



Office of State Revenue
NSW TREASURY
ISO 9001-Quality Certified

Revenue Ruling No. DUT 33

Consideration for Duties Transactions

Preamble

1. Chapter 2 of the *Duties Act 1997* charges duty on specified "dutiabale transactions", with duty charged on the "dutiabale value" of the "dutiabale property". Part 2 of Chapter 2 contains provisions for determining the dutiabale value, including the general provision in section 21 (1):

The *dutiabale value* of dutiabale property that is subject to a dutiabale transaction is the greater of:

- (a) the consideration (if any) for the dutiabale transaction (being the amount of a monetary consideration or the value of a non-monetary consideration), and
 - (b) the unencumbered value of the dutiabale property.
2. Since the decision of the High Court in *Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd* [2005] HCA 3, questions have arisen as to the extent to which payments and obligations arising under agreements that are or include dutiabale transactions can be included as consideration for duty purposes.
 3. This ruling outlines the practice of the Office of State Revenue in determining what constitutes the "consideration for the dutiabale transaction".

Ruling

Consideration

4. The principle outlined by the High Court in *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* [1948] HCA 28 was in relation to equivalent provisions in the *Stamp Duties Act 1920*, but is equally valid in relation to the *Duties Act 1997*. Dixon J stated (at [6]):

"In the context I think that the word "consideration" should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts. The difference is perhaps not very material because the consideration must be in money or money's worth. But in the law of simple contracts it is involved with offer and acceptance: indeed properly understood it is perhaps merely a consequence or aspect of offer and acceptance. Under s 66 the consideration is rather the money or value passing which moves the conveyance or transfer."

5. That interpretation was applied by the High Court in the subsequent case of *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)* [1958] HCA 22 (albeit with different conclusions reached by 2 of the 5 judges). In *Dick Smith Electronics*, the majority (Gummow, Kirby & Hayne, JJ) stated (at [71]-[72]):

"It was accepted by both parties that, consistent with this Court's decisions [in *Archibald Howie* and *Davis Investments*], "consideration" in s 21 of the Act is not to be read as requiring identification of the consideration sufficient to support a contract. So much follows inevitably from the recognition of the fact that s 21 (1)(a) (and the expression "the consideration ... for the dutiable transaction") will find application in cases in which a transfer of dutiable property is not made pursuant to contract. ...

To adapt what was said by Lord Wilberforce of other stamp duty legislation:

In the first place, the phrase "consideration for the transfer or conveyance" seems to me to refer clearly and naturally to that which passed to the transferor company "for" the transferred properties.

The criterion in the Act of consideration "for" the transaction, being the Agreement for the sale and transfer of the Shares to the Purchaser, upon whom s 13 imposes the liability to pay the duty, looks to what was received by the Vendors so as to move the transfers to the Purchaser as stipulated in the Agreement."

6. OSR regards the reference to "what was received by the Vendors so as to move the transfers" follows from the need to identify the dutiable property being transferred by the vendor (as opposed to any other property or rights that are being disposed of or otherwise dealt with by the vendor). The consideration for duties purposes is what was received by the vendor so as to move the transfer of the dutiable property. However, the consideration "for" the dutiable transaction is not limited to amounts paid by the purchaser to the vendor (*Comptroller of Stamps v Buckland* [1959] VR 517).

Duty on transactions

7. Unlike traditional stamp duties, Chapter 2 of the Duties Act imposes duty on transactions, not on instruments. Most dutiable transactions are effected or evidenced by a written instrument, and regard must be had to the legal form in which the parties have constructed the transaction or transactions. For example, a transfer of the fee simple and a lease back are 2 transactions, not a single transaction being a transfer of the reversion. (This example was given by Mason J in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 450 in relation to duty on instruments, but is equally applicable to transactions). However, the real nature of a transaction is not necessarily determined solely by reference to the instrument in question (see the comments in *Dick Smith Electronics* at [62]).
8. Similarly, regard can be had to extrinsic evidence when determining the consideration under a document (*Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties* (1997) 42 NSWLR 505 at 516), and the same principle would apply with at least equal force when assessing liability to duty upon a transaction. The characterisation of amounts by agreement between the parties is not conclusive of whether those amounts are consideration for the dutiable transaction (see, for example, *Eastmark Holdings Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWADT 41, where an amount described as a "Vacancy Sum" was found to be consideration for the surrender of a lease, and not a separate consideration for the giving of vacant possession).

