REVENUE RULING NO. SD 059

ACQUISITIONS OF COMPANY AND UNIT TRUST INTERESTS DUTIABLE AS CO NVEYANCES OF LAND

PREAMBLE

The Stamp Duties (Amendment) Act 1987 was assented to on 10 June 1987, and that Act inserted provisions relating to certain acquisitions of company and unit trust interests, which will now be dutiable as conveyances of land.

The relevant provisions are to be found in Division 30 which has been inserted in Part III of the Act. The intention of Division 30 is to charge stamp duty at conveyance rates on land "notionally" acquired through the acquisition of interests in certain companies and unit trust schemes.

The provisions address two situations:

(1) where a person acquires an interest giving an exclusive, or substantially exclusive, right to the possession of land in New South Wales; and

(2) where a person acquires a majority interest in a "private company" or "private unit trust scheme" which holds land in New South Wales (where the land has a value of at least $1 million) and 80% of the assets of the "private company or "private unit trust scheme" is land.

This Ruling gives a brief outline of the operation of Division 30.

RULING

Section 99A contains several definitions of expressions used in the Division. Some of these definitions have common application to the two situations referred to above, while others have application to only one or the other of the situations.

Definitions

"Landholder">

means a private company or a private unit trust scheme; these two terms are themselves defined:

- "private company" means a company (other than a company the shares of which are listed on a recognised stock exchange) whether or not it is incorporated in New South Wales, and which is entitled to land in New South Wales or carries on business (wholly or partly) in New South Wales;
- "private unit trust scheme" means a unit trust scheme (other than a public unit trust scheme) whether or not its trustees

are resident in New South Wales, the trustees of which are entitled to land in New South Wales or which carries on business (wholly or partly) in New South Wales.

"Designated landholder">

means a land holder, 80% of the gross assets of which comprise land and the unencumbered value of the NSW landholding of which is not less than $1 million. In determining whether land comprises 80% of the gross assets, certain assets of the designated landholder are not taken into account.

"Land use entitlement">

means an entitlement to the exclusive, or substantially exclusive possession of land in New South Wales (not being an entitlement to a dwelling in a building containing a number of dwellings which is conferred by the ownership of shares or units in a unit trust scheme).

"Interest">

means an interest which entitles the holder to participate, otherwise than as a creditor, on a winding up of the landholder. The definition excludes "land use entitlements".

It applies, in the case of a landholder which is a private company, on or after 21 November 1986 or, in the case of a landholder which is a private unit trust scheme, on or after 10 June 1987.

"Majority Interest" in a landholder

means an interest which entitles the holder to participate, otherwise than as a creditor, on a winding up of the landholder to more than 50% of the gross assets of the land holder. Again, the definition excludes an interest which is a land use entitlement.

"Acquisition">

includes, in relation to an interest or land use entitlement in a land holder, an acquisition by way of purchase, gift or allotment of any share or trust unit, or any change in the rights attaching to any share or trust unit. Thus, the Division is intended to apply to situations whereby a person becomes the owner of an interest in a company or unit trust, as well as situations by which rights arise through a restructure of the company or unit trust. An example might be the conversion of preference shares to ordinary shares, with the consequential changes in rights on a winding up.

Section 99A(1) contains other definitions to which reference should be made to determine whether or not obligations arise under Division 30.

Land Owned by a Landholder

Section 99A(2) provides that a reference to land owned by a landholder means:

- in the case of a land holder which is a private company - land owned by the private company beneficially;
- in the case of a landholder which is a private unit trust scheme - land owned by the trustee (in the capacity of trustee) of the private unit trust scheme.

This provision is necessary be cause it is inappropriate to refer to land being owned by a private unit trust scheme because a private unit trust scheme is not a legal entity and therefore cannot own property (it is the trustee who is the owner).

Land Use Entitlement - Statement of Acquisition

Sections 99C and 99D deal with the acquisition by a person of a "land use entitlement" (that is, an interests which carries an exclusive right to the use of land in New South Wales). Section 99C requires a person to lodge a statement with the Chief Commissioner if that person acquires a land use entitlement in relation to a landholder.

