



Office of State Revenue
NSW TREASURY

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Revenue Ruling No. DUT 37

Change in Trustees - Section 54(3) Duties Act 1997

Ruling history

Ruling no.	Issued date	Dates of effect		Status
		From	To	
DUT 37	22 May 2009	22 May 2009		Current

Preamble

1. This Revenue Ruling specifies the circumstances in which a transfer of dutiable property which is trust property, as a consequence of the retirement of a trustee or the appointment of a new trustee of the trust will be liable to nominal duty under section 54(3) of the Duties Act 1997, and the information required by the Chief Commissioner when assessing such a transfer.
2. Section 54(3) provides that duty of \$50.00 is chargeable in respect of a transfer of dutiable property to a person other than a special trustee as a consequence of the retirement of a trustee or the appointment of a new trustee, if the Chief Commissioner is satisfied that, as the case may be:
 - (a) none of the continuing trustees remaining after the retirement of a trustee is or can become a beneficiary under the trust, and
 - (b) none of the trustees of the trust after the appointment of a new trustee is or can become a beneficiary under the trust, and
 - (c) the transfer is not part of a scheme for conferring an interest, in relation to the trust property, on a new trustee or any other person, whether as a beneficiary or otherwise, to the detriment of the beneficial interest or potential beneficial interest of any person.

If the Chief Commissioner is not so satisfied, the transfer is chargeable with the same duty as a transfer to a beneficiary under and in conformity with the trusts subject to which the property is held.

3. Section 54 (3) is the successor to section 73 (2A) of the *Stamp Duties Act 1920*, which was the subject of Revenue Ruling SD 118. Other parts of section 54, which are concerned with transfers of dutiable property to special trustees and as a result of changes in the responsible entity of a managed investment scheme, are not dealt with in this ruling.

Ruling

4. **Transfer of dutiable property as a consequence of the retirement of a trustee or the appointment of a new trustee**

In order for section 54 (3) to apply, the transfer of dutiable property must be as a consequence of the retirement of a trustee or the appointment of a new trustee of the trust. By section 54(1), a 'new trustee' means a trustee appointed in substitution for a trustee or a trustee appointed in addition to a trustee or trustees. Hence, the transfer may result from the retirement of one of a group of existing trustees without the appointment of a new trustee, or

it may be as a consequence of the appointment of a new trustee, being a trustee appointed in substitution for, or in addition to, a trustee, with or without the simultaneous retirement of an existing trustee.

It is sufficient that the transfer is a consequence of the retirement or appointment, even if it is also a consequence of other factors: *Trust Company of Australia Limited v Commissioner of State Revenue* [2006] VSC 64 at [44]-[47], *Commissioner of State Revenue v Challenger Property Nominees Pty Ltd* [2006] VSC 203 at [29]-[38]. However, this is subject to the Chief Commissioner being satisfied that the transfer is not part of a wider scheme referred to in section 54(3)(c) [see para 7 below].

5 Requirement of pre-existing trust and pre-existing trust property

As is apparent from the definition of 'new trustee' in section 54(1), section 54(3) will only apply to a transfer of the dutiable property which is as a consequence of a change in the trustees appointed to administer a pre-existing trust. The section does not apply to a transfer of dutiable property to a person who has been appointed to perform a newly created trust: *Commissioner of State Revenue v Victoria Gardens Developments Pty Ltd* [2000] VSCA 233 at [27]. For example, it would not apply to a transfer from a trustee of a trust to a custodian of that trustee, as the custodian will hold the property on a new trust for the trustee which is distinct from the trusts upon which the trustee formerly held the property (and will hold the beneficial interest in the property following its transfer to the custodian). (In the case of managed investment schemes, however, such a transfer may fall within section 54A(1)(a)).

Also, the dutiable property being transferred must already be an asset of the pre-existing trust. The onus is on the taxpayer to show how and when the asset became an asset of the trust. In the absence of evidence that the dutiable property is already trust property, the transfer will be the means whereby the dutiable property becomes an asset of the trust and will be liable to ad valorem duty accordingly. The Office of State Revenue will conduct searches and examine data such as land tax records to verify whether the dutiable property was held as an asset of the existing trust prior to the change in trustee.

