

Revenue Rulings

Landholder Provisions – Acquisitions of Interests in a Landholder

Revenue Ruling DA.056

Ruling history	
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To	-

Preamble

The landholder provisions in Part 2 of Chapter 3 of the *Duties Act 2000* (the Act) charge duty on relevant acquisitions in landholders.

A landholder is any company or unit trust scheme (whether private or public) that has land holdings in Victoria with an unencumbered value of \$1 million or more.

A person makes a relevant acquisition in a landholder if the person acquires an interest in the landholder -

- (a) that is of itself a significant interest (i.e. an interest of 20% or more in a private unit trust scheme, 50% or more in a private company or a wholesale unit trust scheme or 90% or more in a listed company or a public unit trust scheme); or
- (b) that when aggregated with other interests acquired by the person, an associated person or any other person in an associated transaction results in an aggregation that amounts to a significant interest in the landholder.

If a person has made a relevant acquisition in a landholder, a relevant acquisition also arises each time the person, associated person(s) or any other person(s) whose interest was aggregated in the circumstances referred to in paragraph (b) above acquires a further interest in the landholder (irrespective of the size or timing of the acquisition of the further interest).

With respect to a landholder that is a private company, private unit trust scheme or wholesale unit trust scheme, a relevant acquisition can also arise if a person acquires an economic entitlement in or control over the landholder.

The purpose of this Revenue Ruling is to provide guidance on the meaning of the term 'interest' and to explain how and when an interest may be acquired. The Ruling also sets out who may be liable for duty

on an acquisition of an interest in a landholder and in what circumstances an acquisition may be exempt from duty under the Act. The Ruling does not deal with the acquisition of an economic entitlement under section 81 of the Act or control under section 82 of the Act.

Ruling

What is an interest for the purposes of Part 2 of Chapter 3 of the Act?

Section 79(1) of the Act defines an 'interest' in a landholder to mean an entitlement by a person (other than as a creditor or other person to whom the landholder is liable), whether directly or through another person, to a distribution of property from the landholder on a winding up of the landholder.

Usually, the only persons (other than creditors) entitled to a distribution of property on the winding up of a landholder are the persons who are registered as the members (share or unit holders) of the landholder (see *Affinity Health Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 663). However, for the purposes of Part 2 of Chapter 3 of the Act, a person may have an interest in a landholder even if the person is not registered as a member of the landholder. This is because it is sufficient, for the purposes of Part 2 of Chapter 3 of the Act, for a person to have an entitlement to a distribution of property on a winding up of a landholder through another person. An example of this is where shares or units in a landholder are held on behalf of a person by a trustee.

Typically, a person's entitlement to a distribution of property on the winding up of a landholder is referable to a share or unit holding in the landholder that entitles the person (whether directly or through another person) to receive property on the winding up of the landholder. To determine the extent of a person's interest in a landholder in such

circumstances, it is necessary to consider what the relevant share or unit holding in the landholder would entitle the person to receive as a proportion of the property distributed on a winding up of the landholder. This evaluation is to be made on the basis of a notional winding up of the landholder immediately after the acquisition of the interest by the person. The focus is on the person's proportional entitlement to share in a distribution of the property of the landholder, whatever the property might be on a winding up of the landholder. The evaluation is not concerned with what a person would actually receive (if anything) on a winding up of the landholder or whether or not the person has a proprietary interest in the property (including the land holdings) of the landholder. All that is required to be determined is the percentage the interest represents in terms of an entitlement to a distribution of the property of the landholder on a winding up of the landholder.

When determining the extent of a person's interest in a landholder, regard must also be had to the maximisation of entitlement provisions contained in section 89H of the Act. These provisions provide that the correct evaluation of the entitlement of a person (referred to as an 'interested person') to participate in a distribution of property on the winding up of a landholder is the greater of the following two calculations, unless the Commissioner of State Revenue (the Commissioner) determines otherwise –

- (a) a distribution carried out in accordance with the constitution of the landholder, and with any law relevant to the distribution, as in force at the time of distribution; and
- (b) a distribution carried out after the interested person, and any other person whom the interested person has power to direct with respect to such a distribution or who is, in relation to the interested person, an associated person, had exercised all powers and discretions exercisable by them –
 - i. to effect or compel an alteration to the constitution of the landholder; and
 - ii. to vary the rights conferred by units or shares in the landholder; and
 - iii. to effect or compel the substitution or replacement of units or shares in the landholder with other units or shares in it –in such a manner as would maximise the value of the entitlement.

It is considered that the above provisions only apply to maximise the entitlement of a person over and above a distribution carried out in accordance with the landholder's constitution if the person (or any other relevant person that is associated or under the control of the person) is in a position to exercise control over the landholder and its constitution. In all other instances, the extent of a person's interest is to be determined by reference to a distribution carried out in accordance with the constitution of the landholder.

