



Office of State Revenue
NSW TREASURY

ABN: 77 456 270 638

Revenue Ruling DUT 18

Dutiable Transactions over Land and Improvements

PREAMBLE

1. Chapter 2 of the Duties Act charges duty on the "dutiable value" of "dutiable property" that is the subject of a "dutiable transaction". Both an agreement for the sale or transfer of land, and a transfer of land, are dutiable transactions over dutiable property. The dutiable value of dutiable property is the greater of:
 - the consideration for the dutiable transaction; and
 - the unencumbered value of the dutiable property (subsection 21 (1)).
2. Duty on an agreement for the sale or transfer of land is determined by reference to the dutiable value of "the property agreed to be sold or transferred" (Table to section 9). This has implications for an agreement for the sale or transfer of land which is part of an arrangement relating to land and the erection of improvements, such as a "house/land package" and a "builder's terms" contract.
3. Duty on a transfer of land is determined by reference to the dutiable value of the property transferred. However, nominal duty is payable on a transfer that is in conformity with an agreement for the sale or transfer of land if duty has been paid on the agreement (subsection 18 (2)).
4. The legislation also provides that if, before land is transferred to a transferee, the transferee has made improvements to the land, the unencumbered value of the land is to be determined as if those improvements had not been made (subsection 23 (3)).
5. This ruling identifies the manner in which duty is calculated on:
 - *an agreement for the sale or transfer of land which is part of an arrangement relating to the erection of improvements on the land;*
 - *a transfer of land pursuant to such an agreement; and*
 - *a transfer of land including improvements made by the transferee.*

RULING

The property agreed to be sold or transferred

6. The courts have considered the liability to duty under the *Stamp Duties Act 1920* of agreements for sale of land and related building contracts. Section 41 of that Act refers to "the property agreed to be sold or conveyed", whereas the Duties Act refers to "the property agreed to be sold or transferred".

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7. In *Bambro (No 2) Pty Ltd v Commissioner of Stamp Duties* (1963) 63 SR (NSW) 522, the court considered an arrangement where, under a single instrument, the vendor agreed both to sell the land and to procure a builder to carry out the agreed building works, and the vendor was to receive from the purchaser payment of the consideration for the building works as well as the purchase price of the land. The court held that duty is to be ascertained "by reference to the property agreed to be sold or conveyed regarded as that which, viewing the matter as at the date of the agreement, will be, under the terms of the agreement, the subject of the conveyance at the time when, under the terms of the agreement, the conveyance is to be executed".
8. The reference to "the time when the conveyance is to be executed" is considered to be a reference to the time when title is to be conveyed (the completion date), as an agreement for sale of land rarely specifies when a conveyance is to be executed. The agreement in the *Bambro* case provided that title to the land was to be conveyed before the building works had commenced, and the court held that the property in respect of which ad valorem duty was payable was unimproved land. Duty was to be assessed on the greater of the purchase price for the unimproved land and its unencumbered value, not on the aggregate of the purchase price and the consideration for the building works.
9. In *Davis v Commissioner of Stamp Duties (NSW)* (1995) 30 ATR 405, the duty payable on a house/land package was again determined by reference to the unimproved land. These cases are considered to be equally applicable to the Duties Act.
10. Whether the property agreed to be transferred under the terms of the agreement is improved land or unimproved land is a question of fact. In these circumstances, it is important to distinguish between the property "agreed to be transferred" and the property that is actually transferred on completion. The land that is eventually transferred is the land enhanced by whatever improvements are erected on the land prior to completion (which improvements comprise part of the land by operation of the law of fixtures). However, the property "agreed to be transferred" is the property that will be transferred as contemplated by the parties at the time of the agreement.
11. Therefore, for the purposes of assessing the agreement, the question of whether the property is improved land or unimproved land must be determined on the basis of what the parties agreed to transfer at the time of the agreement. Interim assessment under section 49 will **not** be used to determine, at a later date, whether or not improvements have been made before completion of the agreement.

