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Public Ruling Duties Act:

TRANSFER DUTY—CANCELLED AGREEMENTS

A public ruling, when issued, is the published view of the Commissioner of State Revenue (the Commissioner) on the particular topic to which it relates. It therefore replaces and overrides any existing private rulings, memoranda, manuals and advice provided by the Commissioner in respect of the issue(s) it addresses. Where a change in legislation or case law (the law) affects the content of a public ruling, the change in the law overrides the public ruling—that is, the Commissioner will determine the tax liability or eligibility for a concession, grant or exemption, as the case may be, in accordance with the law.

What this ruling is about

1. Under the *Duties Act 2001* (the Duties Act), transfer duty is imposed on an agreement for the transfer of dutiable property, whether the agreement is conditional or not.¹
2. Liability for transfer duty on an agreement arises when the agreement is made.² The instrument or statement³ that evidences the agreement must be lodged for assessment within 30 days after the agreement is made.⁴
3. In certain circumstances where agreements are cancelled, s.115(1) of the Duties Act operates to exempt those agreements from transfer duty.
4. Where transfer duty has been paid on an agreement that is exempt under s.115(1) of the Duties Act, s.115(3) provides that the Commissioner must make a reassessment if an application is made within six months after the agreement is ended, or within a longer period allowed by the Commissioner.
5. Part 4, Division 2 of the *Taxation Administration Act 2001* (the Administration Act) provides for an amount paid to be refunded if the reassessment decreases the amount payable (subject to the provisions of that Part).
6. The purpose of this public ruling is to clarify the Commissioner's practice in applying the exemption for cancelled agreements under s.115 of the Duties Act.

¹ Sections 8, 9(1)(b) and 10 of the Duties Act
² Section 16 and Schedule 2 of the Duties Act
³ Section 18 of the Duties Act
⁴ Section 19(3) of the Duties Act

Ruling and explanation

7. Under s.115(1) of the Duties Act, transfer duty is not imposed on a dutiable transaction that is an agreement for the transfer of dutiable property if one of the following circumstances applies:
- (a) the agreement is ended because of a breach of it by a party to it
 - (b) the agreement is ended because of non-fulfilment of a condition of it
 - (c) the agreement is brought to an end by frustration
 - (d) the agreement is ended with the consent of the parties to it and there is no resale agreement.

Example 1—Breach

An agreement for the sale of land requires the purchaser to pay the purchase price at settlement in exchange for the vendor giving possession of the property. At settlement, the purchaser does not pay the purchase price even though the vendor is able to settle.

The vendor terminates the contract due to the purchaser's breach and sues for damages.

The agreement will be exempt from transfer duty under s.115(1)(a) of the Duties Act.

Example 2—Non-fulfilment of a condition

An agreement for the sale of land is subject to the purchaser obtaining finance. The purchaser is unable to obtain finance approval.

The parties decide to terminate the agreement due to the purchaser being unable to obtain finance.

The agreement will be exempt from transfer duty under s.115(1)(b) of the Duties Act.

Example 3—Frustration

N operates a manufacturing business producing plastic goods from a factory. M enters into an agreement with N to purchase the business. The business assets consist entirely of machinery and goodwill attributable to the machinery and the factory's location. Three days later, the factory burns down through no fault of the parties. The machinery is totally destroyed and the business can no longer operate from that location. The agreement did not contemplate loss of the assets, making the performance of the contract impossible.

The agreement is automatically terminated as a consequence of the event.

The agreement will be exempt from transfer duty under s.115(1)(c) of the Duties Act.

