

SOUTH AUSTRALIA



RevenueSA

Stamp Duty

Circular No. 227

STAMP DUTY RELIEF GUIDELINES FOR CORPORATE RECONSTRUCTIONS

The Treasurer has approved the following guidelines in respect of the provision of *ex gratia* relief from stamp duty for corporate reconstructions. The guidelines set out the economic circumstances in which *ex gratia* relief will be considered.

Purpose/Policy

1. To provide stamp duty relief for *bona fide* corporate reconstructions where the duty represents an impediment to a restructure which would result in the simplification and rationalisation of an existing corporate structure, making it more efficient, effective and/or competitive.

Bona fide corporate reconstructions are those where there is no change of beneficial ownership but a significant change to the legal ownership of the property the subject of relief.

It is not the purpose of these guidelines to provide relief from stamp duty where the transfer(s) represents a normal commercial transaction, such as the transfer of individual assets from one corporation to another corporation within the corporate structure, rather than the restructuring of corporations within an existing corporate group.

Definitions

2. Except as follows, specific terms used in these guidelines shall have the same meaning as provided in the *Stamp Duties Act 1923* ("the Act"):
 - (a) "**Corporate reconstruction**" means a property transfer [refer paragraph 2b] that is an eligible transaction [refer paragraph 2h] between members of a corporate group [refer paragraph 2e], which are associated eligible entities [refer paragraph 2g], where the ultimate beneficial ownership [refer paragraph 2c] of that property remains unchanged.

The transfer of individual assets (where the transferor member of a corporate group holds assets other than the assets being transferred), which may be defined to be eligible transactions, will not be considered to amount to a *bona fide* corporate

reconstruction, but rather, substantially all of the assets of a corporation must be transferred.

- (b) **“Property”** has the same meaning as provided in the Act and means any real or personal property and includes –
- (i) intellectual property (except know-how and confidential information); and
 - (ii) an interest in property.

For the purposes of these guidelines, property also includes an application to transfer the registration of a motor vehicle by a member of the corporate group where immediately before the application was made the subject vehicle was registered in the name of another member of the corporate group.

- (c) **“Ultimate beneficial ownership of property”** means that property is directly or indirectly owned by the parent of the corporate group. Indirect ownership of property by the parent of the corporate group occurs by virtue of the parent corporation’s ownership and voting control of the member of the corporate group which directly owns the property.
- (d) **“Corporation”** has the same meaning as that provided in the *Corporations Act 2001*, and for the purposes of these guidelines, includes a unit trust.
- (e) Corporations are members of a **“corporate group”** if:
- (i) one of them beneficially owns (directly or indirectly) at least 90% of the issued share capital of, and has voting control over, the other(s);
 - (ii) in the case of a unit trust, one of them owns at least 90% of the units in the unit trust.
- (f) A corporation (“A”) has **“voting control”** over another corporation (“B”) if A is in a position to cast or control the casting of at least 90% of the maximum number of votes that might be cast at a general meeting of B (excluding any power to vote by any person by virtue of the provisions of any debentures or trust deed securing the issue of such debentures).
- (g) Members of a corporate group will be **“associated eligible entities”** if the relevant corporations have been members of the same corporate group for at least 3 years prior to the date of the eligible transaction(s).

Corporations which have been members of the corporate group for less than 3 years prior to the date of the eligible transaction(s) will be considered to be associated eligible entities, for the purposes of these guidelines, where the corporations have been

associated since one of the corporations (“A”) acquired at least 90% of the issued share capital of, and voting control over -

- (i) the other corporation (“B”) on its incorporation; or
 - (ii) B, an incorporated corporation that has neither operated nor held assets or liabilities since it was incorporated (ie. a shelf company).
- (h) “**Eligible transaction(s)**” means an instrument or transaction that conveys, transfers or assigns a beneficial interest in property between associated eligible entities.
- (i) A “**discretionary trust**” has the same meaning as provided in the Act and means 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 (the 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.

