



Inland Revenue Department
Hong Kong

STAMP OFFICE INTERPRETATION AND PRACTICE NOTES

NO. 1 (REVISED)

STAMPING OF AGREEMENTS FOR SALE AND PURCHASE OF IMMOVABLE PROPERTY

These notes are issued for the information of duty payers and their tax representatives. They contain the Department's interpretation and practices in relation to the law as it stood at the date of publication. Duty payers are reminded that their right of appeal to the Court is not affected by the application of these notes.

These notes replace those issued in October 2014.

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INTRODUCTION

The Stamp Duty Ordinance (Cap 117) (“the Ordinance”) was amended in 1992. The amending legislation is largely contained in Part IIIA and head 1(1A) in the First Schedule to the Ordinance. Before the amendment, ad valorem stamp duty (“AVD”) was only payable on the conveyance on sale (i.e. assignment) of property. It was not payable on a sale and purchase agreement entered into before the assignment took place. After the amendment in 1992, sellers and purchasers are generally required to pay AVD on all sale and purchase agreements for residential property. This means that in the case of a series of agreements between different parties in respect of the same property, the amount of duty payable will multiply, thereby acting as a disincentive to speculators. The stamp duty payable on the actual conveyance of a property which is in conformity with a chargeable agreement for sale is fixed at \$100. The Ordinance was further amended by the Stamp Duty (Amendment) (No. 2) Ordinance 2014 (“the Amendment Ordinance”) which was published in the Gazette on 25 July 2014. Under the Amendment Ordinance, with effect from 23 February 2013 (“the Effective Date”), unless specifically exempted or otherwise provided, all agreements for sale of immovable property executed on or after the Effective Date are chargeable with AVD. The Amendment Ordinance brings the time for charging AVD on non-residential property transactions on par with that of residential property transactions.

2. The purpose of this Practice Note is to outline the stamping requirements and the practices being followed by the Collector of Stamp Revenue (“the Collector”) in relation to agreements for sale and purchase of immovable property and subsequent conveyances on sale.

3. This Practice Note should be read in conjunction with Stamp Office Interpretation and Practice Notes (“SOIPN”) No. 8 (Revised) which sets out how the Collector will apply the provisions in relation to different rates of AVD under head 1(1) and head 1(1A) of the First Schedule to the Ordinance from the Effective Date and explains the Department’s practice in connection therewith.

AGREEMENT FOR SALE

Scope

4. In broad terms the provisions in Part IIIA of the Ordinance have application in respect of all agreements for sale and purchase of immovable property in Hong Kong, i.e. in respect of land and buildings in Hong Kong.

5. To come within the scope of the provisions in Part IIIA of the Ordinance, it is not necessary that an agreement be in writing. The provisions apply to instruments (i.e. written documents) of the kinds specified in the definition of “agreement for sale” in section 29A(1). They also apply to an “unwritten sale agreement” which is defined in the section to mean “a contract, agreement, or statement not in the form of an instrument but of such a nature that, if it were in such a form, the instrument would constitute an agreement for sale”.

6. It follows that in considering the question of whether the provisions in Part IIIA of the Ordinance apply, it is necessary to ascertain, if the agreement is in writing whether it is an “agreement for sale”, or if it is not in writing whether it is an “unwritten sale agreement”. If the answer is in the positive, the provisions generally impose certain requirements on the parties to the agreement. A common requirement in respect of all such agreements is that an agreement for sale containing specific information be executed.

7. However, before discussing the nature of the various requirements, it is appropriate to consider further the primary question of what constitutes an “agreement for sale” – and consequently an “unwritten sale agreement” – for the purposes of the legislation.

Meaning of “agreement for sale”

8. The definition of “agreement for sale” is provided in section 29A(1) of the Ordinance. Generally, any contractual agreement for sale or purchase of land and buildings in Hong Kong will come within the terms of the definition. In this regard, the part of the definition most likely to be applicable is that which encompasses “an instrument in which a person contracts to sell or purchase immovable property”.

9. As an anti-avoidance measure, the definition also provides that certain instruments involving rights in respect of immovable property, which might otherwise be used to circumvent the provisions, come within the definition of “agreement for sale”. These include the following:

- (a) options or rights of pre-emption (unless contained in a lease or an agreement for a lease which is for a fixed term of not less than 3 years, and are not exercisable within the first 3 years);
- (b) powers of sale under which consideration moves from the grantee of the power to the grantor or irrevocable powers of attorney (unless given in a mortgage or charge made in favour of a financial institution within the meaning of section 2 of the Inland Revenue Ordinance, Cap 112);
- (c) declarations of trust whether for value or not (unless no beneficial interest passes under the declaration);
- (d) an instrument which constitutes a memorandum, note, or other evidence of an unwritten sale agreement;
- (e) a nomination or direction given by a purchaser of a property to another person to take up an assignment of the property; and
- (f) a document assigning any of the above rights.

