Stamp Duty

Land Holder

Guide to Legislation

This is a general guide to the provisions of Part 4 of the *Stamp Duties Act 1923*.

Part 4, Stamp Duties Act 1923

RevenueSA
DEPARTMENT OF TREASURY AND FINANCE

Government of South Australia

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Contents

This general guide to the provisions of Part 4 of the *Stamp Duties Act 1923* (the "Act"), more commonly known as the 'land holder provisions', is not intended to be a complete statement of the law and must not be construed to waive or modify any legal obligation provided by the Act.

This Guide to Legislation (the "Guide") deals with:

- general principles of liability to duty;
- prescribed interest;
- group;
- aggregation of interests;
- land holding entity;
- land assets;
- determination of value;
- calculation of tax payable;
- South Australian goods;
- 102B Return statement;
- rebates;
- exemptions and related matters;
- multiple incidences of duty;
- recovery;
- transitional provisions; and
- anti-avoidance provisions.

The contents of this Guide are current at the time of printing but may be subject to change in the future.

We hope you find this publication to be worthwhile and we would certainly welcome any comments or suggestions that would help us to improve it.

For further details on any matters relating to the Act mentioned in this Guide, please feel free to contact RevenueSA on (08) 8226 3750

Mike Walker

COMMISSIONER OF STATE TAXATION

13 March 2014

Introduction

Land holder duty is imposed and collected in South Australia in accordance with the provisions of the Act and the *Taxation Administration Act 1996* (the "TAA").

The Commissioner of State Taxation (the "Commissioner") is responsible for the administration of the Act and the TAA.

The land holder provisions contain the following core criteria:

- if a person or a group acquires an interest of 50% or more of the shares or units of a private company or trust and that entity holds, directly or indirectly, local land assets of $1 million or more, conveyance rates of duty will apply; or
- if a person or a group acquires 90% or more of the shares or units of a listed company or public unit trust scheme conveyance duty will apply at a rate of 10% of the amount of duty otherwise payable.

The administrative provisions relating to assessments and collection of duty and any interest and/or penalty tax, lodgment of objections and appeals, and the appointment of liquidators, trustees and agents are found in the TAA.

General Principle of Liability to Duty

A person or group that acquires a **prescribed interest**, or increases a prescribed interest, in a **land holding entity** notionally acquires an interest in the **underlying local land assets** of the entity and is liable to duty in respect of the notional acquisition [**Section 100(1)**].

Transactions are dutiable as a result of a person or group:

- acquiring or having a prescribed interest in a land holding entity; or
- increasing a prescribed interest already held in a land holding entity [**Section 100(2)**].

A transaction, as a result of which a person or group has a prescribed interest or increases a prescribed interest, is dutiable even if the person or group is not a party to the transaction or has only a passive role in the transaction [**Section 100(3)**].

For example, any of the following is capable of being a dutiable transaction:

- an allotment of shares in a company or units in a unit trust scheme;
- the variation or abrogation of rights attaching to shares in a company or units in a unit trust scheme;
- the redemption, surrender or cancellation of shares in a company or units in a unit trust scheme; or
- the addition or retirement of a partner in a partnership with assets comprising shares in a company or units in a unit trust scheme [**Section 100(4)**].

If a **relevant entity** (i.e. a private company, a private unit trust scheme, a listed company or a public unit trust scheme) acquires a local land asset and pays conveyance rates of duty on the acquisition, and as a result of the acquisition becomes a land holding entity, the transaction is not liable to duty under this Part of the Act [**Section 100(5)**].

If a person or group has a prescribed interest in a relevant entity, which becomes a land holding entity only as a result of an increase in the value of pre-owned land beyond the $1 million threshold, no liability to duty arises under this Part of the Act.

A prescribed interest is defined to mean:

- in relation to a private company or private unit trust scheme – a **proportionate interest** in the entity of 50% or more; and
- in relation to a listed company or a public unit trust scheme – a proportionate interest of 90% or more [**Section 91(1)**].

A proportionate interest in a relevant entity (a private company, private unit trust scheme, listed company or a public unit trust scheme) means:

- for a person or group that has a **direct interest** or an **indirect interest** in the entity – the percentage representing the extent of that interest; or
- for a person or group that has both a direct interest and an indirect interest in the entity – an aggregate percentage representing the extent of both those interests [**Section 91(1)**].

A person or group has a direct interest in an entity if the person or group holds a share or unit in the entity. For the purposes of this Part of the Act, a person **holds** a share or unit in a relevant entity if the person:

- is registered as the holder;
- is beneficially entitled to the share of unit; or
- controls the exercise of rights attached to the share or unit [**Section 91**].

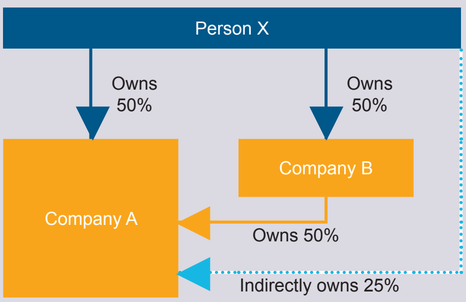
A person or group has an indirect interest in a private company or private unit trust scheme (entity B) if the person or group has a direct interest in a private company or private unit trust scheme (entity A) which is a **related entity** to entity B [**Section 95**].

Two relevant entities are related entities 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 entities (intermediate entities) [**Section 94**].

