

Revenue Rulings

Landholder Provisions – Declared Wholesale Unit Trust Schemes

Revenue Ruling DA.062

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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 (including a wholesale unit trust scheme) that has land holdings in Victoria with an unencumbered value of \$1 million or more.

A wholesale unit trust scheme is defined in section 3 of the Act as a unit trust scheme that is registered under Division 6 of Part 2 of Chapter 3 of the Act as a wholesale unit trust scheme, an imminent wholesale unit trust scheme or a declared wholesale unit trust scheme.

Sections 89Q and 89U of the Act provide for the registration of a unit trust scheme as a declared wholesale unit trust scheme. These sections allow a unit trust scheme to overcome anomalies associated with its status under the Act when it is effectively wholesale in nature and purpose but fails to meet the necessary criteria for registration as such.

Under sections 89Q and 89U of the Act, the trustee of a unit trust scheme may apply for registration and the Commissioner of State Revenue (the Commissioner) may register the scheme as a declared wholesale unit trust scheme if the Commissioner is satisfied that the scheme meets the criteria for registration. The criteria for registration as a declared wholesale unit trust scheme are –

- (a) the scheme should be registered as a declared wholesale unit trust scheme; and
- (b) registration is not being sought for the purpose of, or as part of a scheme or arrangement with a collateral purpose of, avoiding or reducing duty otherwise chargeable under Part 2 of Chapter 3 of the Act.

In considering an application for registration, the Commissioner is permitted under section 89Q(3) of the Act to take into account any matter he considers relevant.

The purpose of this ruling is to explain the factors the Commissioner will take into account when determining whether a scheme should be registered as a declared wholesale unit trust scheme and the circumstances in which the Commissioner is likely to make such a determination.

Ruling

The factors the Commissioner will consider when making a determination as to whether a unit trust scheme should be registered as a declared wholesale unit trust scheme include (but are not limited to) -

- The purpose and nature of the scheme and whether it is effectively wholesale;
- Whether the scheme was established for a particular investor or for a specific type of investor, i.e. public, professional or institutional investors;
- Whether units in the scheme have been offered to retail investors or restricted to professional and institutional investors;
- The degree of ownership and/or control a particular investor or group of related investors has/have over the scheme;
- The percentage of units in the scheme held by qualified investors either alone or together with associated persons;
- The value of each unit holder's subscription under the scheme;
- The direct and indirect land holdings of the scheme, including the unencumbered value of each land holding; and
- The factors restricting the scheme's ability to satisfy the criteria of a wholesale unit trust scheme and whether the scheme is eligible to be registered as an imminent wholesale unit trust scheme.

Generally, the Commissioner would be satisfied that a scheme should be registered as a declared wholesale unit trust scheme where the scheme does not quite

meet the criteria for registration as a wholesale unit trust scheme but is otherwise considered to be wholesale in nature and purpose. Conversely, the Commissioner would not be satisfied that a scheme should be registered as a declared wholesale unit trust scheme if the scheme does not currently meet any of the relevant criteria for registration as a wholesale unit trust scheme but may or is expected to meet some or all of the criteria sometime in the future. Such a scheme may wish to consider its eligibility for registration as an imminent wholesale unit trust scheme under section 89T of the Act.

In determining whether a unit trust scheme is effectively wholesale, the Commissioner will not look beyond the registered unit holders of the scheme. The only exception is where a unit holder is a bare trustee, nominee or custodian separately holding units in the scheme for different beneficial owners (including qualified investors under section 89P of the Act) who could call for the units at any time. In all other cases, the Commissioner will not look through the registered unit holders in order to characterise the scheme as one that should be registered as a declared wholesale unit trust scheme.

Where the Commissioner finds a scheme is effectively wholesale, the Commissioner is more likely to be satisfied that the scheme should be registered as a declared wholesale unit trust scheme if its failure to qualify as a wholesale unit trust scheme is at the margin and/or due to factors beyond its control. Factors beyond the control of a scheme will not include acquisitions of interests in the scheme that prevent the scheme from qualifying as a wholesale unit trust scheme, unless the acquisitions were not contemplated by the acquirers (e.g. a redemption or cancellation of units/shares that gives rise to acquisitions by associated persons that the Commissioner has accepted should not be aggregated for duty purposes under section 78(2) of the Act). However, factors beyond the control of the scheme may include restrictions on the scheme's ability to create and issue new or further units so as to satisfy the criteria for registration as a wholesale unit trust scheme.

Examples 1, 2 and 3 are situations where the Commissioner would be inclined to register a unit trust scheme as a declared wholesale unit trust scheme.