10. The definition does not cover what might be called a usual mortgage (or charge). The rights conferred under such a mortgage are essentially to look to the relevant property as security for money advanced, subject to the mortgagor’s equity of redemption. An instrument of this kind confers no immediate or automatic right of sale of the property (in other words, such a right is exercisable if and only if there is a default on the part of the mortgagor). As such, it is not considered to constitute an agreement for sale as defined and is therefore not chargeable with duty. On the other hand, an agreement for sale which is disguised as a mortgage (incorporating an irrevocable power of attorney) and which does not merely provide security for money advanced but gives, expressly or impliedly, an immediate and automatic right of disposal of a property is chargeable with duty.

11. There might be cases where a mortgage or charge is made in favour of an employer who has lent money to an employee in the ordinary course of his employment which gives the employer a power of attorney expressed to be irrevocable and which is given to secure a proprietary interest of the employer, and giving the employer authority on behalf of the employee to sell or otherwise dispose of any interest of the employee in immovable property. Such mortgage or charge comes within the definition. However, remission or refund of stamp duty of this type of instrument will be considered under section 52 of the Ordinance.

Provisional, conditional, etc. agreements for sale

12. To preclude any argument to the contrary, section 29A(2) provides that an agreement for sale and an unwritten sale agreement may be enforceable or unenforceable, absolute or conditional, formal or informal, temporary or permanent, provisional or non-provisional. It follows that a provisional or preliminary agreement signed at a property agent's office of the kind which typically provides for the forfeiture of the purchaser's deposit or the return of double the amount of the purchaser's deposit falls within the definition of "agreement for sale". Likewise, an instruction for sale or a memorandum of sale signed at a developer's sale office falls within the definition. To prevent the use of frivolous conditions as a means of circumventing the provisions whenever a property is resold, conditional agreements are also covered by the definition.

Agreements not intended to create legal relations

13. The provisions in Part IIIA of the Ordinance are not intended to catch non-binding agreements. Therefore, where an agreement for sale is made "subject to contract", it does not fall within the ambit of the provisions. In this regard, it is relevant that the definition of "agreement for sale" requires the agreement to be one in which "a person contracts to sell or purchase immovable property".

DUTY TO EXECUTE AGREEMENT FOR SALE

Time for execution

14. Where an agreement for sale or an unwritten sale agreement has been made, each vendor and purchaser under the agreement (other than a purchaser who is unaware of the agreement, for example, a nominee under a nomination by the original purchaser) must execute an agreement for sale containing certain specific information [section 29B(1)] (see paragraph 18). The required agreement has to be executed “not later than 30 days after the relevant date” (see paragraph 15).

The “relevant date” for execution

15. The relevant date, in effect, is the date on which the first unwritten sale agreement or agreement for sale is made in respect of the property by the vendor and purchaser [section 29B(3)].

Meanings of “purchaser” and “vendor”

16. The obligation to execute the required agreement for sale is placed on each “purchaser” and “vendor” under an agreement for sale or unwritten sale agreement. These terms are defined widely in section 29A(1) of the Ordinance in line with the definitions of “agreement for sale” and “unwritten sale agreement” (see paragraphs 8-9).

Agent acting for vendor or purchaser

17. If a person enters into an agreement for sale or an unwritten sale agreement as agent for a vendor or purchaser, the agent and the vendor or purchaser, as the case may be, are jointly and severally liable to comply with the requirements concerning the execution of the required agreement for sale [section 29B(4)].

Matters required to be specified in an agreement for sale

18. The following matters must be specified in the required agreement for sale [section 29B(5)]:

- (a) names, addresses and “identification numbers” (see paragraph 19) of the vendor and purchaser. If the vendor or purchaser is not an individual but is registered under the Business Registration Ordinance, Cap 310, the business registration number of the vendor or purchaser;
- (b) location of the property;
- (c) whether the property is residential or non-residential (see paragraphs 25-29);
- (d) date on which the agreement for sale was made;
- (e) if the agreement for sale was preceded by an unwritten sale agreement or another agreement for sale, made between the same parties and on the same terms, the date on which the first such agreement was made;
- (f) whether a date has been agreed for the conveyance on sale, and if so, that date;
- (g) whether there is an agreed consideration for the conveyance on sale, and if so, the amount or value of the consideration;
- (h) the amount or value of any “other consideration” paid or given in relation to the agreement for sale or conveyance on sale pursuant to that agreement (see paragraph 20), such as confirmor fees, and the names, addresses and identification numbers or business registration numbers of the recipients; and
- (i) if the purchaser has not executed the agreement, a statement by each person executing the agreement as to whether the purchaser knows that the agreement affects him.

Meaning of “identification number”

19. For the purposes of the Ordinance, “identification number” in relation to a person means:

- (a) the Hong Kong identity card number;
- (b) if no identity card has been issued to him, the number of any travel document, certificate of identity, or document of identity (within the meanings of section 2(1) of the Immigration Ordinance, Cap 115); and
- (c) if no such document or certificate has been issued to him, the number of any other document that establishes his identity to the satisfaction of the Collector.

