Contents

Public Ruling
Duties Act:

CONCESSION FOR HOMES AND FIRST HOMES – OCCUPANCY REQUIREMENTS

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 or exemption, as the case may be, in accordance with the law.

What this Ruling is about

1. Chapter 2 Part 9 of the *Duties Act 2001* (the Duties Act) provides concessions for transfer duty for a dutiable transaction that is either of the following (each a relevant transaction)—
   (a) the transfer, or agreement for the transfer, of a home or first home, or land on which a first home is to be constructed or
   (b) the acquisition, on its creation, grant or issue, of a new right that is a lease—
      (i) of residential land on which a home or first home is constructed or of vacant land on which a first home is to be constructed and
      (ii) for which a premium, fine or other consideration is payable (a home or vacant land lease).[1]

2. A residence is a person's home if the person's occupation date for the residence is within one year after the person's transfer date for the residential land.[2]

Superseded

1 Section 85 of the Duties Act. The transfer duty home concession provisions (Chapter 2 Part 9 and Part 14 Division 1 of the Duties Act) were extended, from 1 December 2003, to include the acquisition of a new right that is a lease of residential land where the lessee is required to pay a premium, fine or other consideration: s.614 of the Duties Act.

2 Section 86(1) of the Duties Act

3. A home is a person's first home if, before acquiring the home:

   (a) the person did not hold, and never before held, an interest in other residential land[3] in Queensland or elsewhere other than—

   (i) as trustee for another person or

   (ii) as lessee or

   (iii) as the holder of a security interest and

   (b) the person was not, and had never been, a vacant land concession beneficiary[4] in relation to land other than the residential land on which the home is constructed.[5]

4. A residence that is to be constructed on vacant land[6] is a person's first home if:

   (a) the person's occupation date for the residence is within two years after the person's transfer date for the vacant land and

   (b) before acquiring the vacant land—

   (i) the person did not hold, and never before held, an interest in residential land in Queensland or elsewhere other than:

   (A) as trustee for another person or

   (B) as lessee or

   (C) as the holder of a security interest and

   (ii) the person was not, and had never been, a vacant land concession beneficiary in relation to land other than the vacant land on which the residence is to be constructed.[7]

5. A person's occupation date for a residence is the date the person, as owner of the residence[8], starts occupying it as the person's principal place of residence.[9] For a transferee who acquired an accommodation unit in a retirement village and is required to enter into a retirement village leasing arrangement[10], a reference to a person occupying a residence as owner of the residence includes a transferee occupying the unit under the sublease.[11]

6. A person's transfer date for residential land or vacant land is the date the person is entitled to possession of the land under the dutiable transaction that is the relevant transaction.[12]

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3 Section 86A of the Duties Act defines 'residential land' to be land, or the part of land, on which a residence is constructed, and includes the curtilage attributable to the residence if the curtilage is used for residential purposes.

4 Defined in s.86D of the Duties Act

5 Section 86(2) of the Duties Act. Paragraph 3(a)(ii) does not apply to the interest in land of a lessee of a lease of residential land on which a home or first home is constructed and for which a premium, fine or other consideration is payable.

6 Section 86C of the Duties Act defines that a person's land is 'vacant land' if a residence is to be constructed on the land, and when the person acquired the land, there was no building or part of a building on the land.

7 Section 86B of the Duties Act. Paragraph 4(b)(i)(B) does not apply to the interest in land of a lessee of a lease of residential land on which a home or first home is constructed and for which a premium, fine or other consideration is payable.

8 Owner of a residence or vacant land includes the lessee of a lease, mentioned in paragraph 1(b), of the land on which the residence is constructed or is to be constructed: Schedule 6 of the Duties Act.

9 Section 88 of the Duties Act

10 Defined in the Dictionary in Schedule 6 of the Duties Act

11 Sections 88 and 95A of the Duties Act

12 Section 89 of the Duties Act

Superseded

7. Sections 91–94A of the Duties Act outline how the concessional duty will be calculated.

8. In circumstances where the occupancy requirements[13] are not met, Chapter 2 Part 14 of the Duties Act (ss.153–155) provides for a reassessment of duty to disallow the concession, in full or in part.

