

SOUTH AUSTRALIA



STATE TAXATION OFFICE

Stamp Duties

Circular No. 8

STAMP DUTIES ACT, 1923: PART IV

ACQUISITION OF CERTAIN INTERESTS IN COMPANIES AND
UNIT TRUST SCHEMES DUTIABLE AS CONVEYANCES OF LAND

Your attention is drawn to the *Stamp Duties Act Amendment Act (No. 3), 1990* which was proclaimed into operation on 24 May, 1990.

The Act inserts a new Part IV into the Stamp Duties Act to prevent stamp duty revenue being lost as a result of the practice of "artificially" placing land into highly leveraged companies or unit trusts and then transferring the shares to prospective purchasers rather than transferring the land directly.

The provisions of the new Part are quite complex. This circular is intended to facilitate a better understanding of this amendment.

The precise nature and scope of the changes to the Principal Act must be taken from the reading of the statutory provisions as set out in full in the Amending Act in conjunction with the *Stamp Duties Act, 1923*.

1. OPERATION OF PART IV--ACQUISITION OF CERTAIN INTERESTS IN PRIVATE COMPANY

Stamp Duty is chargeable in relation to:

- acquisition of certain interests in private companies or schemes [S.94(1)(a)-, provided
- that these private companies or schemes at the time of the aforesaid acquisition of interests, are:
- entitled to real property, the unencumbered value of which is not less than eighty per cent of all the properties to which the company or scheme is entitled to, and
- the unencumbered value of real property in South Australia to which the company or scheme is entitled is not less than \$1,000,000--[S.94(1)(b)]

Situations which will attract duty are stated at Para 1.2 below; in those situations, a person is required to furnish to the Commissioner a statement of acquisition with relevant particulars. This statement is deemed to be a conveyance operating as a voluntary disposition *inter vivos* of property the value of which is determined according to the relevant provisions of Part IV. Duty is assessed on that statement, as if it is an instrument executed by the person who lodged the statement.--[S.94(2), 95(1), 95(2), 100(1)]

1.1 Acquisition of interests

"Interest" essentially means, an interest in a company or scheme which, if the company or scheme was wound up immediately after the acquisition of the interest, would enable the person who acquired the interest to participate in the distribution of property of the company or scheme.

"Acquisition" has a wide meaning; it includes the purchase, gift, issue or allotment of a share in a company or a unit in a scheme. It also includes an entitlement to an interest in the company or a scheme created by the variation, abrogation or alteration of a right attached to a share or unit, or by the redemption, surrender or cancellation of a share, in a company or scheme.--[S.91(1)]

1.2 Statements of Acquisition

Section 94 makes it obligatory for a person to lodge with the Commissioner, a statement of acquisition when certain interests in a private company or scheme are required, under certain circumstances. These are called relevant acquisitions. They occur when a person:

1.2.1 acquires a majority interest in a private company or a scheme

1.2.2 acquires an interest which together with any interest acquired during the preceding 2 year period results in that person acquiring a majority interest.

1.2.3 acquires an interest which together with any interest acquired during the preceding 2 year period and with the interest acquired by a related person within the same two year period results in a majority interest, or

1.2.4 having a majority interest, either alone or together with the interest of a related person, acquires a further interest in a private company or scheme. [S.94(1)(a)]

Part IV for its operation has formulated different concepts and techniques. Some of these are:-

- related persons
- acquisition of interests over a period of time
- entitlement to property
- valuation of property to which a private company or scheme is entitled
- principle of maximisation
- quarantining of certain property on valuation

1.3 Related Persons

Section **91(2)** sets out rules which establish when the following groups of persons are to be treated as related persons for the operation of the new Part:

- Natural persons
- Private companies
- Trustees

- Natural persons and a private company
- Natural person and a trustee
- Private company and a trustee

These rules are detailed in the legislation.

1.4 Acquisitions of interests over a period of time

Section **94(3)** widens the two year aggregation period stated at 1.2.3 above. It provides that if a person acquires an interest in a private company or scheme and within 2 years before or after that acquisition the person became or becomes entitled to a **right to acquire** a further interest in the company or scheme then, upon this right being exercised, the person will be taken to have acquired that further interest within a period of 2 years after the first mentioned acquisition, notwithstanding that the right may have been exercised after that period.

1.5 Entitlement to land and property

Liability under the new Part will arise when private companies or schemes are "entitled" to land and property **[S.94(1)(b)]**. "Entitlement" is exhaustively defined at section **92**.

