

REVENUE CIRCULAR

RC-SD-003:

2009-10 BUDGET AMENDMENTS

LANDHOLDING CORPORATIONS AND UNIT TRUSTS

Purpose

This Circular provides information on amendments to the landholder stamp duty provisions in the *Stamp Duty Act* (the Act). The amendments implement measures announced by the Treasurer as part of the 2009-10 Budget.

Entities listed on a recognised financial market

From 6 May 2009, landholder stamp duty will be imposed on the acquisition of a significant interest in a corporation or unit trust (an entity) that is listed on a recognised financial market, such as the Australian Securities Exchange. This includes an acquisition by a merger vesting of shares or units in such entities, as this is one way that a takeover can be achieved.

A person has a significant interest in a listed entity if, in relation to all the property of the entity, the person's entitlement is:

- 50 per cent or more, for the merger vesting of shares or units; and
- 90 per cent or more, in all other situations.

Landholder stamp duty will be assessed on all interests acquired by the person and related persons in the entity during the relevant period. Generally the relevant period will be 3 years ending on the date the significant interest is acquired.

Consistent with the position prior to 6 May 2009, if the listing of the entity is a tax avoidance scheme, or part of a tax avoidance scheme, its listing will be disregarded. In determining whether to disregard a listing, the Commissioner will consider factors such as, the length of time that the entity's shares or units have been quoted on the market, the proportion of shares or units that are available to be traded and the turnover of shares or units. If a listing is disregarded, a 50 per cent interest will be a significant interest rather than 90 per cent.

Acquisitions arising from a merger vesting

From 6 May 2009, the Act is amended to clarify the treatment of mergers. The new provisions deem a significant interest to be acquired when there is a merger of:

- an entity with and into another entity;
- entities that results in a new entity being formed; and
- entities with and into each other where each of the merging entities continues in existence, albeit in a merged structure.

Acquisitions in unlisted unit trust schemes

From 6 May 2009, a person has a significant interest in an unlisted unit trust scheme when the person is entitled to 50 per cent or more of all the property of the scheme. This aligns the landholder stamp duty treatment of unlisted unit trusts and unlisted corporations.

Landholder stamp duty was previously imposed where an interest of 20 per cent or more was acquired in a private unit trust scheme. The Act defined a private unit trust scheme as a unit trust scheme that:

- was not a registered managed investment scheme; or
- was a registered managed investment scheme, but where at least one of the following criteria was met:
 - there were fewer than 300 members entitled to units under the scheme;
 - a person, whether alone or together with related persons, was entitled to 20 per cent or more of the issued units in the scheme; or
 - no units in the scheme have been offered to the public under a prospectus or product disclosure statement that has been lodged with, or notified to, the Australian Securities and Investments Commission.

The application of landholder stamp duty will no longer be limited to trusts that are private unit trust schemes. Of note is that all registered managed investment schemes not listed on a recognised financial market will be subject to the 50 per cent relevant acquisition threshold from 6 May 2009.

Arrangements to reduce a person's entitlement to property

For a person to have an interest in a corporation, the landholder provisions require the person to be entitled as a shareholder to a distribution of the corporation's property on the corporation's winding up. A similar principle applies in relation to a unit holder on a distribution of trust property on the termination of the trust.

A stamp duty avoidance scheme has been detected whereby a person obtains control of a corporation without being entitled to the corporation's property on its winding up. As part of the scheme, an arrangement is made to amend the constitution or rules of the corporation to give effect to this disentitlement. The constituent document of a trust could similarly be amended.

Where this arrangement is put in place before the person acquires a shareholding in the corporation, technically the person has not acquired an interest in the corporation.

With effect from 6 May 2009, the Act is amended to counter this scheme and possible variations of the avoidance scheme, through the following three measures.

Arrangements to reduce entitlements

The first measure enables an arrangement to be disregarded for the purpose of assessing landholder stamp duty. This will occur where a person's entitlement to the distribution of property, on the winding up of a corporation or the termination of a trust, is reduced as a result of the arrangement. This includes an arrangement which reduces an entitlement to nil.

As an example, if a person acquires a shareholding in a corporation or unit trust scheme on or after 6 May 2009 that involves such an arrangement, the arrangement will be disregarded and the Commissioner may determine that:

- the person has acquired an interest in the corporation or unit trust scheme of 100 per cent; or
- the person has an entitlement to receive 100 per cent of the unencumbered value of the property of the corporation or trust.

This has application when determining whether a person is a linked entity, and when determining the portion of the unencumbered value of land to which an entity would be entitled if each of its linked entities were to be wound up.

This will be the case regardless of when the arrangement was entered into. However, an arrangement will not be disregarded by the Commissioner if the arrangement is not a tax avoidance scheme or part of a tax avoidance scheme. The Commissioner may also determine that a lesser specified percentage is appropriate, rather than 100 per cent.