9. This Public Ruling clarifies the Commissioner's interpretation of the Duties Act in relation to:
   (a) transfer date
   (b) occupation date, in particular what is meant by the term 'principal place of residence' and
   (c) the circumstances in which a reassessment will be issued.

Ruling and explanation

Transfer date—entitled to possession

10. A person's transfer date is the date that the person is entitled to possession of the land under the dutiable transaction that is the relevant transaction.

11. The date that a person is entitled to possession is a question of fact that is to be determined by reference to the terms of the instrument evidencing the relevant transaction.

12. In the absence of a specific provision in the instrument to the contrary, the phrase 'entitled to possession' is interpreted to mean entitled to receive the rents and profits of the property.

13. In the case of a standard REIQ contract of sale, possession is usually given on completion of the contract when, in exchange for the balance purchase price, the following are delivered to the purchaser:
   (a) the instrument of title
   (b) the unstamped transfer
   (c) any keys and
   (d) any tenancy documents.

Occupation date—principal place of residence

14. A person's occupation date for a residence is the date the person, as owner of the residence, starts occupying it as the person's principal place of residence. For a transferee who acquired an accommodation unit in a retirement village and is required to enter into a retirement village leasing arrangement, a reference to a person occupying a residence as owner of the residence includes a transferee occupying their accommodation unit in a retirement village under a sublease in a retirement village leasing arrangement.[14]

15. The issue of whether a residence is a person's principal place of residence is a question of fact and must be determined with regard to the individual circumstances of each case.

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[13] Defined in the Dictionary in Schedule 6 of the Duties Act
[14] Sections 88 and 95A of the Duties Act

Superseded

16. The following factors may be relevant in determining whether or not a residence is a person's principal place of residence:
    (a) whether the person who acquired the property has moved his or her personal belongings into the dwelling
    (b) the place of residence of the person's family
    (c) the extent of time the person 'lives' in the dwelling
    (d) the address to which the person has his or her mail delivered
    (e) the name of the person liable to account for the payment of utilities (eg electricity, gas and telephone) connected to the dwelling and
    (f) the address of the person on electoral rolls.

17. The relevance and weight of each factor will depend on the individual circumstances of each case.

Circumstances which will result in partial loss of the concession

18. Section 153 of the Duties Act provides for the partial removal of the concession in the following circumstances:
    (a) the transfer duty on the dutiable transaction has been assessed on the basis of a concession for a home, first home or land on which a first home is to be constructed and
    (b) the transferee or lessee, within the year after the transferee's or lessee's occupation date for the residence disposes of the land, other than because of an intervening event[15], by—
        (i) transferring part or all of it or
        (ii) leasing or otherwise granting exclusive possession of part or all of it to another person
        (iii) for a home or vacant land lease—surrendering the lease.

19. For the purposes of s.153 of the Duties Act, the following circumstances are deemed not to constitute a disposal of the land.
    (a) The transferee transfers part of the land to the transferee's spouse and the transfer is exempt from transfer duty under s.151 of the Duties Act.[16]
    (b) The transferee, in respect of an accommodation unit in a retirement village, enters into a retirement village leasing arrangement for that unit.[17]

20. The proportion of the concession removed reflects the extent to which the transferee failed to retain ownership or exclusive possession of all or part of the residence for one year.

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15 Defined in the Dictionary in Schedule 6 of the Duties Act
16 Section 153(1A) of the Duties Act
17 Section 153(1B) of the Duties Act

Superseded

Example 1

C & D acquire a home for $200,000. Under the terms of the agreement, the transfer date is 2 March. They are to commence occupation of the property as their principal place of residence on 5 March. An application made for concession for transfer duty for a home is approved. The transfer duty applicable to the transaction is $2,000.

If C & D had not received the benefit of the concession, the transfer duty payable would have been $5,425. Therefore the concession benefit was $3,425 ($5,425 – $2,000).

Due to an employment opportunity overseas, C & D arrange for the property to be rented. The lease commences on 8 October of the same year.

