

SOUTH AUSTRALIA



RevenueSA

Stamp Duties

Circular No. 209

STAMP DUTIES (LAND RICH ENTITIES AND REDEMPTION) AMENDMENT ACT 2000

The *Stamp Duties (Land Rich Entities and Redemption) Amendment Act 2000* (“the Amending Act”) was assented to and proclaimed into operation today.

The Act deals with five separate measures.

Each of these is explained separately below. The Amending Act deals with some complex issues and its precise operation can only be ascertained by a reading of its content.

ISSUE AND REDEMPTION PROVISIONS

These provisions of the Amending Act ensure that the issue and redemption of units in ‘private’ unit trusts that own property in South Australia are liable to *ad valorem* conveyance duty.

The High Court held in the case of MSP Nominees Pty Ltd v Commissioner of Stamps [1999], 99 ATC 4937 (“the MSP case”) that when two of three unit holders redeemed their units in the relevant unit trust, there was no transaction subject to *ad valorem* conveyance stamp duty, because the unit holders did not have any beneficial interest in the property owned by the Trust; rather they only had a right to due administration of the trust.

The Court also held that the relevant words in Section 71(15) of the *Stamp Duties Act 1923* (“the Act”) “...surrender or renounce a beneficial interest or potential beneficial interest” were not sufficient to cover the transaction that occurred in the MSP case.

The provisions operate to restore the *status quo* and accepted interpretation which existed prior to the decision of the High Court that the transfer, issue and redemption of units in private unit trust was assessable with *ad valorem* duty.

Section 20 of the Amending Act deals with retrospectivity, and operates so that only those amendments that relate to the redemption, cancellation or extinguishment of a interest in a unit trust operate retrospectively.

The redemption provisions apply from 8 November 2000 (date of introduction into Parliament) and also operate prior to 30 September 1999, except in situations where valid objections or appeals (that have yet to be determined) have been lodged within the legislatively prescribed timeframes. Prior notice of this was provided by Circular Number 207 issued on 8 November 2000.

COMMON LAW MORTGAGES

Section 71(5)(a) of the Act formerly operated to exempt from duty any transfer of property (not being land subject to the provisions of the *Real Property Act 1886*) for nominal consideration for the purpose of securing the repayment of an advance or loan.

Such transactions are generally referred to as common law mortgages.

Avoidance opportunities had been identified whereby property was transferred in pursuance of a debt. Subsequently the subject property was not re-transferred when the debt was taken as consideration paid by the creditor for the transfer of property by tacit agreement. These problems were especially evident in the transfer of interests in 'land rich' entities.

The exemption previously provided by Section 71(5)(a) has been repealed and has been replaced by a new provision, Section 60C of the Act, which will require *ad valorem* duty to be charged on transfers of property (not being land subject to the provisions of the *Real Property Act 1886*) to secure an advance or loan. The exemption will provide for a refund of stamp duty if the property is retransferred to the original legal owner, once the advance or loan has been repaid.

This amendment will still provide a fair and reasonable stamp duty regime for legitimate transactions but will prevent its use for avoidance.

DEEDS OF DISCLAIMER - PROBERT CASE

The Amending Act also operates to ensure that instruments that operate to disclaim, transfer or assign interests in real or personal property under a will or intestacy are chargeable with *ad valorem* stamp duty.

In the South Australian Supreme Court Case of *Probert v Commissioner of State Taxation* [1998] 9 October 1998, it was held that a certain Deed of Disclaimer was not assessable with *ad valorem* conveyance duty.

The amendment seeks to ensure that the *status quo* is maintained whereby the Commissioner can continue to assess Deeds of Disclaimer and Arrangement with *ad valorem* conveyance duty and thereby protect the revenue base.

The practices previously adopted by RevenueSA in relation to the valuation of interests in deceased estates will be continued, in that taxpayers will be required to provide a statement of assets and liabilities of the estate as at the date of the relevant instrument.

TRANSFERS OF MORTGAGE

The Act currently provides an exemption from stamp duty for a Transfer of Mortgage. It was arguable however whether the exemption extended to the conveyance of the underlying debt.

Sections 19(a) and 19(b) of the Amending Act ensure that the current stamp duty exemption for the “Conveyance or transfer of a mortgage or an interest in a mortgage” includes the conveyance of a debt associated with a transfer of that mortgage.

The amendments put beyond doubt, that the transfer of the mortgage and any underlying debt are exempt from duty, which will satisfy the original intention of the exemption.

LAND RICH PROVISIONS

The fifth group of amendments deals with Part 4 of the Act.

Part 4 of the Act was enacted in 1990 to counter an avoidance scheme whereby revenue was being lost as a result of the practice of placing land in highly leveraged companies or unit trusts for the purpose of transferring the shares (or units) to prospective purchasers rather than the land itself. The provisions also avoided the practice of the transfer of a share in a company or a unit in a unit trust that gave the holder of the share or unit exclusive possession of the land of the company or the trust (called land use entitlements). These provisions are known colloquially as the land rich provisions.

Various schemes have been identified by RevenueSA whereby through the use of trusts and other interposed entities, taxpayers were able to circumvent the 80% test and the majority interest test found in the original provisions, and remove transactions from the land rich provisions, notwithstanding that the effect of that transaction was to provide control of land, the market value of which may significantly exceed the \$1 million threshold.

The Amending Act implements significant changes to the land rich provisions in order to remove the identified opportunities for tax avoidance. Specifically, amendments have been made to capture third party and passive acquisitions whereby a person gains control of a land rich entity.

The acquisitions or commencement of possession of interests in land rich entities (a company or a unit trust) directly or indirectly are dealt with by the new Part 4. The land use entitlement provisions that were part of the old Part 4 are now enacted at Section 62.

DEFINITIONAL CHANGES

There are several definitional changes made in the Amending Act, most of which are minor in nature.

The definition of “spouse” has been moved to the definitional section, Section 2 and has been amended to lower the time limit required for continuous cohabitation for *de facto* couples from five years to three years.

This definition will apply to Section 60A, Section 71CC and Part 4 of the Act.

Similarly the definition of “spouses” in Section 71CB of the Act has also been amended to reflect the change from five years to three years.

FURTHER INFORMATION

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COMMISSIONER OF STATE TAXATION