

STAMP DUTIES (LAND RICH ENTITIES) AMENDMENT ACT 2006

The *Stamp Duties (Land Rich Entities) Amendment Act 2006* (the “Amending Act”) was assented to on 23 November 2006. The amendments apply to transactions entered into on or after 22 September 2006.

Following extensive consultation with industry representatives, the following information is provided as a guide as to the application of the changes introduced by the Amending Act.

1. Primary Production Entities

An entity owning South Australian land with a value of \$1 million or more will be a land rich entity if the unencumbered value of its underlying land assets comprises 60% or more of the unencumbered value of the entity’s total underlying assets (“60% Test”). However, an 80% threshold applies for primary production entities, provided the entity does not cease to be a primary production entity within three years of the relevant acquisition.

An entity is considered to be a “primary production entity” if the unencumbered value of the entity’s underlying local primary production land assets exceeds 50 per cent of the unencumbered value of its total underlying local land assets.

A local primary production land asset is defined in Section 91(1) of the Act to mean a local land asset consisting of an interest in land that is used for the business of primary production.

A local land asset will be considered to be used for the business of primary production where the Valuer-General has coded the relevant land as primary production land. In broad terms, the Valuer-General’s land use codes are based on the land’s predominant use.

In determining the predominant use of a property the Valuer-General gives consideration to economic uses of the land and not just the use that occupies the largest area.

In most circumstances entities will have the opportunity to make submissions to the Valuer-General as to the predominant use. If the private entity is still not satisfied the issue should be resolved through the Valuer-General’s objection process.

Note: The land use code of a particular property may be determined by a search of the Register of Titles held by the Land Services Group of the Department of Transport, Energy and Infrastructure. A search fee is payable.

2. Land Assets

The Amending Act introduced Section 91A (3) and (4) which provide that land of a private entity will be taken to include anything fixed to the land, including anything that is or purports to be separately owned from the land, unless the Commissioner of State Taxation is satisfied that the separate ownership is not part of an arrangement to avoid the imposition of conveyance rates of duty

“Land” is not defined in the Act, however, Section 4 of the *Acts Interpretation Act 1915* provides as follows.

“4. (1) In this Act and in every other Act or statutory instrument, unless the contrary intention appears-

“land” includes-

(a) a building or structure affixed to land;

...”

The common law already provides that fixtures are considered to be part of the land and therefore fixtures are included as land for the purposes of determining whether a private entity is land rich.

For the purposes of administration of Part 4 of the Act, the term “anything fixed to the land” will be taken to mean “fixtures”.

The new provision operates to allow the Commissioner to include fixtures that are separately owned from the land, as part of the land.

Plant and machinery fixed to leased land will come under these provisions even if they are separately owned from the land.

3. Contractual Rights – Commissioner’s Discretion

Contractual rights or interests are those rights or interests arising from a contract, ie. a legally binding exchange of promises or agreement between parties that the law will enforce. Trade debtors and prepayments are classes of property resulting from a legally binding contract and in contrast, work in progress and future income tax benefits are not regarded as being contractual rights, as they do not arise from a contract.

In determining the total assets* of an entity for the purposes of Part 4 of the Act, contractual rights or interests, other than interests in land arising from a contract to purchase land, are excluded.

However, contractual rights or interests are to be taken into account for the purposes of Section 94 (2)(d)(iii) if the Commissioner is satisfied that it was acquired in the course of the normal business of an entity and not as part of an arrangement to avoid duty (Section 94 (5)).

* i.e. total assets of a private entity include both the assets held beneficially by the private entity and its notional interests in the assets of related entities.

In addition, a private entity must satisfy the Commissioner that any asset (other than a land asset but including contractual rights and interests) acquired by the entity or a related entity within the previous two years was not acquired solely or mainly for the purposes of avoiding land rich duty, before the asset may be included in the entity's total underlying assets (Section 94 (3)).

Where a taxpayer is of the view that a significant interest in a private entity has been acquired or that such an interest has been increased and, in the taxpayer's opinion the entity's land rich status may change upon the exercise of the Commissioner's discretion, the taxpayer should submit the following information:

- i. details of the business of the private entity;
- ii. the circumstances that led to the acquisition of the contractual rights or interests or assets and the date of any pertinent acquisition;
- iii. (for contractual rights) reasons supporting a claim that acquisitions of the contractual rights took place in the course of the normal business of the entity;
- iv. the basis of valuation of any contractual right, interest or asset;
- v. (for contractual rights) whether the beneficial interest in such contractual right or interest subsists only with the private entity; and
- vi. any other factors which the private entity considers relevant to satisfying the Commissioner that the contractual right, interest or asset should be included in the entity's total underlying assets

Reasons supporting a claim might include:

- regularity of acquisitions of particular rights, interests or assets during the business cycle;
- details about the essential necessity of a one-off acquisition to the operation of a business.