How can a person acquire an interest?

Section 80(1) of the Act provides that a person acquires an interest in a landholder if the person obtains the interest beneficially, including if the person's interest increases in the landholder regardless of how it is obtained or increased.

Without limiting this section, section 80(3) of the Act provides that a person is taken to obtain an interest beneficially even if the person obtains the interest as trustee of a trust.

For the avoidance of doubt, section 80(7) of the Act declares that a transfer of a unit or share is not necessary for a person to acquire an interest in a landholder. As a result, a person (including the trustee of a trust) can acquire an interest in a landholder by any means, including the purchase, gift, allotment, issue, cancellation, redemption or surrender of a unit or share, the abrogation or alteration of rights pertaining to a unit or share, the payment of an amount owing on a unit or share and a change in the beneficial ownership of a unit or share. As mentioned earlier, a person can also acquire an interest through another person, such as a trustee.

Consequently, where the acquisition of an interest is by the trustee of a trust, the person(s) on whose behalf the interest was acquired (i.e. the beneficiary or beneficiaries under the trust, depending on the terms of the trust) in addition to the trustee of the trust may be considered to have obtained an interest for the purposes of Part 2 of Chapter 3 of the Act.

To reduce compliance costs and prevent double duty issues arising, Revenue Ruling DA.055 sets out various concessions that may apply when more than one person is considered to have acquired an interest for the purposes of Part 2 of Chapter 3 of the Act.

Similarly, to prevent the indiscriminate aggregation of interests acquired by a person acting in different capacities (i.e. as trustee of different trusts and/or in the personal capacity of the person), the person

is treated under Part 2 of Chapter 3 of the Act as a separate person in respect of each capacity the person has acquired an interest in a landholder. It should be noted however that this treatment does not prevent the aggregation of interests acquired by such a person if the person may be regarded as an associated person in respect of any of the capacities in which the person has acquired an interest in the landholder. An example of this is where a person separately acquires interests in the same landholder on behalf of two private unit trust schemes that have common beneficiaries. In such circumstances, the interests may be aggregated to determine whether a relevant acquisition has been made in the landholder because the person, although treated as a separate person, is an associated person in respect of each of the capacities in which the person has acquired an interest in the landholder.

When does a person acquire an interest?

A person (including the trustee of a trust) acquires an interest for the purposes of Part 2 of Chapter 3 of the Act on obtaining an interest beneficially, that is on obtaining an entitlement (whether directly or through another person) to a distribution of property from a landholder on the winding up of the landholder.

Generally, a person will obtain an interest in a landholder on completion of the agreement for the acquisition of shares or units in the landholder and not on the date the person is entered on the register of members of the landholder. An example of this is where A has completed its purchase of all of B's shares in a landholder. Even though the sale has completed (A has paid B the purchase price in full and received a registrable transfer), the register has not yet been updated and the shares still remain registered with B. As a constructive trust arises in favour of A on full payment of the purchase monies, A would be regarded as having an entitlement through B to the property of the landholder on a winding up of the landholder. Accordingly, A would be considered to have acquired an interest in the landholder on the date it completed its acquisition of B's shares.

However, in certain circumstances, it is recognised that a person's right to the enjoyment of an interest in a landholder may be provided in advance of the date of completion of the relevant agreement or withheld even after the person has been entered onto the register of members of the landholder. If, under an agreement for the acquisition of shares or units

in a landholder, a person becomes entitled to the benefit of the shares or units prior to the completion of the agreement (such as the date of execution of the agreement or payment of a deposit under the agreement), the person will be considered to have obtained an interest in the landholder at that earlier time and not on the date of completion of the agreement. Conversely, even if a person has been entered onto the register of members of a landholder, the person's right to participate in a distribution of property on the winding up of the landholder may be withheld pending a payment from the person. This is particularly relevant in cases involving the issue or purchase of unpaid or partly paid shares or units in a landholder. Whilst the issue of shares or units by a landholder normally confers a right to participate in a distribution of property on a winding up of the landholder, the capacity to enjoy this right may be withheld until the shares or units have been paid up, either fully or to a specified extent. In such cases, an acquisition will be taken to have occurred when the required payment is made (see *Commissioner of Stamp Duties (Qld) v MIM Holdings Ltd* (1999) 99 ATC 5084).

Exempt acquisitions

Section 89D of the Act sets out exemptions from duty for certain acquisitions of interests in a landholder. It is important to note that an acquisition, whether exempt under section 89D of the Act or not, is nevertheless an acquisition of an interest in a landholder which may be taken into account in determining whether a relevant acquisition has occurred in the landholder. This is in contrast to the types of interests/acquisitions that are specifically excluded from the operation of the landholder provisions by section 78(5) of the Act and clauses 31(2) and 31(3) of Schedule 2 of the Act.

