SOUTH AUSTRALIA

RevenueSA

Stamp Duties **Circular No. 244**

STAMP DUTY ON INSTRUMENTS WHICH VARY THE TERMS OF A DISCRETIONARY TRUST

This Circular sets out the assessment of the stamp duty on instruments which vary the terms of a discretionary trust in the following ways:

- adding or removing a person as a potential beneficiary;
- variation of income or capital entitlements of potential beneficiaries under a discretionary trust; and
- minor changes which do not vary the entitlements of potential beneficiaries under a discretionary trust.

The effect of section 71(5)(g) of the *Stamp Duties Act 1923* ("the Act") is also set out in this Circular.

This Circular reflects the input of various representatives of RevenueSA consultative group members and that input is both acknowledged and appreciated.

The relevant legislative provisions:

A person who may be entitled to a beneficial interest in all or part of any property subject to a discretionary trust on the exercise of discretion by the trustee is defined for the purposes of the Act as an "object". For the purposes of this Circular this term will be used to distinguish this person from the beneficiaries of non-discretionary trusts. The interest of the object in the trust property is defined as a "*potential beneficial interest*". The following definitions found in the Act, are important for the interpretation of the relevant provisions:

> *"**"discretionary trust"** means an arrangement, however made, under which a person holds property, and the beneficial interest in all or any part of that property may be vested in a person (in this Act referred to as an **"object"** of*

the discretionary trust) on the exercise of a discretion, whether subject to any other contingency or not and whether the exercise of the discretion is obligatory or optional;

*"**potential beneficial interest**" means the rights, expectancies or possibilities of an object of a discretionary trust in, or in relation to, property subject to the discretionary trust;*

*"**interest**" in property means a legal or equitable interest and includes a potential, contingent, expectant or inchoate interest."*

Sections 71(3)(a)(iii)-(vi) of the Act deem an instrument to be a conveyance operating as a voluntary disposition *inter vivos* if it effects, acknowledges, evidences or records any of the following transactions:

- the creation of an interest in property subject to a trust (s71(3)(a)(iii));
- the transfer of an interest in property subject to a trust (s71(3)(a)(iv));
- the surrender or renunciation of an interest in property subject to a trust (s71(3)(a)(v)); and
- the redemption, cancellation or extinguishment of an interest in property subject to a trust (s71(3)(a)(vi))

whether or not any consideration is given for the transaction.

The operation of section 71(3)(a) of the Act is restricted to any instrument that relates to land, a marketable security or a unit under a unit trust scheme, or an interest in land, a marketable security or a unit under a unit trust scheme (section 71(4)).

An object of a discretionary trust does not have any beneficial interest in one or all of the assets of the trust as such, but merely a right to be considered by the trustee. Consequently, the valuation of such an interest for the purposes of imposing *ad valorem* duty (that is on the disposition of that interest through its creation, transfer, surrender, renunciation, redemption, cancellation or extinguishment) cannot generally be made through any known valuation techniques. This valuation problem is dealt with however by section 3A(3) and section 71(8) of the Act.

Section 3A(3)

"For the purpose of calculating duty on an instrument that relates to a potential, contingent, expectant or other inchoate interest

(a) the interest is to be treated as an actual interest i.e. as if the potentiality, contingency or expectancy had been realised or anything necessary to perfect the interest had occurred; and

(b) if the interest is dependent in any way on the exercise of a discretion or any other contingency, it will be presumed that the discretion has been exercised, or the contingency has been realised, so as to give rise to the greatest possible liability to duty in this State."

Section 71(8)

"A conveyance operating as a voluntary disposition inter vivos that transfers a potential beneficial interest in, or in relation to, property subject to a discretionary trust shall, subject to this Act, be chargeable with duty as if it transferred the beneficial interest in the property that the transferee would have if the discretion under the discretionary trust were so exercised as to confer upon him the greatest benefit in relation to that property that can be conferred upon him under the discretionary trust."

(emphasis added)

RULING

General

Where an interest in the property of a discretionary trust is conveyed by an instrument, or is the subject matter of an instrument deemed to be a voluntary conveyance *inter vivos*, the instrument of conveyance (operating as a voluntary disposition *inter vivos* or otherwise) is chargeable with *ad valorem* stamp duty as if it conveyed the entire trust property. The value of the interest conveyed will be arrived at by applying the provisions of either section 3A(3) or section 71(8) of the Act.

Recognising the right of indemnity that a trustee has in relation to all debts incurred by the trustee in the administration of the trust against the trust property, *ad valorem* duty will be calculated on the "net value" of the trust property.

The net value of the trust property is the value arrived at after deducting from the total value of all properties subject to the trust and which are situated in South Australia, the liabilities of the trust that are attributable to those assets.