Meaning of “other consideration”

20. This term includes all consideration paid or given to any person for or in connection with the agreement for sale or any conveyance of the property, excluding legal expenses. Whilst “other consideration” could arguably cover incidental expenses such as genuine agency fees, name transfer fees, mortgage fees, photocopying charges and traveling expenses, the Collector’s practice is to exclude all such payments. However, a confirmor fee, by whatever name called, paid by the purchaser whether directly or indirectly to a previous buyer of a property in order to acquire the property must be included.

Failure to execute an agreement for sale

21. Where the parties to an agreement for sale or an unwritten sale agreement fail to comply with section 29B(1), the agreement is deemed to be a chargeable agreement for sale. In such circumstances, the parties are jointly and severally liable to the Collector for the payment of the stamp duty chargeable on the agreement and any penalty payable under section 9 [section 29B(6)]. Any such stamp duty paid may be set off against the stamp duty payable in respect of a conveyance on sale made in pursuance of that agreement [section 29B(7)].

22. Any person who with intent to defraud the Government fails to comply with the requirements of section 29B(1) commits an offence [section 29B(9)]. However, the Collector may, before the commencement of criminal proceedings, compound any such offence. Section 60 of the Ordinance provides that any person who commits or attempts to commit any offence under the Ordinance shall be liable to a fine at level 6 (currently

\$100,000 according to the Eighth Schedule of the Criminal Procedure Ordinance, Cap 221) and to imprisonment for 1 year.

Enforceability of agreements for sale

23. The provisions in part IIIA of the Ordinance do not affect the validity or enforceability of an agreement for sale or unwritten sale agreement [section 29B(10)]. It is only an offence for failure to reduce an agreement to writing if it is for the purpose of defrauding the Government. Thus, an oral agreement for the sale of land can remain in oral form so long as the appropriate duty is paid on it.

CHARGEABLE AGREEMENTS FOR SALE

24. The AVD on agreements for sale is imposed by head 1(1A) in the First schedule to the Ordinance. Before the Effective Date, it only applies to agreements for sale of residential property. From the Effective Date onwards, it also applies to agreements for sale of non-residential property unless the agreement is preceded by another agreement for sale of the same property made between the same parties and on the same terms before the Effective Date.

Meaning of “residential property”

25. Residential property is defined to mean any immovable property other than “non-residential property” [section 29A(1)]. On the other hand, “non-residential property” means immovable property which, under the existing conditions of:

- (a) a Government lease or an agreement for a Government lease;
- (b) a deed of mutual covenant, within the meaning of section 2 of the Building Management Ordinance (Cap 344);
- (c) an occupation permit issued under section 21 of the Buildings Ordinance (Cap 123); or
- (d) any other instrument which the Collector is satisfied effectively restricts the permitted user of the property,

may not be used, at any time during the term of the Government lease in respect of the property or during the term of the Government lease that has been agreed for in respect of the property (as is appropriate), wholly or partly for residential purposes.

26. In other words, it is only where a property cannot be used for residential purposes under the existing conditions of any of the above-mentioned documents that it is a non-residential property. Where this is not the case, it must, by definition, be residential property.

27. It should be noted that the classification is by reference to permitted use rather than actual use. For example, where the permitted use of a factory building is non-residential, it would not be regarded as a residential property simply because it is resided in by watchmen in the performance of their duties. On the other hand, where it is permissible to use a property for residential purposes it will be classified as residential property even if it is actually used for agricultural purposes.

28. Whether or not a property is a residential property has to be determined by reference to the permitted use at the time of sale of the property. In the generality of cases, the permitted use of a property is specified in instruments such as government leases, deeds of mutual covenant or occupation permits. It should also conform with the zoning of the lot where the property situates in an Outline Zoning Plan (“OZP”) published by the Town Planning Board in accordance with the Town Planning Ordinance (Cap 131). It is only when the government lease does not specify the use of a vacant lot without any property development (deed of mutual covenant and occupation permit are not applicable in such case) that the Collector will treat the OZP as an “instrument” for the purposes of subparagraph (d) of the definition of “non-residential property” (see paragraph 25) and take the specified land use zone as the permitted use of the lot. Moreover, if a lot where a non-residential property situates is re-planned for residential development in the OZP, yet existing conditions of the relevant government lease, deed of mutual covenant or occupation permit specify non-residential use for the property, then as long as the immovable property has neither been redeveloped with corresponding revisions effected in the government lease and the deed of mutual covenant, nor application for changing the land use for residential development has been made under the Buildings Ordinance (Cap 123), the

Collector will regard the immovable property as a non-residential property under the Ordinance.