Under section 89D(a) of the Act, a person's acquisition of an interest in a landholder is treated as an exempt acquisition if the means by which the person acquired the interest would have resulted in no ad valorem duty being payable under Chapter 2 of the Act had the subject of the acquisition been a transfer of the land of the landholder to the person. By virtue of this section, all the exemptions in Chapter 2 of the Act can apply to exempt acquisitions of interests liable to duty under Part 2 of Chapter 3 of the Act. To determine if an acquisition of an interest in a landholder is exempt under section 89D(a) of the Act, it is necessary to assume for the purposes

of the exemptions in Chapter 2 of the Act that the subject of the acquisition is land instead of an interest in the landholder. It is not necessary to substitute the actual parties to the transaction with a hypothetical transaction involving the landholder. For example, a transfer of an interest in a landholder from husband to wife is treated as a transfer of the land of the landholder from the husband to the wife and not a transfer of land from the landholder to the wife. As a transfer from husband to wife is exempt from duty under section 43 of Chapter 2 of the Act, section 89D(a) of the Act would apply to treat the transfer of the interest in the landholder as an exempt acquisition for the purposes of Part 2 of Chapter 3 of the Act.

Generally, no duty is payable on an exempt acquisition of an interest in a landholder at the time of its acquisition. This, however, does not mean that an exempt acquisition is quarantined from aggregation and/or duty at a latter point in time, for example when there is a subsequent acquisition of an interest in the landholder by either the same person and/or an associated person. Unless the Commissioner determines otherwise, an exempt acquisition may become liable to duty on the basis of aggregation with subsequent acquisitions. As mentioned earlier, this is because exempt acquisitions are not one of the types of interests that are excluded from aggregation and liability to duty under section 78(5) of the Act or clauses 31(2) and 31(3) of Schedule 2 of the Act.

An example of when an exempt acquisition may become liable to duty because of the acquisition of a subsequent interest in a landholder is the exempt transfer of an interest from husband to wife immediately before the husband acquires another interest in the landholder. In such circumstances, there is no basis for not aggregating and assessing the wife's acquisition with the subsequent acquisition made by the husband. It should be noted that the duty implications of this approach are identical to those that would have arisen had the husband continued to hold his earlier interest.

As a safeguard against the indiscriminate aggregation of interests acquired by associated persons, the Commissioner has discretion under section 78(2) to disaggregate interests if satisfied that the interests were acquired and will be used independently and were not acquired and will not be used for a common purpose. Where an anomalous duty outcome arises, the Commissioner also has a discretion under section

89E of the Act to limit the amount of duty payable on a relevant acquisition to the duty that would be payable under Chapter 2 on a transfer of the land of the landholder. For information on the operation of the concession under section 89E of the Act, please see Revenue Ruling DA.055.

An example of where the Commissioner would be inclined to exercise the discretion to disaggregate interests acquired by associated persons is where a relevant acquisition arises on the aggregation of an interest acquired by a son (from the executors of the Will of his recently departed father) with an earlier interest acquired independently by a remote relative of the son. Even though the son's acquisition is exempt pursuant to section 89D(a) of the Act, no exemption applies to the relative's acquisition. However, as the interests of the son and the relative were acquired independently, the Commissioner would be inclined to disaggregate the interests under section 78(2) such that no duty would be payable on the relative's acquisition, unless there is evidence to suggest that the interests will not be used independently or will be used for a common purpose.

Another example of where the Commissioner would be inclined to exercise the discretion to disaggregate interests under section 78(2) of the Act is when a relevant acquisition in a landholder arises on the aggregation of interests acquired by persons that are regarded as associated persons only because of the interests they acquired and/or hold in the landholder. In these circumstances, the Commissioner would also be inclined to treat those persons as if they were not associated persons for the purposes of determining whether the landholder is a widely held trust or wholesale unit trust scheme. This position is in line with the Commissioner's ability to determine that a landholder that does not strictly meet the criteria for a widely held trust or wholesale unit trust scheme may be registered as a declared public or wholesale unit trust scheme under the Act. However, it is important to note that if the relevant persons are associated by virtue of some relationship other than the interests they acquired and/or hold in the landholder, the Commissioner may not be inclined to treat the persons as if they were not associated persons both for the purposes of determining the status of the landholder under the Act and/or whether a relevant acquisition has occurred in the landholder.

Further assistance

If a taxpayer requires advice on the interpretation and application of Part 2 of Chapter 3 of the Act in relation to their particular circumstances, the taxpayer may contact the Landholder Acquisitions Branch at the State Revenue Office or request a private ruling in accordance with Revenue Ruling GEN.009. In all cases, the onus is on the taxpayer to provide the Commissioner with the necessary information to enable an informed decision to be made.

Please note that rulings do not have the force of law. Each decision made by the State Revenue Office is made on the merits of each individual case having regard to any relevant ruling. All rulings must be read subject to Revenue Ruling GEN.001.