

STAMP DUTY – TOP HATTING – RELIEF FOR RESTRUCTURE OF AUSTRALIAN STAPLED REAL ESTATE INVESTMENT TRUSTS

In response to industry submissions the Treasurer has agreed to consider applications seeking *ex gratia* relief from stamp duty for transactions which introduce an interposed unit trust (“Interposed Unit Trust”) to an Australian stapled real estate investment arrangement, a practice known as “top hatting”.

BACKGROUND

An Australian stapled real estate investment arrangement involves the contractual binding of units in a unit trust scheme that holds a portfolio of Australian real property assets with units in a similar scheme(s) and/or with shares in a company(s) (collectively the Stapled Entities) so that the units and/or shares cannot be sold separately.

A top hatting restructure involves the trustee of an Interposed Unit Trust becoming the owner of: for a new trust – all of the ownership interests in the stapled entities; or for an existing trust – all of the ownership interests in the other stapled entities.

These transactions may involve the trustee of the Interposed Unit Trust acquiring a significant interest in a land rich entity or being the transferee under a voluntary disposition *inter vivos* of interests in a unit trust scheme that attracts duty by virtue of section 71 of the *Stamp Duties Act 1923* (the “Act”).

Due to their stapled status, Australian real estate property trusts are at a competitive disadvantage when competing for capital and product, particularly in international markets.

Recognising that the structural limitation places Australian stapled real estate investment trusts at a disadvantage, the Commonwealth Government introduced the *Tax Laws Amendment (2007 Measures No. 5) Act 2007* (Cwth) that, *inter alia*, inserted subdivision 124-Q into the *Income Tax Assessment Act 1997* (Cwth)(the “ITAA”) to provide capital gains tax rollover relief when an Interposed Unit Trust is interposed between the holders of stapled securities and Stapled Entities.

ELIGIBILITY FOR STAMP DUTY RELIEF

The Treasurer may approve an *ex gratia* payment in respect of the stamp duty payable on eligible transactions which introduce an Interposed Unit Trust to an Australian stapled real estate investment arrangement if the Treasurer is satisfied that:

- the transactions are made for the purpose of giving effect to a scheme that would qualify as a roll-over under subdivision 124Q of the ITAA; and
- when the scheme is completed, the Interposed Unit Trust will not be a private unit trust scheme, for the purposes of Part 4 of the Act; and
- the transactions are not part of a scheme, a purpose of which is, to minimise duty otherwise payable under the Act.

An “**eligible transaction**” will include an acquisition of shares and units in the Stapled Entities occurring either by transfer of those shares or units or by those shares or units being redeemed and fresh shares or units being allotted to the trustee of the Interposed Unit Trust or any combination of those and the issue of units in the Interposed Unit Trust as consideration for the acquisition of shares and units in the Stapled Entities.

APPLICATIONS

Applications are to be made in the form of a written submission to the Treasurer and should provide:

- (a) the purpose of the reorganisation of the Stapled Entities, including the actual or anticipated benefits to the reorganisation of the stapled arrangement;
- (b) background and summary of the ownership and business activities of the Stapled Entities;
- (c) details of the stapled arrangement, including a diagram showing the stapled structure and the proposed structure following the introduction of the Interposed Unit Trust;
- (d) sufficient information and documentation to support the claim that the proposed transactions fall within the capital gains rollover provisions of subdivision 124-Q of the ITAA, including any private ruling that has been received in advance or subsequently from the Federal Commissioner of Taxation that a proposed transaction falls within the capital gains rollover relief provisions of subdivision 124-Q of the ITAA;
- (e) details of how the relevant transactions constitute eligible transactions for the purposes of this Circular;
- (f) copies of documents or instruments that facilitate the restructure in South Australia and, where relevant, supporting documentation (such copies may include draft documents or instruments);
- (g) details of any other applications for relief in other jurisdictions, including letters 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 sought, and relief will not be sought, an explanation as to why such relief will not be sought; and

- (h) any other relevant information that the Treasurer should reasonably be made aware of in determining the application.

The Treasurer may also require the applicant to provide additional information or evidence that the Treasurer deems necessary in determining the application.

Applications may be made at any time prior to the eligible transactions, but no later than 6 months after the date of the eligible transactions.

Applications should be addressed to: -

The Treasurer of South Australia
GPO Box 2264
ADELAIDE SA 5001

APPROVALS and CLAW BACK

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 Trustee of the Interposed Unit Trust does not retain, directly or indirectly, 100% ownership in the Stapled Entities for a period of at least three years from the date of the eligible transaction(s); or
- (iv) the Interposed Unit Trust becomes a private unit trust scheme, for the purposes of Part 4 of the Act, within three years of the eligible transaction,

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.

The claw-back requirements will normally be the subject of a Deed of Agreement (the "Deed").

Further, the Treasurer may provide approval subject to certain conditions, which will be outlined in the Deed entered into between the Treasurer and the relevant entities.

In most cases, the Treasurer will impose a condition 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:
 - (i) within 3 years from the date of the eligible transaction(s), the trustee of the Interposed Unit Trust ceases to retain 100% ownership in the Stapled Entities;
 - (ii) the Interposed Unit Trust becomes a private unit trust scheme, for the purposes of Part 4 of the Act.
- (b) provide to the Treasurer, as a prerequisite to the payment of any stamp duty relief, a copy of the favourable ruling issued by the Federal Commissioner of Taxation, in

relation to the eligible transaction qualifying as a roll-over under subdivision 124Q of the ITAA.

- (c) pay the duty otherwise payable on the eligible transaction(s) if approval is withdrawn; and
- (d) pay interest on the *ex gratia* payment amount (from the date of the eligible transaction) if approval is withdrawn 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.

While the Treasurer may indicate his approval to provide stamp duty relief for a transaction prior to the transaction occurring, the Treasurer will not enter into the Deed with the relevant entities until such time that the eligible transaction has occurred.

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.

FURTHER INFORMATION

Further information regarding these amendments may be obtained from RevenueSA.

Location

RevenueSA

State Administration Centre

200 Victoria Square East

ADELAIDE SA 5000

Postal

Commissioner of State Taxation

RevenueSA

GPO Box 1353

ADELAIDE SA 5001

Telephone

(08) 8226 3750

Facsimile

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COMMISSIONER OF STATE TAXATION