The section emphasises the continuing existence of the trust, with the transferred property remaining an asset of the trust. Hence, the section cannot apply to a transfer of trust property to the beneficiaries of the trust, which brings the trust to an end: *Sportscorp Australia Pty Ltd & ors v Chief Commissioner of State Revenue* [2004] NSWSC 1029 at [68].

Pre-existing trust – distinction between trust cloning and trust splitting

The requirement that the transfer be as a consequence of a change in the trustees appointed to administer an existing trust as distinct from a newly-created trust highlights the distinction between trust cloning and trust splitting.

- 'Trust cloning' refers to the situation where a pre-existing trust is 'cloned' by the execution of a new trust with the same or (substantially the same) terms and conditions, and with the same beneficiaries, as under the existing trust deed. The trustee of the new trust may be the same person as the trustee of the pre-existing trust or a different person. Where a trust is cloned, section 54(3) will not apply to any transfer of dutiable property from the trustee of the pre-existing trust to the trustee of the new trust, even though as a result of the transfer the same property will be held on trust for the same beneficiaries. This is because any such transfer is between the trustees of two different trusts rather than (as required by section 54(3)) as a consequence of a change in the trustee of a pre-existing trust within which the property continues to be held; that the beneficiaries of the respective trusts are the same is irrelevant: *AG Lamattina & Sons Pty Ltd v Commissioner of State Revenue (VIC)* (1996) 96 ATC 4474 at 4478). As section 54(3) does not apply to such a transfer, it will be liable to ad valorem duty calculated on the dutiable value of the property being transferred as at the date of the transfer.

- ‘*Trust splitting*’ refers to the situation where there is an existing trust and the trust fund comprises a number of different items of property. The trust is then “split” in the sense that separate trustees are appointed for part of the trust property with the existing trustee(s) remaining as trustee(s) of the remainder of the trust property, although (unlike the position with a trust cloning) all the property remains held subject to the trusts of the existing trust deed. In this situation (and unlike the situation with trust cloning), the transfer of the split property to the new trustee(s) of that property is a transfer to the new trustee(s) of a pre-existing trust, and section 54(3) will therefore apply to that transfer provided requirements (a) and/or (b) (as the case may be) and (c) of that section are satisfied.

6. The new or continuing trustee is not and cannot become a beneficiary under the trust

Under section 54(3)(a) and (b), the Chief Commissioner must be satisfied that (as the case may be):

- none of the continuing trustees remaining after the retirement of the trustee is or can become a beneficiary under the trust, and
- none of the new trustees after the appointment of a new (whether additional or substituted) trustee is or can become a beneficiary under the trust.

This means that the new or continuing trustees cannot be existing beneficiaries of the trust and can never become beneficiaries of that trust. This requirement applies irrespective of the nature of the trust, although it will typically be a discretionary trust or a unit trust. This requirement also applies to all types of beneficiaries under the trust, however remote their actual or potential interest in the trust may be.

All new trustees (whether additional or substitute trustees) and any continuing trustees must satisfy this test. However, the prohibition does not apply to former trustees, so that the concession can still apply even where the retiring trustee is or may become a beneficiary of the trust. But the status of the retiring trustee as a beneficiary (or potential beneficiary) of the trust may be relevant to whether there is a scheme of the kind referred to in section 54(3)(c) [see para 7 below].

There is no set form of words required to preclude either a continuing or new trustee from becoming a beneficiary under a trust. The Chief Commissioner will be satisfied that this is the case where the terms and conditions of the trust deed and any variation thereto provide that the new or continuing trustee is prohibited from being or becoming a beneficiary under the trust and where this prohibition is irrevocable: *Oates Properties Pty Ltd & Ors v Commissioner of State Revenue* [2003] NSWSC 596 at [35] and [38].

