



Office of State Revenue
NSW TREASURY

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Revenue Ruling No. DUT 30

Property Vested in an Apparent Purchaser

Ruling history

Ruling no.	Issued date	Dates of effect		Status
		From	To	
DUT 30	13 November 2006	20 June 2006	-	Current

Preamble

1. Section 55 of the *Duties Act 1997* provides that certain transactions in relation to property vested in an apparent purchaser are chargeable with duty of \$10¹. The concession applies to:
 - (a) a declaration of trust made by an apparent purchaser in respect of identified dutiable property:
 - (i) vested in the apparent purchaser upon trust for the real purchaser who provided the money for the purchase of the dutiable property, or
 - (ii) to be vested in the apparent purchaser upon trust for the real purchaser, if the Chief Commissioner is satisfied that the money for the purchase of the dutiable property has been or will be provided by the real purchaser, or
 - (b) a transfer of dutiable property from an apparent purchaser to the real purchaser if:
 - (i) the dutiable property is property, or part of property, vested in the apparent purchaser upon trust for the real purchaser, and
 - (ii) the real purchaser provided the money for the purchase of the dutiable property and for any improvements made to the dutiable property after the purchase.

2. Section 55 therefore provides concessional duty treatment in the context of resulting trusts under which the apparent purchaser is trustee and the real purchaser is the beneficial owner of the trust property. The section is the successor to similar provisions in the *Stamp Duties Act 1920*, being section 73 (1)(e) (conveyances / transfers) and paragraph (1) under the Heading "Declaration of Trust" in the Second Schedule to that Act (declarations of trust). Those provisions were the subject of Revenue Rulings SD120 and SD128.

3. Section 55 was amended with effect from 20 June 2006 to clarify and expand the operation of the concession. This Ruling updates and replaces the Stamp Duties Rulings having regard to those amendments.

¹ This duty is \$50 if executed on or after 1 January 2009

Ruling

Apparent purchaser and real purchaser

4. The principles relating to resulting trusts were summarised by the High Court in *Calverley v Green* (1984) 155 CLR 242 (per Gibbs CJ at 246-7 and Deane J at 266-7). A resulting trust arises where a person (the real purchaser) acquires property in the name of another person (the apparent purchaser) or jointly in the names of both the real and apparent purchasers. In the absence of evidence that the real purchaser intended the apparent purchaser to take a beneficial interest in the property (and subject to a presumption of advancement that might arise from a relationship between the real and apparent purchaser), the apparent purchaser is presumed to hold the property in trust for the real purchaser. In the case of a joint purchase, the purchasers are presumed to hold the property in trust for themselves as tenants in common in the proportions in which they contributed the purchase money, regardless of the proportions in which they purchased the property.
5. In *Truskett v Commissioner of Stamp Duties (NSW)* (1976) 6 ATR 1, Rath J, held that the Stamp Duties Act equivalent of section 55 was confined to the situation where property is purchased in the name of a stranger to the real party to the purchase. In that case the real and apparent purchasers were the same persons with no difference in their capacities, so that no question of a resulting trust arose. A resulting trust arises only where the moneys are provided by the beneficial owners in the character of purchasers of the property. Therefore, no resulting trust arises if the 'beneficial owner' provided the moneys as a loan or a gift to the legal owner of the property.
6. Where part of the purchase price is provided by means of a loan secured by a mortgage over the property, the persons who are under an obligation to repay the loan are taken to have provided that part of the purchase price, regardless of who actually makes those repayments. The person who actually pays mortgage instalments is merely repaying the loan, not contributing to the purchase price (*Calverley v Green* per Mason & Brennan JJ at 257-8). However, section 55 (1A) provides:

For the purposes of subsection (1), money provided by a person other than the real purchaser is taken to have been provided by the real purchaser if the Chief Commissioner is satisfied that the money was provided as a loan and has been or will be repaid by the real purchaser.

