

Revenue Ruling

Stamp Duties Act 1923

SDA007

SECTION 71CC

EX GRATIA SCHEME FOR TRANSFEROR/TRANSFeree TRUSTS

Preamble

Section 71CC of the *Stamp Duties Act 1923* (the "Act") provides an exemption from stamp duty on the transfer of primary production land and associated farming goods between certain relatives (family members) and/or their trustees.

The second reading speech relating to the introduction of the exemption provided that the policy supporting the exemption was to exempt intergenerational transfers of farming land for succession purposes where both the transferor and transferee have been in a business relationship (with respect to the farming land) for at least 12 months.

The exemption extended to transfers between trustees who were acting as trustee for the relevant individual relatives involved in the intergenerational transfer. Accordingly, it has been RevenueSA's practice to exempt transfers between trusts where the beneficiaries of those trusts are restricted to the individual relatives of the relevant transferor. The following transfers have therefore been previously exempted by RevenueSA:

- ▶ from an individual to a trust where the beneficiaries of that trust are restricted to relatives of the individual transferor;
- ▶ from a trust with beneficiaries restricted to the individuals of a specific family, to an individual of that family; and
- ▶ from a trust with beneficiaries restricted to the individuals of a specific family, to another trust with beneficiaries also restricted to the individuals of the same family.

Where the beneficiaries or potential beneficiaries of a trust include non-relatives, companies, other trusts or charities, the exemption is not available.

Discussion

As a business relationship of 12 months must exist between the two target individuals/relatives involved in the intergenerational transfer, RevenueSA was concerned that the exemption could not be applied to transfers involving trusts with multiple beneficiaries such that the business relationship between two distinct relatives could not be ascertained/identified. RevenueSA therefore sought advice in order to ascertain the proper scope of the legislative exemption.

RevenueSA's advice is that the exemption cannot be applied to transfers involving trusts which have more than one beneficiary. This is because the relevant trustee of that trust cannot be said to be acting as trustee for the specific individual/relative to which the business relationship criterion was satisfied. Accordingly, under the current wording of Section 71CC of the Act, only a trustee who holds (as transferor) – or will hold (as transferee) – the property on trust solely for a specific individual beneficiary is eligible for the exemption.

Therefore, any transfers of primary production land involving trusts with more than one beneficiary are subject to *ad valorem* stamp duty under the Act.

This advice is a significant departure from RevenueSA's long-standing assessing practices.

Ruling

Having regard to the intended reach of the exemption and the existing practice of RevenueSA applying the exemption to discretionary trusts, unit trusts and self-managed superannuation funds, the Treasurer has approved an *ex gratia* scheme to provide stamp duty relief so that RevenueSA's existing assessing practice in relation to Section 71CC can be maintained, pending consideration of appropriate legislative amendment.

The following criteria must be satisfied in order to obtain *ex gratia* relief:

- ▶ The land must be at least 0.8 hectares in size.
- ▶ The land must be used wholly or mainly for the purposes of carrying on a business of primary production.
- ▶ The stipulated transferor and transferee (see next two dot-points) must be 'relatives' as defined in Section 71CC(5) of the Act and have a pre-existing 12 month business relationship arising from the use of the land for primary production purposes.
- ▶ The sole or principal business of the transferor must be that of primary production on the relevant land. Where the transferor is a trustee of a trust, the lodging party must stipulate the beneficiary under the trust with which the transferee has a pre-existing 12 month business relationship.
- ▶ The sole or principal business of the transferee must be that of primary production on the relevant land. Where the transferee is a trustee of a trust, the lodging party must stipulate the beneficiary under the trust with which the transferor has a pre-existing 12 month business relationship.
- ▶ Where both the transferee and transferor are trustees, the lodging party must stipulate the beneficiary under each trust who have a pre-existing 12 month business relationship with one another.
- ▶ The Commissioner of State Taxation may have regard to the factors listed in Section 71CC(2) of the Act in determining whether a business relationship exists between the transferor and transferee.
- ▶ Where a transferor and/or transferee is/are a trustee of a trust(s), the beneficiaries of the trust(s) must be limited to natural persons within the relevant family group. Again, refer to the definition of 'relative' in Section 71CC(5) of the Act.
- ▶ The transfer does not arise from arrangements or a scheme devised for the principal purpose of taking advantage of the exemption in Section 71CC of the Act.

Examples

Example 1

Daniel and Katie run a cattle farm situated on 500 hectares of land which is held in their family trust, the Shank Family Trust. The beneficiaries of the Shank Family Trust are limited to Daniel and 'the relatives of Daniel as the term relative is defined in Section 71CC(5) of the Act'. Daniel and Katie's daughter Charlie has assisted with running the cattle farm for a number of years and draws a wage and/or a distribution from the Shank Family Trust.