The direct and/or indirect interest that a person or group has in a relevant entity is expressed as a proportionate interest [**Section 91(1)**].

Example

Person X owns 50% of the shares in Company A and also owns 50% of the shares in Company B, which owns 50% of the shares in Company A.



Person X then has a direct interest in Company A of 50% and an indirect interest in Company A of 25%. Person X therefore has a proportionate interest in Company A of 75%.

The proportionate interest of a person or group is the highest of the following:

- a percentage representing the proportion of votes that the person or members of the group would be entitled to exercise (or control) at a general meeting of shareholders or unit holders assuming all shareholders or unit holders exercised their voting rights;
- a percentage representing the extent to which a person or member of the group is entitled to participate in dividends or distributions of income; or
- a percentage representing the extent to which the person or members of the group would be entitled to participate in the distribution of assets on a winding up of the relevant entity [**Section 93(3)**].

The proportionate interest of a person or group in a relevant entity is to be determined as if any power that the person has, or the members of the group or any of them have, to increase the extent of an interest (by varying the constitution documents of the relevant entity or in any other way) has been exercised so as to maximise the relevant interest in the relevant entity [**Section 93(4)**].

Example

Person X owns 48% of the issued voting shares in Company A and also owns non voting convertible preference shares in Company A. The constitution of Company A provides that the owner of non voting convertible preference shares may convert these shares to ordinary voting shares.

In the event of conversion, Person X would own 52% of the issued voting shares in Company A. Person X's proportionate interest in Company A is 52%.

Unit trust scheme

A unit trust scheme is an arrangement under which investors may acquire rights to participate, as beneficiaries under a trust, in profits, income or distribution of assets arising from the acquisition, holding, management, use or disposal of property [**Section 91(1)**].

Property is deemed to be held beneficially by a unit trust scheme if it is held by the trustee of the scheme for the unit holders [**Section 91(2)**].

A relevant entity can have an interest in land directly as the beneficial owner, or indirectly through a related entity (refer to 'land holding entity' section), a discretionary trust or a partnership. A part or the whole of such land held indirectly is attributed to the relevant entity.

Discretionary trust

A relevant entity or other person that is an object of a discretionary trust is deemed to be beneficially entitled to the trust property unless:

(a) the relevant entity or other person satisfies the Commissioner that such deeming operates unreasonably in the circumstances of a particular case [**Section 91(3)(a)**]; and

(b) the Commissioner determines that the relevant entity or other person is not, in the circumstances of the particular case, to be regarded as beneficially entitled to the trust property [**Section 91(3)(b)**] .

This deeming provision enables:

- the tracing of direct and indirect interests through a discretionary trust, as a relevant entity that is the object of a discretionary trust, is deemed to be beneficially entitled to the property of the discretionary trust;

- a relevant entity's notional interest in the assets of other private companies or private unit trust schemes, to be traced through a discretionary trust, as a relevant entity that is the object of a discretionary trust is deemed to be beneficially entitled to the property of the discretionary trust.

Without this 'look through', the aggregation of the direct and indirect interests of a person in a land holding entity, or a relevant entity's notional interest in the underlying South Australian land, would be blocked by the placing of a discretionary trust interest holder in a chain of relevant entity interest holders.

The objects are deemed to be beneficially entitled to any South Australian land of the discretionary trust. If the South Australian land of the discretionary trust is valued at $1 million or more, any relevant entity that is an object of the discretionary trust will be a land holding entity for the purposes of Part 4 of the Act, unless they satisfy the Commissioner that this deeming provision operates unreasonably.

If a discretionary trust acquires a prescribed interest or increases a prescribed interest in land holding entity, a relevant entity or other person that is an object of the discretionary trust, is deemed to hold that prescribed interest or increased interest and will be liable to duty under Part 4 of the Act, unless they satisfy the Commissioner that this deeming provision operates unreasonably.

Partnership

A relevant entity or other person that is a partner in a partnership is deemed to be beneficially entitled to a proportionate share in each and every asset of the partnership, determined according to the greater of either the relative entitlement to participate in the surplus property of the partnership or the relative capital contribution of the partner (being equity and any loan capital) [**Section 91(4)** and **(5)**].

The Commissioner has the discretion to determine the proportionate share of a partner on a basis other than participation in surplus property or relative capital contribution [**Section 91(6)(a)(ii)**].

The Commissioner will take into account the terms of any partnership agreement and any instrument effecting a change in a partnership, which clearly stipulate each partner's proportionate share in partnership assets.

In determining the relative capital contribution of partners, any loan to the partnership is considered to be loan capital and a capital contribution unless the Commissioner is satisfied that the loan was entered into as part of a 'genuine business arrangement'. Such a loan will bear the hall marks of an open market loan such as a specified interest rate, terms of repayment, security, if any, and it will rank in priority to the equity capital in the event of dissolution of the partnership.

Loan capital is any loan provided by a partner to attain or maintain a partner's proportionate share in the partnership. Such loans, generally long term in nature, will be aggregated with the partner's equity to determine the relative capital contribution of the partner for the purposes of determining the partner's proportionate share in the partnership.

The entitlements attaching to the partner's loan will be considered in each situation to determine whether the loan is part of an arrangement to avoid or reduce duty under Part 4 of the Act.