Consequently, the person who has been repaying or is intended to repay the loan will be taken to have provided that part of the purchase price.

Transfer following improvements and changes to the dutiable property

7. Section 55 (1)(b) was amended from 20 June 2006 to apply to a transfer of property that has been improved after purchase if the real purchaser provided the money not only for the purchase of the property, but also for any subsequent improvements. At the same time, section 55 (1B) was introduced and provides that:

This section applies whether or not there has been a change in the legal description of the dutiable property between the purchase of the property by the apparent purchaser and the transfer to the real purchaser.

Note. For example, if the dutiable property is land, this section continues to apply if there is a change in the legal description of the dutiable property as a consequence of the subdivision of the land.

8. While a legal analysis might conclude that subdivision or similar changes gives rise to new and different property arising from new and different rights (and not merely a change in description), section 55 (1B) is clearly intended to apply in these circumstances. This is consistent with the comments of Gzell J in *Sportscorp Australia Pty Ltd & Ors v Chief Commissioner of State Revenue* [2004] NSWSC 1029 (at pars 29-30) that an analysis that refers to the creation of new rights "does not sit well" with the relevant provisions of the Duties Act.
9. A change in title will often arise in combination with the making of physical improvements to the land. Section 55 (1)(b) now clearly can apply when, for example, the property acquired by the apparent purchaser was vacant land, and the property transferred to the real purchaser is a completed building held under strata title. The fact that arrangements such as a construction contract were entered into by the apparent purchaser would not prevent the concession from applying.

Transfer of part of the dutiable property

10. The concession also applies where the property transferred is only part of the dutiable property purchased by the apparent purchaser. Section 55 (1)(b) now refers to dutiable property that is 'part of property' vested in the apparent purchaser upon trust for the real purchaser. In *Commissioner of State Revenue v Pattison* (2001) 3 VR 520, a similar concession in the Victorian legislation was held not to apply when land held by an apparent purchaser was subdivided into 2 lots, and only one of those lots was transferred to the real purchaser. Those same circumstances would now be eligible for the concession under section 55 (1)(b).
11. This can be distinguished from the situation where there is more than one real purchaser all of whom together were joint real purchasers of all of the property, but severally receive all of a part of the property. For example, in *Growing Wealth Pty Ltd & Ors v Commissioner of Stamp Duties* [2000] QCA 418, an agent acquired land to construct separate residential units. Funds were provided by investors who contributed amounts referable to the price specified for an individual unit. The Queensland equivalent of section 55 did not apply to transfers of the individual lots to each investor because, among other things, the investors were entitled to all of the land as tenants in common in proportion to their contributions, but each received the entire interest in an individual lot. Applying these facts to section 55 (1)(b), although each lot is 'part' of the dutiable property vested in the apparent purchaser, each 'real purchaser' did not provide all of the money for the purchase and improvement of any individual lot. Section 55 (1)(b) can only apply where the whole of the purchase money was paid by the 'real purchaser' (*Triantifillis v Commissioner of Stamp Duties (NSW)* 98 ATC 4484).

Example - transfer

12. The following example illustrates the combined effect of the amendments to section 55 made from 20 June 2006.

Company A acquires land as agent for X & Y, who jointly provided the purchase money. A obtains a loan secured by a mortgage over the land held by A, guaranteed by X & Y. The loan money is used to construct a residential apartment building and to register a strata plan. A then transfers lot 1 in the strata plan to X, lot 2 to Y and lots 3 & 4 to X & Y as tenants in common in equal shares. The remainder of the lots are sold to third parties, with the proceeds used to repay the loan.

The concession in section 55 (1)(b) can still apply despite:

- the making of improvements to the property,

- the change of legal description to a strata plan,
- the transfer of only part of the property, being lots 1 - 4, and
- the loan to the apparent purchaser (A), and mortgage granted by A, to fund the improvements (provided X & Y have repaid or will repay the loan).

