

REVENUE RULING NO. SD 008

LOAN SECURITIES - TERRITORIAL NEXUS

PREAMBLE

Section 29(1) of the Stamp Duties Act 1920 (N.S.W.) provides, in part, as follows:

"29 (1) Except as aforesaid, no instrument executed in New South Wales or relating (wheresoever executed) to any property situate or to any matter or thing done or to be done in any part of New South Wales, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity for any purpose whatsoever, unless it is duly stamped in accordance with the law in force at the time when it was first executed:.....">

RULING

The Chief Commissioner accepts that the relevant nexus for the extra-territorial operation of the Stamp Duties Act 1920 (N.S.W.) stems from the words adopted in sec. 29(1), subject to any express provision contained in any specific head of duty. For example, with respect to a conveyance, sec. 65 of the Stamp Duties Act 1920 (N.S.W.) makes it clear that the conveyance head of duty is limited to property in New South Wales. This is also the view that the Chief Commissioner accepts with respect to declarations of trust.

Where a conveyance or declaration of trust does not relate to property in New South Wales, it may nevertheless be dutiable in New South Wales for a fixed amount by reason of the fact that it is executed in New South Wales. With regard to loan security duty, specific territorial connecting factors are evident from sec. 84B(3A), 84D and 84F in addition to sec. 29 of the Stamp Duties Act 1920 (N.S.W.).

Practitioners will be aware of the Victorian Supreme Court decision in *Ansett Transport Industries (Operations) Pty. Ltd. v Comptroller of Stamps (Vic.)* 82 ATC 4643. In that case, a mortgage executed in the Australian Capital Territory over an aircraft (at a time when the aircraft was in the United States of America but subsequently came to Victoria) was held not to be dutiable with Victorian mortgage duty and, in particular, was not a mortgage "relating to any matter or thing to be done in Victoria" within sec. 17(4) of the Stamps Act 1958 (Vic.), being the materially equivalent provision to sec. 29 of the Stamp Duties Act 1920 (N.S.W.).

The Comptroller had argued that the mortgage was within sec. 17(4) of the Victorian legislation because of one or more of the following facts:

* there was a probability that the aircraft would fly to and land in Victoria;

* the mortgagor would be required to comply with the Air Navigation Act when in Victoria and indeed elsewhere;

* the mortgage would be registered under the Companies Code in Victoria and kept at the mortgagor's registered office in Victoria;

* administrative acts (including repayment, access to financial accounts, giving of notices, etc.) would, if done, be done in Victoria.

McGarvie J. rejected the Comptroller's argument. His Honour held that sec. 17(4) of the Stamps Act 1958 (Vic.) was intended to ensure that where a mortgage transaction has a basic connection with Victoria, the instrument of mortgage will not escape duty by being executed and held outside Victoria. A mortgage was said to have the required basic connection with Victoria if the mortgaged property is in Victoria or if the act which brings the secured debt into existence or which discharges the secured debt and the mortgage, is done or to be done in Victoria. It was noted that for this purpose, the mortgage transaction may extend beyond the mortgage instrument to, for example, a separate contract secured by the mortgage. The words "to be done ..." mean expressly or impliedly required by the mortgage or another part of the mortgage transaction to be done in Victoria and import a sense of obligation.

The Chief Commissioner in New South Wales accepts that Ansett's case (above) generally reflects the position in New South Wales. The Chief Commissioner considers that the following matters (not intended to be exhaustive) are of a sufficient connection to establish a liability to duty in respect of a loan security:

(a) where the loan security is executed in New South Wales;

(b) where the property over which security is taken (if any) is located in New South Wales;

(c) where the moneys advanced or to be repaid or some other matter is required to be done in the jurisdiction and this is stated either in the loan security instrument or in the instrument which creates the obligation that the loan security secures;

(d) where the governing law is required to be that of New South Wales.

On the other hand, the Chief Commissioner is also of the view that any one of the following matters may not of itself establish a sufficient connection to render a loan security dutiable in New South Wales:

(i) where the borrower/mortgagor or lender/mortgagee is incorporated in New South Wales;

(ii) where the loan security is being registered with the Corporate Affairs Commission in New South Wales (unless this is stated as being required to be done in New South Wales as a term of the instrument);

(iii) where the parties submit to the jurisdiction of the courts in New South Wales;

(iv) where notices under the loan security may be served upon a party in New South Wales.

It should be noted, however, that until the 1982 amendments to sec. 25 of the Stamp Duties Act 1920 (N.S.W.), sec. 29 of that Act had had only limited consideration by the courts as to the extent of its application, particularly in so far as the phrase "any matter or thing done or to be done in any part of New South Wales" is concerned.

A. D. CLYNE,
Chief Commissioner of Stamp Duties.
1 December, 1985

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