

Revenue Rulings

Landholder Provisions – Constructive Ownership of Land Holdings of Discretionary Trusts

Revenue Ruling DA.059

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.

In determining whether a company or unit trust scheme is a landholder (and the amount of duty payable on a relevant acquisition), its land holdings are not limited to land it directly owns. In certain circumstances, they may include land held by linked entities and discretionary trusts: sections 75 and 76 of the Act.

Under section 76 of the Act, a company or unit trust scheme (including a landholder and linked entity) that is a beneficiary of a discretionary trust may be deemed to own or to be otherwise entitled to 100% of the land that is the subject of the trust even though at law it may not have a present entitlement to any part of such property.

For the purposes of section 76 of the Act, a company or unit trust scheme is a beneficiary of a discretionary trust if the capital of the trust may be applied in its favour, either upon the exercise of a power or discretion conferred under the trust, or in circumstances where a discretion conferred under the trust is not exercised.

To avoid unjust results arising, section 76 of the Act provides the Commissioner of State Revenue (the Commissioner) with discretion to determine that a company or unit trust scheme's entitlement to the land of a discretionary trust is less than 100%. In addition to the discretion, and as a safeguard against double counting, section 76 of the Act contains a restriction on its operation where two or more companies and/or unit trust schemes are determined to be entitled to the land of the discretionary trust. In such cases,

the provisions of section 76 of the Act cannot apply to deem any of those companies and/or unit trust schemes (either individually or together) to own or be entitled to more than 100% of the land of the trust.

In determining the land that can be traced through a particular discretionary trust, section 76 of the Act deems the land of one discretionary trust (the First Trust) to be the land of another discretionary trust (the Second Trust) if the Second Trust is a beneficiary of the First Trust, or if the trustee of the Second Trust (in its capacity as trustee) is a beneficiary of the First Trust.

The purpose of this Ruling is to explain the factors the Commissioner will take into account in determining whether a company or unit trust scheme's (including a landholder's or linked entity's) deemed ownership or entitlement to the land of a discretionary trust is less than 100%. This Ruling does not deal with the constructive ownership of land held through linked entities under section 75 of the Act. For information on the tracing of land through linked entities, please see Revenue Ruling DA.058 which is available on the State Revenue Office (SRO) website.

Ruling

The factors that the Commissioner will consider in determining whether a company or unit trust scheme (including a landholder or linked entity) should be deemed to own or be entitled to less than 100% of the land of a discretionary trust include (but are not limited to) –

- The company or unit trust scheme's entitlement to the capital (i.e. the property) of the trust upon the vesting of the trust, determined on the assumption that the circumstances entitling the company or unit trust scheme to a distribution of the capital of the trust are satisfied.
- The likelihood of the company or unit trust scheme receiving any of the capital of the discretionary trust, having regard to any intention

(manifest or implied) of the settlor and/or trustee to vest the property of the trust in the company or unit trust scheme.

- If the discretionary trust was not established for the benefit of the company or unit trust scheme, how the company or unit trust scheme is related to the person(s) for whom the discretionary trust was established.
- The use of the land of the discretionary trust, and whether the trust or its land forms part of a business structure or activity involving the company or unit trust scheme including whether the trust's land or any part of it has been used as security for the benefit of the company or unit trust scheme or a business structure or activity involving it.
- Evidence of historical capital distributions made by the trustee of the discretionary trust. Where there have been no capital distributions, and the terms of the trust do not distinguish between persons or classes of persons to whom the income and capital of the trust may be applied, the Commissioner may consider evidence of past income distributions to determine the extent of a company or unit trust scheme's and/or linked entity's entitlement.

In determining whether a company or unit trust scheme's entitlement to the land of a discretionary trust should be less than 100%, the Commissioner's primary consideration will be its entitlement to the capital of the trust upon its vesting. This will be the case even if the vesting of the trust is not contemplated at the time of the Commissioner's determination. Once the Commissioner has determined the company or unit trust scheme's entitlement to a distribution of the capital of the trust upon the vesting of the trust, he may, having regard to the other factors identified in the above paragraph and any further factors he considers relevant, either increase or decrease the company or unit trust scheme's entitlement for the purposes of section 76 of the Act.

The following examples illustrate when the Commissioner may determine that a company or unit trust scheme's entitlement to the land of a discretionary trust is less than or equal to 100% –

Example 1: A discretionary trust that has been established to hold a family home for asset protection purposes

Under the terms of the trust deed, a company falls within the class of beneficiaries entitled to

a distribution of the capital of the trust on the basis that one of the family members is a director and shareholder of the company. Under the trust, the company's right to receive a distribution of the capital of the trust upon its vesting is as one of five potential default beneficiaries should the fund not be distributed to named discretionary objects. Assuming that the circumstances entitling the company to a distribution of the capital of the trust are satisfied, it would be entitled to receive at least 20% of the capital of the trust upon its vesting. The only asset comprising the capital of the trust is the family home. The home is used and occupied as the principal place of residence of the family and is not in any way connected to the business structure or activity involving the company. While the company is a capital beneficiary entitled to at least 20% of the capital of the trust, the Commissioner would be inclined to find that the company's entitlement to the land of the trust is nil as the home was never intended to benefit the company and will most likely never vest in the company. In a case such as this, the land of the discretionary trust would be disregarded in determining whether the company is a landholder.

Example 2: A private company landholder operates two closely aligned businesses, i.e. a building and construction business in its own right and a land banking and investment business in its capacity as trustee of a discretionary trust

The landholder (in its own right) and three related individuals are the specified beneficiaries of the discretionary trust. Under the terms of the trust, the trustee has the discretion to distribute the capital and income of the trust to any of the specified beneficiaries. If the trust were to vest, the landholder and the three other beneficiaries would each be entitled to receive a distribution of 25% of the capital of the trust. Despite these entitlements, all distributions of income made during the life of the trust have only been made in favour of the landholder. Furthermore, the trust's land holdings have been used to secure third party loans to the landholder for the business it carries on in its own right. While the landholder is one of a number of beneficiaries potentially entitled to the capital of the trust, the Commissioner would be inclined to deem the landholder to own or to be otherwise entitled to 100% of the land of the

discretionary trust. This is because the land of the trust forms an integral part of the business operations of the landholder, and the fact that the landholder is trustee of the trust and has made income distributions exclusively to itself, indicates that the land of the trust is intended to benefit the landholder. Accordingly, all the land of the trust will be taken into account in determining the duty payable on a relevant acquisition in the landholder.

The above considerations are provided as a guide only and are not an exhaustive list of the matters or factors the Commissioner may consider. Each matter will be considered on its own individual facts in determining the application of the provisions.

A taxpayer, who is uncertain of the application of section 76 of the Act in a particular case, may contact the Landholder Acquisitions Branch at the SRO or apply to the Commissioner for 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 in order to make an informed decision as to a company or unit trust scheme's deemed entitlement under section 76 of the Act.

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.