The following example illustrates this distinction:

Example

According to the ABC Partnership Agreement, A (a relevant entity), B and C are equal partners and carry on various investment activities. Each partner was required to contribute $100 capital on the formation of the partnership. The Balance Sheet of the Partnership after the first year of trading is as follows:

Assets	
Land	$60
Bonds	$200
Shares	$240 (100% of land holding entity XYZ Pty Ltd)
Liabilities	
Loan - Partner B	$50
Accounts payable	$100
Provision for Taxes	$100
Partnership Funds	
Partner A	$100
Partner B	$50
Partner C	$100

In the present circumstances, the loan from Partner B to the Partnership increases Partner B's proportionate share so that all partners would be treated as having an equal interest in the Partnership. In this case the individual interest in land of each partner, including relevant entity A, is $20 (being 1/3 of the land assets value) plus an interest in the land of XYZ Pty Ltd.

Now assume that the partnership is facing cash-flow issues, however, only Partner C is in a position to provide funds to the Partnership during this difficult financial period. Partner C therefore lends the Partnership $75 on an arm's length basis, so that the Balance Sheet looks as follows:

Assets	
Cash at Bank	$75
Land	$60
Bonds	$200
Shares	$240 (100% of land holding entity XYZ Pty Ltd)
Liabilities	
Loan - Partner B	$50
Loan - Partner C	$75
Accounts payable	$100
Provision for Taxes	$100
Partnership Funds	
Partner A	$100
Partner B	$50
Partner C	$100

In these circumstances, the loan from Partner C to the Partnership will not be treated as a capital contribution. The Commissioner will consider whether this loan is part of an arrangement to avoid or reduce duty. The partner's individual interest in land of is $20 plus an interest in the land of XYZ Pty Ltd.

A group for the purposes of Part 4 is a 'group of associates' [**Section 91(1)**] and the relationships that can give rise to associate status are drafted broadly to ensure that contrived ownership splitting is not employed to avoid the payment of stamp duty when control of South Australian land is effectively passed.

A person is an associate of, or associated with, another if:

- they are married or in a close personal relationship;
- one is the parent, child, brother or sister of the other;
- they are in a partnership;
- they are companies which are related bodies corporate for the purposes of the *Corporations Act 2001* (Cwlth);
- one is a company and the other is a director or executive officer of, or shareholder in, the company;
- they are both trustees of a trust or one is a trustee of the trust and the other is a beneficiary of the trust; or
- a chain of relationship can be traced between them under one or more of the above points.

In circumstances where a person has an interest in a land holding entity and other persons who are associated with the person together have acquired a prescribed interest in the entity, the group will be liable to duty under Part 4, unless the person satisfies the Commissioner that the association with the other persons has not arisen from a common commercial interest and the persons in the relationship will act entirely independently of each other [**Section 91(8)**].

A corporate group, including the parent entity and its related bodies corporate and those bodies corporate that can be traced to the parent entity through a chain of relationships, constitute a group of associates.

A married couple will be associated unless they establish to the Commissioner's satisfaction that their association has not arisen as a result of a common commercial interest or purpose and they will act entirely independently of each another.

The executive officer of a company means a person who is concerned in, or takes part in, the management of the company (regardless of the person's designation and whether or not the person is a director of the company) [**Section 91(1)**].

Although this definition is potentially quite wide it will generally be taken not to apply, for example, to a human resources manager or an administrative assistant unless they have a significant role in managing the company.

A company and the shareholders of the company are associated and form a group. In exercising the discretion to disregard the association between a listed company and shareholders in the company, shareholders with small parcels of shares in the company will be considered to be acting independently and not sharing a common interest or purpose with the company, unless another basis for the association exists.

Land Holding Entity

A relevant entity is a 'land holding entity' if the unencumbered value of the underlying **local land assets** of the relevant entity is $1 million or more [**Section 98**].

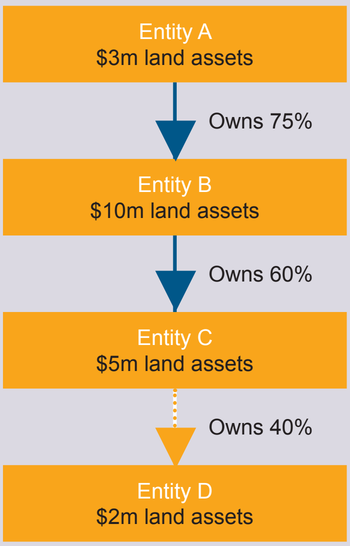
A 'local land asset' is a land asset consisting of an interest in land in South Australia [**Section 92(2)**].

The **underlying local land assets** of a relevant entity include the land assets held beneficially by the entity and its notional interests in the land assets of related entities [**Section 91(1)**].

A relevant entity has a notional interest in a land asset held beneficially by a private company or private unit trust scheme if the relevant entity holds a proportionate interest of 50% or more in the private company or private unit trust scheme, or if a chain of such proportionate interests of 50% or more can be traced between the relevant entity and the private company or private unit trust scheme [**Section 96(1)**]. A **significant interest** for the purposes of this calculation is a proportionate interest of 50% or more [**Section 91(1)**].

Example

Entity A holds a 75% proportionate interest in Entity B which has land assets of $10M. Entity B in turn holds a 60% proportionate interest in Entity C which has land assets of $5M. Entity C in turn holds 40% proportionate interest in Entity D which has land assets of $2M.



