

SOUTH AUSTRALIA



STATE TAXATION OFFICE

Stamp Duties

Circular No. 118

MORTGAGE DUTY - EXERCISE OF DISCRETION PURSUANT TO SECTION 79(5) OF THE STAMP DUTIES ACT

The Stamp Duties (Penalties, Reassessments and Securities) Amendment Act, 1992, (Act No. 88 of 1992), which came into effect on 14 December, 1992 provides, amongst other matters, for a discretion for mortgages to be stamped to reflect the expected liability rather than the potential liability.

Section 79(5) provides:

"(5) The Commissioner has a discretion, in the case of a mortgage securing a contingent liability, to permit the mortgage to be stamped for an amount that is less than the full amount of that liability, but if the contingency subsequently happens, further duty becomes chargeable on the mortgage as from the date of the happening of the contingency and the amount of that further duty is to be calculated as follows:

(a) duty is to be calculated on the mortgage on the basis of the full amount of the liability as if the mortgage were a new and separate instrument made on the date of the happening of the contingency; and

(b) the further duty is then to be calculated by subtracting the amount of duty already paid from the amount of duty calculated under paragraph (a)."

The discretion provided at Section 79(5) of the Act will be exercised by the Commissioner of Stamps, upon application, in circumstances where it is considered fair and reasonable to do so.

The following is a guide to situations where the discretion has been exercised and provides an indication to lodging parties and taxpayers of circumstances in which that discretion is likely to be exercised.

FLOOR PLAN FINANCING ARRANGEMENTS - RULING

In relation to unlimited mortgages that secure floor plan bailment arrangements, discretion will be exercised to allow those mortgage instruments to be stamped to an amount that is equivalent to twenty percent of the approved limit of credit.

Where the credit limit is increased an upstamping requirement will be created and further duty will become due on the same basis as the original stamping, that is to say twenty percent of the increase.

EQUIPMENT LEASE TRANSACTIONS - RULING

In the case of unlimited mortgages that secure equipment leasing arrangements discretion will be exercised to allow these mortgage instruments to be stamped to an amount that is equivalent to three months' rental premium on the equipment. It is considered that such an amount would generally reflect the level of exposure that would be most commonly at risk.

BILLS NEGOTIATED NOT UNDER A LETTER OF CREDIT - RULING

Where a bank enters into a bill facility agreement, an overdraft, or a combination of both, with a client and the liabilities arising from these transactions are secured by a mortgage, the mortgage is stamped to the highest amount of the liability secured. Such amount is determined on the assumption that all contingencies to which the mortgage or liability is subject will actually happen.

Sometime later the bank may allow the customer to draw against uncleared funds deposited in the customer's account in the form of an overseas cheque. These funds are drawn under an arrangement known as "bills negotiated not under a letter of credit".

During the period from the time of the withdrawal of the funds and the honouring of the overseas cheque, the bank has a further contingent liability.

This contingency would give rise to an upstamping requirement should the liability exceed the total secured on the mortgage.

In view of the short period of time during which this extra contingency exists the Commissioner will not pursue upstamping requirements in the four weeks following the presentation of the cheque. Should the cheque not be met within the four weeks an upstamping obligation will arise and duty will be payable.

PERFORMANCE GUARANTEES - RULING

Discretion will be exercised in respect of these types of facilities to require stamping for a lesser amount where the Commissioner is satisfied the full amount of the liability may not be advanced or required.

Where that lesser amount is exceeded an upstamping requirement will be created and duty will be payable.

PAYROLL FACILITIES - RULING

Payment of stamp duty under the mortgage provisions of the Act will not apply to facilities provided by an institution to a client for payroll encashment purposes.

This discretion will apply only where the facility is a short-term provision solely for the clearance of cheques or transfers of funds. This would normally be for periods of less than three days.

Where this facility becomes part of a permanent overdraft arrangement or loan, or if the funds become unavailable for whatever reason, duty will be payable on that facility.

FORWARD EXCHANGE CONTRACTS - RULING

Where a bank enters into a forward exchange contract, to buy or sell foreign currency at a future time, there is sometimes a shortfall on the exchange rate which would give rise to a liability under the contract to repay that shortfall to the bank.

This would normally require the contract to be stamped as a mortgage securing the repayment of a debt.

Due to the nature of these types of dealings and the contingent nature of the liability, which is directly relative to the foreign currency exchange rates, discretion will be exercised by the Commissioner to allow these contracts to be stamped to an amount that is equal to ten percent of the amount specified in the contract.

PROCEDURE FOR GAINING A SECTION 79(5) ASSESSMENT

All of the above described facilities must be submitted for the opinion of the Commissioner. The exercising of the power of discretion cannot be delegated to an authorised institution under section 10 of the Act and therefore, inhouse endorsement of these types of instruments cannot be permitted.

The instrument(s) accompanied by all relevant supporting documentation to support such request should be lodged together with an opinion form clearly indicating the reasons why the exercise of the Commissioner's discretion is sought.

Stamped instruments will be denoted to show that they have been stamped pursuant to section 79(5) of the Act and that the discretion has been exercised.

The stamping will then reflect the lesser amount of the security as has been allowed under the discretion. In all cases where the level of stamping is exceeded, a liability of duty arises, and all documents should be resubmitted for the Commissioner's assessment.

OBLIGATION TO UPSTAMP

Where the arrangement, that has been the subject of an exercise of the Commissioner's discretion subsequently occurs, then the instrument becomes liable to full duty from that date.

Thus, for example, in the case of floor plan financing, should default occur by the mortgagor then the instrument is immediately liable for payment of duty on the full amount.

ENQUIRIES

Any enquiries in relation to assessments under Section 79(5) can be referred to Mr Ray Barnes Manager Stamp Duty Assessing on telephone number (08) 226 3716.

8 November, 1994

COMMISSIONER OF STAMPS