Example 1

A property fund was established five years ago to provide professional and institutional investors

with investment and diversification opportunities in real property-based securities. Among other things, the fund's investments include the indirect ownership of three properties in Victoria and New South Wales worth \$100 million each. As the fund does not intend to acquire any further property, it is closed to new investments. However, an existing repurchase facility allows for some limited trading of existing units. Currently, the fund has 20 unit holders, none of whom, either alone or together with associated persons, hold 20% or more of the units in the scheme and 15 of whom are qualified investors holding 65% of all the units on issue. Such a scheme may be considered wholesale in nature as it is structured, owned and operated in a manner that is consistent with the criteria of a wholesale unit trust scheme under the Act. If the trustee of the scheme is restricted in creating and issuing new or further units in the scheme so as to immediately come within the criteria of a wholesale unit trust scheme, the Commissioner would be inclined to treat the scheme as one that should be registered as a declared wholesale unit trust scheme, provided the trustee uses the repurchase facility to ensure the qualified investor holding rate is maintained, if not increased, over time. However, if there are no restrictions on the creation or issue of new or further units, registration may be conditional on the trustee issuing new or further units to qualified investors within an agreed time frame.

Example 2

A unit trust scheme that has been owned and operated by members of the same family for some time has decided to register as a managed investment scheme and issue a product disclosure statement (the PDS) to a targeted group of institutional investors. The PDS identifies that the scheme owns one significant industrial property worth \$75 million and that two other properties worth \$15 million each have been secured through various option agreements with the current owners. The offer of units under the PDS closes over-subscribed, with institutional investors meeting the description of qualified investors in section 89P(1) of the Act obtaining 90% of all the units on offer. Of all the applicants that acquired units, only five were successful in obtaining a subscription of units to the value of \$3 million or more. Subsequent to the allocation of units to applicants, the owner of one of the properties that the scheme was to

acquire exercised its right to withdraw the property from sale. Consequently, the scheme is unable to satisfy the wholesale unit trust land holding and/or subscription requirements for registration. Given that the scheme falls just short of these requirements, the Commissioner would be inclined to register the scheme as a declared wholesale unit trust scheme.

Example 3

A unit trust scheme has applied and been registered as an imminent wholesale unit trust scheme under the Act. Despite only attracting investments from qualified investors under an information memorandum made available through a number of fund managers, the scheme is unable to satisfy the criteria of a wholesale unit trust scheme upon expiration of the registration period because of a shortfall in subscriptions and the underwriter being required to take up 40% of the units in the scheme. In such circumstances, the Commissioner may register the scheme as a declared wholesale unit trust scheme on the condition that the underwriter's interest in the scheme (or at least 10% of its interest in the scheme) is sold or diluted in favour of qualified investors within an agreed time frame. It is important to note that in these circumstances, registration will take effect from a date determined by the Commissioner and will not be backdated to the start date of the imminent wholesale unit trust scheme registration period.

Examples 4, 5 and 6 are situations where the Commissioner would not be inclined to register a scheme as a declared wholesale unit trust scheme.

Example 4

A unit trust scheme that was established for and owned by a particular investor (who is a qualified investor under section 89P(1) of the Act) has decided to offer a 49% interest in the scheme to the public as its property portfolio has grown to include five A grade hotel properties valued at \$50 million (\$10 million each). The scheme registers as a managed investment scheme and issues a product disclosure statement for the offer of units to the public. After the allocation of units to applicants, the scheme has 500 unit holders of which three unit holders (including the initial unit holder) are qualified investors holding 61% of all the units on issue. Of the three qualified investors, the initial unit holder for whom the scheme was

established holds 51% of the units in the scheme. The other two qualified investors each hold 5% of the units in the scheme. In such circumstances, the Commissioner would not be inclined to register the scheme as a declared wholesale unit trust scheme as the scheme was and still is controlled by the initial unit holder and is not wholesale in nature or purpose.

Example 5

After undertaking a number of retail offerings, a unit trust scheme that owns a sizeable and valuable portfolio of properties has decided to also seek funds from wholesale clients. An information memorandum is prepared and distributed among a select group of fund managers. The documentation indicates that this will be the first and only time there will be an exclusive offer of units to wholesale clients. After the allocation of units to wholesale clients, the scheme has 1,000 unit holders of which 50 are qualified investors holding 45% of the units in the scheme. One of the qualified investors holds 25% of all the issued units in the scheme with the remaining 49 holding 20%. As non-qualified investors hold a substantial percentage of the units in the scheme, the Commissioner would not be inclined to register the scheme as a declared wholesale unit trust scheme.

Example 6

A unit trust scheme that is controlled by a group of qualified investors has applied for registration as a declared wholesale unit trust scheme for the purpose of ensuring that a trust in which it owns units can qualify for registration as a wholesale unit trust scheme. In these circumstances, the Commissioner would not be satisfied that the registration is not being sought as part of a scheme or arrangement to avoid or reduce duty otherwise chargeable under Part 2 of Chapter 3 of the Act.

The above examples are provided as a guide only and are not exhaustive. The Commissioner will consider each application based on its own facts when determining whether or not a unit trust scheme should be registered as a declared wholesale unit trust scheme.

In all cases the onus is on the applicant to provide the Commissioner with the necessary information in order to make an informed decision on whether the unit trust scheme meets the criteria to be registered

as a declared wholesale unit trust scheme. To assist applicants in applying for such registration, the Commissioner has developed an application form which is available on the State Revenue Office website (Duties Form 59). Please note that the Commissioner will not process an application for registration unless the relevant form is completed in full and submitted with all relevant documentation and information.

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.