In this case Entity A has a notional interest in the land assets held beneficially by Entity B and Entity C but not in the land assets held by Entity D as the chain of 50% proportionate interests is broken between Entity C and Entity D.

Entity A has a notional interest in the land assets of Entity B
i.e. 0.75 x $10m =$7.5 million.

Entity A has a notional interest in the land assets of Entity C
i.e. 0.75 x 0.60 x $5m = $2.25 million.

Entity A also owns $3 million land directly.

Entity A therefore has land assets of $12.75 million for the purposes of Part 4.

A 'land asset' is an interest in land other than a mortgage, lien or charge or an interest under a warrant or writ [**Section 92(1)**].

An 'interest in land' includes any of the following:

- a lease or licence granted under
  - the *Mining Act 1971*;
  - the *Offshore Minerals Act 2000*; or
  - the *Petroleum and Geothermal Energy Act 2000*;
- a lease granted under the *Aquaculture Act 2001*, including a sublease of such a lease; and
- an interest conferred by a forestry property (vegetation) agreement (within the meaning of the *Forestry Property Act 2000*) [**Section 91(1)**].

A relevant entity's interest in land will include an interest in anything fixed to the land, including anything:

- separately owned from the land (other than where the separation of ownership occurs by virtue of or as a result of the operation of other legislation or law); or
- fixed to the land but notionally severed or considered to be legally separate to the land by virtue of or as a result of the operation of other legislation or law [**Section 92 (3)**].

In relation to an interest in land that is separately owned from the land, the Commissioner may determine that the interest will not be included if the separate ownership of the interest is not part of an arrangement to avoid duty under the land holder provisions [**Section 92(5)(a)**].

An interest in land of the relevant entity that is notionally severed or legally separated by operation of other legislation or law will not include an interest that is owned by another entity unless the entities are related and a person or group holds a significant interest in both, or either entity holds a significant interest in the other, either directly or through a chain of other entities [**Section 92(5)(b)**].

Example - Wind Farms

A company owns land upon which it carries on a business of primary production.

An electricity generation company, which has no common shareholders with the land owning company, has installed a series of power generating wind turbines on part of the land. The wind turbines are fixed to the land but are not considered to be owned by the land owning company due to the operation of the *Electricity Act 1996*.

In the event of the sale of a prescribed interest in the land owning company, the value of the wind turbines would not be aggregated with the value of the land.

In the event that a person acquires a prescribed interest in the electricity generation company, the value of the wind turbines would be included in the value of land assets of the electricity generation company.

Aggregation of Certain Interests Acquired by Persons who are not Associates

If a person or group acquires an interest in a land holding entity (a later transaction) that, when aggregated with an interest in the entity acquired by another person as a result of an associated transaction on the same day or within the preceding three years (a prior transaction), amounts to a prescribed interest in the entity, then the person or group is deemed to acquire that prescribed interest in the entity through that later transaction [**Section 101(1)(a)**].

The person or group and any other person acquiring an interest as a result of the associated transaction are jointly and severally liable for the payment of duty in respect of the acquisition [**Section 101(1)(b)**].

An 'associated transaction' is defined to mean, in relation to the acquisition of an interest in a land holding entity by a person or associated person, an acquisition of an interest in the entity by another person in circumstances in which:

- those persons are acting in concert; or
- the acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions [**Section 101(2)**].

Transactions captured involve two or more persons who are not 'associated' for the purposes of the Act but who in substance are acting for the same commercial or economic purpose or objective.

The Commissioner considers that two or more persons will be acting in concert where there is evidence showing a common purpose, object, an understanding, agreement or plan regarding the persons' acquisitions of interests in a land holding entity.

Where there has been no communication, directly or indirectly, or a tacit understanding, between persons, yet the transactions appear to arise spontaneously, the persons will not be considered to be acting in concert.

In considering whether acquisitions of interests in a land holding entity constitute 'substantially one arrangement, one transaction or one series of transactions', the Commissioner will consider the substance of the several acquisitions and in particular seek to determine whether there is some essential unity, some oneness, some unifying factor between the acquisitions.

Where it can be shown that transactions are separate and independent they will not be regarded as associated transactions.

The Commissioner will have regard to the following factors when determining whether acquisitions constitute 'associated transactions':

- the nature of any agreements, understandings or arrangements between the parties to the acquisitions of interests in the land holding entity;
- any association between the parties to any agreements, understandings or arrangements relating to one or some of the acquisitions of any interest in the land holding entity;
- whether there is any interdependence between the acquisitions including whether there was any contingency that one or some of the acquisition would not take place without the completion of others; and
- the timing of any acquisitions.

Example

Two persons, who are not associates, enter into an arrangement to acquire a prescribed interest, where Person A acquires 40% and Person B acquires 20%.

Without associated transaction provisions, neither Persons A nor B would have been liable to duty on the acquisition, however, these provisions operate to aggregate the acquisitions of Person A and Person B, so that Persons A and B have jointly acquired a prescribed interest of 60%, for the purposes of determining the notional acquisition that is liable to duty.

In the past, concerns have been raised that the aggregation provisions might operate to aggregate the interests of existing shareholders or unit holders in a land holding entity in circumstances where the company or unit trust scheme makes a *pro rata* issue of shares or units.

As a *pro rata* issue of shares does not result in any change in the relative proportionate interest of any shareholder or unit holder, RevenueSA does not regard such issues as giving rise to an associated transaction.