In the case of a unit trust, where there is no prohibition on the new trustee (or any continuing trustee) from also holding units in the trust (and therefore being or becoming a beneficiary of the trust), it is irrelevant in what capacity the units are or may be held by that trustee; they may be held beneficially or in some other trustee capacity. In such a situation, sections 54(3)(a) or (b) is simply not satisfied, and the transfer of the trust property to the new trustee (or any continuing trustee) will be liable to ad valorem duty accordingly.

7. Not part of a scheme for conferring an interest, in relation to the trust property, on any person to the detriment of the beneficial interest or potential beneficial interest of any person

Finally, section 54(3)(c) requires the Chief Commissioner to be satisfied that the transfer is not part of a scheme for conferring an interest, in relation to the trust property, on a new trustee or any other person, whether as a beneficiary or otherwise, to the detriment of the beneficial interest or potential beneficial interest of any person.

In making a determination under section 54(3)(c), the onus is on the taxpayer to satisfy the Chief Commissioner that the transfer is not part of such a scheme and in doing so, they may be required to provide an explanation of the reasons for the change in trustee and all of the surrounding circumstances.

The word 'scheme' denotes a plan or course of action to be followed or implemented: *Commissioner of State Revenue v Serana Pty Ltd* [2008] WASCA 82 at [146]. The plan or course of action is not limited or confined by reference to the actual parties to the transfer, the time when any beneficial interest has passed or will or may pass, or the means by which the interest has passed or will or may pass: *Serana* at [147]. Section 54(3)(c) will apply where the transfer is an element or aspect of any such plan of action or scheme which has the effect of conferring an interest in relation to the trust property on any person to the detriment of the beneficial interest or potential beneficial interest of any person.

The question of whether the transfer is part of such a scheme will be determined by reference to the facts and circumstances of each case which are in existence at the date of the transfer, though regard may be had to subsequent events to discover the true position as at that date: *Serana* at [150]. Those facts and circumstances may include the terms of any relevant instruments and any rights and powers of any person with respect to the property being transferred.

The scheme must be for the conferral of an interest 'in relation to' the trust property; the interest need not be (although it obviously includes) a beneficial interest in the property. Further, the scheme must be for the conferral of this interest on a new trustee or any other person (whether as beneficiary or otherwise), to the detriment of the beneficial interest (or potential beneficial interest) of any person. For example, the appointment of the new trustee of a discretionary trust (eg: in a trust splitting situation) might be part of a scheme for the distribution of the property to certain beneficiaries of the trust to the detriment of other beneficiaries.

8. Evidence required

When lodging a transfer for assessment under section 54 (3), the following evidence must be provided:

- (i) A complete copy of the relevant trust deed (stamped if applicable); and
- (ii) Evidence as to when the property in the transfer was acquired, such as a copy of the stamped front page of the Agreement for Sale or Transfer. Where it is not clear from the Agreement or transfer that the property was acquired as an asset of the trust, the taxpayer may be required to provide evidence that the trust provided the purchase money for the acquisition of the property; and
- (iii) A complete copy of any relevant amendments or variations to the trust deed made in accordance with the provisions of the trust (stamped if applicable); and
- (iv) Evidence of the appointment or retirement of trustees made in accordance with the provisions of the trust, such as a Deed of Appointment and Retirement, or some evidence in writing which has the same effect (such as minutes of a meeting); and
- (v) A copy of the register of unit-holders identifying all of the unit-holders, the number of units held by each of them and when the units were acquired (for unit trusts only).

If the Chief Commissioner is not satisfied as to one or more of the requirements of section 54 (3) (a), (b) and (c), the transfer of dutiable property to the trustee(s) "is chargeable with the same duty as a transfer to a beneficiary under and in conformity with the trusts subject to which the property is held...". If a transfer under and in conformity with the trusts would be subject to nominal duty (such as under section 57 or 63), that nominal duty will apply. However, in most instances, the transfer will be liable to *ad valorem* duty calculated on the

dutiable value of the property as at the date of the transfer. For the purpose of assessing this duty, evidence of value in accordance with *Revenue Ruling DUT012* must be provided.

Tony Newbury

Chief Commissioner of State Revenue

22 May 2009