As the transferees have leased the property within one year after their occupation date, the reassessment provision (s.153) will be triggered and the concession benefit will be reduced.

The number of days that C & D occupied the property as their principal place of residence was 218 days (5 March – 8 October, inclusive).

The formula for calculating the further transfer duty payable is contained in s.153(2) of the Duties Act. It is the proportion of the concession benefit received that reflects the number of days that C & D fail to satisfy the occupancy requirements. In this instance, the number of days C & D have failed to satisfy the occupancy requirements is 147 days (365 – 218).

Therefore the further transfer duty payable is $1,379.35 ($3,425 x 147/365).

Example 2

X & Y acquire a residence for $250,000. Under the terms of the agreement the transfer date is 9 May. They are to commence occupation of the property as their principal place of residence on 10 May. An application made for concession for home is approved. The transfer duty applicable to the transaction is $2,500.

If X & Y had not received the benefit of the concession, the transfer duty payable would have been $7,175. Therefore the concession benefit was $4,675 ($7,175 – $2,500).

On 8 July of the same year, X's grandmother, Z, takes up occupation of a self-contained unit attached to the residence. Z pays $100 a week for the exclusive use of the unit.

As X & Y have granted exclusive possession of part of the property within one year of their occupation date, the reassessment provision (s.153) will be triggered and the concession benefit will be reduced.

The number of days that X & Y occupied the property as their principal place of residence was 60 days (10 May – 8 July, inclusive).

The formula for calculating the further transfer duty payable is contained in s.153(2) of the Duties Act. It is the proportion of the concession benefit received that reflects the number of days that X & Y fail to satisfy the occupancy requirements. In this instance, the number of days X & Y have failed to satisfy the occupancy requirements is 305 days (365 – 60).

Therefore the further transfer duty payable is $3,906.50 ($4,675 x 305/365).

Superseded

Example 3

G & H acquire, for $300,000, vacant land on which a residence is to be constructed. The transfer date for the vacant land is 1 September. G & H satisfy the conditions for a concession for a first home in relation to the acquisition of the vacant land, and an application for a concession is approved. The transfer duty applicable to the transaction is $4,125.

If G & H had not received the benefit of the concession, the transfer duty payable would have been $8,925. The concession benefit was $4,800.

A residence is constructed on the vacant land and G & H commence occupation of the property as their principal place of residence on 1 March.

On 1 May, G & H enter into an agreement to sell the property. The agreement settles on 30 May.

As G & H have transferred the property within one year after their occupation date (1 March), the reassessment provision (s.153) will be triggered and the concession will be reduced.

The number of days that G & H occupied the property as their principal place of residence was 91 days (1 March – 30 May, inclusive).

The formula for calculating the further transfer duty payable is contained in s.153(2) of the Duties Act. It is the proportion of the concession benefit received that reflects the number of days that G & H fail to satisfy the occupancy requirements. In this instance, the number of days G & H have failed to satisfy the occupancy requirements is 274 days (365 – 91).

Therefore the further transfer duty payable is $3,603.25 ($4,800 x 274/365).

Example 4

On 1 July J & K enter into a long term sub-lease of residential land on a Great Barrier Reef island for which a premium of $300,000 is payable. Under the terms of the sub-lease the transfer date is 30 July. J & K are to commence occupation of the property as their principal place of residence on 31 July. An application made for concession for home is approved. The value of the interest acquired in the land is $300,000. The transfer duty applicable to the transaction is $3,000.

If J & K had not received the benefit of the concession, the transfer duty payable would have been $8,925. Therefore the concession benefit was $5,925 ($8,925 – $3,000).

On 5 November of the same year J & K surrender the sublease.

As J & K have surrendered the sublease within one year of their occupation date, the reassessment provision (s.153) will be triggered and the concession benefit will be reduced.

The number of days that J & K occupied the property as their principal place of residence was 98 days (31 July – 5 November, inclusive).