29. A single agreement for sale may involve both residential and non-residential units. The Collector will treat the agreement as an agreement for sale of residential property if the residential unit and non-residential unit are inseparable for sale and purchase. In determining whether residential and non-residential properties under a single instrument are separable for sale and purchase, the Collector may take into account various documents, including approved building plan, deed of mutual covenant, occupation permit and any other document that the Collector considers relevant. For instance, if the relevant deed of mutual covenant specifies that the residential and non-residential properties have taken certain undivided shares in common (i.e. the residential and non-residential properties concerned do not have their respective undivided shares), the properties concerned will be regarded as inseparable for sale and purchase. On the other hand, if the properties concerned are separable for sale and purchase, the Collector will treat the sale and purchase of the properties as separate and distinct and apply the respective definition of residential property and non-residential property as provided under the Ordinance to determine the nature of the properties and AVD will be charged on the basis of the respective consideration. However, the applicable AVD rates on the sale and purchase of the residential unit and non-residential unit shall be based on the total consideration of the entire instrument.

Time for stamping

30. The time for stamping an agreement for sale is 30 days after the “relevant date” (see paragraph 15) [head 1(1A)(B) in the First Schedule].

31. However, if an agreement for sale is superseded, within the first 14 days of the time allowed for stamping, by another agreement for sale made between the same parties and on the same terms (see paragraphs 34-37), the time for stamping the second agreement will be 30 days from the date of its execution [Note 2(a) to head 1(1A) in the First Schedule]. Provided that the second agreement is stamped within this period, the first agreement will cease to be chargeable with stamp duty [Note 2(b) to head 1(1A) in the First Schedule]. This is illustrated by the following example:

Date of provisional agreement for sale: 1 March 2014
Date of formal agreement for sale: 8 March 2014

The stamping requirements are –

- (a) The time for stamping the formal agreement is 7 April 2014 i.e. 30 days from 8 March 2014 [Note 2(a) to head 1(1A) in the First Schedule].
- (b) Upon stamping the formal agreement, the provisional agreement will cease to be chargeable to any stamp duty [Note 2(b) to head 1(1A) in the First Schedule].

32. If the two agreements are more than 14 days apart, the first agreement should be presented for stamping within 30 days after the “relevant date”. After the first agreement is stamped, the second agreement is chargeable with fixed stamp duty of \$100 and the time for stamping is within 30 days after its execution (not “relevant date”) [Note 3(b) to head 1(1A) in the First Schedule]. This is illustrated by the following example:

Date of provisional agreement for sale: 1 March 2014
Date of formal agreement for sale: 17 March 2014

The stamping requirements are:

- (a) Since the formal agreement was not executed within 14 days from the date of the provisional agreement, the provisional agreement would continue to be chargeable with AVD. The time for stamping the provisional agreement would be 31 March 2014 i.e. 30 days from 1 March 2014 [Note 3(a) to head 1(1A) in the First Schedule].
- (b) Provided that AVD was paid on the provisional agreement by the above deadline, the formal agreement would be chargeable with fixed duty of \$100 and the time for stamping would then be 16 April 2014 i.e. 30 days from 17 March 2014 [Note 3 (b) to head 1(1A) in the First Schedule].

- (c) If the parties wished to have the full AVD paid on the formal agreement, the Collector would have no objection so long as the AVD was paid on or before 31 March 2014. The provisional agreement would then be stamped with \$100 duty.

Same parties and same terms

33. Generally speaking, AVD is charged on the first agreement for sale and fixed stamp duty of \$100 is charged on any subsequent agreement for sale made between the same parties and on the same terms. If two agreements for sale are not made between the same parties and on the same terms, they will be considered as separate agreements for sale and both chargeable with AVD and other stamp duty, if applicable.

34. In order to be regarded as being made between the same parties as a previous agreement, an agreement for sale must fulfill the following conditions [section 29A(3A)]:

- (a) the names of both of the vendor(s) and the purchaser(s) specified in the previous agreement are the same as those in the agreement for sale; and
- (b) where there is more than one purchaser specified as such in the previous agreement, the property or interest to be acquired by a person as one of the purchasers under the previous agreement is the same as that to be acquired by that person under the agreement for sale.

35. An agreement for sale or a conveyance on sale is regarded as made on the “same terms” as a previous agreement if, but only if, the agreement or the conveyance and the previous agreement are made in respect of the same property and specify the same consideration for the conveyance [section 29A(4)].

36. For the purposes of considering whether 2 or more agreements for sale of residential property are made between the same parties, before the Effective Date, a person and a parent, spouse or child of that person are treated as the same person. From the Effective Date onwards, 2 or more persons are

treated as the same person if, on the date of agreement made between those persons:

- (a) they are closely related;
- (b) each of them is acting on his or her own behalf; and
- (c) each of them is not a beneficial owner of any other residential property in Hong Kong.

[Note 5 to head 1(1A) in the First Schedule]

Two persons are closely related if one of them is the parent, spouse, child, brother or sister of the other; and if there are more than two persons, they are closely related if each of them is a parent, spouse, child, brother or sister of each of the others [section 29AD]. The Ordinance does not define “parent”, “spouse”, “child”, “brother” or “sister”. For the purposes of AVD, the Collector will adopt the ordinary meaning and accept persons who are blood-related, half blood-related, and also persons who have spouse relationship, adoption or step relationships as the parents, spouse, children, brothers or sisters of the person concerned.

