

Information Circular No: 29

Stamp Duties Act 1923 *Taxation Administration Act 1996*

Land Holding Entities & Tax Avoidance Schemes

Issued 21 July 2011

Background

The *Statutes Amendment (Land Holding Entities and Tax Avoidance Schemes) Act 2011* (the "Amending Act") that gives effect to measures announced by the Government in the State Budget on 16 September 2010, was today assented to by His Excellency the Governor.

The Amending Act:

- ▶ replaces the entire land rich provisions in Part 4 of the *Stamp Duties Act 1923* (the "Act") with landholder provisions which are deemed to come into force on 1 July 2011;
- ▶ introduces into the Act an exemption from stamp duty for the transfer of property held by a security trustee to the trustee of the self managed superannuation fund ("SMSF"); and
- ▶ also introduces general anti-avoidance provisions into the *Taxation Administration Act 1996* (the "TAA").

Under the former land rich provisions, duty was payable on the unencumbered value of the South Australian land owned by a private company or trust when:

- ▶ a person acquired 50% or more of the shares or units in the private company or trust;
- ▶ the private company or trust owned South Australian land valued at \$1 million or more; and
- ▶ 60% or more of the value of the total assets of the private company or trust was land (or 80% or more for a primary production entity).

A company or unit trust quoted on a recognised stock exchange was not subject to duty under the land rich provisions unless, in the case of a listed unit trust, it met the definition of a private unit trust scheme.

Landholder Provisions

The landholder provisions have the following features:

- ▶ the 60% (or 80%) land to total assets test has been removed. Now, if control of an entity changes (i.e., a person acquires directly or indirectly 50% or more of the shares or units of a private company or trust) and that entity holds local land assets of \$1 million or more, conveyance rates of duty will apply to the land assets being acquired.
- ▶ a listed entity is subject to the landholder provisions where 90% or more of the shares or units, in the entity, are acquired. Duty for a listed entity is charged at a concessional rate of 10% of the amount of duty otherwise payable.
- ▶ in addition, a widely held unit trust (i.e. one which has not less than 300 unit holders where none of the unit holders individually, or together with an associated person, is entitled to 20% of the units in the trust) is, along with a listed trust, also treated as a public unit trust scheme for the purposes of the provisions.
- ▶ the land value threshold remains at \$1 million, however, the definition of land asset has been revised.

General principle of liability to duty

For the purposes of the landholder provisions, a person or group that acquires a prescribed interest or increases a prescribed interest in a land holding entity, notionally acquires an interest in the underlying local land assets of the entity and is liable to duty in respect of the notional acquisition.

In relation to a private company or a private unit trust scheme, a prescribed interest means a proportionate interest in the entity of 50% or more, and in relation to a listed company or public unit trust scheme means a proportionate interest of 90% or more.

Land holding entity

A 'private company', 'listed company', 'private unit trust scheme' or 'public unit trust scheme' (the "relevant entity") is a 'land holding entity' if the unencumbered value of the underlying local land assets of the relevant entity is \$1 million or more.

Notional interest

A relevant entity has a notional interest in an asset held beneficially by a private company or private unit trust scheme if the relevant entity holds a proportionate interest of 50% or more in the private company or private unit trust scheme, or if a chain of such 50% interests can be traced between the relevant entity and the private company or private unit trust scheme.

Underlying land assets

The underlying land assets of a relevant entity include the assets held beneficially by the entity and its notional interests in the land assets of related entities.

Two entities are related entities if one has a direct interest in the other or if a series of direct interests can be traced between them through other related entities.

Definition of land

A 'land asset' is an interest in land other than a mortgage, lien or charge or an interest under a warrant or writ. An 'interest in land' includes a lease or licence granted under the *Mining Act 1971*, the *Offshore Minerals Act 2000*, or the *Petroleum and Geothermal Energy Act 2000*; a lease granted under the *Aquaculture Act 2001*, including a sublease of such a lease and an interest conferred by a forestry property (vegetation) agreement (within the meaning of the *Forestry Property Act 2000*).

A 'local land asset' is a land asset consisting of an interest in land in South Australia.

A relevant entity's interest in land will include the value of any items fixed to the land, whether or not they constitute fixtures at law.

The interest in land will include anything fixed to land that is separately owned from the land or that is notionally severed or considered to be legally separate to the land by operation of another Act or law.

In relation to an interest in land that is separately owned from the land, the Commissioner of State Taxation (the "Commissioner") may determine that the interest will not be included if the separate ownership of the interest is not part of an arrangement to avoid duty under Part 4.

The interest in land of the relevant entity that is notionally severed or legally separated by operation of another Act or law will not include an interest that is owned by another entity, unless the entities are related and a person or group holds a significant interest in both or either entity holds a significant interest in the other, either directly or through a chain of other entities.

Goods

Under the landholder provisions, stamp duty is charged on the value of the acquirer's notional interest in the entity's underlying local land assets and South Australian goods.

South Australian goods means goods that are used solely or predominantly in South Australia but does not include goods that are stock-in-trade; materials held for use in manufacture; goods under manufacture; goods held or used in connection with the business of primary production; livestock; a registered motor vehicle or a registered tractor; or a ship or vessel.

The Commissioner may, if the Commissioner considers it to be fair and reasonable to do so in the circumstances of a particular case, exclude specified goods, or a specified class of goods, from the calculation of duty.