Agreements ended with consent

8. Under s.115(1)(d) of the Duties Act, one way in which an agreement may be ended with the consent of the parties is by novation. Novation occurs when a new agreement (the novated agreement) is entered in substitution for and discharges an earlier agreement (the original agreement). Novation is the term applied to cases that include:
- (a) where the parties to an agreement cancel it and a new agreement is then entered into

by some or all of the original parties to the first agreement

- (b) where the parties to an agreement make a new agreement, with new obligations, expressly or impliedly cancelling an existing agreement
 - (c) where, pursuant to a tripartite (three-party) agreement, the obligation of a third person is by express or implied agreement accepted by one party to an existing agreement with the consent of the third person and of the other party to the agreement, in lieu of the obligation of the other party, who, by the new agreement, is released from his obligation under the original agreement.⁵
9. Novation may involve the addition and/or removal of a party. All parties to the original agreement, plus any additional parties under the novated agreement, must agree to the novation. Where this does not occur, the original agreement will not be treated as ended by consent within the meaning of s.115(1)(d) of the Duties Act, and transfer duty will be payable on both agreements.⁶
10. Novation may occur in a number of ways, including:
- (a) by termination of one agreement and entering into a new agreement
 - (b) by written amendment to the original agreement
 - (c) by deed of variation.
11. Novation depends on intention, which may be expressed or inferred.⁷

Example 4

P enters into an agreement (the first agreement) with V to purchase V's property. Before settlement, P wishes to change the purchaser of the property to include his spouse, Q. P and V agree to cancel the first agreement, and another agreement (the second agreement) is entered into between V as vendor and P and Q as purchasers, to replace the first agreement. The terms of the first and second agreements are otherwise identical.

As a result of cancelling the first agreement, P is released from his obligations under that agreement. P acquires an interest in the property with Q under the second agreement.

Because the interest that P acquires in V's property does not represent a profit for P as a result of the second agreement, the second agreement is not a resale agreement (explained in paragraphs 14–17) and s.115(1)(d) of the Duties Act applies, so transfer duty will not be payable on the first agreement.

Circumstances where the exemption will not apply

12. Where an agreement contains provisions enabling it to be performed in a number of ways and it is performed by means other than the sale of the subject property to the named purchaser, the agreement will not be a cancelled agreement and transfer duty will be payable on it.

⁵ *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* [2012] HCA 6 at [27]; see also *Hillam v Jacullo* [2015] NSWCA 196; *Coghill v Indochine Resources Pty Ltd* [2015] FCA 377

⁶ *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* [2012] HCA 6 at [28]

⁷ *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* [2012] HCA 6 at [31] – [32]; *Coghill v Indochine Resources Pty Ltd* [2015] FCA 377 at [56] – [57]

13. A novation does not occur when the obligations of the parties under an agreement are discharged by performance although new rights and obligations arise under a second agreement.

Example 5

P enters into an agreement (the first agreement) with V to purchase V's property. The first agreement contains a clause that allows P to nominate a third party to be the purchaser of the property, provided the notice requirements are satisfied. P nominates Q as the new purchaser and gives notice to V in the manner required in the first agreement. Q executes a new agreement with V on the same terms (with the exception of the nomination clause).

As the parties acted at all times pursuant to their rights and obligations under the first agreement for the sale of the property, the first agreement has been performed, not cancelled. Transfer duty will be payable on the first and second agreements.⁸

Resale agreements

14. Where an agreement is ended with the consent of the parties to the agreement, an exemption from transfer duty under s.115(1)(d) of the Duties Act will only apply if there is no resale agreement.⁹
15. An agreement is a resale agreement if all of the following applies:
- (a) under the agreement, any of the dutiable property the subject of the cancelled agreement is or will be transferred or is agreed to be transferred
 - (b) the transferee under the cancelled agreement or a related person of the transferee receives, or will receive, directly or indirectly a financial benefit other than:
 - (i) the release of the transferee from the transferee's obligation under the cancelled agreement
 - or
 - (ii) an interest in the dutiable property to the extent that the unencumbered value of the interest does not represent a profit for the transferee because of the resale agreement.¹⁰
16. When determining if an agreement is a resale agreement, it is a question of fact in each case whether or not the purchaser under the first contract or agreement (or a related person of the purchaser) receives a direct or indirect financial benefit under the arrangements, contracts or agreements.
17. The term 'financial benefit' is not defined and therefore has its ordinary meaning. It is a wide expression that includes benefits in money or money's worth.