37. For cases where after execution of the agreement for sale, the parties entered into a supplemental agreement postponing the date of completion with a sum payable to the vendor by the purchaser as compensation or damages, the supplemental agreement would not itself be regarded as an agreement for sale. The subsequent conveyance would be treated as being on the same terms as the previous agreement. The additional sum would not form part of the consideration, provided that it was genuinely paid as compensation or damages.

Computation of stamp duty payable

38. The rates of AVD applied to the “consideration” are specified in head 1(1A)(A). These are in line with those applicable to assignments of immovable property. To qualify for AVD at the lower rate pertinent to the amount or value of the consideration, a chargeable agreement for sale must contain a statement certifying that the transaction agreed to, or effected by, the instrument does not form part of a larger transaction or series of

transactions (see paragraphs 43-44) in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds that amount [head 1(1A) and section 29G].

39. Where there are 2 or more agreements for sale made between the same parties and on the same terms (see paragraphs 34-37), all of the agreements are deemed to be made on the “relevant date” [Notes 2(aa) and Note 3(a) to head 1(1A) in the First Schedule] for the purpose of computing the stamp duty payable. The stamp duty rates prevailing at the “relevant date” (see paragraph 15) will apply to these agreements.

40. The consideration used for the purpose of computing stamp duty liability is deemed to be the aggregate of the amount or value of the agreed consideration for the conveyance of the property and the amount or value of any other consideration paid or given to any person for or in connection with the agreement for sale or any conveyance of the property excluding legal expenses [section 29C(8)].

Nil or inadequate consideration; material date for valuation

41. In the first instance, stamp duty will be charged by reference to the consideration stated in the agreement for sale. However, where the amount of the consideration is not ascertained at the time of the agreement or the stated consideration is less than the value of the property, stamp duty will subsequently be charged on the value of the property [section 29F]. The Commissioner of Rating and Valuation, if necessary, will be requested to provide expert advice as to the adequacy of the stated consideration.

42. For the purpose of assessing the adequacy of the stated consideration the date of the agreement for sale will be taken as the material date for valuation. However, the parties may request that an earlier date be used if it is the “relevant date” (see paragraph 15) e.g. the date of a provisional agreement, date of an instruction for sale, date of a memorandum for sale and date of an unwritten sale agreement, etc.

Series of transactions

43. Where a chargeable agreement for sale is certified in accordance with section 29G of the Ordinance at a certain amount, it can be stamped at a

lower AVD rate pertinent to that particular amount. Otherwise the agreement will be chargeable with AVD at the top rate. This certificate is a statement in the instrument certifying that the transaction effected by the instrument does not form “part of a larger transaction or series of transactions” (S.T. case) in respect of which the aggregate amount or value of the consideration exceeds that particular amount.

44. The Collector takes the view that an S.T. case is in general one with co-ordination or interdependence between the transactions. One typical example is the purchase of a flat and a car park from the same developer on the same date or within a short time span under two separate instruments. If the purchaser is at liberty to purchase the flat with or without the car park, the Collector may not view the transactions as an S.T. case even though there may be a pre-condition for the sale of car park that the purchaser should be a purchaser or owner of a flat in the development at the time of purchase. However, if there is a pre-condition that the flat must be sold together with the car park or vice versa, then the transactions will likely form part of a larger transaction or a series of transactions. The AVD of the relevant instruments will then be computed at the rate pertinent to the total amount or value of the consideration of the flat and car park. This approach may be taken for other similar cases such as the purchase of adjoining flats. It should, however, be noted that each case has to be considered on its own merits. Furthermore, it should be noted that the above guidelines apply only to arm’s length cases. They do not apply to cases where the execution of different instruments is an artificial act to split up a transaction for the purpose of stamp duty avoidance. Section 11 of the Ordinance stipulates that all the facts and circumstances affecting the liability of any instrument to stamp duty are to be fully and truly set forth therein.

Series of agreements with a common purchaser

45. Where two agreements for sale are made in respect of the same property and both agreements involve a common purchaser, stamp duty will be charged as illustrated in the following examples [section 29C(5)]:

Scenario 1 (where the number of purchasers in the second agreement is greater than that of the first agreement)

	<u>Vendor</u>	<u>Purchasers</u>
Agreement 1:	A	B + C
Agreement 2:	A	B + C + D

A signs a document in which he contracts to sell a property to B and C. A does not assign the property to B and C, but upon their request signs another document in which he contracts to sell the property to B, C and D. Both agreements are chargeable with AVD. However, if the first agreement is stamped, the AVD on the second agreement will be reduced by two thirds representing the interests B and C acquired under the first agreement [applying section 29D(4)].

Scenario 2 (where the number of purchasers in the second agreement is less than that of the first agreement)

	<u>Vendor</u>	<u>Purchasers</u>
Agreement 1:	A	B + C + D
Agreement 2:	A	B

A signs a document in which he contracts to sell a property to B, C and D. A does not assign the property to B, C and D, but upon their request signs another document in which he contracts to sell the property to B alone. Both agreements are chargeable with AVD. However, if the first agreement is stamped, the AVD on the second agreement will be reduced by one third representing the interest B acquired under the first agreement [applying section 29D(5)].