Relationship with unencumbered value

9. Any determination of "consideration" for duties purposes must take place within the context of the obvious relationship between consideration [paragraph (a) of section 21 (1)] and unencumbered value [paragraph (b)]. As stated by the minority in *Dick Smith Electronics* (at [20]):

"In the ordinary case of an arm's-length agreement for the sale of property, there is likely to be no difference between (a) and (b). Indeed, the consideration for the sale agreement would, in many cases, be the best evidence of the property's value. The section does not assume that there will be a difference between (a) and (b). It accepts that there may be a difference, and makes provision for that."

10. As indicated in Revenue Ruling DUT 012, the consideration is usually accepted as an indication of the value of the property in an arm's length transaction. In cases where the consideration is or appears to be less than the value, evidence of value is required as identified in that Ruling.
11. However, in other cases the total "consideration" payable under an agreement will exceed the unencumbered value of the dutiable property. In such a case, either:
- the purchaser has paid a premium over and above the unencumbered value (and this would constitute part of the consideration for the dutiable transaction), or
 - the purchaser has paid consideration for the transfer of the dutiable property and for some other thing, and it is necessary to determine how much of the total amount is "consideration for the dutiable transaction".

Apportionment

12. Section 27 (1) states that if a dutiable transaction relates to dutiable property and property that is not dutiable property, it is chargeable with duty only to the extent that it relates to dutiable property. The dutiable value of the dutiable transaction would therefore be only a proportion of the total consideration.
13. For example, an agreement for the purchase of all the shares in 2 companies, only one of which is a New South Wales company, would be chargeable only upon the consideration for the transfer (or the unencumbered value) of the shares in the New South Wales company. A provision in the agreement that the transfer of the New South Wales shares is conditional upon payment of the total purchase price does not make that total amount "consideration for the dutiable transaction". Interdependence between 2 matters does not convert the consideration for one into part of the consideration for the other.
14. It is clear from the case law that the consideration which moves the dutiable transaction is not necessarily limited to the payment of the purchase price for the dutiable property. However, in an arm's length transaction the total "consideration" will generally reflect the full value of all of the property and rights being dealt with. It follows that the entire "consideration" is not necessarily "consideration for the dutiable transaction".
15. In cases where it is accepted that not all of the "consideration" is "for" the dutiable transaction, the parties may or may not have expressly apportioned the consideration in the agreement. If the purchase price is apportioned between different items of

property, the dutiable amount will not necessarily be limited to the amount expressed by the parties to be for the dutiable transaction. If OSR is not satisfied that the amount of the total consideration apportioned to the dutiable property reflects the unencumbered value of that dutiable property, the dutiable value could be determined on the unencumbered value, and evidence of value might be required. For example, in an agreement for sale of business, the absence of consideration for goodwill might be indicative that some other component of the total consideration includes the value of the goodwill.

16. Similarly, where the agreement does not apportion the consideration between the different items of property, the consideration will be apportioned according to the unencumbered value of dutiable and non-dutiable property. Note, however, that the dutiable value in such a case is not necessarily the unencumbered value of the dutiable property. For example, if the consideration includes a premium in excess of the value of all the property in the transaction, the total consideration will be apportioned between the dutiable and non-dutiable property in accordance with their respective values.