Daniel and Katie wish to hand control and ownership of the farm to Charlie and her husband. Although Daniel and Katie, as trustees of the Shank Family Trust, could distribute the land to Charlie and her husband as beneficiaries of the trust stamp duty exempt, Charlie and her husband desire to hold the land in their own family trust. Accordingly, a transfer is effected wherein the cattle farm and associated goods are conveyed from Daniel and Katie as trustees for the Shank Family Trust to Chas Pty Ltd as trustee for the Chas Family Trust. The beneficiaries of the Chas Family Trust are also limited to Charlie and 'the relatives of Charlie as the term relative is defined in Section 71CC(5) of the Act'.

On lodgement of the transfer for stamping, Charlie stipulates her Father Daniel as the individual relative with whom she has an existing 12 month business relationship in respect of the cattle farm.

Ex gratia relief is available in these circumstances.

Example 2

Ross and Mary own 250 hectares of land upon which they conduct a dairy farm in partnership. Ross and Mary desire to transfer the primary production land to their self-managed superannuation fund, in which both are members. Upon lodgement of the transfer, Ross and Mary submit that they have been in a 12 month business relationship arising from the use of the land for primary production. They also submit that Ross' existing interest in the land is being transferred to the fund's trustee to be allocated for Mary's benefit and vice versa.

Given it is RevenueSA's current practice to exempt such transfers, *ex gratia* relief is available in these circumstances.

Similarly, Ross and Mary could obtain *ex gratia* relief had they transferred the land to a unit trust in which both Ross and Mary were the only unit-holders.

Example 3

Alana owns and operates a primary production business on 100 hectares of farming land. Alana's daughter Eloise has worked as an employee of the business for 15 years. Alana makes plans to retire so that Eloise will succeed to the primary production business. Alana conveys the land to EPJ Pty Ltd, which is the trustee for the Eloise Family Trust. The Eloise Family Trust is an ordinary discretionary trust established for the benefit of Eloise's immediate family. The range of beneficiaries include Eloise, her husband, their children, their children's spouses, companies in which the aforesaid beneficiaries own shares, trusts in which the aforesaid beneficiaries are listed beneficiaries, and charitable entities. Alana, in attending to the lodgement of the transfer, stipulates Eloise under the Eloise Family Trust as the individual relative with whom she has a pre-existing 12 month business relationship.

Ex gratia relief is not available in the above example as the beneficiaries of the Eloise Family Trust are not limited to natural persons or the relatives of Alana. *Ex gratia* relief would have been available had the beneficiaries of the Eloise Family Trust not included the companies, trusts and charities.

Example 3.2

Upon being informed that *ex gratia* relief is not available, Eloise suggests to RevenueSA that EPJ Pty Ltd as trustee could execute either a deed of amendment or deed of rectification to restrict the range of beneficiaries of the trust by deleting the reference to companies, trusts and charities.

RevenueSA does not consider such course of action as being effective as:

- ▶ A deed of amendment cannot amend a trust deed retrospectively, irrespective of whether or not the trustee ever exercised its discretion to distribute to companies, trusts or charities.
- ▶ A deed of amendment to disenfranchise certain beneficiaries amounts to a resettlement of the trust such that the net asset value of the trust's assets is subject to *ad valorem* duty.
- ▶ A deed of rectification requires that the trust relationship established under the original deed does not reflect the relationship intended by the settlor and trustee. That is, the trust deed was drawn as a result of mutual mistake of trustee and settlor. There must be clear and unambiguous evidence that the deed does not accurately represent the agreement or common intention of the parties at the time when it was executed. Further, the common law remedy of rectification does not operate where the mistake of the parties is one of potential revenue (tax) consequences. A court will not decree rectification for mistake where the parties were mistaken with respect to the liability of the transaction for stamp duty.

For all of the above reasons, RevenueSA will not entertain any 'retrospective' deed of amendment or rectification so that the parties can access the *ex gratia* relief described in this Ruling.

Taxpayer Obligations

Ex Gratia Relief

Formal written application for *ex gratia* relief under this Ruling must be made within 60 days of executing the relevant transfer document, otherwise interest and penalty tax may be applied to the stamp duty payable. In these circumstances, the *ex gratia* payment ultimately provided will not extend to relieve the taxpayer from the interest and penalty tax incurred.

Please forward all applications to RevenueSA by hand or post using the address and postal details below.

RevenueSA may request any further documentation or evidence – including statutory declarations – to satisfy itself that *ex gratia* relief is warranted.

Statutory Exemption

Transfers between individuals (i.e. not involving trusts) which satisfy the criteria of Section 71CC of the Act may still be endorsed using the RevNet system.

LTO Fees

Where relief under this *ex gratia* scheme is provided, the relevant transfer will nonetheless be stamped with *ad valorem* duty as the statutory exemption does not apply. This will result in LTO fees above the nominal amount being payable on the registration of the transfer.

In order to ensure nominal fees are payable on transfers which have been afforded *ex gratia* relief, RevenueSA has arranged with the Registrar General that an additional stamp is to be imprinted on the transfer to indicate that the relief has been provided.

The Register General will then provide concessional treatment to the transfer.

Mike Walker
COMMISSIONER OF STATE TAXATION

16 December 2013

Further Information

Further information can 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
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History

This Revenue Ruling is effective from 16 December 2013.

This is the first Revenue Ruling issued on this topic.