If a trust owns an asset that is situated outside South Australia, then the value of that asset together with the value of any liabilities of the trust attributable to that property will not be taken into account for stamp duty purposes.

If a trust owns an asset that is situated in South Australia and other assets that are situated outside South Australia and the liabilities of the trust cannot be readily attributable to any of the assets, the liabilities will be apportioned amongst the assets on the basis of the value of the assets.

Whether a liability is attributable to a certain asset of the trust will be determined on a case by case basis, using the rationale that the liability will be attributed to the asset to which it has the closest nexus. If no such link exists, RevenueSA will take a common sense approach based on what is fair and equitable in the circumstances.

For example, where a trust holds a property in both South Australia and New South Wales and the liabilities of the trust are not secured over either property, then the liabilities will be apportioned to the SA and NSW assets in line with the value of those assets.

If the liabilities of the trust are secured over the South Australian property and not the New South Wales property then RevenueSA will attribute the liability to the South Australian property alone.

Situations where a*d valorem* duty is chargeable

An instrument by which the trustee of a discretionary trust varies a trust deed to redeem, cancel or extinguish the interest of an object or by which such an interest is surrendered or renounced, is chargeable with *ad valorem* duty on the net value of the trust property.

An instrument by which the trustee of a discretionary trust varies a trust deed to add a new beneficiary in respect of capital, that is a potential beneficial interest in relation to property subject to the trust, is chargeable with *ad valorem* duty on the net value of the trust property.

Where the trust deed is not amended but the beneficiary executes a unilateral deed which transfers or surrenders, renounces, redeems, cancels or extinguishes his/her interest in property subject to a trust, the deed will be subject to duty on the net value of the trust property.

Situations where nominal duty is chargeable

The following variations are chargeable with nominal duty as the entitlement to income depends on the future cash flow of the trust:

- an instrument by which an object of a discretionary trust surrenders or renounces his/her entitlement to income (but not capital) from the trust; or

- an instrument of variation of the trust deed that creates an entitlement to income (not capital) for a new object of the trust or that varies the entitlement to income of existing objects.

RevenueSA has adopted this approach because, in accordance with past practice, it is considered that the interest representing the quantum of entitlement to income, has a nominal value only. This is despite the fact that the value of the entitlement to income could be determined by actuarial methods pursuant to Section 3A(3).

An instrument that varies any terms of a discretionary trust (eg banking powers) but does not involve the creation or variation of any beneficial interest or potential beneficial interest in property subject to a trust is exempt from *ad valorem* duty. However, if the instrument of variation is drawn as a deed, it is chargeable with nominal duty of $10.

Application of the provisions of section 71(5)(g)

Section 71(5)(g) of the Act provides that a transfer of a potential beneficial interest in property subject to a discretionary trust where:

- the discretionary trust was created by an instrument that is duly stamped and is wholly or principally for the benefit of a family group; and

- the transfer is made:

  - by one member of the family group to another member of the family group; or

  - by a member of the family group by way of surrender or renunciation of the potential beneficial interest and another member of the family group is to continue as an object or beneficiary under the trust;

will be deemed not to operate as a voluntary disposition *inter vivos* and therefore will be exempt from stamp duty or subject to the payment of $10 in stamp duty if the transfer is effected by way of deed.

Similarly, an acknowledgment by a trustee (pursuant to his/her power or authority) that a member of the family group no longer has any interest in the trust, and another member of the family group is to continue as an object or beneficiary of the trust will also not be subject to *ad valorem* duty.

A family group is defined under Section 71(15) as being *"a group of persons connected by an unbroken series of relationships of consanguinity or affinity"*.

Capital Gains Tax Changes

Changes to the capital gains tax provisions of the *Income Tax Assessment Act 1997 (Cth)*, have created pressure on trustees of discretionary trusts to execute instruments by which the trust deed is varied so that a particular object cannot receive a distribution of income or capital, greater than 39% of the income from the trust.

RevenueSA's view is that such variations are chargeable with *ad valorem* duty under the Act, based on 61% of the net value of the trust property, as all beneficiaries formerly entitled to a maximum distribution of 100% of the capital and income of the trust, can now, at most, be entitled to 39% of the capital and income of the trust.

FURTHER INFORMATION

Location

RevenueSA
State Administration Centre
200 Victoria Square East
ADELAIDE SA 5000

Postal

Commissioner of State Taxation
RevenueSA
GPO Box 1353
ADELAIDE SA 5001

Telephone

(08) 8226 3750

Facsimile

(08) 8226 3737

Website

http://www.revenuesa.sa.gov.au

E-mail

Revenuesa@saugov.sa.gov.au

5 December 2003

COMMISSIONER OF STATE TAXATION