⁸ *Australian National Airlines Commission v Commissioner of Stamp Duties (Qld)* 87 ATC 4218

⁹ Section 115(1)(d) of the Duties Act

¹⁰ Section 115(2) of the Duties Act

Example 6—Direct financial benefit

P enters into an agreement (the first agreement) with V to purchase V's property. Before settlement, P learns that B wishes to purchase V's property and is willing to pay a fee to P in exchange for P agreeing to terminate the first agreement. B pays such a fee to P, and P and V agree to cancel the first agreement. Another agreement (the second agreement) is then entered into between V as vendor and B as purchaser.

In these circumstances, the second agreement involves the transfer of property that is the subject of the first agreement. P acquired a direct financial benefit as a result of the second agreement, because P has been paid a fee by B for agreeing to terminate the first agreement.

Therefore, the second agreement will be considered to be a resale agreement, so the first agreement will not be considered to be exempt under s.115 of the Duties Act. Transfer duty will be payable on both the first and second agreements.

Example 7—Indirect financial benefit

The same facts as Example 6, except that the fee payable for P terminating the first agreement is paid to P's family trust.

In these circumstances, the second agreement is a resale agreement under s.115(2) of the Duties Act because P has received an indirect financial benefit due to the payment of P's fee to P's family trust.

Therefore, s.115 of the Duties Act will not apply to the first agreement and transfer duty will be payable on both agreements.

Cancellation before duty paid

18. If s.115(1) of the Duties Act applies to exempt an agreement for the transfer of dutiable property and duty has not been paid, no duty is payable on the agreement.
19. In that case, no action will need to be taken in relation to the lodgement or stamping of the agreement unless either:
 - (a) there is a resale agreement
 - or
 - (b) the Commissioner requires, by notice in writing, that the agreement be lodged.
20. Where the exemption in s.115(1) of the Duties Act applies to an agreement that is lodged, the agreement will be stamped in accordance with s.492(b) of the Duties Act.

Cancellation after duty paid

21. Under s.115(3) of the Duties Act, if transfer duty has been paid on the agreement and it has been subsequently cancelled, the Commissioner must make a reassessment and refund the duty in accordance with Part 4, Division 2 of the Administration Act.

Reassessments of duty

22. When applying for a reassessment under s.115(3), an applicant should provide:
- (a) the original stamped instrument or a copy if the original cannot be found
 - (b) the reason for the cancellation of the agreement
 - (c) the full facts and circumstances relating to the cancellation of the agreement
 - (d) a statutory declaration from the vendor and the purchaser or other evidence from both parties, to satisfy the Commissioner that the relevant provisions of s.115(1) and (2) of the Duties Act have been met
 - (e) details of any further agreements for the same property that the vendor has entered into.
23. The application for the reassessment must be lodged with the Commissioner within six months after the cancelled agreement is ended or within a longer period if the Commissioner allows.
24. Where a document such as a Queensland Titles Registry Form 1 Transfer has been denoted as having transfer duty paid on the associated agreement and that agreement has been cancelled, the transfer must be produced with the cancelled agreement in order for a reassessment to be made.
25. Once the transfer duty notation on the associated document has been marked as cancelled, it will be returned with the cancelled agreement.

Cancelled transfers

26. Section 115(1) does not apply to a transfer of dutiable property.¹¹
27. If transfer duty has been assessed and paid on a transfer of dutiable property effected or evidenced by an instrument or Electronic Lodgement Network (ELN) transfer document¹², and the instrument or ELN transfer document is cancelled by the parties before it has legal effect, a taxpayer may apply to the Commissioner for a refund of the transfer duty paid.¹³

Date of effect

28. This public ruling takes effect from its date of issue.

Elizabeth Goli
Commissioner of State Revenue
Date of issue: 19 May 2017

¹¹ Section 9(1)(a) of the Duties Act

¹² Section 156D of the Duties Act

¹³ Section 156A of the Duties Act

References

| Public Ruling | Issued | Dates of effect | |
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