

Information Circular No: 85

Stamp Duties Act 1923

Part 4AA - Corporate Group Exemptions

Issued 18 June 2015

Replaces Information Circular 77

Duty is imposed and collected in South Australia in accordance with the provisions of the *Stamp Duties Act 1923* (the "Act") and the *Taxation Administration Act 1996* (the "TAA").

Duty is payable pursuant to the Act on the conveyance of property from one person to another; and under Part 4 of the Act, on a notional acquisition of an interest in the underlying local land assets of a land holding entity.

Prior to the introduction of Part 4AA of the Act, stamp duty relief was provided to eligible transactions undertaken to restructure a corporate group in the form of an *ex gratia* relief payment made by the Minister for Finance, pursuant to an administrative scheme.

A stamp duty exemption is available for all corporate reconstruction transactions undertaken on or after 18 June 2015 to which Part 4AA of the Act applies (the "Exemption").

The Exemption is based upon eligibility criteria that seek to ensure that corporate groups that operate in South Australia can realise the most advantageous deployment of property amongst their group members.

Corporate group restructuring transactions completed in the 12 month period up to 18 June 2015 will continue to be eligible for stamp duty relief subject to the criteria set out in RevenueSA Circular No 227 requiring applications to be approved by the Minister of Finance and related Deeds of *Ex Gratia* Relief to be entered into by the Minister and the relevant entities.

Exemption from duty

If the Commissioner of State Taxation (the "Commissioner") is satisfied that Part 4AA of the Act applies to a transaction, the Commissioner must exempt the transaction from duty [Section 102L(1)].

If the Commissioner exempts a transaction from duty, the Commissioner must assess the transaction, and any instrument that gives effect to, acknowledges, evidences or records the transaction, as exempt from duty [Section 102L(2)].

Application for exemption

A member of a corporate group may apply to the Commissioner for an Exemption at any time before, or within five years after, the completion of the transaction to which the application relates [Section 102M(1)].

The Application Form is available on www.revenuesa.sa.gov.au.

All relevant sections of the Application Form must be completed and any additional supporting information requested is to be attached and numbered according to the section to which it refers.

An application in relation to a proposed transaction must be accompanied by draft copies of all instruments that it is intended will give effect to, or acknowledge, evidence or record, the transaction [Section 102M(2)].

The Commissioner may require a member of the corporate group applying for an Exemption to provide such additional information or evidence as the Commissioner may require for the purpose of determining whether the transaction, or any instrument connected to the transaction, is exempt from duty [Section 102M(3)].

The Commissioner may require the information or evidence to be given on oath or verified by statutory declaration [Section 102M(4)].

If the Commissioner determines to exempt from duty a transaction, or a proposed transaction, in relation to which an application has been made under this section, the Commissioner must advise the applicant in writing that the transaction, and any instruments giving effect to, or acknowledging, evidencing or recording, the transaction, are exempt from duty [Section 102M(5)].

Transactions to which the Exemption applies

Part 4AA of the Act applies to:

- ▶ a transaction involving a conveyance of property, or an agreement to convey property, from a member of a corporate group to another member, or to other members, of a corporate group; and
- ▶ a transaction whereby, under Part 4 of the Act, a member of a corporate group notionally acquires from another member of the same corporate group an interest in the underlying local land assets of a land holding entity;

if:

- ▶ the corporate group's interest in the property the subject of the transaction is not diminished as a result of the transaction;
- ▶ the purpose, or one of the purposes, of the transaction is to change (i) the structure of the corporate group; or (ii) the holding of assets within the corporate group;
- ▶ the transaction does not result in property of the corporate group being held by a member of the corporate group as trustee of an ineligible trust; and
- ▶ the transaction is not part of a tax avoidance scheme within the meaning of Part 6A of the TAA [Section 102K].

An Exemption may be available to a transaction involving the transfer of a single asset or a single parcel of land between members of the same corporate group and it is not necessary to convey any particular minimum percentage of the assets of a group member.

Example 1

The parent corporation of a corporate group is a holding corporation for two wholly owned subsidiary corporations. In addition, the parent corporation itself owns land, which it leases to one of the subsidiary corporations. The parent corporation's land accounts for 15% of its total assets.

In order to facilitate the conversion of the parent corporation into a pure holding corporation and change the holding of assets within the corporate group, the parent corporation proposes that it convey its land to the subsidiary which leases the land.

Subject to all of the other requirements being met, the Exemption will be available.

Corporate groups

A **corporate group** is comprised of a parent corporation and the subsidiaries of the parent corporation [Section 102J(3)].