46. For the purposes of the relief outlined above, if the chargeable agreements for sale are made in respect of residential property, before the Effective Date, a person and a parent, spouse or child of that person are treated as the same person. From the Effective Date onwards, the conditions for treating two or more persons as the same person are set out in paragraph 36.

Agreement to exchange or partition immovable property

47. A chargeable agreement to exchange immovable properties would, in the absence of a specific relief provision, be charged to stamp duty as if it were two separate chargeable agreements for sale, one in respect of each property [section 10(2)]. However, section 29C(10) provides that such an agreement to exchange will only be stamped by reference to the “equality money” i.e. the money paid for the difference in value of the properties instead of on the value of each of the respective properties. The adequacy of the equality money will be assessed by virtue of section 29F (see paragraph 41). This section also applies to a chargeable agreement to partition an immovable property.

48. Section 29C(10) applies to a case where both of the properties to be exchanged are residential properties. The Collector accepts that the section also applies to a case where a residential property is exchanged for a non-residential property or vice versa. However, exchange of a residential property for a non-residential property may be subject to buyer’s stamp duty computed by reference to the value of the residential property (see paragraph 26 of SOIPN No.7).

Chargeable agreement for sale not containing the required particulars

49. If a chargeable agreement for sale does not contain all the required particulars or is not executed by all persons concerned, the Collector may refuse to stamp the agreement [section 29C(2)]. In practice, the Collector will return the agreement for rectification before accepting it for stamping. However, to avoid paying any penalty for late stamping, the parties may simply pay the stamp duty first pending the rectification.

Chargeable agreement for sale consisting of two or more instruments

50. An agreement for sale may consist of 2 or more instruments [section 29A(3)]. Where a chargeable agreement for sale consists of 2 or more instruments, the principal instrument only is chargeable with stamp duty [section 29C(7)]. The other instruments are not chargeable with stamp duty.

51. There are cases where the stated consideration of an agreement for sale is revised by a subsequent supplemental agreement before assignment. The revision may be triggered by an adjustment of the terms of the original

agreement, in particular, a change in the payment method. In computing the amount of stamp duty payable, all the facts available at the time of stamping will be taken into account. The Collector's practices are as follows:

(a) Principal and supplemental agreements presented for stamping at the same time

If the principal agreement is presented to the Collector for stamping together with the supplemental agreement, the revised consideration provided in the supplemental agreement will be used to compute the stamp duty payable on the principal agreement.

(b) Stamping before variation of consideration

If an agreement for sale has already been stamped with duty paid according to the consideration stated therein, any subsequent supplemental agreement shall not affect the stamp duty previously assessed. There is no provision in the Ordinance for a refund of stamp duty due to a subsequent reduction of the consideration. Correspondingly, if the agreement for sale is stamped and there is a subsequent increase in price prior to assignment, the Collector will not demand further stamp duty unless the agreement confers a substantial benefit on the purchaser by reason of the inadequacy of the consideration or other circumstances [sections 29F(1) and (3)].

The foregoing practices apply to cases where the change in price is due to variation of the terms of the agreement agreed on an arm's length basis. They do not apply to changes made for the purpose of stamp duty avoidance.

Cancelled agreement for sale

52. If an agreement for sale is cancelled, annulled or rescinded or is otherwise not performed, it will not be regarded as a chargeable agreement for sale [section 29C(5A)(a)]. However, where the cancellation, annulment etc. is by reason of the occurrence of a specified event described in section 29C(5AA) of the Ordinance [e.g. resale or disposal of the property by way of

nomination or direction by the first purchaser], the agreement will continue to be regarded as a chargeable agreement for sale [section 29C(5A)(b)]. For example, if A purchases a property from Developer X and later resells it to B, the agreement for sale made between X and A is chargeable even though the agreement, in line with common market practice, is subsequently cancelled by consent of the parties and replaced by a new chargeable agreement made between X and B. For the avoidance of doubt, section 29C(4)(b) of the Ordinance provides that the new agreement made between X and B is chargeable with stamp duty by reference to the consideration (which includes any confirmor fee) required to be stated in the new agreement.

53. A document which is used for the purpose of cancelling an agreement for sale will not itself be regarded by the Collector as an agreement for sale chargeable to duty.

54. If stamp duty has been paid for an agreement for sale which pursuant to section 29C(5A)(a) of the Ordinance is not regarded as a chargeable agreement, an application for refund may be made to the Collector within 2 years after the cancellation, annulment or rescission of the agreement, or in the case where the agreement is not performed, 2 years after the agreed date of completion of the transaction [section 29C(5B)].

CONVEYANCES ON SALE

Conveyance on sale executed “in conformity with” a chargeable agreement for sale

55. Where a conveyance on sale is executed “in conformity with” a chargeable agreement on sale which is stamped, the conveyance is chargeable with stamp duty of \$100 only [section 29D(2)(a)].