Criteria

3. Subject to paragraph 12, the Treasurer may approve an *ex gratia* payment in respect of the stamp duty applicable on an eligible transaction if the Treasurer is satisfied that the eligible transaction is for the purposes of giving effect to a *bona fide* corporate reconstruction.
4. Eligible transactions must be between associated eligible entities.
5. A member of a corporate group will not be an associated eligible entity to the extent that the property the subject of the eligible transaction is or will be held by a member as trustee of a discretionary trust, regardless of whether a member of the corporate group is a beneficiary under the discretionary trust.
6. Subject to paragraph 9, the transferor and the transferee corporations must remain members of the corporate group for a period of not less than 3 years immediately after the date of the eligible transaction(s).
7. The Treasurer may exclude or modify any of the above-mentioned criteria in considering an application, or impose further criteria, conditions or restrictions on applicants seeking an *ex gratia* payment of stamp duty.

Claw-Back

8. Where an application for an *ex gratia* payment of stamp duty has been approved and:
 - (i) it is subsequently determined that any declaration or evidence furnished to the Treasurer is false or misleading in a material particular; or

- (ii) material information which should reasonably have been given to the Treasurer was not so given; or
- (iii) the relevant entities have ceased to be members of the corporate group (other than in circumstances outlined in paragraph 9) within 3 years of the date of the eligible transaction(s);

the approval will be deemed to have been withdrawn and any *ex gratia* payment made will be repayable by the applicant, with interest, from the date on which the eligible transaction(s) occurred [refer paragraph 21(c)].

9. Approval will not be withdrawn under paragraph 8 if the relevant entities cease to be members of the corporate group by virtue of the liquidation of either of them (or winding up in the case of a unit trust), if the Treasurer is satisfied that the liquidation is not an arrangement to evade the payment of any tax, levy or impost levied by the Commonwealth, States or Territories, or to avoid the operation of the claw-back provisions of these guidelines.
10. In the event that the property the subject of an eligible transaction is transferred outside the corporate group within 3 years of the eligible transaction, then the relevant entities will be liable to pay to the Commissioner of State Taxation (“the Commissioner”) the amount of stamp duty that would have been payable on the eligible transaction had it not been for the relief granted as a result of the Treasurer’s approval, with interest from the date on which the eligible transaction(s) occurred [refer paragraph 21(c)].
11. The requirements outlined in paragraphs 8 and 10 will normally be the subject of a Deed, as provided for in paragraph 20 and 21.

Excluded Applications

12. Applications may be excluded from stamp duty relief if the Treasurer considers that an eligible transaction is for the purpose of evading any tax, levy, or impost levied by the Commonwealth, States or Territories, or is not otherwise lawful.

Applications

13. Applications are to be made in the form of a submission to the Treasurer addressing each of the issues specified in these guidelines that are relevant to the reconstruction. In particular, the application should provide:
 - (a) a background and summary of the ownership and business activities of the corporations, including the place and date of incorporation of the entities, shareholders (in the case of widely held corporations, the top 20 shareholders/unit holders) and directors;
 - (b) the purpose of the corporate reconstruction, including the actual or anticipated benefits to the corporate group;

- (c) details of how the relevant corporations are associated eligible entities within the corporate group, and include diagrams depicting the respective entities and associations (both prior to and after the reconstruction);
- (d) details of the individual steps which are to give effect to the restructure;
- (e) details of the instruments to be executed to achieve the restructure in South Australia and, where relevant, elsewhere, and supporting documentation (such as copies of instruments, which may include draft documents);
- (f) details of how the transaction(s) are eligible transaction(s) (ie. transfers of property between associated eligible entities);
- (g) independent valuations (if undertaken) of all property to which the application relates, ensuring that the basis of the valuation and all workings are provided.