Where a corporation (A) has:

- ▶ a direct or indirect interest in another corporation (B) that is a proportionate interest of 90% or more; or
- ▶ a direct and indirect interest in another corporation (B) that, in combination, constitutes a proportionate interest of 90% or more,

then,

- ▶ A is the **parent corporation** of B; and
- ▶ B is a **subsidiary** of A [Section 102J(1)].

Direct and indirect interests

In order to establish the relevant corporate group and its members, consideration is to be given to the types of interests a corporation has in any other corporation(s).

If a corporation (A) holds securities of another corporation (B), A has a direct interest in B [Section 102I(1)].

The direct interest that A has in B is to be expressed as a proportionate interest calculated by determining the percentage of B's total securities held by A [Section 102I(2)].

Two corporations are related corporations if:

- ▶ one has a direct interest in the other; or
- ▶ a series of such relationships can be traced between them through another or other related corporations [Section 102I(3)].

If a corporation (A) has a direct interest in a corporation (B) which is related to another corporation (C), A has an **indirect interest** in C [Section 102I(4)].

The indirect interest that a corporation has in another corporation is to be expressed as a proportionate interest calculated by multiplying together:

- ▶ a percentage representing the proportionate interest of A in B; and
- ▶ a percentage representing B's proportionate interest in C;

and expressing the result as a percentage [Section 102I(5)].

Example 2

Corporation W holds 30% of Corporation X, which in turn holds 75% of Corporation Y, which in turn holds 50% of Corporation Z, with each successive holding arising by way of a direct interest.

In this case Corporation W's indirect interest in Corporation Z is to be expressed as a proportionate interest of 11.25%.

Corporation W also has an 80% direct interest in Corporation Z.

Corporation W therefore has a direct and indirect interest in Corporation Z, which in combination constitutes a proportionate interest of 91.25% (being the total of the indirect interest of 11.25% and the direct interest of 80%).

If corporation A is not entitled (whether directly or indirectly) to cast, or control the casting of, 90% or more of the maximum number of votes at a general meeting of corporation B, B is not a subsidiary of A [Section 102J(2)].

Example 3

Corporation L has a 100% direct interest in Corporation M and a 50% direct interest in Corporation N.

The other 50% interest in Corporation N is held by another person, as Corporation N was established in order to facilitate a joint venture.

The maximum number of votes Corporation L can control at general meetings of both Corporations M and N is in proportion to its interests in the corporations (being 100% and 50% respectively).

In light of the above, Corporations L and M constitute a corporate group, with Corporation L being the parent corporation and Corporation M being a subsidiary.

However, Corporation N is not a member of a corporate group with either Corporation L, or Corporations L and M together, as:

- ▶ both Corporation L's (i) proportionate interest and (ii) entitlement to cast the maximum number of votes at a general meeting of Corporation N fall below the minimum 90% thresholds for there to be a corporate group comprising Corporation L and Corporation N; and
- ▶ only Corporation M is a subsidiary of Corporation L.

Conditions of exemption

An exemption granted in relation to a proposed transaction is subject to a condition that the applicant will, within two months after the transaction occurs, advise the Commissioner in writing if:

- ▶ the actual transaction, or any circumstances relating to it, differs materially from the proposed transaction, or any circumstances of the proposed transaction, as specified in the exemption application; or
- ▶ any information relevant to the transaction, or to any circumstances relating to it, differs materially from the information specified in the exemption application [Section 102N].

Example 4

At the time of applying for an exemption in relation to a proposed transaction involving the transfer of land from Corporation D to Corporation C, Corporation C had a 100% direct interest in Corporation D, such that Corporation C was the parent corporation of Corporation D, and hence Corporations C and D constituted a corporate group.

Following receipt of advice from the Commissioner that the proposed transaction was exempt from duty, and prior to the transaction occurring, Corporation C sold 49% of its interest in Corporation D to another corporation that was not a member of the corporate group.

Upon completion of the sale, Corporation C:

- ▶ ceased to have a proportionate interest of 90% or more in Corporation D; and
- ▶ ceased to be entitled to cast 90% or more of the maximum number of votes at a general meeting of Corporation D.

Consequently, Corporation D ceased to be a subsidiary of Corporation C, and Corporations C and D ceased to be members of a corporate group.

The transaction the subject of the Commissioner's exemption was then undertaken.

As the proposed transaction involved the conveyance of property from a member of a corporate group to another member of the corporate group, and the actual transaction differed materially from the proposed transaction, the Commissioner must be advised.

