

NOTE : THIS DOES NOT CONSTITUTE LEGAL ADVICE AND SHOULD NOT BE RELIED UPON IN CONNECTION WITH ANY TRANSACTION

**EXPLANATION OF
STAMP DUTY AMENDMENTS (2011)**

Note : These amendments came into force on July 1st, 2011

RULES OF INTERPRETATION

- The amendments affirm the centrality of the substance-over-form test, and the primacy of commercial reality over technical characterizations of instruments or transactions that may not correctly reflect that commercial reality. In other words, it is not how the transaction or instrument in question is internally characterized that is important but rather what its true nature for commercial purposes is revealed to be.
- Moreover, in determining whether a transaction is subject to stamp duty, the transaction must be scrutinized in its broader context so that account is taken of any related transactions or series of transactions. (Note “transaction” has long been defined under the Act to include a series of transaction).
- In conducting such a scrutiny, steps in a transaction that are really not intended to have commercial efficacy but instead are only being used to create a pretext for the avoidance of stamp duty are to be ignored.
- This approach is consistent with the recent Privy Council decision in Carreras Group Limited v. The Stamp Commissioner (2004) on appeal from the Court of Appeal of Jamaica. *(Note : this case concerned a transfer of shares purportedly in consideration of the issuance of a debenture by the purchaser to the vendor obligating the purchaser to redeem the debenture in two weeks time. The PC held that when the transactions were examined as a whole, and when particular regard was had of the fact that the debenture carried no security and no interest; that a mere two weeks would elapse from the issuance of the debenture to its redemption; and that the debt*

the purchaser was obliged to pay in order to redeem the debenture was, in commercial reality, the purchase price for the shares, it was clear that the true nature of the transaction was not that of an exchange of shares for a debenture (which would have been exempt from stamp duty under the Jamaican Act) but rather a transfer of shares for a monetary consideration (which was subject to duty); and that since that was its true nature, it would be subject to stamp duty accordingly.

- Bottom line : if it walks like a duck and quacks like a duck, it will be treated as a duck, even though the duck may purport to be a completely different animal. It is not what you call something that matters but rather what it really is.

APPLYING THE RULES OF INTERPRETATION TO SPECIFIC AREAS OF MISCHIEF AND SCHEMES OF AVOIDANCE

- OPTIONS : The 2011 amendments apply the foregoing principles of interpretation to particular schemes of avoidance, including so-called “options” that effectively pass the rights of enjoyment over property even though the option itself has not been, and indeed may never be, formally exercised. In such a case, the option will be deemed to have been exercised as soon as those rights of enjoyment arise and stamp duty will be payable accordingly.

Illustration : I give you an option to buy my shares in Company X (being all the issued shares). You pay me the full purchase price for the shares “up front”, albeit as an “option-price” whereupon I arrange the appointment of your nominees to the board of directors in place of mine. Moreover, you immediately succeed to all of my dividend rights as well. In sum, the main economic and control rights and powers that attach to the shares are being given to you up front, albeit under colour of an “option”. Such an arrangement would be immediately subject to full stamp duty in the same way and to the same extent as a out-and-out sale of the shares.

- ESCROW CLOSINGS : Similarly, if parties purport to complete a transaction, say, a sale of land, in escrow but under the escrow terms the purchaser pays the purchase price at once and is immediately put into possession and is able to enjoy other rights of ownership, the transaction will be conclusively deemed to have been completed in full on the 1st anniversary of the escrow and will be stampable accordingly.

REMOVING/CLARIFYING CERTAIN EXEMPTIONS

- PUBLIC COMPANIES : A public company no longer has any exemption from stamp duty on the sale or purchase of its business or any of its property. (*Note : the exemption from stamp duty on the sale of shares in a public company on a stock market is not affected by these amendments and therefore continues*).
- INSURANCE COMPANIES, BANKS, TRUST COMPANIES : Sale of controlling interest in, or the book of business of, an insurance company, Bank, or Bank & Trust company, or Trust Company, doing business in The Bahamas is now subject to stamp duty.
- EXEMPTED LIMITED PARTNERSHIPS (“ELPs”) : Exemption of ELPs from stamp duty has now been eliminated. Instead ELPs are to be treated in precisely the same way as IBCs.
- ESTATE TRANSFERS : Deeds of Assent and other instruments transferring the property of a deceased person to the persons beneficially entitled under the relevant will or intestacy have long been exempt from stamp duty. However, where the persons beneficially entitled, instead of taking title themselves, direct the personal representatives to convey the property to someone else, such transfers will be subject to full stamp duty.
- TRANSFERS OF MORTGAGES BETWEEN BANKS AND CREDIT UNIONS : Transfers of mortgages as between licensed lending institutions are now exempt from duty.

ASSESSING/PROVING MARKET VALUE

- Amendments re-affirm that stamp duty is payable at the time of execution of the relevant instrument; and that stamp duty is based on the market value of the relevant property or business.
- Market value refers to the market value as at the date of stamping or, where not more than six months have elapsed, the market value as at the date of execution.
- Treasurer now has express authority to require the parties to produce appraisals (but not binding on Treasurer).
- Amendments include a re-statement of the exemption of transfers of property from an individual to (a) a company that he solely owns; or (b) a trust under which no person other himself, his spouse, his children and remoter issue can have any possibility of ever taking or receiving any benefit or interest.

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