How the contingency principle affects stamp duty payable on leases

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In Singapore, stamp duty is a tax on documents or instruments which are required to be stamped pursuant to the Stamp Duties Act (the Act). For leases or tenancy agreements including acceptance of a lease letter of offer, stamp duty is payable based on the total amount of the consideration (including rent and other consideration) payable to the landlord.

For many leases, it is relatively easy to ascertain the stampable amount at the time of stamping as the quantum of rent and other consideration (for example, service charge) payable is set out in the leases. For other cases, the rent or other consideration (or a part of it) payable under the lease may, at the point of stamping, be unknown or includes a portion that is to be paid only upon the fulfillment of certain conditions or the realisation of certain contingencies, thereby making it uncertain at the point of stamping what the exact total or average rent may be, as it would depend on, for example:-

1. the determination of relevant variables during the term; or
2. whether certain conditions/contingencies are or are not met.

For these cases where rent is uncertain at the point of stamping, the contingency principle may be applied to help in the computation of stamp duty. This principle is found in the common law, and is often overlooked in the calculation of stamp duty. It provides that where there is a sum payable on a contingency, that is on an event that has yet to happen and may in fact not happen *(such that there could be two possible rent amounts depending on whether the contingency occurs)* then duty is levied on the maximum sum payable *(between the possible rent amounts)*, so long as that amount is quantifiable and regardless of however unlikely it is to become payable. This is adapted from *Lionore Australia (Avalon) Pte Ltd v Commissioner of State Revenue* [2006] WASAT. This means that the stamp duty payable on a lease will be based on the maximum amount payable as rent upon the realisation of the contingency. However, in instances where the entire rent amount is, at the point of stamping unknown but there is a minimum amount that is to be paid, then the contingency principle will be applied and the minimum rent amount will be dutiable.

Three situations where the Contingency Principle may be applied:

(1) Possible rents are fixed

In this scenario, there are two possible rent amounts depending on the outcome of a contingency. For example, a landlord of a newly opened shopping mall may accept a lower rent amount until such time that at least 50% of the shops in the mall are open for business as illustrated below.

Illustration 1

Under a lease agreement, a landlord lets a shop to a tenant and the rent amount payable is determined as follows:-

1. Rent is S$1,000 per month in the event that less than 50% of the lettable floor area of the mall is open for business.
2. Rent is S$2,000 per month in the event that 50% or more of the lettable floor area of the mall is open for business.

In the above illustration, two possible rent amounts may be payable depending on the percentage of the mall that is open for business. At the point of stamping, the parties would not know at which point of the term the rent will increase from S$1,000 to S$2,000 and as such, cannot compute the total or average consideration that would be payable for the term. In such a case, the contingency principle would be extended to prescribe that since there are two possible fixed rent amounts, stamp duty will be levied based on the maximum amount payable, which is S$2,000 per month in this case. It does not matter if for the entire term, less than 50% of the lettable floor area of the mall is open for business and rent payable is only S$1,000 per month.

(2) Possible rents are not fixed but there is a minimum amount

In a scenario where the possible rent payable is not fixed for the term but a minimum rent is payable, then the contingency principle will prescribe that the minimum rent is the dutiable amount under the contract.

Illustration 2

Under a lease agreement, a landlord lets a shop to a tenant and the rent amount payable is determined as follows:-

1. The prevailing market rent to be determined pursuant to an agreed procedure before the start of each year; or

2. Rent of S$10,000 per year,

whichever is the higher.

In the above illustration, only the minimum rent is ascertainable at the point of stamping. As such, the application of the contingency principle means that the minimum rent of S$10,000 per year will be used to compute the total or average contractual rent amount payable for the purpose of assessing the amount of dutiable consideration under the lease.

(3) Two possible rents and the maximum or minimum amount is not ascertainable

This is a situation where there are two possible rent amounts as in Illustrations 1 and 2 but where one of the rent amounts is unascertainable at the point of stamping due to events which have not occurred, for instance where the monthly rent payable is based on the monthly gross turnover of the tenant and as such, the parties are not able to ascertain the maximum or minimum amount payable under the lease, as illustrated below.

Illustration 3

Under a lease agreement, a landlord lets a shop to a tenant and the rent amount payable is determined as follows:-

1. If the adjoining unit is not tenanted, rent is S$10,000 per month;

2. If (and from the date) the adjoining unit is tenanted, rent is 5% of the tenant's monthly gross turnover at the shop.

In the above illustration, two possible rent amounts may be payable depending on whether the adjoining unit is tenanted. However, unlike illustrations 1 and 2, the parties cannot ascertain the maximum or minimum total or average consideration payable under the lease at the time of stamping. In such a case, the contingency principle has been applied in certain jurisdictions such that the amount of consideration that may be ascertained is the dutiable consideration, which in this case is S$10,000 per month.

Practical Application

As can be seen from the above scenarios, the contingency principle may apply in one way or another to impact the dutiable amount under a lease. We would like to highlight that the above is not meant to be a comprehensive account of how the contingency principle works or as a guide to determine the consideration that is dutiable. For the latter, our statutory regime would also impact the consideration that is dutiable.

For example:

- Section 25(2) of the Act provides that where the rent or any other consideration payable by the lessee under a lease cannot be ascertained or estimated at the time that the lease is presented for stamping (whether because the consideration depends on some future contingency or for any other reason), the Commissioner may assess the duty payable based on the open market rent for the leased property as if the open market rent were the rate or average rate of rent per annum under the lease and there were no other consideration payable under the lease; and

- Section 25(3) of the Act provides that if the consideration payable by the lessee under a lease can be ascertained or estimated at the time that the lease is presented for stamping but the duty that may be charged on the instrument (whether as a lease or a conveyance on sale or both) apart from this section is less than the duty that would be payable based on the open market rent for the property, the Commissioner may assess the duty payable based on the open market rent as if the open market rent were the rate or average rate of rent per annum under the lease and there were no other consideration payable under the lease.

In view of the above sections, it is important to note that the dutiable amount of consideration that is ascertained using the contingency principle would be subject to the considerations set out in these sections.

Practically, the parties may seek adjudication from IRAS on the stamp duty payable in such circumstances and parties are advised to do so no later than the due date for stamping in order to avoid any late payment penalty.

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