

SOUTH AUSTRALIA



STATE TAXATION OFFICE

Stamp Duties

Circular No. 146

VARIATION OF THE TERMS OF A DISCRETIONARY TRUST

A number of requests have been received seeking clarification of the stamp duty liability of taxpayers in relation to instruments which vary the terms of a discretionary trust. This Circular provides clarification in situations where a trust is varied either by adding or removing a person as a potential beneficiary, or where an instrument otherwise varies potential beneficial interests between objects of the trust.

RULING

Section 71(3)(a)(iii) of the *Stamp Duties Act 1923* (“the Act”) deems an instrument to be a conveyance operating as a voluntary disposition *inter vivos* if it effects, acknowledges, evidences, or records a transfer of a beneficial interest in property subject to a trust, or a potential beneficial interest in, or in relation to, property subject to a discretionary trust, whether or not any consideration is given.

In other words, an instrument that varies the terms of the trust which results in the creation or variation of any beneficial interest, or potential beneficial interest in property subject to the trust, will be an instrument for the purposes of Section 71(3)(a)(iii). Such an instrument is liable to *ad valorem* duty.

Further, Section 71(8) of the Act deems such an instrument to be a conveyance “... *as if it transferred the beneficial interest in the property that the transferee would have if the discretion under the discretionary trust were so exercised as to confer upon him the greatest benefit in relation to that property that can be conferred upon him under the discretionary trust*”.

Accordingly, an instrument is deemed to have conveyed the entire trust property where a trustee of a trust, or any other person who has the power to do so under the trust instrument, adds or removes a person as a potential beneficiary under a discretionary trust, or varies the potential beneficial interests among existing objects. *Ad valorem* duty is payable on the “net value” of the trust as at the date of the variation.

The “**net value**” of a trust is the sum of the market values of all properties of the trust less amounts for which the trustee has a right of indemnity. These amounts are generally the liabilities of the trust.

Section 71 of the Act states that:

“potential beneficial interest” means the rights, expectancies or possibilities of an object of a discretionary trust in, or in relation to, property subject to the discretionary trust.

Some examples of instruments which are **liable** to *ad valorem* duty are:

- An instrument by which a corporate trustee varies a discretionary family trust deed to remove a family member as a potential beneficiary.
- An instrument by which a discretionary trust is varied by adding a person as a potential beneficiary in respect of capital.

Some examples of instruments which are **exempt** from *ad valorem* duty are:

- An instrument by which a member of a family group who is included as a potential beneficiary under a discretionary trust, surrenders or renounces his or her potential beneficial interest to another member of the family group who is continuing as a potential beneficiary.

Pursuant to Section 71(5)(g) of the Act, an exemption from *ad valorem* duty applies to this form of vesting if the instrument that created the discretionary trust is *duly stamped*. It is recognised that such an instrument does not vary the terms of the trust, but it does result in the vesting of a potential beneficial interest. The instrument is exempt from *ad valorem* duty, but if it is drawn as a Deed it is chargeable with \$10 nominal duty.

- An instrument that varies any term of a trust (eg: banking powers), but **does not** involve the creation or variation of any beneficial interest, or potential beneficial interest in property subject to a trust, is deemed not to be a conveyance operating as a voluntary disposition *inter vivos*. Such an instrument is exempt from *ad valorem* duty if the instrument that created the trust is *duly stamped*. If the variation instrument is drawn as a deed it is chargeable with \$10 nominal duty.
- An instrument which transfers a potential beneficial interest in property subject to a discretionary trust, where the transfer is from one member to another member of the family group.

LODGEMENT OF INSTRUMENTS

An instrument varying the terms of a discretionary trust must be lodged for the opinion of the Commissioner and the opinion form should include a submission detailing the facts and circumstances affecting the variation instrument. If the variation instrument is liable to *ad valorem*

duty, it should be accompanied by the relevant financial statements of the trust as at the date of variation.

ENQUIRIES

Any enquiries relating to this ruling may be directed to:

Location

State Taxation Office
Taxpayer Services
Ground Floor, State Administration Centre
200 Victoria Square East
ADELAIDE SA 5000

Postal

Commissioner of Stamps
State Taxation Office
Box 1353 GPO
ADELAIDE SA 5001

Telephone Enquiries

(08) 8226 3728, (08) 8226 3732 or (08) 8226 3716.

Facsimile Enquiries

(08) 8226 3737

30 January 1997

COMMISSIONER OF STAMPS