That statement must be lodged within two months after the land use entitlement is acquired, or within such longer period as the Chief Commissioner may approve in writing. The period of two months has been selected because that is the time allowed for the stamping of dutiable instruments before fines commence to accrue. The Chief Commissioner will approve of an extension of time for lodgment of a statement where the party required to lodge it is able to demonstrate 'that lodgment on time is impossible due to circumstances beyond the control of that party.

The statement is deemed, under the section to be an instrument for the purposes of the Stamp Duties Act and chargeable with ad valorem duty (determined by reference to section 99D). Since the statement is deemed to be an instrument, provisions of the Act relative to fines for late payment of duty come into consideration.

It is recognised that instances will arise where it might not be possible to determine the amount of stamp duty payable at the time of lodgment of the statement. In that event, payment of the estimated duty should be made at the time the statement is lodged Any additional duty assessed should be paid within 21 days of notification of that additional amount to avoid incidence of fines. Otherwise, the terms of the administrative guidelines concerning the imposition of fines for late payment of duty on documents (see Revenue Ruling SD21) will be applicable.

The information required in the statement is set out on the face of the legislation [see section 99C(3)].

The statement is chargeable with duty at the rates specified in paragraph (1) under the heading "Conveyances of Any Property" in the Second Schedule to the Act. The duty attaches to the unencumbered value of the land the subject of the land use entitlement as at the date of acquisition, aggregated with the unencumbered value of any land which is the subject of a prior land use entitlement (the details of which are required to be disclosed in the statement).

"Prior land use entitlement" is defined (see section 99A) as a land use entitlement acquired within three years before the acquisition of the entitlement which necessitated the lodgment of a statement, but not before 21 November 1986 in the case of a private company or 10 June 1987 in the case of a private unit trust scheme.

The statement affords the opportunity of disclosure of the amount of stamp duty or duty "of a like nature" paid in respect of the acquisition of each prior land use entitlement either under Division 30 or on any instrument effecting or evidencing an acquisition. This enables a credit to be given for duty paid on the acquisition of the land use entitlement and on the acquisition of any prior land use entitlement. For example, duty may have been paid previously on a share transfer. The reference to duty "of a like nature" is intended to deal with circumstances where duty is paid outside New South Wales on an acquisition.

While section 99D provides for aggregation of land use entitlements and prior land use entitlements, provision is also made for non-aggregation in circumstances where the Chief Commissioner is satisfied that aggregation would not be just and reasonable. This discretion will be exercised in situations where the circumstances make it clear that there has been no collusion between the parties and no deliberate attempt to "split" an acquisition to obtain the benefit of a lower marginal rate of stamp duty (for example, where there are "related persons" but the Chief Commissioner is satisfied that aggregation should not occur).

Interests in Designated Landholders

Sections 99E and 99F deal with the acquisition by a person of majority interests and other interests in 'designated landholders.

Broadly, a person who acquires an interest in a designated land holder, where that interest either gives the person a majority interest or builds on a majority interest already held, is obliged to lodge a statement with the Chief Commissioner.

The statement is required to be lodged within two months after the interest is acquired and must be accompanied by information which will enable the Chief Commissioner to determine the extent of the interest and its value.

The required contents of the statement are apparent on the face of the legislation [see section 99E(3)].

Section 99E(4) then requires the person lodging the statement to furnish information to support the advice contained in the statement concerning the interest acquired, either by the relevant acquisition or any prior acquisition. That information is to include the maximum percentage of the property of the designated landholder to which the person (or that person together with any related person) would be entitled (otherwise than as a creditor or other person to whom the designated land holder was liable at the time of the acquisition) on a winding up of the designated landholder immediately after the acquisition of the interest. Also required is the basis and method of calculation of that percentage.

The statement is then deemed to be an instrument and is chargeable with ad valorem duty. That duty is determined in accordance with section 99F.

Thus, the "trigger" for the operation of section 99E is that a person (or a person together with related persons) have a "majority interest" in the designated landholder. The "majority interest", as defined is an interest in a designated landholder which would entitle a person to more than 50% of the assets thereof on a winding up.

The scheme of section 99E can be summarised as follows -

- where a person either alone or with related persons, obtains a greater than 50% interest in a private company or private unit trust scheme;
- the company or unit trust is entitled to land, the unencumbered value of which comprises not less than 80% of the unencumbered value of all assets (subject to certain exclusions); and
- the company or unit trust is entitled to land in New South Wales, the unencumbered value of which is not less than $1 million,

ad valorem duty will be payable, as if the person had acquired an interest in the New South Wales land itself.

