp Duty: Additional Conveyance Duties (ACD) on Residential Property-Holding Entities (Second Edition)* (19 February 2018) at para 6.2.

(3) Cancellation or redemption of equity interests in entity[69]

54 There is a conceptual distinction between a share buyback and a share cancellation. Shares may be repurchased but not cancelled (becoming treasury shares) and shares may be cancelled without being repurchased. It is possible that the draftsman intended to make it clear that the cancellation of shares may be a taxable event, bearing in mind that a popular way to avoid the payment of stamp duty on the transfer of shares is to directly cancel them, since cancellation of shares does not need to be effected by an instrument. Interestingly enough, there is no overlap between ss 23C(3)(*a*) and 23C(3)(*c*) of the SDA. Once a share is acquired, it becomes a treasury share and thus, by definition, not an equity interest. Thus, its cancellation will not attract ACD.

(4) Conversion of instruments[70]

(a) Converting equity interests into instruments that are not equity interests

55 This type of transaction is akin to a simultaneous share buyback and issuance of debentures. As such, one would expect a majority shareholder to be affected in the same way as in a share buyback. Duty A or C may be payable if a majority shareholder ends up increasing his percentage of equity interests as a result of the conversion. Again, duty B or D may also be payable.

(b) Converting instruments that are not equity interests into equity interests

56 It is fairly common for entities to issue debt instruments that can be converted into shares (such as convertible bonds). Such a conversion is akin to a simultaneous share issuance and redemption of debentures. One would accordingly expect a majority shareholder to be affected in the same way as in a share issuance. Duty B or D may be payable if the majority shareholder ends up decreasing his percentage of equity interests due to the dilutive effect of the issuance of new shares. As above, Duty A or C may also be payable.

(c) Converting equity interests from one class to another class

57 This provision may have the effect of a share issuance or share buyback depending on the change in equity interests resulting from the class conversion.

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69 See s 23C(3)(*c*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
70 See s 23C(3)(*d*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

(5) *Conversion of entity to another type of entity*[71]

58 There may be some confusion with regards to this provision because of the term "entity". While in the ACD regime, "entity" includes those business structures without separate legal personality, such as trusts, general partnerships and limited partnerships, it would appear that when we refer to the conversion of entities, we must necessarily be talking about the conversion from one entity to another, both entities of which have separate legal personality. It is not possible to assert, for instance, that a general partnership has "converted" into a company. As far as the law is concerned, that is not a "conversion" but a transfer of assets from a group of individuals to another legal person (the company).

59 Special cases aside, as far as Singapore business structures are concerned, there are only two main types of possible conversions: that of a limited liability partnership ("LLP") converting into a company or *vice versa*. A problem of potential double taxation arises when an LLP converts into a company. This arises from the existence of s 32A of the SDA and will be covered in the next Part.

(6) *Change of partners of partnership, limited partnership or limited liability partnership*[72]

60 While partnerships are not covered in detail in this article, the application of s 32A of the SDA may have some relevance to the corporate practitioner. Section 32A is a SAAR that seeks to catch instances of partners avoiding the payment of stamp duty by transferring their interests in the 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. It is noted that s 32A is probably a relic of the past that was not repealed when the ACD regime was introduced to prevent precisely that kind of tax avoidance that s 32A sought to prevent. If the general case of ACD potentially applies to transfers of equity interest in an LLP, these transfers may be subjected to the ridiculous theoretical possibility of triple taxation under s 23C(3)(*f*), the general case of ACD and s 32A.

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71 See s 23C(3)(*e*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
72 See s 23C(3)(*f*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).

(7) Amalgamation of entities[73]

61 Effectively, an amalgamation of entities involves one or more of the following transactions for each of the various entities: share issuances or buybacks; and debentures issuances or redemptions. Thus, depending on the change in equity interests, the same consequences considered earlier may apply to the majority shareholder. It is worth recalling that, where ACD is potentially dutiable, the stamp duty relief provisions are not applicable to the transaction.[74] Practitioners hoping to rely on stamp duty relief should take note.

(8) Any other arrangement[75]

62 The list of specified cases is not exhaustive, as it potentially includes any other arrangement that "in the Commissioner's opinion, has as its purpose or one of its purposes" the effect of changing the holding of equity interests.

