SOUTH AUSTRALIA

RevenueSA

Stamp Duty **Circular No 233**

STAMP DUTY - LEASES

A lease or agreement to lease or any document for the tenancy or occupancy of land or a tenement is chargeable with stamp duty pursuant to section 4 of the *Stamp Duties Act 1923* ("the Act") and the charging schedule in Schedule 2.

Sections 72-75 of the Act prescribe the methods to be employed to determine the rent or other consideration upon which *ad valorem* stamp duty is chargeable on a lease or agreement for a lease.

The basis for determining the rent or consideration payable under a lease, is prescribed in Schedule 2 of the Act. A lease for a term greater than one year is to be assessed on the basis of the average rate of rent per annum where this can be ascertained, or estimated. Otherwise, the lease is to be assessed on the basis of the rent per annum where this can be ascertained or estimated, or on the basis of the Current Market Rent if the average rate of rent per annum or rate of rent per annum cannot be ascertained.

Duty is payable at the rate of $1 per $100, or fractional part of $100 on the basis of the average annual rental, or on the annual rental (inclusive of any GST component), provided that the consideration for the property in any case, is not less than the Current Market Rent for the property. This is subject to the Exemptions and Exclusions set out at page 5.

For the purposes of the Act:

> *"**Current Market Rent**" for property means the consideration (including rent and any other form of valuable consideration) that a lessee might reasonably be expected to pay under a lease of the property, if it were unoccupied and offered for renting, expressed as a rate of rent per annum.*

Note: Pursuant to section 75 of the Act, the rate, or average rate of rent per annum used as a basis for calculating duty on rent may be:

- the actual or estimated rate of rent charged; or

- if the consideration payable by the lessee cannot be ascertained or estimated, or would result in a lower duty being payable – the equivalent Current Market Rent.

GOODS AND SERVICES TAX ("GST")

Pursuant to section 2 of the Act:

> *""**rent**" includes an amount (however it may be described in a lease) to be paid by a lessee to a lessor to reimburse, offset or defray the lessor's liability to GST;"*

For the purpose of this definition, it does not matter whether the consideration is being expressed as:

- rent inclusive of GST; or
- rent, plus GST.

Therefore, stamp duty is to be assessed on 1% of the value of the average annual rate of rent per annum or the rate of rent per annum, inclusive of any GST component.

WHERE AVERAGE ANNUAL RENT CAN BE ASCERTAINED

Where an average rate of rent per annum can be ascertained or estimated, stamp duty will be charged at the rate of $1 per $100 or any fractional part of $100. The following examples, while not exhaustive, illustrate the principles involved (note: examples are GST inclusive):

- where a lease is executed for 5 years on or after 1 January 2002, with a total rent of $110,000 payable for the term of the lease, the average annual rent is $22,000 and therefore no stamp duty is payable (ie., the average annual rent does not exceed the $50,000 per annum threshold, and the term commences on or after 1 January 2002: see Exemption 1, Lease or Agreement for a Lease, Schedule 2 of the Act);
- where a lease is executed for 5 years with total rent of $330,000 payable for the term of the lease, the average annual rent is $66,000. Stamp duty payable is $660;
- where a lease is executed for 3 years with rent of $55,000 for the first year, $60,000 for the second year and $65,000 for the third year, the average annual rental is $60,000, with stamp duty payable is $600; and
- where a lease is executed for a term of 4 years, which allows for a rent free period for the first 3 months, stamp duty is charged on the actual average rent paid during the term of the lease. For example:

1 December, 2002 to 30 November, 2003	(9 X $5,500)	$49,500
1 December, 2003 to 30 November, 2004	(12 X $5,500)	$66,000
1 December, 2004 to 30 November, 2005	(12 X $5,500)	$66,000

1 December, 2005 to 30 November, 2006	(12 X $5,500)	$66,000
TOTAL RENT PAYABLE		$247,500

Average rate of rent per annum ($247,500 ÷ 4) = $61,875
Stamp duty payable is $619

WHERE AVERAGE ANNUAL RENT CANNOT BE ASCERTAINED

Where the average annual rate of rent per annum cannot be ascertained, but the first year's rent is ascertainable, then the rent is to be calculated on that rate of rent per annum, provided that it is not less than the Current Market Rent for the property.

Where the average rate of rent per annum, or the rate of rent per annum cannot be ascertained or estimated, the quantum of duty payable is to be calculated on the basis of the Current Market Rent that can be reasonably expected for the property.

In the event that the lessee cannot ascertain or estimate an average rate of rent per annum or the rate of rent per annum (first year's rent), that equates to the Current Market Rent, an assessment of the duty payable may be made based upon the Current Market Rent as if the Current Market Rent were the average rate of rent per annum or rate of rent per annum under the lease and there was no other consideration payable under the lease.

For the purpose of such an assessment, the lessee may utilise the ensuing methods in determining the rent on the basis of the Current Market Rent for a property:

- comparable rentals on the basis of an equivalent floor area;
- comparable rentals for similar business activities;
- any information about the relevant property, the subject of the lease, or agreement to lease; and
- independent expert valuation (refer RevenueSA Circular No 166).