Valuation issues

Provisions have been introduced which set out how the value of a relevant asset is to be determined under Part 4. These provisions allow the Commissioner to cause a valuation of an asset or interest to be made in circumstances where there is no evidence, or there is unsatisfactory evidence provided, as to the value of the asset or interest.

Upon the acquisition of an asset or interest, or notional acquisition under Part 4, the value of local land assets and South Australian goods is to be determined according to the unencumbered market value of the asset at the time that the question of value falls to be determined.

In addition, when determining the value of an asset or interest, it is to be assumed that a hypothetical purchaser would, when negotiating the price for any asset or interest, have knowledge of all existing information relating to the asset or interest; and no account is to be taken of any amount that a hypothetical purchaser would have to expend to reproduce, or otherwise acquire, a permanent right of access to and use of existing information relating to the asset or information.

Partnerships

In order to ensure that partnership structures are not used to defeat the operation of Part 4, a deeming provision has been introduced so that each partner is regarded as holding the proportionate part of the property of the partnership.

A relevant entity or other person that is a partner in a partnership is deemed to be beneficially entitled to a proportionate share in each and every asset of the partnership, determined according to the greater of either the relative entitlement to participate in the surplus property of the partnership, or the relative capital contribution of the partner (being equity and any loan capital).

The Commissioner has a discretion to determine the proportionate share of a partner, including not taking into account loan capital, if satisfied that the loan was entered into as part of a genuine business arrangement and not as an arrangement to avoid or reduce duty under Part 4.

Rebates/Reductions/Exemptions

Section 102A (4)

The former Part 4 provisions did not allow a rebate from the duty payable on the acquisition of a significant interest by a person or group, where that person or group previously held an interest in the entity when that entity did not own land, and duty was subsequently paid by the entity on the acquisition of the interest in land.

The new landholder provisions allow for a pro-rata rebate in these circumstances.

Section 102A (5)

Previously Section 97(4) led to an anomalous result in which a percentage rebate was provided based upon any interests acquired in a landholder entity, more than three years before the date of a dutiable transaction, regardless of whether the assessment of duty arose on an initial dutiable transaction or a subsequent assessment of only an increased interest in the landholder entity. In the latter case the rebate had the potential to remove any duty liability.

New Section 102A (5) limits the rebate provided to duty arising on an initial dutiable transaction.

Section 102A (7)

This provision allows the land holder conveyance rate assessment to be reduced by the amount of any duty paid on the acquisition of the financial products that gave rise to the prescribed interest acquisition. The reduction is limited to only the share or unit duty paid that reflects the entity's local land assets and South Australian goods as a percentage of the entity's total assets.

Section 102G (3) and (4)

If the Commissioner is satisfied that it is just and equitable to do so, the Commissioner may exempt from duty under Part 4, wholly or partly, transactions entered into by a group or between members of a group, where the group or a member of the group acquires all or part of a prescribed interest in a land holding entity previously held by the group or a member of the group.

Schemes of arrangement

New Section 102F (2) limits the exemption from duty under Part 4 for an acquisition of an interest in a landholder entity that takes place under a compromise or arrangement approved by the Court, under Part 5.1 of the *Corporations Act 2001*, to creditor schemes of arrangement.

Concession for life insurance companies

A concession has been introduced for statutory funds of life insurance companies to provide that those statutory funds are not considered to be associated persons for the purpose of Part 4, and such funds will be treated as separate and independent for the purposes of the landholder provisions.

102B Return statement

Where a person or group acquires or increases a prescribed interest in a land holding entity Section 102B (1) of the Act requires the lodgement of a return with the Commissioner within two months after the date of the dutiable transaction. The **Section 102B return** form is available on the RevenueSA web site and needs to be completed and submitted to RevenueSA with the transfer documents and other supporting documentation for assessment.

Recovery

If a person or group fails to pay duty as required under Part 4, the landholder provisions provide the Commissioner with the power to register a charge against any land of a relevant entity and that charge will rank as a first charge over any of its land.

Transitional provisions

Transitional provisions have been included that deal with acquisitions before and after the implementation date of the landholder model. Agreements entered into on or before 30 June 2011 but completed on or after 1 July 2011 will be dealt with under the superseded land rich provisions.

Anti-Avoidance Provisions

New general anti-avoidance provisions have been introduced into the TAA, which will allow the Commissioner to make an assessment or reassessment of tax where a person has used an artificial, blatant or contrived tax avoidance scheme for the sole or dominant purpose of avoiding or reducing the amount of tax payable.

The anti-avoidance provisions will only apply to taxation liabilities that crystallise on or after midnight 30 June 2011. The provisions will not apply to completed schemes where liability crystallised or would have crystallised prior to that date.

Self Managed Superannuation Funds

The Amending Act introduces Section 71 (7a) to the Act to exempt the transfer of property by a trustee to a Self Managed Superannuation Fund, where the property has been held by the trustee for the benefit of the SMSF, the SMSF financed the acquisition of the whole of the property by the trustee and *ad valorem* duty was paid on the acquisition of the property for the trust.

Further Information

Where appropriate, Revenue Rulings will be issued to deal in more detail with matters covered by the Amending Act.

Further information can be obtained from RevenueSA.

Location	RevenueSA State Administration Centre 200 Victoria Square East ADELAIDE SA 5000
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