The provisions have yet to be applied by the Commissioner and are considered to be an effective deterrent to those persons whom might otherwise use this approach to reduce their stamp duty liability.

Calculation of Tax Payable

Initial dutiable transaction on prescribed interest acquisition

The duty in respect of a transaction under which a person or group acquires a prescribed interest in a land holding entity is:

- where the entity is a private company or a private unit trust scheme – the duty payable on a conveyance of land with the unencumbered value equivalent to the value of the acquirer's notional interest in the entity's underlying local land assets and underlying South Australian goods [**Section 102A(1)(a)**]; or
- where the entity is a listed company or a public unit trust scheme – 10% of the duty payable on a conveyance of land with the unencumbered value equivalent to the value of the acquirer's notional interest in the total of the entity's underlying local land assets and underlying South Australian goods [**Section 102A(1)(b)**].

Subsequent dutiable transaction on an increased prescribed interest acquisition

Duty on a transaction under which a person or group increases its prescribed interest in a land holding entity is calculated as follows:

$$D = d1 - d2$$

Where

D is the amount of the duty

d1 is the amount payable if the whole interest was acquired in a single transaction at the time of the acquisition

d2 is the amount payable if the pre-existing interest was acquired in a single transaction at the time of the increase [**Section 102A(2)**].

Value of notional interest

The value of the notional interest acquired in the underlying local land assets and underlying South Australian goods are determined as follows:

$$NV = TV \times P$$

Where

NV is the value of the notional interest acquired

TV is the total unencumbered value of all the entity's underlying local land assets and goods

P is the fraction representing the proportionate interest of the person or group in the entity [**Section 102(1)**].

Example		
Person X increases a prescribed interest in private Company A, which has total unencumbered local land valued at $1 million, from 50% to 60%.		
D	=	d1 – d2
d1	=	value of whole notional interest acquired x conveyance duty rate
		($1 million x 60%) x conveyance duty rate
		$600 000 x conveyance duty rate
		$26 830
d2	=	value of pre-existing notional interest x conveyance duty rate
		($1 million x 50%) x conveyance duty rate
		$500 000 x conveyance duty rate
		$21 330
D	=	$26 830 - $21 330
		$5500 (duty payable)

The duty calculated is subject to any applicable rebates. Refer to the section dealing with rebates in this Guide.

South Australian Goods

Under the land holder provisions, stamp duty is charged on the value of the acquirer's notional interest in the entity's underlying local land and South Australian goods.

South Australian goods mean goods that are used solely or predominantly in South Australia [**Section 91(1)**] but do not include the following goods:

- goods that are stock-in-trade;
- materials held for use in manufacture;
- goods under manufacture;
- goods held or used in connection with the business of primary production;
- livestock;
- a registered motor vehicle or a registered tractor; or
- a ship or vessel [**Section 91(1)**].

For the purposes of determining whether goods are used solely or predominantly in South Australia, the circumstances that exist at the time of the acquisition or increase of the relevant interest will be considered [**Section 91(12)(a)**].

However, if the Commissioner is satisfied that the location of the goods has been changed in order to obtain a reduction in duty – the circumstances that existed immediately before the change of location will be used in determining South Australian goods [**Section 91(12)(b)**].

Goods are considered to be used predominantly in South Australia if they are used more in South Australia than in any other Australian jurisdiction. In determining jurisdiction of predominant use, regard will be had, amongst other things, to the physical location of the goods and the place of commercial operation or application of the goods.

In addition the Commissioner may, if the Commissioner considers it to be fair and reasonable to do so in the circumstances of a particular case, exclude specified goods, or a specified class of goods, from the calculation of duty [***Section 102A(9)***].

The inclusion of goods within the Act was intended to assist in removing grey areas in relation to what assets are considered to be fixed to the land.

The Commissioner will utilise his discretion to exclude goods where it is clear that the goods have no ongoing connection or requirement for their use in relation to the land in question.

It is expected that in identifying the underlying South Australian goods of a land holding entity for the purposes of the Section 102B Return, the acquirer of the prescribed interest, or increased prescribed interest, will provide a separate listing of goods that they submit have no ongoing connection or requirement for their use in relation to the land.

Items such as paintings, furniture and stationary supplies are examples of things that bear no connection or requirement for their use in relation to the land owned by the landholder.

Example

A company owns South Australian land upon which a railway goods yard operates. The owner also owns locomotives and freight wagons that are regularly used and stored within the confines of the yard.

In the event of the sale of a prescribed interest in the land owning company, in the normal course the Commissioner would consider it fair and reasonable to exclude the rolling stock from the goods of the land owning company for the purposes of the calculation of duty under Part 4 of the Act.

Example

If a company is sold that is in the business of primary production and the land owned by the company has a dam on it which contains fish, the fish in the dam (if not considered to be excluded goods, as livestock) would be excluded by the Commissioner in the calculation of stamp duty.

Determination of Value

Upon the acquisition of a prescribed interest in a land holding entity, the value of local land assets and South Australian goods, is to be determined. The value is the market value of the asset at the time that the question of value falls to be determined and such market value must be based on the unencumbered value [**Section 99(2)**].

In determining the unencumbered market value of goods, for the purposes of Part 4 of the Act, the Commissioner considers that this value is the amount for which the goods could be exchanged between knowledgeable, willing parties in an arm's length transaction.