Revocation of exemption

The Commissioner may revoke an exemption granted if:

- ▶ the Commissioner ceases to be satisfied that Part 4AA of the Act applies to the exempted transaction; or
- ▶ a party to the exempted transaction fails to comply with a condition under Section 102N; or
- ▶ the Commissioner becomes aware that:
 - any draft copies of instruments accompanying the application for the exemption differ in a material particular from the corresponding instruments submitted for assessment by the Commissioner; or
 - the applicant for the exemption provided false or misleading information, or failed to provide relevant information, in support of the application [Section 102O].

Duty payable if transaction ceases to be exempt

If the Commissioner determines to revoke an exemption granted in relation to a transaction, the following applies:

- ▶ the Commissioner must give written notice of the determination to the parties to the transaction or to the parent corporation of the corporate group to which the parties belong or belonged; and
- ▶ if the exemption is revoked after the transaction takes place:
 - duty is payable in relation to the transaction from the date of the transaction;
 - the liability of the parties to pay duty is to be assessed in relation to the circumstances applying at the date of the transaction as if the transaction had not been an exempted transaction;
 - the duty chargeable on an instrument is to be calculated according to the rates in force as at the date of the instrument;
 - for the purposes of Section 20 of the Act, the duty is to be regarded as having become chargeable on any relevant instrument in consequence of the Commissioner's determination to revoke the exemption;
 - the parties to the transaction may, at the discretion of the Commissioner, be liable to pay interest and penalty tax as if the failure to pay duty at the date of the transaction was a tax default under the TAA; and
 - the members of the corporate group to which the parties to the transaction belong or belonged are jointly and severally liable for payment of the duty [Section 102P].

Definitions

For the purposes of Part 4AA of the Act, the following definitions are applicable:

Property

From 18 June 2015, property includes land and prescribed goods [Part 4A Divisions 3 and 4].

Corporation

Corporation has the same meaning as in section 9 of the *Corporations Act 2001* of the Commonwealth and includes a unit trust scheme [Section 102H(1)].

A unit trust scheme means an arrangement made for the purpose, or having the effect, of providing for persons having funds available for investment facilities for the participation by them, as beneficiaries under a trust, in any profits or income arising from the acquisition, holding, management or disposal of any property subject to the trust [Section 2(1)].

Security

A security of a corporation includes (i) an issued share of the corporation and (ii) if the corporation is a unit trust scheme, a unit issued under the scheme [Section 102H(1)].

Hold

A person holds property (including the security of a corporation) if the person:

- ▶ is registered as the holder; or
- ▶ is beneficially entitled to the property; or
- ▶ controls the exercise of rights attached to the property [Section 102H(1)].

Unit trust schemes

A reference to anything done by or held by a unit trust scheme is to be taken to refer to the thing being done by or held by a trustee or custodian of the unit trust scheme as trustee or custodian of that unit trust scheme [Section 102H(2)(a)].

A corporation that is a unit trust scheme is taken to be a party to a transaction if the trustee or custodian of the unit trust scheme enters into the transaction as trustee or custodian of the scheme [Section 102H(2)(b)].

Motor vehicles

A transfer of the registration of a motor vehicle will be taken to be a conveyance of the vehicle from the transferor to the transferee [Section 102H(2)(d)].

Partnerships

A corporation that is a partner in a partnership is to be regarded as beneficially entitled to a proportionate share in each and every asset of the partnership, unless the Commissioner considers, having regard to the circumstances of the corporation and any relevant corporate group of which the corporation is a member, that this deeming would operate unfairly [Sections 102H(2)(c) and 102H(3)].

Ineligible trusts

In order for the Exemption to be available, the transaction cannot result in property of the corporate group being held by a member of the corporate group as trustee of an ineligible trust [Section 102K(e)]. An ineligible trust is a discretionary trust that is not a unit trust [Section 102H(1)].

A discretionary trust is an arrangement, however made, under which a person holds property, and the beneficial interest in all or any part of that property may be vested in a person (in the Act referred to as an object of the discretionary trust) on the exercise of a discretion, whether subject to any other contingency or not and whether the exercise of the discretion is obligatory or optional [Section 2(1)].

The availability of the Exemption is not precluded where an ineligible trust is the parent corporation and/or the conveying member of a corporate group, provided the recipient corporation is not a trustee of an ineligible trust.

Graeme Jackson
COMMISSIONER OF STATE TAXATION

26 November 2015

Further Information

Further information in relation to any of the above taxation measures can be obtained from RevenueSA.

Location	RevenueSA State Administration Centre 200 Victoria Square East ADELAIDE SA 5000
Postal	Commissioner of State Taxation RevenueSA GPO Box 1353 ADELAIDE SA 5001
Telephone	(08) 8226 3750
Facsimile	(08) 8226 3737
Email	stamps@sa.gov.au
Website	www.revenuesa.sa.gov.au