Agreements for sale and related building contracts

12. Where there is an agreement for the sale of land and, at or about the same time (and whether or not in the same instrument), an agreement for carrying out building works on that land, it is necessary to identify as at the date of the agreement the property agreed to be transferred by the vendor on completion of the agreement.
13. Where the vendor is responsible for procuring the construction of certain works prior to transfer, ad valorem duty is payable on the consideration for both the land and improvements, or the value of the improved land (that is, taking into account the value added to the land by the making of the improvements) upon the basis that the vendor has agreed to sell the improved land.
14. An example of an agreement that would be assessed as an agreement to transfer improved land is a house and land package under which the purchaser of land enters into an agreement with the vendor of the land to receive, on settlement, transfer of a completed house built to agreed specifications. Such agreements would comprise either a single contract to purchase the completed house, or two interdependent contracts with settlement linked to completion of the building.

Permission to erect improvements prior to completion

15. Under some agreements, a purchaser is given the right by the vendor to erect improvements on the land prior to completion. The right to erect improvements may be set out in a special condition of the contract, or contained in a separate instrument or given orally. Unlike an agreement that does not contemplate completion until after improvements have been erected, these agreements merely permit the commencement of improvements prior to completion.
16. In such cases, the vendor is not agreeing to sell any improvements to the land (that is, is not agreeing to erect or procure the construction of improvements prior to completion of the agreement) and the consideration will reflect only the value of the unimproved land.
17. In assessing the duty on the agreement, the Chief Commissioner cannot retrospectively determine the liability on the agreement by reference to what is eventually transferred. As a consequence, in circumstances where the vendor is neither selling a completed house, nor erecting improvements prior to completion, nor procuring the construction of improvements prior to completion, the Chief Commissioner will assess on the basis that the parties are not agreeing to transfer improved land.
18. Examples of agreements that would be assessed as agreements to transfer unimproved land include the following.
 - A "builder's terms" agreement, being where the purchaser plans to erect

improvements on the property, with an extended period for completion.

- Where the vendor permits the purchaser of vacant land to commence construction of a new home before completion of the agreement, such as a local council selling lots in a subdivision, and allowing the purchasers to engage a builder prior to completion.

Transfers pursuant to an agreement

19. The above discussion has focussed on the ad valorem duty payable on the agreement for sale. The transfer pursuant to the agreement will also be liable to ad valorem duty unless it is a transfer made "in conformity" with the agreement (see subsection 18 (2)).
20. Revenue Ruling DUT 010 states that a transfer will be in conformity with an agreement for sale or transfer if, among other things, the property the subject of the transfer is the same as the property agreed to be sold or transferred. In determining this, the Chief Commissioner will not have regard to any improvements made between exchange and settlement.

Transferee's improvements

21. A transfer of land that is not in conformity with an agreement for the sale or transfer of land is assessable with ad valorem duty on the unencumbered value of the property as at the date of transfer. One exception is where the transferee has made improvements to the land prior to transfer (subsection 23 (3)). In such a case, the unencumbered value of the land is to be determined as if those improvements had not been made.
22. A common example of this is the transfer of a house and land where the transferee had built the house on land owned by a family member. For assessment purposes, the unencumbered value of the property is the unencumbered value of the land prior to the making of the improvements.
23. An application to assess a transfer under subsection 23 (3) should include a statutory declaration fully detailing the circumstances in which the improvements were made by the transferee, plus supporting evidence (such as receipts or bank statements) that the transferee paid for the improvements. The following will be acceptable as evidence of the unencumbered value of the property for the purposes of subsection 23 (3):
 - where the land was unimproved prior to the making of improvements by the transferee - evidence of the unencumbered value of the vacant land at the date of the transfer; and
 - where the land was already improved prior to the making of improvements by the transferee - evidence of the improved value of the land as at the date of the transfer together with evidence of the cost of the improvements.

24. Subsection 23 (3) can also apply to an agreement for the sale or transfer of land, by virtue of the deeming provisions in subsection 9 (2). This effectively provides that subsection 23 (3) is deemed to state:

If, before an agreement for the sale or transfer of land is entered into, the purchaser has made improvements to the land, the unencumbered value of the land is to be determined as if those improvements had not been made.

25. Restated, subsection 23 (3) can only apply to an agreement in relation to improvements that have been made before the agreement is entered into. The agreement and any subsequent transfer are two separate dutiable transactions. Consequently, in assessing the agreement, subsection 23 (3) cannot apply to improvements made after the agreement is entered into, even if made before the date of transfer.

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28 August 2000