Acquisition of control by means other than a relevant acquisition

The second measure applies where a person, whether alone or together with related persons, acquires control of a corporation or unit trust by means other than a relevant acquisition. The Act is amended so that landholder stamp duty will be imposed as if the person has acquired an interest of 100 per cent or a lesser specified percentage.

A person acquires control if the person acquires the capacity to determine or influence the outcome of decisions about any of the financial and operating policies of the corporation or trust. In considering whether this has occurred, the Commissioner will take into account:

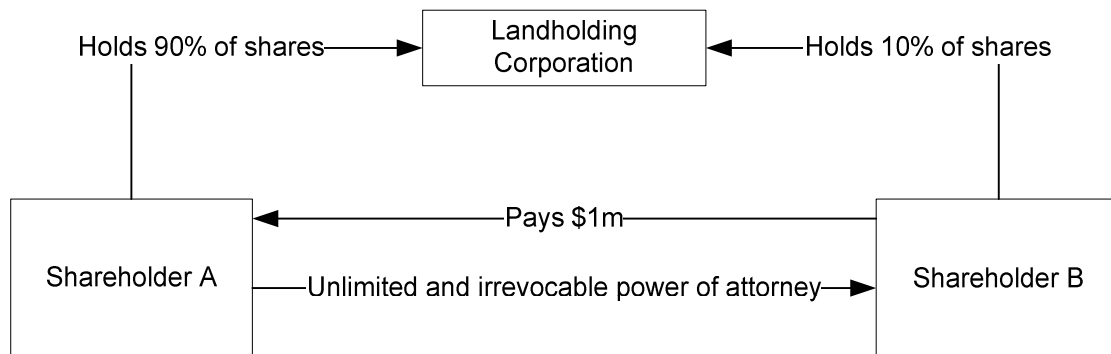
- any enforceable rights the person has over the financial and operating policies;
- any practical influence the person can exert over those policies; and
- any other practice or behaviour of the person that might affect those policies.

Accordingly, a person may acquire control without there being a transfer of shares or units to that person. For example, this measure may apply where a person is appointed to the board of directors of a corporation.

Importantly, consideration will be given as to whether there is an arrangement that would have the effect of defeating the object of the landholder stamp duty provisions. This will include whether the existing directors are under any obligation, whether formal or informal, to follow the wishes of that person. This will also include whether

any shareholder will allow the person to benefit, or exercise rights which confer benefits similar to holding an interest in the landholder.

Outlined below is another example, where shareholder A grants a power of attorney over the rights attaching to its shares to shareholder B. The power of attorney is unlimited and irrevocable. The consideration for the grant is \$1 million. Of note, the operation of these provisions is not dependent on the payment of consideration between the shareholder or another person.



Shareholder A will remain registered as a shareholder of the corporation. However, shareholder B will use the power of attorney over the voting rights attaching to the shares to its advantage.

In this example, shareholder B has acquired control of the corporation. The Commissioner may determine that shareholder B has acquired an interest of 100 per cent in the corporation. If shareholder B has held its initial shareholding of 10 per cent in the corporation for more than 3 years, it would be more appropriate to determine that shareholder B has acquired an interest of 90 per cent.

Calculation of entitlement

The third measure clarifies the mechanism to be applied in calculating a shareholder's entitlement to the property of a corporation on its winding up. In calculating this entitlement, regard will also be had to persons related to the shareholder, including all powers and discretions these related persons can exercise. This measure applies to unit trusts in a similar manner.

Enabling listed stapled entities to reorganise by 'top hatting'

From 1 July 2009, listed stapled entities will be able to reorganise by way of 'top hatting', with a new head trust being interposed or an existing trust elevated to head trust, without landholder stamp duty being payable.

An acquisition by a person will not be liable for landholder stamp duty where:

- the acquisition is made for the purpose of giving effect to a scheme that would qualify as a roll-over under Subdivision 124-Q of the *Income Tax Assessment Act 1997* (Cth) for capital gains tax purposes;
- when the scheme is completed, the interposed trust will not be an unlisted unit trust scheme; and

- the acquisition is not a tax avoidance scheme or part of a tax avoidance scheme.

A statement of acquisition must still be lodged with the Territory Revenue Office. Accompanying the statement should be an application with sufficient information and evidence to demonstrate that the scheme qualifies as a roll-over.

However, if the interposed trust becomes an unlisted unit trust scheme at any time within 3 years after the scheme is completed, landholder stamp duty is to be reassessed as if the 'top hatting' concession did not apply. The statement must then be relodged with the Territory Revenue Office and stamp duty paid within 60 days of the trust's delisting.

However, provided the statement of acquisition is relodged and all of the applicable duty paid within the 60-day period, the Commissioner will generally remit interest and penalty tax in full.

Commissioner's Guideline CG-GEN-001, which sets out information on the revenue publication system, is incorporated into and is to be read as one with this Circular. All Circulars and Guidelines are available from TRO's website.

Refer to the Revenue Legislation Amendment Bill 2009 and explanatory statement for precise details of the amendments.



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