Note: The Commissioner must be satisfied that there is a relationship between the contractual right or interest and the normal business of the entity. The phrase "normal business of the entity" has been specifically adopted in the Amending Act over the commonly used phrase "ordinary course of business" to accurately convey this relationship to the normal business of the entity.

By way of an example, the Commissioner will allow trade debtors to be included in a private entity's total assets where the debtors arise in the course of the normal business of an entity, i.e. in circumstances where the debtors are generated from normal operations and are settled on normal trading terms of the private entity's business.

4. Aggregation of Interests

Section 95A of the Act, which was introduced by the Amending Act provides for the aggregation of interests acquired in a land rich entity as a result of "associated transactions", made on the same day or within the preceding three years that amount to a "significant interest" in the entity (50% or more).

An “associated transaction” is defined in Section 95A to mean, in relation to the acquisition of an interest in a land rich entity by a person or group, an acquisition of an interest in the entity by another person in circumstances in which:

- (a) those persons are acting in concert; or
- (b) the acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions.

Section 95A has been drafted broadly to capture transactions by two or more persons that are not “associated” for the purposes of the Act but who in substance are acting as a single commercial or economic entity or enterprise.

The Commissioner considers that two or more persons will be acting in concert where there is evidence showing a common purpose, object, an understanding, agreement or plan regarding the persons’ acquisitions of interests in a land rich entity.

Where there has been no communication, directly or indirectly, between persons, yet the transactions appear to arise spontaneously, the persons will not be considered to be acting in concert.

In considering whether acquisitions of interests in a land rich entity constitute ‘substantially one arrangement, one transaction or one series of transactions’, the Commissioner will consider the substance of the several acquisitions and in particular seek to determine whether there is some essential unity, some oneness, some unifying factor between the acquisitions.

Where it can be shown that transactions are separate and independent they will not be regarded as associated transactions.

The Commissioner will have regard to the following factors when determining whether acquisitions constitute “associated transactions”:

- the nature of any agreements, understandings or arrangements between the parties to the acquisitions of interests in the land rich entity;
- any association between the parties to any agreements, understandings or arrangements relating to the acquisitions of any interest in the land rich entity;
- whether there is any interdependence between the acquisitions including whether there was any contingency that one or some transactions would not take place without the completion of others; and
- the timing of any acquisitions.

For example, two non-associated persons may enter into an arrangement to acquire a significant interest, where person A acquires 51% and person B acquires 20%.

Prior to the introduction of section 95A, person A would have been liable to duty on the 51% acquisition under section 95 of the Act. Section 95A operates to aggregate the acquisitions of person A and person B, so that person A has the significant interest of 71%, for the purposes of determining the notional acquisition that is liable to duty, under section 95.

Practitioners have expressed concern that section 95A might operate to aggregate the interests of existing shareholders in a land rich company in circumstances where the company makes a *pro rata* issue of shares.

As a *pro rata* issue of shares does not result in any change in the proportionate interest of any shareholder RevenueSA does not regard such issues as giving rise to an associated transaction for the purposes of section 95A .

5. Multiple incidences of duty

The introduction of enhanced anti-avoidance provisions to Part 4 of the Act contained in the Amending Act increase the circumstances where the Act will apply to bring an acquisition of an interest or a series of such acquisitions in a land rich entity to duty under multiple provisions.

Section 102 of the Act expressly addresses such situations by allowing, where duty may be assessed in different ways in respect of the same transaction, duty to be assessed so as to maximise the return to revenue but not so as to extend the incidence of duty beyond a single person or group identified in the assessment.

Further the Act provides the Commissioner with discretion to exempt a subsequent acquisition of a significant interest in a land rich entity where that acquisition does not diminish a former significant interest of the person or group, making the acquisition.

The following example demonstrates the operation of section 102:

Person A acquires a 40% interest in a land rich entity and six months later person B acquires a 40% interest in the entity, under one series of transactions, to which section 95A of the Act applies. Person B will be deemed to have acquired a significant interest of 80% in the land rich entity and be liable to duty on the notional acquisition of 80%, under section 95 of the Act.

Two months later, person A acquires a further 20% interest in the land rich entity, but independently from person B resulting in person A, in their own right, having a significant interest of 60% in the entity and is, without the operation of section 102 (2), liable to duty.

As person B has a significant interest in the land rich entity and person A later acquires a significant interest in the entity without the interest of person B being reduced, the Commissioner is able to exempt the later acquisition, wholly or in part from duty under Part 4, if it is just and equitable to do so.

In this example after the latter acquisition persons A and B together have 100% of the interests in the land rich entity. Person A will be charged with duty on the 60% holding reduced by section 102 (2) relief amounting to 50% of the duty paid by person B.

FURTHER INFORMATION

Further information regarding these amendments may be obtained from RevenueSA.

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