IV. Additional conveyance duties in corporate practice

63 This section focuses on the common transactions encountered in corporate practice and considers the relevant ACD implications. Apart from the broad situations covered earlier, several popular corporate strategies may attract ACD liability.

A. Concepts determining relevant relationships: Parties acting in concert **versus** *associates*

64 Reading the Takeovers Code[76] together with the SDA can be a rather confusing affair. Both the Takeovers Code and SDA appreciate that the relevant authorities should look beyond the holdings of an individual to determine if there are any other parties working so closely with that individual, such that their holdings should be taken into consideration together with the individual's for the purposes of enforcing the relevant rules. The Takeovers Code has no less than three concepts designed to address this: (a) parties acting in concert;[77]

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73 See s 23C(3)(*g*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
74 See ss 15(1AA) and 15A(1A) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
75 See s 23C(3)(*h*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed).
76 Securities Industry Council, *The Singapore Code on Take-Overs and Mergers* (25 March 2016).
77 See Securities Industry Council, *The Singapore Code on Take-Overs and Mergers* (25 March 2016) at pp 5–9.

(b) associates;[78] and (c) associated companies.[79] On the other hand, the SDA applies a single concept of "associate", an extensive umbrella term that may potentially be quite tricky to apply in practice.[80] As the concepts determining relevant relationships in the Takeovers Code and SDA are very different, there is no reason to assume that the total shareholdings computed under the Takeovers Code and SDA will be the same or even anywhere within range of each other. It is particularly dangerous to assume that just because a crucial threshold under the Takeovers Code has not been crossed (for example, the 30%-mandatory-offer threshold) another threshold under the SDA would similarly not have been crossed (for example, the 50%-or-more-significant-owner threshold).

65 The concept of an associate in the SDA glaringly omits a key issue. While the SDA provides that 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 associates,[81] it provides no guidance as to what the test for an "arrangement" is. Perhaps some guidance can be drawn from the experience of the UK's Takeover Panel in the context of mergers and acquisitions. Wan Wai Yee and Umakanth Varottil have argued that in the context of the Takeovers Code, "the need for an agreement or understanding for cooperation suggests that there must be a commonality or community of interests between a person and those acting in concert".[82] They go on to interpret the UK's Takeover Panel as finding that "what matters is the intention to support or assist in acquiring control over the target with the knowledge of doing so".[83] This position should be adopted in view of the need for a test for the existence of an arrangement with respect to the relevant equity interest or voting rights. Such a test has to be carefully crafted, with clear limits. Otherwise, it might be possible to argue that any agreement between shareholders to vote for a particular resolution to issue, transfer or cancel equity interests might be a relevant arrangement. The shareholders held to be "acting in concert" would then almost always collectively reach the 50% or more significant owner threshold and have to pay any ACD resulting from the resolution.

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78 See Securities Industry Council, *The Singapore Code on Take-Overs and Mergers* (25 March 2016) at pp 9–10.

79 See Securities Industry Council, *The Singapore Code on Take-Overs and Mergers* (25 March 2016) at p 11.

80 See para 20, at nn 38–41 above.

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

82 Wan Wai Yee & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis, 2013) at p 419.

83 Wan Wai Yee & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis, 2013) at p 420.

66 In their analysis of two seminal UK cases,[84] Wan and Umakanth concluded that "the mere presence of a commercial relationship in the ordinary course may be insufficient to constitute a concert party relationship. However, if there are unusual relationships that are extraordinary in nature, that might point towards the existence of concert party relationship if the surrounding circumstances support such a finding".[85] Thus, in the absence of a finding of an express arrangement with respect to the relevant equity interest or voting rights, it might be difficult (but still possible) to find an implied arrangement.

B. Strategies

(1) Transfers of assets

67 Under the ACD regime, the entity which equity interests are being conveyed must be a PHE (and thus property-heavy) at the point of the conveyance. This naturally creates a temptation to engage in transactions that would cause the entity to fail to satisfy the property-heavy condition. The two most obvious methods would include either selling some residential properties owned by the entity in question or flooding the entity with other assets to dilute the proportion of value of the entity made up by residential properties. This can be a temporary or permanent arrangement, noting that technically, one could buy the properties back or remove the other assets the next day potentially without triggering ACD.

