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Public Ruling Duties Act:

TRANSFERS OR AGREEMENTS BY WAY OF GIFT OF RESIDENTIAL LAND WITHIN A MARRIAGE OR DE FACTO RELATIONSHIP

A Public Ruling, when issued, is the published view of 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, subsidy or exemption, as the case may be, in accordance with the law.

What this Ruling is about

1. The *Duties Act 2001* (the Duties Act) imposes transfer duty on the transfer, or agreement for the transfer, of land in Queensland.¹
2. Section 151 of the Duties Act provides an exemption from transfer duty in cases where there is a transfer, or agreement for the transfer, by way of gift, of an interest in residential land from one party to a subsisting marriage or de facto relationship to the other party, if the parties will own the land as joint tenants or tenants in common in equal shares after the transfer, and the residence will be the principal residence of the parties.
3. The exemption in s.151 of the Duties Act was not intended to exclude an acquisition that involves the assumption of liability under an existing mortgage.
4. On 2 May 2003, an administrative arrangement was approved which broadened the scope of the exemption under s.151 of the Duties Act so that a transfer, or an agreement for the transfer, of a residence to a spouse or partner by way of gift, but subject to an existing mortgage, may qualify for the exemption. The Duties Act has been administered on this basis since that time.

¹ Refer ss.8, 9(1)(a) and (b), 10(1)(a) of the Duties Act.

5. The purpose of this Public Ruling is to:
- (a) detail what information is required to satisfy the Commissioner that the exemption is applicable
 - (b) set out the treatment of non-residential land if acquired as part of the transaction and
 - (c) provide guidance as to what should be considered to be a transfer by way of gift for the purposes of the section.

Ruling and explanation

Information required

6. To receive the exemption, the party transferring the interest in the land (the transferor) must be able to attest to the following in the form of a statutory declaration:
- (a) the transferor is a party to a subsisting marriage or de facto relationship²
 - (b) the transferee is the other party to the subsisting marriage or de facto relationship
 - (c) the date of the marriage, or, in the case of de facto partners, the date they commenced to live together as a couple on a genuine domestic basis³
 - (d) the transfer of property consists of an interest in residential land⁴
 - (e) the transfer does/does not include an interest in non-residential land
 - (f) after the transfer the parties will own the land as joint tenants or tenants in common in equal shares
 - (g) the transfer is by way of gift and
 - (h) the residence will be the parties' principal residence⁵ from the date of transfer.
7. The statutory declaration containing all of the above elements must be submitted with the transfer, or agreement for transfer, together with the approved Form 2.2, Dutiable transaction - transfer duty.

Residential and non-residential land

8. The exemption extends only to the extent of the interest acquired in residential land—that is, that part of the land on which a residence is constructed, including the curtilage attributable to the residence if that curtilage is used for residential purposes.
9. If the land transferred includes residential and non-residential land, transfer duty will be imposed on the dutiable value of the non-residential land. To calculate the transfer duty payable, it will be necessary to obtain a valuation of the entire property with an apportionment of the property's value between the residential and non-residential land.

² For definition of de facto relationship, refer to Schedule 6 of the Duties Act.

³ To qualify for the exemption, de facto partners must have lived together as a couple for at least 2 years – see definition of de facto partner, Schedule 6 of the Duties Act.

⁴ For definition of residential land, refer to Schedule 6 of the Duties Act.

⁵ For definition of residence, refer to s.87 of the Duties Act.

Transfer by way of gift

10. One feature of the exemption is that the transfer has to be by way of gift. The Commissioner will generally accept for the purposes of s.151 of the Duties Act that a transaction is by way of gift if the agreement or transfer records the consideration between the parties as 'by way of natural love or affection' or 'by way of gift' or similar.
11. The consideration for a dutiable transaction includes the amount of any liabilities assumed under the transaction, including an obligation, whether contingent or otherwise, to pay any unpaid purchase money payable under an agreement for the transfer of dutiable property.⁶
12. In determining whether the subject property was transferred by way of gift, the Commissioner will not include as consideration any debt assumed by the transferee under an existing mortgage over the subject property. This overrides the general principle contained in s.12(1)(a) of the Duties Act.
13. However, with the exception of the above, if, as part of the transaction any of the following apply it will be considered that the transfer is not by way of gift:
 - (a) consideration is paid for the transfer (whether or not that consideration is equal to the dutiable value of the dutiable property)
 - (b) liabilities are assumed under the transaction (including the assumption of an obligation, whether contingent or otherwise, to pay any unpaid purchase money payable under an agreement for the transfer of the land)
 - (c) the amount or value of any debt is released or extinguished under the transaction.

Example 1

Mrs J owns a residential unit which has an existing mortgage of \$75 000 registered on the title and decides to transfer half of her interest in the property to her husband for the consideration of 'natural love and affection'. They execute a transfer to effect this transaction. After registration of the transfer their interest in the property will be Mrs J and Mr J as tenants in common in equal shares. Mr J will also assume a half interest in the mortgage. Mrs J completes a statutory declaration containing the elements described in paragraph 6 of this Public Ruling. She submits the declaration, the transfer and the Form 2.2 – Dutiable transaction - transfer duty for assessment. As Mr and Mrs J satisfy all of the Commissioner's requirements, the transfer will be taken to be exempt from transfer duty as a result of the administrative arrangement.

Example 2

X owns a home. X has been living in the home with his de facto, Y, for 4 years and decides to transfer a half interest in the property to Y for the cash amount of \$15 000 and the assumption of half of the mortgage. They execute a transfer to effect this transaction. After registration of the transfer, their interest in the property will be X and Y as tenants in common in equal shares. As X and Y cannot declare that the property was transferred by way of gift, the transfer is not exempt from transfer duty either under s.151 of the Duties Act or the administrative arrangement.

⁶ Section 12(1)(a) of the Duties Act

Date of effect

14. This Public Ruling takes effect from the date of issue.

David Smith
Commissioner of State Revenue
Date of Issue 24 February 2009

References

Public Ruling	Issued	Dates of effect	
		From	To
DA151.1.1	24 February 2009	24 February 2009	15 April 2010
Supersedes Practice Direction DA 67.1	17 January 2006	17 January 2006	23 February 2009