Section 99F provides that the statement is chargeable with duty at the rates specified in paragraph (1) under the heading "Conveyances of any Property"> in the Second Schedule of the Act.

Where there is a relevant acquisition and there are no prior acquisitions, the amount of duty is calculated by multiplying the unencumbered value of all land in New South Wales to which the designated land holder is entitled, by the percentage of the interest acquired on the relevant acquisition.

Where the relevant acquisition is combined with prior acquisitions, the duty is determined as the aggregate of the amount calculated in accordance with the previous paragraph and, in respect of each prior acquisition, an amount

calculated by multiplying the unencumbered value of all land in New South Wales to which the designated land holder was entitled at the date of the prior acquisition, by the percentage of the interest acquired by the prior acquisition.

Section 99F(2) then provides for a reduction in the duty payable in respect of the duty paid under Division 30 on any prior acquisition included in the statement and in respect of any duty paid to acquire either the relevant acquisition, or any prior acquisition in respect of which duty under Division 30 has not been paid.

The credit for duty previously paid will be available only to the extent that the duty so paid is referable to the land brought to duty through the statement. For example, if the land in New South Wales brought to duty had an unencumbered value of $8 million and the unencumbered value of all the assets of the company or unit trust was $10 million, the credit for duty previously paid would be allowed to the extent of 80% of the duty already paid on the acquisition.

The statement required under section 99E must be lodged within two months of acquisition of the interest or within such longer period as the Chief Commissioner may approve in writing.

The duty with which the statement is chargeable shall be paid at the time of lodgment of the statement.

A form approved by the Chief Commissioner for statements required under sections 99C(3) and 99E(3) are available from the Stamp Duties Division.

Ascertainment of Values

Section 68 of the Stamp Duties Act provides that, in the case of every conveyance and agreement chargeable with ad valorem duty, the Chief Commissioner may require the purchaser or other person primarily liable with respect to the instrument to furnish within a time specified with a declaration by a competent valuer as to the value of the property comprised in such instrument, or with such other evidence of the value of such property as the Chief Commissioner thinks fit. The Chief Commissioner may then assess the duty in accordance with that evidence.

Section 99G provides that section 68 applies to and in respect of statements under either section 99C (land use entitlements) or 99E (interest in designated landholders).

In relation to interests in land, section 125 provides for the ascertainment of value of land by such means as the Chief Commissioner thinks fit. Where evidence of value is required for the purposes of Division 30, the following evidence of value will be acceptable:

(i) Land -

(a) a recent valuation by the Valuer-General or by a "registered real estate valuer", as defined in the Valuers' Registration Act, 1975. "Recent valuation" for the purpose of this paragraph means a valuation within twelve months of the acquisition giving rise to the obligation to lodge a statement; or

(b) where the land has been purchased within three years prior to, or sold within three years subsequent to, the acquisition of the shares or units - the contract price adjusted using the quarterly Consumer Price Index (CPI) numbers published by the Australian Statistician.

Where the purchase preceded the acquisition of shares or units, the evidence of value produced must be accompanied by a statutory declaration to the effect that there have not been any rezonings, improvements or lifting of council restrictions between the date of purchase and the date at which the value of

the land must be known. If rezonings, improvements or lifting of council restrictions have occurred in that period, a valuation from the Valuer-General or a "registered real estate valuer" must be provided.

Where a sale has occurred after the date on which the value of land is required to be known and it is claimed that the land value has increased significantly between an acquisition of shares or units liable to duty under Division 30 and the date

on which the land was sold, the person primarily liable to pay stamp duty will be entitled to furnish evidence to substantiate a value at the relevant date, rather than using the CPI adjusted contract price. Acceptable evidence will be a certificate from the Valuer-General or a valuation by a "registered real estate valuer", specifying the value of the land at the relevant date.

Alternatively, the Chief Commissioner will make an automatic adjustment to the sale price, consistent with the CPI movements in the period between the relevant date and the date of sale.