Liability date

17. Another contextual matter worth noting is that the dutiable value is determined at the liability date. A liability to duty arises when a transfer of dutiable property occurs (section 12 (1)). In the case of an agreement for sale or transfer, the transfer occurs when the agreement is entered into (section 9 (2)). Liability on a written agreement will therefore arise on first execution (section 12 (2)), and the dutiable value is to be determined as at that date.
18. OSR considers the decisions in *Bambro (No 2) Pty Ltd v Commissioner of Stamp Duties* (1964) 80 WN(NSW) 1142 and *Davis v Commissioner of Stamp Duties (NSW)* (1995) 30 ATR 405 are still applicable such that the dutiable value of the dutiable property will be calculated on the dutiable property agreed to be transferred, determined as at the liability date. In those cases, the court found that the parties had agreed to transfer unimproved land, notwithstanding agreements to carry out building works, and that the consideration for the transfer was the purchase price for the land not including the amount payable for the building works.
19. The issue of liability date was considered only fleetingly in *Dick Smith Electronics*, but it is arguable that the total amount agreed to be paid to the vendor was indicative of the unencumbered value of the dutiable property at the liability date. (Although unencumbered value was not at issue in *Dick Smith Electronics*, this point was implied in the majority judgement (at [80]), which referred to an interest "in what but for the dividend amount would have been larger and more valuable assets of the Company".) As the majority in *Dick Smith Electronics* decided the parties had in that case agreed to transfer the shares for a specified consideration that appears to equate to their value as at the liability date, it followed that the declaration of a dividend after that date was merely part of the means of satisfying that consideration, and so did not affect the character or value of the shares for duties liability purposes.

Encumbrances and liabilities

20. Section 22 (1) states that the consideration for the transfer of dutiable property is taken to include the amount or value of all encumbrances, whether certain or contingent, subject to which the dutiable property is transferred. For example, the consideration for

a transfer of land subject to a mortgage would be the sum of the purchase price and the amount or value of the mortgage.

21. Consideration can also include an assumption by the purchaser of liabilities of the vendor. For example, in an agreement for sale where the purchaser agrees to take over debts or assume liabilities of the vendor, the amount or value of the debts or liabilities assumed is added to and forms part of the consideration on which duty is calculated.

Contingent amounts

22. Any amount that is identifiable as consideration in accordance with the principles outlined in this ruling will be included as part of the consideration for duties purposes even if only payable on a contingency (see *Lionore Australia (Avalon) Pty Ltd v Commissioner of State Revenue* [2006] WASAT 250). However, to the extent that this permits an assessment on the maximum consideration payable, section 49 of the Duties Act permits the Chief Commissioner to assess duty by way of estimate when the full dutiable value cannot be immediately ascertained, and to place an interim stamp on the instrument. The estimate assessment may include some, none or all of the contingent amount, subject to reassessment under section 288A when the final dutiable value is ascertained. As an alternative in some circumstances, a compromise assessment under section 12 of the *Taxation Administration Act 1996* may be made by agreement with the taxpayer.

Examples

23. The following examples are necessarily expressed in general terms, but any actual case will be considered on its specific facts. Each is subject to the general comments made above regarding identification of the dutiable property the subject of the dutiable transaction, and the true characterisation of amounts as either consideration for the dutiable transaction, or as consideration for some other matter or thing. The "Notes" at the end of some paragraphs comment on the relationship between consideration and unencumbered value.

Amounts included as consideration

24. Assumption of a liability to pay employee entitlements

The assumption of employee entitlements (such as long service leave) is an assumption of a liability constituting consideration. This is so even if the assumption of that liability is a statutory obligation, as that obligation only arises by virtue of the purchaser agreeing to take on the employees and relieve the vendor of the obligation which existed at the time of the agreement. Most commonly, the purchase price is determined on the value of the business as a whole rather than as the sum of the values of the components of the business. In such a case, the balance of the purchase price payable on settlement is reduced by the amount of employee entitlements outstanding at that date. Where the amount deducted is an after-tax amount, OSR accepts that the value of the additional consideration is the after-tax value of the liabilities.

Note. In an arms length transaction, the full purchase price (without any set off or adjustment) would usually equal the unencumbered value of the property transferred or agreed to be transferred.