A private company or scheme is entitled to property, if:

- (a) it owns property, **or**
- (b) if its subsidiary owns property **or**
- (c) a discretionary trust owns property and the company or scheme or their subsidiaries are the object of that trust. **[S.92(2)]**

Property owned includes property owned beneficially and in the case of a private scheme, property owned by the trustee (in the capacity of trustee) of that scheme. **[S.92(1)]**

A wider definition is given to a subsidiary company or scheme. It includes, in addition to the meaning given under section 7 of the **Companies (South Australia) Code**, instances when two entities are widely separated by interposed legal entities, but are linked together by a chain of ownerships of interests.-- **[S.92(1)]**

1.6 Value of Property to which a Company is entitled.

Section **92(4)** establishes a set of rules by which the unencumbered value of properties is to be determined:

The unencumbered value of property to which a company or scheme is entitled is the sum of

- (a) the unencumbered value of property owned by the entity at the date of acquisition, and
- (b) if properties are owned by a subsidiary or the subsidiary of a- subsidiary etc, the unencumbered value of property to which the company or scheme would be entitled, if the subsidiary and all interposed entities were wound up on that date.

In determining the unencumbered values of properties on winding up, a maximisation principle is used. The value for stamp duty purposes will be the greater of either of the following amounts:

(a) an amount derived as if the winding up were carried out in accordance with the existing memorandum, articles of association and any law relating to winding up proceedings; **or**

(b) an amount, derived as if the person who made the relevant acquisition, exercised all powers and discretions to which the person is entitled to after the acquisition, but prior to the date of winding up, so that

(i) the memorandum or articles were altered,

(ii) the rights attached to shares and units were varied, **or**

(iii) the shares or units in the company were substituted or replaced,

all or some of the above powers or rights being so exercised with the sole object of maximising the amount of that person's entitlement.

1.7 Ascertainment of value of all property to which a company is entitled (quarantining of certain properties on valuation)

Section **94(5)** enumerates a list of properties, which should not be taken into account in , determining the total value of all property to which the company or the scheme is entitled. They are:

(i) cash in any currency

(ii) money on deposit with any financial institution

(iii) negotiable instruments

(iv), loans which by their terms, either are to be repaid on demand by the lender or are to be repaid within 2 years of the date of the loan

(v) loans to related persons

(vi) loans to a spouse, child, parent, brother or sister of (in the case of a private company) a majority shareholder, director or secretary of the company or, (in the case of a private scheme) a trustee of, or a beneficiary under the scheme.

It should be noted that the 80% criteria is computed on the value of property and not on the value of assets.

1.8 Information that has to be furnished on the statement to the Commissioner

The information will consist of two parts. The first pertains to relevant acquisitions, that is those that are mentioned at 1.2.1, 1.2.2, 1.2.3 and 1.2.4, the acquisition of which triggers the operation of the new Part The second part relates to each "prior acquisition".

Prior acquisitions are acquisitions of interest acquired at any time during the period of 2 years immediately preceding the date of relevant acquisition--**[S.91(1)]**

The following information is required:

Relevant Acquisition

- (i) Name and address of person
- (ii) Date of relevant acquisition
- (iii) Interest acquired
- (iv) Total interest to date
- (v) Unencumbered value of all real property in SA to which the entity is entitled at the acquisition date
- (vi) Unencumbered value of all property to which the entity is entitled at the acquisition date.

Prior Acquisition

- (i) Name and address of person
- (ii) Date of prior acquisition
- (iii) Interest acquired
- (iv) Unencumbered value of all real property in SA to which this entity is entitled at the **date of such prior acquisition**
- (v) Unencumbered value of all property to which the entity is entitled at the **date of such prior acquisition**
- (vi) Amount of duty paid in relation to such prior acquisition.

In relation to 1.8 (iii) above, for both relevant and prior acquisitions, the person should also furnish, a figure, which is the **maximum** percentage of property of the private company or 'scheme (in relation to which the statement is furnished), to which he or she and related persons would be entitled, on winding up of that private company or scheme immediately after such acquisition, in a distribution of properties. The basis of calculation of the percentage should also be supplied.

Pro forma copies of the forms approved by the Commissioner of Stamps are attached to this circular. Copies of these forms are available at the Stamp Duties Office.

1.9 Assessment and Payment of Duty

The value on which duty will be charged is an amount equal to

(i) In cases where there have been no prior acquisitions:

-- the value of all unencumbered real property in South Australia to which the entity is entitled at the date of acquisition multiplied by the percentage of interest acquired by the relevant acquisition.

