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Public Ruling

First Home Owner Grant Act: AN INTEREST THAT IS SUBJECT TO A TRUST

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. The *First Home Owner Grant Act 2000* (the FHOG Act) sets out certain eligibility criteria that an applicant for the first home owner grant (the grant) must satisfy.¹
2. One such criterion is that an applicant or an applicant's spouse must not have had a relevant interest in residential property prior to 1 July 2000 or a relevant interest in property that is used as their residence (other than the property to which the application relates) on or after 1 July 2000.²
3. A 'relevant interest' in land includes an estate in fee simple in the land.³ Any person who is registered on the title as an owner will, generally, have a relevant interest for the purposes of the FHOG Act.
4. An exception is where a person holds an interest subject to a trust.⁴ The FHOG Act does not specify that a trust must be declared in writing. Therefore cases where a trust has been orally declared or where an implied, resulting or constructive trust has arisen must also be considered.

¹ Sections 11–15 of the FHOG Act

² Section 14 of the FHOG Act; however, in respect of eligible transactions entered into on or after 1 January 2004, there is a limited exception in s.14(5) covering cases where an earlier grant was paid but then repaid because of a failure to satisfy the residence requirement.

³ Section 8(1)(a) of the FHOG Act

⁴ Section 8(2)(b) of the FHOG Act

5. The purpose of this Public Ruling is to provide clarification as to what evidence the Commissioner requires in order to be satisfied of the existence of a trust.

Ruling and explanation

6. Every application depends on its own particular facts. This Public Ruling provides general guidance on the evidence to be provided with an application where it is claimed that a property was or is held on trust.

Express trusts

7. An express trust is created by an express declaration of intention. The declaration may be made orally or in writing.
8. An oral declaration must be manifested and proved either by writing signed by some person who is able to declare such trust or by the person's will.⁵
9. It does not matter if the written evidence was made after the oral declaration.
10. If the declaration of trust was evidenced in writing at or before the time of the acquisition of the property, a copy of the declaration of trust or other documentation evidencing the trust should be provided.
11. If the declaration of trust was evidenced in writing after the acquisition of the property, then evidence of the oral declaration of trust before acquisition of the property will be required.
12. No particular form of writing is required. Acceptable written proof includes correspondence, a statement in an instrument or an affidavit. However, the writing (and not any supporting oral evidence) must contain all the terms of a trust, clearly setting out the beneficiaries, the trust property and the full nature of the trust.

Implied or resulting trusts

13. An implied or resulting trust may arise where no trust is expressly declared over the relevant property, however the legal ownership of such property differs to the equitable or beneficial ownership.
14. Whether or not an implied or resulting trust arises depends on the intention of the relevant parties as evidenced by their acts and declarations before or at the time of purchase, or so immediately after it as to constitute a part of the transaction.⁶
15. The applicant must satisfy the Commissioner of the existence of an implied or resulting trust.

⁵ Section 11(1)(b) of the *Property Law Act 1974*

⁶ *Calverley v Green* (1984) 155 CLR 242

Constructive trusts

16. Constructive trusts arise by operation of law. This does not necessarily mean that a constructive trust exists only if ordered by the Court. The Court merely enforces the trust, it does not create the trust. A constructive trust is created immediately once the circumstances, in respect of which equity would construe a trust, exist.
17. The circumstances in which a constructive trust arises will differ in each case.

Type of evidence – express, implied, resulting or constructive trust

18. The types of evidence which an applicant could provide to support their claim that a trust exists in relation to property include the following:
 - (a) A statutory declaration from each applicant detailing the circumstances of the creation of the trust.
 - (b) Statutory declarations from the beneficiary or beneficiaries detailing the circumstances of the creation of the trust.
 - (c) Statutory declarations from third parties (for example, real estate agent, bank employee, solicitor) corroborating the evidence of the applicant as to the circumstances of the creation of the trust.
 - (d) In the case of an express, implied or resulting trust, evidence of contributions to the property before and after acquisition (such as who paid the deposit and the balance of the purchase price, who made the mortgage payments, who paid the rates) made in accordance with the terms of the trust. Such evidence may include copies of bank statements, deposit slips and receipts.
 - (e) In the case of an implied or resulting trust, any further documents made before, at or after the acquisition of the property concerning any arrangements between the parties as to the acquisition of the property.
 - (f) In the case of a constructive trust, documentation (for example, an order of a court) or such other evidence relevant to the creation of the constructive trust.

Type of evidence—implied or resulting trusts—guarantor or co-borrower registered on title

19. A financial institution may provide a home loan to a home-buyer (borrower) on the condition that, for security purposes, a third party is a guarantor or co-borrower and that guarantor or co-borrower is registered on the title to the property.
20. The Commissioner will usually accept the existence of an implied or resulting trust in relation to the situation described in paragraph 19 if evidence is provided which establishes each of the following:
 - (a) The arrangement was only entered into as a result of a requirement of a financial institution that a third party acts as a guarantor or co-borrower.
 - (b) The guarantor or co-borrower does not have a beneficial interest in the property.
 - (c) The guarantor or co-borrower provided no money towards the purchase of the property and will not be making any loan payments.

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21. To prove the matters listed in paragraph 20, the following documentary evidence should be provided:
- (a) A letter or other documentation from the financial institution which states that the financial institution requires, for security purposes, the third party to be a guarantor or co-borrower.
 - (b) Statutory declarations by both the borrower and the guarantor or co-borrower:
 - (i) stating the reasons why the guarantor or co-borrower's name appears on the title
 - (ii) declaring that the guarantor or co-borrower is not entitled to any benefit in relation to the property, including right of occupancy or entitlement to rents or profits
 - (iii) declaring that the guarantor or co-borrower has not provided and will not provide any of the purchase monies and has not made and will not make any loan payments and
 - (iv) declaring that, should any of the circumstances detailed in (ii) and (iii) above change, the applicant will notify the Commissioner immediately.
 - (c) Evidence that the guarantor or co-borrower has provided no money towards the purchase of the relevant property. Bank statements showing the transfer of deposit monies and the balance of the purchase price from the borrower's account to the vendor's account and showing home loan payments, if any, made by the borrower would be acceptable evidence.

Date of effect

22. 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
FHOGA008.1.1	24 February 2009	24 February 2009	2 November 2020
Supersedes Practice Direction FHOG 3.2	18 October 2004	18 October 2004	23 February 2009