68 The draftsman of the SDA has wisely foreseen this scheme and provided in ss 23C(6) and 23C(7) for a SAAR that would catch it. If an arrangement which results in the change in the composition of the tangible assets of an entity (or any other arrangement that the Commissioner thinks has avoidance as its purpose) results in an entity ceasing to be a PHE within a prescribed period before the transfer of equity interests within it, ACD may be levied notwithstanding that the entity in question may not be a PHE.[86] The Commissioner has the power to provide for this prescribed period under the section 23 Order, but it is noted that this power has not yet been exercised at the moment.

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84 *R v Panel on Take-Overs and Mergers, ex parte Datafin plc* [1987] 1 QB 815 (CA); *R v Panel on Take-Overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 (CA).

85 Wan Wai Yee & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis, 2013) at p 422.

86 Stamp Duties Act (Cap 312, 2006 Rev Ed) ss 23C(6) and 23C(7).

(2) Revaluation

69 An entity may seek to have its assets revalued if it estimates that it would not be a PHE under the new valuation. However, the ACD regime does not allow entities to freely revise their valuation of assets for the purposes of determining whether they are PHEs. The SDA prescribes that the market values used in the relevant formula must be those "as at the end of the most recent completed accounting period" of the relevant PHEs.[87] This has the effect of "locking in" the market values of assets for a length of time, regardless of the degree of fluctuations of market values that might have taken place in the meantime. While it is understood that there has to be some kind of anti-avoidance rule in this area to prevent revaluations of which the primary purpose is to obtain a tax benefit, to lock in the market values for a period that may span three months to a year may not be fair to the taxpayer. This is particularly so when we consider that the residential property market can completely change in a very short period. Perhaps Parliament considers allowing entities to freely conduct asset revaluations, but put a SAAR in place to prevent abuse of this.

70 A new SAAR is required for it is argued that a revaluation of assets would not potentially fall under the current SAAR in ss 23C(6) and 23C(7) of the SDA since the said sections only catch "arrangements". Under s 23C(11) of the SDA, an "arrangement" is defined as "any scheme, trust, grant, covenant, agreement, disposition or transaction". In this context, it is hard to see how a revaluation in itself could constitute an arrangement.

71 Even if Parliament makes this amendment, practitioners who wish to rely on an asset revaluation should be aware of the existence of a parallel timeline provided for in the Takeovers Code. Generally, the Securities Industry Council ("SIC") will not permit a target company to announce material information such as asset valuations after the 39th day following the posting of the offer document. This is to give potential bidders time to determine whether to revise its offer in response to the new information.[88] This rule may impact when the target entity may wish to carry out its asset revaluation.

72 Further, r 26 of the Takeovers Code draws an important distinction between valuations of assets that are made in connection with an offer and those which are not. Valuations made in connection with an offer are subject to more stringent requirements, such as the

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87 Stamp Duties Act (Cap 312, 2006 Rev Ed) ss 23(14) and 23(15).

88 Wan Wai Yee & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis, 2013) at p 534.

need for the valuation to be supported by the opinion of a named independent professional expert and the need for the directors to state the basis of the valuation to the shareholders.[89] In any case, IRAS will, in all probability, require the target company to show objective proof of the market value of its assets at the time of the relevant conveyance.

(3) Anticipatory defensive measures

73 Popular anticipatory defensive measures against hostile takeovers include (a) interlocking or circular shareholdings, where two or more companies acquire and hold large but non-controlling blocks of shares in each other;[90] (b) pyramiding, where a pyramidal structure of interlocking shareholdings are held through a series of inter-related companies under the same ultimate management control;[91] and (c) shareholders voting agreements.[92] Such defensive measures may become rather a lot more expensive to set up with the advent of the ACD regime. Due to a very broad concept of an "associate", it is likely that where various companies or individuals under the same ultimate management control transfer equity interests to set up the structures, they are going to meet the "significant ownership" condition and have to pay ACD on such transfers. More generally, certain consolidation or restructuring arrangements may now attract stamp duty liability that may not fall within the scope of existing stamp duty relief provisions.[93]