The depreciated or written down value of an asset or interest will generally not be accepted by the Commissioner as being representative of unencumbered value.

Further, in determining the value of an asset or interest, it is to be assumed that a hypothetical purchaser would, when negotiating the price for any asset or interest, have knowledge of all existing information relating to the asset or interest; and no account is to be taken of any amount that a hypothetical purchaser would have to expend to reproduce, or otherwise acquire a permanent right of access to and use of, existing information relating to the asset or interest [**Section 99(7)**].

These provisions allow the Commissioner to cause a valuation of an asset or interest to be made in circumstances where there is no evidence or there is unsatisfactory evidence provided as to the value of the asset or interest and, depending upon the merits of the case, pass the cost of making a valuation on to any person who is liable to pay duty in respect of the transaction, under Part 4 of the Act [**Section 99(3)**].

102B Return Statement

Where a person or group acquires or increases a prescribed interest in a land holding entity, the acquirer is required to lodge a return with the Commissioner and the payment of the relevant amount of duty within two months of the date of the dutiable transaction.

The Section 102B Return is available on www.revenuesa.sa.gov.au and needs to be completed and submitted to RevenueSA with the transfer documents and other supporting documentation for assessment [**Section 102B(1)**].

Section 102A(4)

Prior holdings in a land holding equity

If a person or group holds an interest in a relevant entity and the relevant entity acquires land so as to become a land holding entity, and *ad valorem* duty was paid on the land acquisition and subsequently the person or group acquires a prescribed interest in the entity, a rebate is available.

Duty is reduced in accordance with the following formula:

$$D = d1 - d2$$

Where

D is the amount of the duty

d1 is the amount payable if the whole interest was acquired in a single transaction at the time of the acquisition

d2 is the amount payable on a conveyance of the interest in the South Australian land (held by the landholding entity at the time that the person or group acquires a prescribed interest in the land holding entity) corresponding to the interest held by the person or group at the time the entity became a land holding entity.

Example

Persons A and B each hold four of the 10 issued shares in Company X and Person C holds two of the 10 issued shares in Company X. Company X acquires South Australian land with an unencumbered valued at $10 million and pays duty on the land acquisition at *ad valorem* rates (i.e. duty amounting to $543 830). Shortly after the acquisition, Person A purchases the shares in Company X held by Person B resulting in Person A holding a prescribed interest in Company X, (which is now a land holding entity) of 80%.

A has a notional interest of $8 million in the South Australian land held by Company X upon which duty calculated under Section 102A (1) is $433 830.

The Section 102A (4) rebate formula applies:

D	=	d1 – d2
d1	=	$433 830
d2	=	is the duty payable on a hypothetical acquisition of the interest held by Person A when company X became a land holding entity
		i.e. = (4/10th of $10 million) x conveyance rate = $213 830
D	=	$433 830 - $213 830
		$220 000 (duty payable)

Section 102A(5)

Three year rule

If any part of a prescribed interest in a land holding entity was acquired by the relevant person or group more than three years before the date of a dutiable transaction (the earlier transaction), duty will be rebated on the acquisition of a prescribed interest only by the percentage representing the extent of the earlier acquisition as a proportion of the prescribed interest as a whole.

Example

Company X, a land holding entity, owns South Australian land and goods with an unencumbered value of $10 million. Person A has held a 25% interest in Company X for more than three years before acquiring a further 50%.

Person A has a notional interest of $7.5 million in the South Australian land and goods of Company X upon which duty calculated under Section 102A(1) is $406 330 (i.e. duty on $7.5 million).

The Section 102A(5) rebate applies to the extent of 25% for the interest held for more than three years:

Rebate $= \dfrac{25\%}{75\%} \times \$406\,330$

$= \$135\,443.30$

Duty Payable $= \$406\,330 - \$135\,443.30$

$270 886.70

In so far as **Sub-Sections 102A(4)** and **(5)** both apply to an acquisition of a prescribed interest in a particular land holding entity, the provision that provides the higher benefit to the acquiring person or group will apply [**Section 102A(6)**].

Section 102A(7)

Financial products

If a person or group acquires or increases a prescribed interest in a land holding entity through the acquisition of financial products or units in a private unit trust scheme, and duty has been paid under this Act or a corresponding law in respect of the financial product or unit transaction, duty payable on a dutiable transaction is reduced by the amount calculated under the following formula:

$$R = A/B^{*} \times C$$

Where

R is the amount of the reduction

A is the total unencumbered value of all the entity's underlying local land assets and goods

B is the total unencumbered value of all the entity's assets held in South Australia, a corresponding jurisdiction or any other place

C is the sum of the duty paid under the Act or a corresponding law in respect of the relevant transaction.

* any decimal determined from this fraction is not rounded down.

Example - Trust with Interstate Assets

Company X, a non-South Australian registered company, owns South Australian land and goods with an unencumbered value of $10 million. Company X has total assets of $500 million in all jurisdictions, i.e. South Australian land and goods are 2% of the total assets of Company X.

All of the issued shares in Company X are acquired by Person A for $200 million and Person A pays the required duty at financial product rates on the shares acquired in another jurisdiction, amounting to $1.2 million.

Person A acquires a notional interest of $10 million in the South Australian land and goods of Company X upon which duty calculated under Section 102A(1) is $543 830.