56. A conveyance on sale is not executed “in conformity with” an agreement for sale unless it is in favour of exactly the same person(s) named in the agreement for sale as the purchaser(s) and the conveyance is of the whole or part of the immovable property which is the subject matter of the agreement for sale [section 29D(6)(c)] (see also paragraph 65 on closely related persons).

57. This is illustrated by the following example:

<u>Instrument</u>	<u>Vendor</u>	<u>Purchaser</u>
Agreement	A	B
Sub-Sale Agreement	B	C
Assignment	A	C (B as confirmor)

A sells a property to B. B in turn sells the property to C. A conveyance on sale of the property is made directly by A to C with B joining as the confirmor. The stamp duty position would be as follows:

- (a) The conveyance on sale is charged with stamp duty of \$100 only if C can produce a stamped agreement for sale under which he is named as the purchaser, i.e. the sub-sale agreement made between B and C. The first agreement between A and B should also be stamped. Otherwise, the Collector may refuse to stamp the conveyance (see paragraph 59).
- (b) If the chargeable agreement between B and C is not stamped, the conveyance on sale is chargeable to AVD under head 1(1) in the First Schedule, plus a penalty calculated by reference to the date by which the chargeable agreement for sale should have been stamped. After the conveyance is so stamped, the agreement for sale will then become chargeable with stamp duty of \$100 [section 29D(2)(b)].

58. For non-residential property transactions with the agreement for sale made before the Effective Date, only the conveyance on sale is chargeable with AVD but not the agreement for sale. However, section 29D(6)(a) deems a conveyance on sale to be in respect of residential property unless it contains a statement certifying that the immovable property subject to the conveyance is non-residential property. It follows that if such statement is not included, the parties are obliged to produce details of a stamped chargeable agreement for sale before the conveyance on sale can be stamped at \$100 duty. On the other hand, such a statement is not by itself conclusive [section

29D(6)(b)]. From the Effective Date onwards, agreements for sale of non-residential property made on or after that date are chargeable with AVD. In this regard, for non-residential property transactions also, the details of a stamped chargeable agreement for sale have to be provided before the conveyance on sale can be stamped with fixed stamp duty of \$100.

59. Where a stamping request for a conveyance on sale is made to the Collector and he has reason to believe that there existed a previous transaction of the property for which a chargeable agreement for sale has not been properly prepared or stamped, he may refuse to stamp the conveyance on sale [section 29D(1)].

***Conveyance on sale executed “in conformity with”
2 or more agreements for sale***

60. Section 29D(3) deals with the situation where a conveyance on sale is executed in conformity with 2 or more agreements for sale, each relating to different parts of the property, and one or more of those agreements is a chargeable agreement for sale.

61. This is illustrated by the following example:

<u>Instrument</u>	<u>Property</u>	<u>Vendor</u>	<u>Purchaser</u>
Agreement 1	X (Residential)	A	B
Agreement 2	Y (Residential)	A	B
Agreement 3	Z (Commercial)	A	B
Assignment	X, Y and Z	A	B

A sold 3 properties, 2 residential and 1 non-residential, to B under 3 separate agreements for sale (all made on 22 February 2013) and then conveyed all the properties to B in 1 assignment. The stamp duty position would be as follows:

- (a) Where each of the chargeable agreements for sale (i.e. Agreements 1 and 2) are stamped, the conveyance will be chargeable with AVD under head 1(1) in the First Schedule less the total amount of AVD paid or assessed to be payable in respect of these Agreements [section 29D(3)(a)].

- (b) Where any of the chargeable agreements for sale (i.e. Agreements 1 and 2) is not stamped, the conveyance will be chargeable with AVD under head 1(1) in the First Schedule, plus any penalty payable in respect of that agreement under section 9, less the amount of AVD paid or assessed to be payable in respect of the other chargeable agreement [section 29D(3)(b)].
- (c) After the conveyance is stamped in accordance with (b) above, any unstamped chargeable agreement for sale will be chargeable with stamp duty of \$100 while any chargeable agreement pending adjudication will cease to be chargeable with any further stamp duty. However, any stamp duty already assessed to be payable, following adjudication, on a chargeable agreement for sale will continue to be payable [section 29D(3)(c)].

Conveyance on sale executed “in pursuance of” a chargeable agreement for sale

62. Where a conveyance on sale is not executed “in conformity with” a chargeable agreement for sale, it may be executed “in pursuance of” a chargeable agreement for sale e.g. the conveyance includes an additional new purchaser or only some purchasers named in the agreement for sale appear in the conveyance. Such conveyance is stamped in accordance with section 29D(4) or (5) of the Ordinance (see paragraphs 63-64).