(ii) In cases where there have been one or more prior acquisitions:

-- the value of all unencumbered real property in South Australia to which the entity is entitled at the date of acquisition multiplied by the percentage of interest acquired by the relevant acquisition, **and**,

--in respect of each prior acquisition, the value of all real property in South Australia to which the entity is entitled at **the date of prior acquisition** multiplied by the percentage of interest acquired by the prior acquisition--**[S.95(1)]**

Duty will be assessed on the amounts, as if the statement were a conveyance operating as a voluntary disposition **inter vivos**.

The duty charged will be reduced by

- (i) any duty charged under this part in respect of a prior acquisition
- (ii) duty paid under a "corresponding law" in respect of a relevant or prior acquisition, and
- (iii) duty paid on transfer instruments in relation to relevant and prior acquisitions-- **[S.95(2)]**

2. OPERATION OF PART IV--LAND USE ENTITLEMENT

The second limb of Part IV **[S.96, 97]** applies in relation to the acquisition of certain interests in a private company or scheme which gives the person acquiring such interest a 'land use entitlement'.

"Land use entitlement" means an interest in a private company or scheme which gives the person acquiring this interest an entitlement to the executive possession of real property in South Australia.

If a person acquired a land use entitlement, a statement in respect of the acquisition must be lodged with the Commissioner. The statement lodged with the Commissioner should contain the following information:

- (i) Name and address of the person who acquired the land use entitlement
- (ii) Title reference of the property to which the land use entitlement applies
- (iii) The date of acquisition of the land use entitlement
- (iv) The encumbered value of such property
- (v) The same information as in i to iv above in relation to each prior acquisition, and
- (vi) The amount of duty paid in respect of each prior acquisition **[S.96]**

Duty will be assessed on the statement, as if it were a conveyance operating as a voluntary disposition **inter vivos** of property of value equal to the unencumbered value of land on the acquisition date aggregated with the unencumbered values of land in all prior acquisitions **[S.97(1)]**

Pro forma copies of the forms approved by the Commissioner of Stamps are attached to this circular. Copies of these forms are available at the Stamp Duties Office.

The duty so charged will be reduced by the duty paid

- (i) under this Part in relation to each prior land use entitlement
- (ii) under a corresponding law
- (iii) in relation to transfer instrument--**[S.97(2)]**

It should be noted, that unlike the first limb **[S.94, 95]** to attract liability, the acquisition does not have to be a majority acquisition. Moreover, neither of the criteria (i.e. the value of land in South Australia should exceed \$1 million or that the real property of the private company or scheme should exceed 80% of all property to which the private company or scheme is entitled) are applicable when land use entitlements are acquired.

3. EXEMPTIONS

The new Part **IV** contains a number of exemptions to ensure that the provisions do not impact upon a wide range of well established transactions. Subject to certain conditions being met, exemptions include:

- Receiver or trustee in bankruptcy.
- Liquidators
- Executor or Administrator of deceased estates
- Acquisitions as a result of certain Court orders.
- Survivorship.
- Deceased estates.
- Dissolution of marriage.
- Situations where duty has already been paid on another instrument.
- Amalgamation of two or more bodies incorporated under an Act of the State.
- Transfers or undertakings under an Act of the State.
- Acquisitions by a beneficiary of a trust.
- Transfer of an interest from a trustee to a beneficiary.
- Acquisitions made as part of a financial accommodation.

[Refer Sections 93, 92(6) and 98]

4. PENALTY

Your attention is drawn to section 100(2) of the Act. A person who is required to lodge a statement under section **94** or **96** who fails or refuses to lodge the statement within the time allowed by Part IV may be guilty of an offence. Penalty \$10,000.

Your attention is also drawn to section **105a**. A private company in which a person acquires a majority interest or in which a person acquires a land use entitlement should lodge a statement in an approved form with the Commissioner of Stamps within 2 months of the acquisition: Penalty \$500. A pro forma copy of the approved form is attached.

As previously stated, this circular is intended only as an overview of the new provisions. The precise nature of the new Part IV can only be obtained by specific reference to the legislation.

Copies of the relevant "Acquisition Statement" Forms are available at the Stamp Duties Office.

Any enquiries should be directed to the Manager, Stamps, on telephone (08) 226 3716.

11 December, 1990

COMMISSIONER OF STAMPS

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