25. Example. An agreement for sale of a business contains a provision that the total purchase price of \$10 million will be reduced by 70% of the value of employee entitlements outstanding at the settlement date. The value of the entitlements at that date is \$1 million. The purchase price is therefore \$9.3 million. The consideration for the purchase of the business is \$9.3 million plus \$700,000 = \$10 million. [Note that a separate "consideration" for the novation of employee contracts or other matters relating to employees accepting employment with the purchaser, whether or not in the same instrument, would constitute part of the total consideration for the sale of the business and might constitute part of the dutiable value consistent with paragraphs 8 and 15 above.]

26. Dividend paid by the company

In an agreement for the purchase of all the issued shares in a company, a condition that the company will declare a dividend before settlement will constitute additional consideration where the dividend is payable to the vendor, and the purchaser is required to fund the company (directly or indirectly) to enable payment of the dividend. The only property or rights being disposed of by the vendor is the shares, and the consideration is the total amount received by the vendor (being the purchase price and the dividend amount). (This is effectively the situation in *Dick Smith Electronics*.)
Note. Payment of the dividend would reduce the value of the shares, so that the amount of the purchase price would depend on the amount of the dividend. In an arm's length transaction, the total amount received by the vendor would, in all probability, be equivalent to the unencumbered value of the shares at the date of the agreement.

27. Goods and services tax

Where the purchase price is expressed to be GST-inclusive, the amount of GST is not deducted from the consideration for duties purposes. Where the purchase price is expressed to be GST-exclusive, any additional amount payable by the purchaser in respect of GST is in satisfaction of the vendor's liability, and constitutes additional consideration. See *Ambiance (Arncliffe) Pty Ltd v Chief Commissioner of State Revenue* [2002] NSWADT 206 and *Gould Management Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWADT 66.

Amounts NOT included as consideration

28. Repayment of loans

A provision in an agreement for the sale of shares requiring the purchaser to repay or procure the repayment of the loan owed by the company is regarded as a separate dealing with the loan. The vendor is effectively disposing of both the shares and the loan. As a consequence, an amount payable by or on behalf of the purchaser in respect of a loan repayable by the company (to the vendor or a third party) is not included as consideration for the transfer of shares in the company in determining the dutiable value.

Note. Any dealing with the loan would not affect the value of the shares at any relevant date.

29. Example. Vendor agrees to sell all the issued shares in Company to Purchaser for a purchase price of \$6 million. Purchaser also agrees to procure Company to repay a loan of \$2 million owed to Vendor. On settlement, Purchaser arranges for Bank to lend \$1 million to Company and Purchaser lends \$1 million to Company, so that Vendor receives \$6 million from Purchaser and \$2 million from Company. The consideration for the dutiable transaction is \$6 million.

30. Payment in settlement of litigation

If a dutiable transaction is part of a settlement of litigation or potential litigation, an amount paid by the transferee to the transferor is not necessarily consideration for the dutiable transaction. Duty will generally be assessed on the unencumbered value of the dutiable property, and to the extent that the total amount paid exceeds that unencumbered value, that excess will be accepted as settlement of potential litigation, not as consideration for the dutiable transaction.

31. Example. An agreement whereby a lease is surrendered, and the lessor is released from all actions and claims which the lessee may have against the lessor arising out of the lease or the lessee's business in exchange for the payment of a specified amount by the lessor to the lessee, is a dutiable transaction. Any amount paid in excess of the value of the lease would be accepted as settlement of potential litigation, not as consideration for the dutiable transaction. Duty will be assessed on the unencumbered value of the dutiable property, which in the case of a lease would often be nominal.

32. Interest payable under a terms contract

Land purchased under a terms contract provides for payment of the purchase price by instalments together with an amount for interest calculated on that balance. As a general rule, the specified purchase price is the consideration for the transfer of the dutiable property, and the interest is consideration for the provision of credit. The interest is therefore not included in the consideration for the transfer of the land. Provided OSR is satisfied that the amount expressed to be the purchase price represents the unencumbered value of the property, that price will be accepted as the consideration for the dutiable transaction.

Tony Newbury

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