However, the transferee X did not provide the whole of the money for the purchase and improvements in relation to lot 1, and Y did not provide the whole of the money for the purchase and improvements in relation to lot 2. Therefore, only the transfer of lots 3 & 4 to X & Y jointly will be assessed to \$10² duty under section 55 (1)(b).

[Note: If all 4 lots had been transferred to X & Y jointly, section 55 (1)(b) would apply, and subsequent transfers of the separate lots to X and to Y could be eligible for concessional duty under section 30 as a partition.]

Evidence required - transfer

13. The apparent purchaser (trustee) must furnish a statutory declaration stating:
 - (a) the intention of the parties regarding the beneficial ownership of the property at the time of purchase by the apparent purchaser,
 - (b) why the property was purchased in the name of the apparent purchaser,
 - (c) who actually provided the purchase money for the property, including any deposit payable under the agreement for the purchase of the property, and
 - (d) the date of birth of the real purchaser (if he or she was under 18 years of age at the time of the purchase by the apparent purchaser) or, if the real purchaser is a company, the date of its incorporation.
14. In addition, evidence is generally required to confirm that the real purchaser actually provided the purchase money for the trust property. This may consist of bank statements, copies of cheques etc. The evidence should be sufficient to demonstrate that the real purchaser actually provided the deposit as well as the balance of the purchase money. If any part of the purchase money was borrowed by the apparent purchaser (eg, in the apparent purchaser's name as mortgagor) details of the loan arrangements and any indemnities given by the real purchaser should be provided, together with evidence of the source of any loan repayments made prior to the transfer.
15. Where the property has been improved between purchase and transfer, evidence should be provided of any arrangements between the parties to indicate that any actions taken by the apparent purchaser were as agent or trustee for the real purchaser. The same kind of evidence referred to in paragraph 14 should be provided as to the source of funds for the improvements.
16. In certain circumstances the Chief Commissioner may accept a transfer as coming within section 55 (1)(b) without requiring evidence of payment of the purchase money. For example, a statutory declaration would be sufficient evidence to enable a transfer to a listed company to be accepted as coming within section 55 (1)(b).

Declaration of a resulting trust

17. The provisions of section 55 (1)(a) (declarations of trust) only apply to property vested or to be vested upon purchase. As a result, any subsequent improvements or changes to the

² This duty is \$50 if executed on or after 1 January 2009

property are not relevant. In *Truskett* (supra) and in *Crowther v Commissioner of Stamp Duties (NSW)* (1978) 8 ATR 433, the requirements for the equivalent of section 55 (1)(a) were identified as follows -

- there is a real purchaser and an apparent purchaser who are different persons, and
- in following the concept of a resulting trust, the real purchaser must have actually provided the purchase money.

Consequently, a declaration of trust in favour of a company to be formed cannot meet either of the above requirements and does not come within the concession.

Evidence required - declaration of trust

18. The information required to stamp a declaration of trust under section 55 (1)(a) is similar to that required to stamp a transfer under section 55 (1)(b):
- a statutory declaration by the purchaser named in the agreement stating:
 - (a) who actually provided the money, including the deposit if any, for the purchase of the trust property, and
 - (b) if the beneficiary is a company, the date of its incorporation,
 - the stamped agreement evidencing the purchase of the trust property by the trustee, (or a copy of the stamped transfer where no agreement was executed), and
 - the evidence referred to in paragraph 14 above.
19. In certain circumstances the Chief Commissioner may accept a declaration of trust as coming within section 55 (1)(a) without calling for documentary evidence to show who actually provided the consideration:
- a declaration of trust over shares in a 'shelf company' (being a company that has not traded and has no assets other than the paid-up capital for the issued shares),
 - a declaration of trust by a solicitor over a mortgage transaction,
 - a declaration of trust over a liquor licence that is consequent upon the purchase of a business (the agreement evidencing the purchase of the business by the beneficiary named in the trust deed should also be provided).

Tony Newbury

Chief Commissioner of State Revenue

13 November 2006