The Section 102A(7) reduction

$$\mathbf{R} = \frac{\$10 \text{ million}}{\$500 \text{ million}} \times \$1.2 \text{ million}$$

= $24 000

Duty Payable = $543 830 - $24 000

$519 830

Example - Company with South Australian Assets Only

Company X, a South Australian registered company, owns South Australian land and goods with an unencumbered value of $10 million.

All of the issued shares in Company X are acquired by Person A for $2 million and Person A pays the required duty at financial product rates on the interests acquired amounting to $12 000.

Person A has a notional interest of $10 million in the South Australian land and goods of Company X upon which duty calculated under Section 102A(1) is $543 830.

The Section 102A(7) reduction

$$\mathbf{R} = \frac{\$10 \text{ million}}{\$10 \text{ million}} \times \$12\,000$$

= $12 000

Duty Payable = $543 830 - $12 000

$531 830

A transaction under which a person or a group acquires an interest in a land holding entity is exempt from duty under the land holder provisions if it takes place in circumstances in which a conveyance of an interest in the underlying local land assets would not attract *ad valorem* duty.

Section 102F(1)

Exemption applies if equivalent transaction in land is exempt (or does not attract *ad valorem* duty)

Example

Husband owns 100% of the shares of Company A whose only asset is the matrimonial home of Husband and Wife which is valued at $1.2 million. Husband transfers the shares to his Wife. As the transfer of the land between Husband and Wife would be exempt under Section 71CB of the Act, the transfer of the shares does not attract duty under Part 4.

Example - Family Farm

Section 71CC of the Act provides an exemption from stamp duty on the transfer of an interest in certain land, or land and goods from a natural person or the trustee for the natural person to a relative of the natural person, or a trustee for a relative of the natural person, if the Commissioner is satisfied:

- that the land to which the transfer relates is used wholly or mainly for the business of primary production and is not less than 0.8 hectares in area; and
- that the sole or principal business of the natural person who, or whose trustee, is the transferor is (immediately before the instrument) the business of primary production.

The exemption under Section 102F(1) will be available to the transfer of shares in a company that owns the family farm if:

- the land of the landholder is not less than 0.8 hectares in area;
- the land is 'used wholly or mainly for the business of primary production';
- the land holder owns more than one property, those properties must all be used for primary production;
- the transferor of the interests in the land holder and the transferee should have had, for 12 months preceding the transfer, a business relationship with respect to the use of the property for the business of primary production;
- the transferor of the shares should be a natural person or the trustee for that natural person; and
- the transferee of the shares should be a relative of the natural person transferor or that natural person's trustee or a lineal ancestor or spouse or domestic partner of the transferee natural person.

Section 102F(2)

Creditors schemes or arrangements

An acquisition of an interest in a land holding entity that takes place solely as a result of the making of a compromise or arrangement with the creditors of the land holding entity under Part 5.1 of the *Corporations Act 2001* (Cwlth) is exempt.

It should be noted that shareholder schemes of arrangement no longer qualify for exemption under this provision.

Section 102F(3)

Land used for business of primary production

If a transaction provides for either:

(i) the acquisition of all shares or units in a relevant entity from a person who holds, or from members of a group who together hold, those shares or units; or

(ii) the acquisition of shares or units in a relevant entity where the parties to the transaction are members of the same group;

and

- the underlying land assets are used wholly or mainly for the business of primary production; and
- the Commissioner is satisfied:
  - in the case where (i) above applies – that the transaction forms part of a sale as a going concern of the undertaking carried out on the land; and
  - in the case where (ii) above applies – that the undertaking carried out on the land is to continue without any change, or any significant change,

  then the value of any underlying South Australian goods held or used in connection with the undertaking carried out on the land that would be dutiable under the land holder provisions on account of the transaction, but for this subsection, will not be taken into account for the purposes of the calculation and imposition of duty under the land holder provisions.

Section 102G(1)

Maximising revenue

If it is possible under the land holder provisions to assess the incidence of duty in different ways in respect of the same transaction, duty will be assessed so as to maximise the return to the revenue but not so as to extend the incidence of duty beyond a single person or group identified in the assessment.

Example

As part of a single transaction, Person A acquires 60% and Person B acquires 40% of the shares in private company X, which holds more than $1 million in South Australian land. Person A and Person B are associates.

Person A has acquired a prescribed interest of 60% in company X and is liable to duty under Part 4 on that acquisition. The Group of associates, comprised of Person A and Person B, has acquired a prescribed interest of 100% in company X and is liable to duty under Part 4 on that acquisition.

In this case, an assessment will be raised identifying the Group and Person A will not be separately charged with duty.

Section 102G(2)

Multiple prescribed interests

If a person or a group acquires a prescribed interest in a land holding entity, and another person or group later acquires a prescribed interest in the land holding entity without diminishing the former prescribed interest, the Commissioner may, if satisfied that it is just and equitable to do so, exempt the later acquisition, wholly or partly, from duty under the land holder provisions.

Example

The shares of X Pty Ltd, a land holding entity, are divided into Class A and Class B shares.

The Class A shares confer rights to dividends but no rights to share in the distribution of assets on winding up of the company. The Class B shares confer no rights to dividends but do confer rights to share in the distribution of assets on the winding up of the company.

Person A acquires all the Class A shares and pays duty under the land holder provision on the acquisition of a prescribed interest in the company. Person B then acquires all the Class B shares.