C. Ambiguity

(1) At or about the same time

74 In corporate transactions, one rarely deals with single contracts. Instead, a considerable number of parties are normally involved over what can be a rather lengthy period. In this context, s 23(12)(*b*) of the SDA provides a rather unwelcome ambiguity with regard to when separate transactions should be treated as part of the same conveyance, such that ACD is levied at each stage. It states:

> [In] 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

89 Wan Wai Yee & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis, 2013) at pp 535–537.
90 See Chidambaram Chandrasegar, *Take-Overs and Mergers* (LexisNexis, 2nd Ed, 2010) at p 340.
91 See Chidambaram Chandrasegar, *Take-Overs and Mergers* (LexisNexis, 2nd Ed, 2010) at p 341.
92 See Chidambaram Chandrasegar, *Take-Overs and Mergers* (LexisNexis, 2nd Ed, 2010) at pp 342–343.
93 See para 1, at nn 5 and 6 above.

> 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 problem 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 when transactions will be taken to be part of the same conveyance. It should be noted that the impact of this provision is limited to situations where associates are involved. As noted above,[94] artificially splitting transactions may not result in any tax advantage, since ACD will be levied on the difference between the equity interests owned after the transaction and the lowest amount of equity interests owned at any time since 11 March 2017. However, the interpretation of "at or about the same time" can potentially determine the quantum of ACD an owner must pay, should his associate purchase further equity interests subsequently.

75 For example, assume that parties A and B are associates who do not own any equity interests in company X. A purchases 50% of the equity interests in company X. Three months later, B purchases 10% of the equity interests in company X. Regardless of how "at or about the same time" is interpreted, B will have to pay ACD on 60% of the equity interests in company X. However, the interpretation of the term will determine whether A has to pay ACD on 50% or 60% of the equity interests in company X. Apart from the issue of potential double taxation, the question arises whether three months is "at or about the same time".

V. Conclusion

A. Far-reaching consequences

76 The ACD regime is a complex one of which application spans multiple areas of law. The key focus seems to be that it seems to apply almost whenever securities are issued or traded in companies heavy in residential properties. The number of ways in which ACD can be relevant to a transaction means that there is an opportunity for an ACD specialist dealing with residential property companies; one who can understand the ACD implications over a whole range of transactions. This may have created an entirely new specialisation. Much like projects, oil and gas, aviation and other practice areas, residential property has now become a new practice area in itself. A practitioner in this area

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94 See para 16, at n 31 above.

must be able to understand not just one or two areas of law like mergers and acquisitions or capital markets, but a considerable mix of areas of law.

77 Apart from understanding the implications of the ACD regime and when it applies, practitioners have to optimise their client's positions *vis-à-vis* the regime. Given that the draftsman has done an excellent job at pre-empting tax avoidance, the practitioner's main value-add may come in three main forms.

78 First, it may be beneficial to seek an advance ruling from IRAS on behalf of clients. As noted, in many corporate transactions, the actual quantum of tax paid may not in fact be as important as the certainty of whether any tax has to be paid in the first place. Given the considerable ambiguity in this frankly rather new area of law, it may also be prudent to obtain a binding ruling from IRAS on which one may safely rely on.

79 Second, it may be possible to engage with the Ministry of Finance ("MOF") to determine if it might be willing to exercise its discretion to offer stamp duty remission under s 74 of the SDA. If a practitioner can successfully convince MOF that Parliament never intended to subject cases such as the proposed transaction to ACD, MOF may well be willing to remit the duties payable regardless of the liability it is empowered to impose under the SDA.

80 Third, with the balance swinging in favour of debt rather than equity financing further, there may be a need for careful development of financial instruments that have more characteristics representative of debt rather than equity instruments. The effect of utilising an instrument that is debt rather than equity in nature has consequences that extend beyond that of the deductibility of financing costs. ACD is a rather hefty duty that can reach almost 31% of the value of the residential property transferred. Taxpayers have to be sure of the eventual classification of the instruments that are used and may well seek legal opinions to insure themselves against the risk of a mistaken classification.