In the event that a rent figure is not provided by the lessee for a lease, RevenueSA will make a determination of the rent for the property based on any of the aforementioned determinants and on-charge the costs, including any incidental costs to the person/s liable to pay the stamp duty.

LEASE PERIOD LESS THAN 12 MONTHS

Pursuant to Schedule 2 of the Act, a lease for less than 12 months is to be charged on the basis of the rent per annum and is therefore charged as if the lease was for a period of 12 months.

Eg:

- A six month lease entered into after 1 January 2002 for $24,000 is annualised as a 12 month lease for $48,000. As the lease is for less than $50,000, it is exempt from stamp duty.

- A six month lease entered into after 1 January 2002 for consideration of $30,000 is annualised as a 12 month lease for $60,000. Stamp duty payable is $600.

LEASE EXTENSIONS

An extension of a lease, where there is a change to the rental convenants is chargeable as a new lease, and may be assessed in the manner described above.

The exception to this rule is an extension of a lease for a period not exceeding one day, specifically to vary the terms or convenants only, and not to vary the rent or consideration for the lease. The stamp duty payable for this extension is $10.

LEASES RENEWED PRIOR TO EXTINGUISHMENT OF A CURRENT LEASE

Where a lessee renews a lease prior to the extinguishment of a current lease, the rent in respect of the new agreement is to be calculated on the basis of the average rate of rent per annum or rate of rent per annum, or the Current Market Rent, applicable to the new agreement.

LICENCE AGREEMENTS

Licence agreements will not ordinarily be charged with lease duty, except where the agreement (whatsoever it is called) gives the tenant/licensee "exclusive rights to" or "exclusive possession of the property", in which case, it will be subject to the lease provisions of the Act.

NOMINAL/PEPPERCORN LEASES

With effect from 1 January 2002, a lease for a nominal rental, commercial peppercorn lease, or a rent that is less than the equivalent Current Market Rent for a property, is to be assessed for stamp duty on the basis of the equivalent Current Market Rent for the property. If the rent (based on the Current Market Rent for the property) exceeds the $50,000 per annum threshold contained in Exemption 1, Lease or Agreement to Lease, Schedule 2 of the Act, the lease is dutiable at the rate of $1 per $100 or any fractional part of $100.

SUBSEQUENT LEASES

Where an agreement for a lease/deed of lease has been stamped as the lease and the parties subsequently produce an executed lease in registrable form over the same property, then providing the lease is in conformity with the agreement to lease/deed of lease (ie. same or similar terms and conditions, the same property and the same rent or consideration) the lease will attract stamp duty of $0.50c. Where the rent stated in the subsequent lease is greater than that stated in the earlier lease, stamp duty is chargeable at the rate of $1 per $100, or fractional part of $100 on the additional rent, plus $0.50c.

EXEMPTIONS AND EXCLUSIONS

- A general threshold exemption for a lease, or agreement for a lease, or any written document for a tenancy or occupancy of land or a tenement that commences on or after 1 January 2002, and where the rent reserved, averaged over the term of the lease, proposed lease, tenancy or occupancy, does not exceed $50,000 is provided under the *LEASE or AGREEMENT FOR a LEASE* heading in Schedule 2 of the *Act*. [This exemption was introduced as part of the 2001/2002 Budget measures in the *Statutes Amendment (Taxation Measures) Act 2001*.]

- A further general exemption for leases of <u>residential premises</u> that are to be occupied by the tenant (lessee) as their principal place of residence for the term of the lease is also provided under the abovementioned heading.

- The following types of leases are exempt from stamp duty under the *GENERAL EXEMPTIONS FROM ALL STAMP DUTIES* heading of Schedule 2 of the *Act*:

  - Leases to the Crown and to any person on behalf of the Crown; and
  - Any cemetery leases.

TIME FOR PAYMENT OF DUTY AND STAMPING

A lease or an agreement for a lease is, subject to any express provisions to the contrary in the Act, chargeable with stamp duty, being payable:

- In the case of an instrument executed in South Australia – within two months after its execution; or

- In the case of an instrument executed outside South Australia – within two months after its receipt in South Australia, or within six months after its execution, whichever period first expires.

- If a further charge for duty arises after the execution of the original instrument, that duty must be paid and the instrument stamped within two months after that event.

Failure to produce the instrument in accordance with the foregoing requirements results in an offence invoking a $10,000 penalty.

STAMPING OPTIONS

RevenueSA offers both electronic and manual lodgement stamping systems for a range of instruments, including leases. Full details regarding the stamping method for leases can be found in the RevenueSA Stamp Duty Document Guide, TIMBER Guide to Assessing or the Stamp Duty Guide to Assessing for Counter Lodgements that are available on the RevenueSA Website.

FURTHER INFORMATION

Location

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2 October 2002

COMMISSIONER OF STATE TAXATION