(ii) Assets Other Than Land -

(a) Where recent financial accounts of the company or unit trust are available and have been prepared by a person independent of the company or unit trust, the value attributed therein to assets other than land generally will be acceptable for the purposes of assessment of stamp duty, provided any changes in the composition of the assets, between the date of the accounts and the relevant dates, are detailed and appropriate adjustments are made to the values.In some instances (for example, share portfolios shown in the accounts) more detailed evidence of value may be required. "Recent accounts"> will be accounts referable to a date within twelve months of the relevant date.

(b) Where no recent accounts are available, a list of all assets other than land must be provided, together with a valuation of those assets by an independent "valuer" as defined in section 3 of the Act (that is, a person whose business it is to make valuations of the particular class of property of which a valuation is required).

Anti-avoidance Provisions

Division 30 employs the concept of "related persons", reference to which is to be found in section 99A(8). The concept is designed to ensure that persons, who would otherwise be required to lodge statements and pay stamp duty, cannot avoid the provisions of the Division by "splitting" acquisitions between themselves and other parties in relation to whom they are not at arms' length.

Division 30 also introduces a concept similar to that of "underlying interest" in the provisions of the Commonwealth Income Tax Assessment Act in relation to "negative gearing" of rental properties - see section 99A(3) which addresses the situation where a company or unit trust owns little or no land itself but owns shares or units in another company or unit trust which itself owns a substantial amount of land. Thus, the provision prevents the "masking" of land ownership of a company or unit trust by interposing another company or unit trust. The Section also looks beyond one interposed company or unit trust and traces landholdings to the eventual land holder, no matter how far removed from the first landholder.

The first land holder will be regarded as entitled to land if, as a result of a notional winding up of all land holders interposed between that first land holder and an actual landholder, the first landholder would be entitled to participate in a distribution of the property of the actual landholder.

Provisions are also included to ensure that discretionary trusts cannot be used to mask the beneficial ownership of land. That is, since the trustee of the discretionary trust has a power to determine who will be entitled to trust property (and income therefrom) it is often argued that a discretionary beneficiary or a discretionary object is not beneficially entitled to the trust property (or income). Section 99A(6) addresses avoidance through the use of discretionary trusts by deeming the property the subject of a discretionary trust to be beneficially owned by a land holder who is a discretionary beneficiary or a discretionary object of the trust. This applies only where a company or unit trust and the settlor or trustee of a discretionary trust are not at arms' length.

The Chief Commissioner has a discretion to determine that the property deemed to be beneficially owned by a landholder by virtue of the subsection shall not be deemed to be so owned.

Section 99A(7) augments these provisions by deeming, in certain circumstances, property of one discretionary trust to be subject to another discretionary trust. This is intended to block avoidance of duty by interposing two or more discretionary trusts between land and a landholder.

Exclusions from Operation of the Division

Section 99B excludes the acquisition of certain interests from the operation of Division 30.

The Division does not apply to or in respect of an acquisition of a land use entitlement or an interest in a designated landholder if:

(a) the acquisition is by a person in the capacity of a receiver or trustee in bankruptcy a liquidator or an executor or administrator of the estate of a deceased person;

(b) the acquisition occurred solely as the result of -

(i) the making of a compromise or arrangement under part VIII of the Companies (NSW) Code which has been approved by the court;

(ii) the distribution of the estate of a deceased person, including an acquisition occurring as a result of a will, a codicil or an order of a court varying or modifying the application of the provisions of a will or codicil or an intestacy or an order of a court varying or modifying the application, in relation to the estate of a deceased person, of the provisions of a law relating to the distribution of the assets of persons who died intestate;

(c) the acquisition is by -

(i) a person who was a partner in a marriage and has occurred solely as a result of the dissolution of the marriage; or

(ii) a person who was a de facto partner in a de facto relationship and has occurred solely as the result of the termination of the relationship;

(d) the acquisition, had it been effected by an agreement or conveyance, would not be chargeable with ad valorem duty.

The word "solely" is intended to ensure that any acquisition, if it is to be exempt, must occur as a direct consequence of the specified events. Thus, for example, the exclusion would not cover the situation where shares were acquired because the shares were sold by an executor in the liquidation of an estate of a deceased person. However, the transfer of shares to a beneficiary of a deceased estate would be an acquisition to which Division 30 would not apply.

A. D. CLYNE,
Chief Commissioner of Stamp Duties.
25 June 1987.

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