63. Section 29D(4) caters for the situation where a conveyance on sale is executed “in pursuance of” a chargeable agreement for sale in favour of a person named in the agreement as the purchaser and another person who is not so named. This is illustrated by the following example:

	<u>Vendor</u>	<u>Purchasers</u>
Agreement	A	B + C
Assignment	A	B + C + D

A signs an agreement in which he contracts to sell a property to B and C. The conveyance is subsequently made in favour of B, C and

D. The stamp duty position would be as follows:

- (a) If the agreement for sale is stamped, the conveyance will be charged to AVD under head 1(1) in the First Schedule and the relevant amount will be reduced by two thirds representing the interests which B and C acquired under the agreement for sale [section 29D(4)(a)].
- (b) If the agreement for sale is not stamped, the conveyance will be charged to AVD under head 1(1) in the First Schedule [section 29D(4)(b)].

64. Section 29D(5) covers another situation, where the conveyance is in favour of some (but not all) of the persons named in the chargeable agreement for sale as the purchasers. This is illustrated in the following example:

	<u>Vendor</u>	<u>Purchasers</u>
Agreement	A	B + C + D
Assignment	A	B

A signs an agreement in which he contracts to sell a property to B, C and D. The conveyance is subsequently made in favour of B alone. The stamp duty position would be as follows:

- (a) If the agreement for sale is stamped, the conveyance will be charged to AVD under head 1(1) in the First Schedule and the relevant amount will be reduced by one third representing the interest which B acquired under the agreement for sale [section 29D(5)(a)].
- (b) If the agreement for sale is not stamped, the conveyance will be charged to AVD under head 1(1) in the First Schedule [section 29D(5)(b)].

Conveyance on sale in favour of close relatives

65. In respect of residential property transactions with the conveyance on sale executed before the Effective Date, for the purpose of deciding whether the conveyance on sale is made “in conformity with” the chargeable

agreement for sale, a person and a parent, spouse or child of that person are treated as the same person. From the Effective Date onwards, 2 or more persons are treated as the same person if, on the date of the conveyance concerned:

- (a) they are closely related;
- (b) each of them is acting on his or her own behalf; and
- (c) each of them is not a beneficial owner of any other residential property in Hong Kong.

[section 29D(6)(c)(ii) and (7)]

Therefore, if the person and his close relative(s) are treated as the same person, the following conveyances (which are not exhaustive) would only be chargeable with stamp duty of \$100 under section 29D(2)(a):

<u>Purchaser(s) in agreement for sale</u>	<u>Purchaser(s) in subsequent conveyance</u>
X	X + X's spouse
X	X's spouse
X	X's parents
X + X's spouse	X
X + X's spouse	Their children

EXEMPTIONS AND RELIEF

Exempted agreements

66. By virtue of section 29H of the Ordinance, the provisions concerning chargeable agreements for sale do not apply to the following types of agreements for sale and unwritten sale agreements:

- (a) those made in favour of the Government or an incorporated public officer within the meaning of section 38 of the Ordinance;

- (b) those in respect of exempted premises where the purchaser is an exempted person within the meaning of section 38 of the Ordinance; and
- (c) those made with the consent of the Hong Kong Housing Authority or to which the Hong Kong Housing Authority or a person nominated by it is a party (e.g. flats sold under the Home Ownership Scheme, Private Sector Participation Scheme, Tenants Purchase Scheme etc.). It should be noted that AVD is payable on subsequent conveyances in respect of flats sold under these schemes.

Sales of property between associated companies

67. For sales of property between associated companies within the meaning of section 45(2) of the Ordinance, the relief from stamp duty provided by that section in respect of a conveyance of property from one associated company to another will apply equally to an agreement for sale of the same kind [section 29H(3)].

STAMPING ARRANGEMENT

68. Stamping requests for agreements for sale and conveyances on sale can be made in one of the following ways:

- (a) submitting an application for stamping, electronically or in paper form, without presenting the original instrument; or
- (b) presenting the original instrument to the Stamp Office for imprinting of a conventional stamp.

69. Depending on the mode of stamping requests chosen by the duty payer, the Collector will either issue a stamp certificate for the instrument or imprint a conventional stamp on the instrument. Both stamp certificates and conventional stamps have the same legal status. Under section 2 of the Ordinance, “stamped”, in relation to an instrument, means:

- (a) the instrument has been stamped by means of a stamp; or

- (b) a stamp certificate has been issued in respect of the instrument by the Collector.

70. Details of the stamping procedures and required forms can be found in the relevant Stamping Procedures and Explanatory Notes issued by the Collector. These procedures are available for download from the website of the Inland Revenue Department (www.ird.gov.hk).

MISCELLANEOUS

Registration of agreements for sale

71. The provisions in part IIIA of the Ordinance do not alter the law and practice relating to the registration of agreements for sale. It is the responsibility of the parties to register the agreement under the Land Registration Ordinance (Cap 128) if they wish to retain priority. A chargeable agreement for sale must be stamped before it can be registered [section 15(2)].

Consequences of non-payment

72. If the stamp duty payable on a chargeable agreement for sale is not paid when due, the Ordinance provides for the imposition of a penalty in addition to the applicable duty [section 9(1)]. Any duty and penalty applicable is recoverable by the Collector as a civil debt from all parties liable. An unstamped chargeable agreement for sale cannot be registered at the Land Registry and therefore the purchaser cannot obtain the legal benefits associated with registration.