Where independent valuations are not available, externally audited financial statements and relevant explanatory notes for the previous three financial years should be provided. Separate financial statements should be provided in respect of the corporate group and the relevant entities. If consolidated statements only are available, then there should be sufficient details therein of the relevant property. Any marketable securities to be transferred must be specifically identified, ensuring that the basis of their valuation and workings are also provided;

- (h) the quantum (broken down for each tax head) of South Australian taxes paid by the corporate group during the preceding 12 months;
 - (i) the status of any other applications for relief in other jurisdictions and provide documentation (such as a letter from the relevant State/Territory Revenue Office). If there is an intention to apply for relief in other jurisdictions, but such applications have not been made at the time relief is sought in South Australia, details of the prospective applications should also be provided. If the restructure will have stamp duty implications in any other jurisdiction in which relief has not been applied for, and the corporate group does not intend to apply for such relief, an explanation as to why such relief will not be sought; and
 - (j) any other relevant information that the Treasurer should reasonably be made aware of in determining the application.
14. The Treasurer may also require the applicant to provide additional information or evidence that the Treasurer deems necessary in determining the application.
 15. Applications may be made at any time prior to the eligible transaction(s), but no later than 12 months after the date of the eligible transaction(s).
 16. Applications should be addressed to:-

The Treasurer of South Australia
GPO Box 2264
ADELAIDE SA 5001

Approvals

17. The Treasurer may provide up to a maximum of 95% of the stamp duty otherwise payable on the eligible transaction(s) by way of *ex gratia* payment for a corporate reconstruction that meets the subject criteria. The applicant will be expected to pay the remaining stamp duty otherwise payable on the eligible transaction(s) or an administration fee of \$1,000, whichever is the greater.

Full stamp duty relief or the waiving of the administration fee may be considered in exceptional circumstances.

18. Where approval is granted prior to the eligible transaction(s) occurring, the applicant must on entering into the transaction(s), advise the Treasurer in writing whether or not there have been any material changes to the circumstances of the original (and any subsequent) application.
19. The Treasurer may approve relief for specified parts of a proposed application (eg. specified transfers, or transfers from or to specified corporations), or may limit relief to a specified type of duty (ie. conveyance or marketable security rates of duty). Partial relief may be granted on the condition that non-exempt parts of the proposed reconstruction will proceed.
20. The Treasurer may provide approval subject to certain conditions, which in most cases will be outlined in a written undertaking entered into between the Treasurer and the relevant entities.
21. In most cases, the Treasurer will impose a condition, to be contained in the written undertaking referred to in paragraph 20, that the applicant (or such other person as determined by the Treasurer) will be required to:
- (a) advise the Treasurer within 14 days, in writing, if, within 3 years from the date of the eligible transaction(s), the parent, or the relevant holding company of the transferor or transferee corporation(s):
 - transfers shares (or units) in the corporation(s); or
 - enters into an agreement to transfer shares (or units) in the corporation(s); or
 - enters into any other transaction (including a liquidation referred to in paragraph 9);
 as a result of which the corporation(s) will not remain a member of the corporate group;
 - (b) pay the duty otherwise payable on the eligible transaction(s) if approval is withdrawn under paragraph 8 or 10; and
 - (c) pay interest on the *ex gratia* payment amount (from the date of the eligible transaction) if approval is withdrawn under paragraph 8 or 10, at a rate determined pursuant to section 26 of the *Taxation Administration Act 1996*. The premium component of any interest incurred under section 26 of the *Taxation Administration Act 1996* may be remitted.

FURTHER INFORMATION

Location

RevenueSA
State Administration Centre
200 Victoria Square East
ADELAIDE SA 5000

Telephone

(08) 8226 3750

Website

<http://www.revenuesa.sa.gov.au>

Postal

Commissioner of State Taxation
RevenueSA
GPO Box 1353
ADELAIDE SA 5001

Facsimile

(08) 8226 3737

E-mail

revenuesa@saugov.sa.gov.au

24 June 2002

COMMISSIONER OF STATE TAXATION