In this case, the Commissioner could, if satisfied that it would be just and equitable to do so, grant relief to Person B under the above subsection.

Section 102G(3)

Transactions between individuals and group members

If a person holds a prescribed interest in a land holding entity and a group of which the person is a member acquires all or part of that prescribed interest from that person, the Commissioner may, if satisfied that it is just and equitable to do so, exempt the later acquisition, wholly or partly, from duty under the land holder provisions [**Section 102(3)(a)**].

If a person who is a member of a group acquires an interest in a land holding entity from another member of the group who holds a prescribed interest in the land holding entity, the Commissioner may, if satisfied that it is just and equitable to do so, exempt the later acquisition, wholly or partly, from duty under the land holder provisions [**Section 102(3)(b)**].

Section 102G(4)

Transactions between a group and an individual or subgroup

If a group holds a prescribed interest in a land holding entity and a person or group that is a member or subgroup of the group acquires all or part of that prescribed interest from the group, the Commissioner may, if satisfied that it is just and equitable to do so, exempt the later acquisition, wholly or partly, from duty under the land holder provisions.

Valuation of interest under contract or option to purchase land

If an interest in land consists of an interest arising under a contract or option to purchase the land, the interest is to be valued, for the purposes of the land holder provisions, by subtracting from the market value of the land the amount that the purchaser, under the contract or the holder of the option, would be required to pay in order to complete the purchase [**Section 102D**].

Example

Entity A contracts to purchase South Australian land from Entity B, for $10 million. Entity A pays a deposit of $1 million. The value of Entity A's interest in land arising under the contract is $10 million - $9 million = $1 million.

Concession for life insurance companies

If a person who acquires an interest in a land holding entity is a life company, any interests in the land holding entity acquired or held by the life company for different statutory funds are to be treated as if they were acquired or held independently by separate persons.

If a life company acquires or holds an interest in a land holding entity otherwise than for a statutory fund, that interest is to be treated as if it were acquired or held independently of, and by a separate person to, any interest acquired or held by the life company for a statutory fund.

For the purposes of the land holder provisions, a life company, its statutory funds, and any trustee, are not to be treated as associates except in a case where the Commissioner determines that particular dealings between them (in any combination) form substantially one arrangement.

For the purpose of this concession, 'life company' and 'statutory fund' have the same meaning as in the *Life Insurance Act 1995* (Cwlth) [**Section 102E**].

Recovery

If a person or group fails to pay duty as required under the land holder provisions, the Commissioner may recover the duty, as a debt, from the relevant entity.

Instead of, or as well as, proceeding against the relevant entity for recovery of duty as a debt, the Commissioner may register a charge on any of its land for the amount of the unpaid duty.

The Commissioner must give written notice of the registration of a charge to:

- the registered proprietor of the land; and
- the person in default, or each member of the group in default.

A charge will rank as a first charge on the relevant land.

If the duty remains unpaid six months after the registration of the charge, the Commissioner may apply to the District Court for an order for the sale of the land.

On an application, the Court may make an order for sale of the land by public auction and, in that event, the proceeds of sale are to be applied in the following order:

1. In payment of the costs of the sale and other costs of proceeding under the land holder provisions of this Act.
2. In discharging the liability to duty.
3. In discharging other liabilities secured by registered instrument.
4. In discharging other liabilities as directed by the Court.
5. In payment to the registered proprietor of the land immediately before the completion of the sale.

If the Commissioner recovers duty, the relevant entity may recover the amount paid to, or recovered from, the entity from the person or persons principally liable for the payment of the duty [**Section 102C**].

Transitional Provisions

The enactment of the *Statutes Amendment (Land Holding Entities and Tax Avoidance Schemes) Act 2011* inserted land holder provisions into the Act, replacing the predecessor land rich provisions and contained transitional provisions with the following effect.

The duty chargeable under land holder provisions is chargeable on any acquisition of a prescribed interest, or any increase of a prescribed interest, in a land holding entity occurring on or after 1 July 2011.

If a person acquires an interest in a land holding entity on or after 1 July 2011, acquisitions made before that date are to be counted for the purpose of determining whether the person has a prescribed interest in the entity under the land holder provisions.

The enactment of the land holder provisions does not affect a liability to duty arising under the Act with respect to the acquisition of a significant interest, or an increase in a significant interest, in a private entity (as those terms are defined for the purposes of predecessor land rich provisions) occurring before 1 July 2011 (and accordingly land rich provisions will continue to apply with respect to the assessment and imposition of duty in such a case as if this Act had not been enacted).

An interest acquired in a land holding entity on or after 1 July 2011 as a result of an agreement entered into, or option executed, before 1 July 2011 is to be treated, for the purposes of the transition provision, as if it were acquired before 1 July 2011 (and accordingly the land rich provisions will apply to the relevant acquisition but the acquisition may still be counted for the purposes of determining whether a prescribed interest is acquired or held under the land holder provisions on or after 1 July 2011).

The acquisition of shares of minority shareholders in a listed company by a takeover offer subsequent to 1 July 2011, that results from the issue of a compulsory acquisition notice, issued prior to 1 July 2011, will be treated as an acquisition before 1 July 2011. The issuing of the compulsory acquisition notice is considered to be ‘an agreement entered into, or option executed, before 1 July 2011’.

Further Information

Further information can be obtained from RevenueSA.

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