The formula for calculating the further transfer duty payable is contained in s.153(2) of the Duties Act. It is the proportion of the concession benefit received that reflects the number of days that J & K fail to satisfy the occupancy requirements. In this instance, the number of days J & K have failed to satisfy the occupancy requirements is 267 days (365 – 98).

Superseded

Therefore the further transfer duty payable is $4,334.17 ($5,925 x 267/365).

Circumstances where the full concession will be removed

21. Section 154 of the Duties Act provides that a reassessment to remove the concession in its entirety will be triggered in the following circumstances:

(a) the transfer duty on a relevant transaction has been assessed on the basis of a concession for a home, first home or land on which a first home is to be constructed and

(b) other than because of an intervening event[18]—

(i) the transferee or lessee, before the occupation date, disposes of the land by—

(A) in the case of home or vacant land lease—the lessee surrendering the lease or

(B) transferring, leasing or otherwise granting exclusive possession of, part or all of the land to another person or

(ii) the transferee fails to take up occupation within one year after the transfer of the residential land, or within two years after the transfer date of the vacant land on which a residence is to be constructed, as the case may be.

22. For the purposes of s.154 of the Duties Act, the following circumstances are deemed not to constitute a disposal of the land:

(a) There is a relevant transaction and the residential land is leased to the vendor or an existing tenant prior to the occupation by the transferee. There is also a requirement for the vendor or tenant to vacate the residential land within a certain timeframe, being:

(i) where the occupier is the vendor—the earlier of:

(A) as soon as reasonably practicable or

(B) within six months after the transfer date.

(ii) where the occupier is an existing tenant—the earlier of:

(A) on the termination of the current term of the lease or

(B) within six months after the transfer date.[19]

(b) The transferee or lessee transfers part of the land to the transferee's spouse and the transfer is exempt from transfer duty under s.151 of the Duties Act.[20]

(c) The transferee, in respect of an accommodation unit in a retirement village, enters into a retirement village leasing arrangement for that unit.[21]

23. The reassessment will impose transfer duty as if the concession had never applied to the transferee.[22]

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18 Defined in the Dictionary in Schedule 6 of the Duties Act
19 Section 154(2) of the Duties Act
20 Section 154(2A) of the Duties Act
21 Section 154(2B) of the Duties Act
22 Section 154(3) of the Duties Act

Superseded

Claims for concession subsequent to assessment

24. Where circumstances prevent a transferee claiming the concession at the time of assessment of transfer duty (for example, the transferee was not aware they were eligible to claim the concession), a claim for the concession may be made in the approved form. A reassessment under s.17 of the *Taxation Administration Act 2001* will be made to allow the concession only where the following occupancy requirements have been or will be met.

25. That is, a reassessment will be made to allow the concession, provided the transferees:

    (a) will start to occupy the residence as their principal place of residence within one year after the transfer date in the case of residential land, or within two years after the transfer date in the case of vacant land and

    (b) have not transferred, leased or otherwise granted exclusive possession of the residential land or vacant land (except in the circumstances outlined in paragraphs 19 and 22) between the transfer date and the occupation date.

26. Where both of these conditions are not met, the concession will not be allowed as the use of the property would not be consistent with acquiring the property as a principal place of residence.

Example 4

E & F acquire a residence for $350,000. The transfer date is 2 March. At the time of the assessment they did not claim a concession as they intended to use the residence as an investment property.

On 2 November of the same year, the tenants moved out and E & F commenced occupation of the residence as their principal place of residence. Even though their occupation date is within one year after the transfer date, the concession will not be allowed as the land was leased between the transfer date and occupation date. The use of the property as an investment is inconsistent with the purchase of the property as a principal place of residence.

Date of effect

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

David Smith
Commissioner of State Revenue
Date of Issue 15 April 2010

Superseded

References

Public Ruling	Issued	Dates of effect	
		From	To
DA085.1.3	15 April 2010	15 April 2010	31 July 2011
DA085.1.2	3 July 2009	1 July 2009	14 April 2010
DA085.1.1	24 February 2009	24 February 2009	30 June 2009
Supersedes Revenue Ruling DA 2.4	22 January 2009	22 January 2009	23 February 2009

Superseded

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