

## SOUTH AUSTRALIA



### STATE TAXATION OFFICE

Stamp Duties

Circular No. 102

#### **STAMP DUTIES ACT, 1923 - SECTION 71(5)(d) TRANSFER OF PROPERTY FOR THE PURPOSE OF EFFECTUATING THE RETIREMENT OF A TRUSTEE OR THE APPOINTMENT OF A NEW TRUSTEE**

Section 71(5)(d) of the Stamp Duties Act, 1923 ("the Act") exempts from ad valorem stamp duty in certain circumstances the transfer of property for the purpose of effectuating the retirement of a trustee or for the appointment of a new trustee. Questions have been raised in recent times concerning the application of Section 71(5)(d) and the circumstances under which the Commissioner will grant an exemption.

Section 71(5)(d) stipulates that the relevant transfers will be exempt from ad valorem stamp duty if the Commissioner is satisfied that those transfers are not part of a scheme which has either of the following features:-

- i) the scheme confers a benefit in relation to the trust property upon the new trustee; or  
the scheme confers a benefit in relation to the trust property on a person whether that person is a beneficiary of a trust or otherwise; and
- ii) these benefits have been conferred to the detriment of the beneficial interest or the potential beneficial interest of any person.

#### **RULING**

Though Section 71(5)(d) is a provision that provides exemption from stamp duty, it has been drafted, necessarily with a wide scope to prevent abuse. Therefore it is not possible to categorise in precise detail the circumstances under which the Commissioner will hold a transfer of property to be part of a "scheme" for the purposes of Section 71(5)(d). In all cases the Commissioner will take an overview of all the surrounding circumstances before making a determination.

So that consideration can be given to the issue of whether or not the Commissioner's discretion should be exercised, the following particulars may be required at the time of lodgement of the instrument:-

1. Where the retiring and new trustees are natural persons.
  - 1.1 The reason for the retirement of the trustee and all relevant surrounding circumstances.
  - 1.2 The relationship of the retiring trustee with the beneficiary/beneficiaries (either named or potential) other than as a trustee. A list of named and potential beneficiaries is required.
  - 1.3 The reason and surrounding circumstances for the appointment of a new trustee.
  - 1.4 The relationship of the new trustee with the beneficiaries (either named or potential) other than as a trustee.
  
2. Where the retiring and new trustees are corporate entities.
  - 2.1 The reason and surrounding circumstances for the retirement.
  - 2.2 The relationship of the directors and the shareholders of the retiring trustee with the beneficiaries (either named or potential) other than as a trustee. A list of named and potential beneficiaries is required.
  - 2.3 The reason and surrounding circumstances for the appointment of a new trustee.
  - 2.4 The relationship of the directors and the shareholders of the new trustee with the beneficiaries (either named or potential) other than as a trustee.

"Relationship" for the purposes of this circular is to be determined according to the following principles:-

Two persons are related to each other, if

- i one person is the spouse, parent or child of the other,
- ii one person is a holding company or subsidiary company of the other, or
- iii both persons are companies subject to common control.

3. Where a corporate trustee retires and a natural person has been appointed as a trustee in its place or, a natural person retires and a corporate trustee has been appointed in his/her place then the above requirements set out in both paragraphs 1 and 2 apply.
  
4. A detailed financial position of the trust (the statement of affairs - the balance sheet) on the date of change or at the last day that the financial affairs of the trust were drawn (balance sheet date) must also be provided giving details of the person, organisation etc. to whom the trust is in a position as a creditor and to whom the trust is in a position as a debtor. These details should include a statement showing the relationships of those debtors and creditors to the trustee(s) and to the beneficiaries (named and potential).

This list of requirements is not exhaustive. It will be up to the lodging party to satisfy the Commissioner through evidence, documents, submissions etc. that this transfer is not part of a scheme referred to at Section 71(5)(d) of the Act.

If, after examination of the particulars furnished, the Office is of the opinion that the criteria set out in Section 71(5)(d) of the Act have not been met, then that opinion will be discussed with lodging parties so that any further submissions can be taken into consideration before a final decision is reached.

15 February, 1994

COMMISSIONER OF STAMPS