

Transfers of property to trustee or nominee

Revenue Ruling DA.024

Replaces Revenue Ruling SD.101

Preamble

Section 35 of the *Duties Act 2000* (the Act) exempts from duty transfers of dutiable property to and from a trustee or nominee in certain circumstances.

Section 35(1) of the Act has three requirements and all must be satisfied:

- The transfer is to or from a trustee or nominee;
- The property is to be held by that trustee or nominee solely as trustee or nominee of the transferor; and
- The property is to be held without any change in beneficial ownership.

The predecessor exemption found in Exemption 18 of Heading VI of the Third Schedule of the *Stamps Act 1958* was considered in *Comptroller of Stamps v. Yellowco Five Pty Ltd* [1993] 2 VR 529 and in *Commissioner of State Revenue v Victoria Gardens Pty Ltd* (2000) 46 ATR 61.

The effect of *Yellowco* was that for the exemption to apply, the Commissioner must be satisfied that if the conveyance is to a trustee of a trust, the terms of the trust deed do not allow any future possibility of trust property being held by the trustee as trustee for any other person(s) in addition to, or other than, the transferor.

In *Victoria Gardens* it was held that the exemption requires that the trust should be one in which the real property is held on trust for the transferor and that a trust for sale is not within the exemption since it is a trust, not to hold, but to sell. These decisions serve as authority for the Commissioner of State Revenue's interpretation of section 35 of the Act.

As from 16 June 2003 the exemption applies whether or not there has been a change in the legal description of the dutiable property. An example of a change in the legal description of dutiable property is the issuing of new certificates of title of land following a sub division of the land.

The purpose of this ruling is to explain the circumstances that would satisfy the requirements of section 35 of the Act.

Ruling**Power of Sale**

Section 35(1) presumes that there will ultimately be a re-transfer of the property to the original transferor. Therefore, the Commissioner will refuse the exemption

on applications where the trustee has an unrestricted power of sale.

Trusts**Bare Trust**

The Trustee of a bare trust merely holds the trust property for the beneficiary and has no active duties other than to convey the property on demand to the beneficiary, or as otherwise directed by the beneficiary. A bare trust in favour of the transferor is therefore the only type of trust that can satisfy the requirements of section 35(1).

Discretionary Trust

The trustee of a discretionary trust, in accordance with the terms of the trust, has wider powers to deal with trust property than under a bare trust. As a consequence, the trustee has the discretion to transfer the property other than to the transferor. For this reason, the Commissioner is of the view that section 35(1) cannot apply to a discretionary trust.

Unit Trust

The Commissioner is also of the view that section 35(1) will not apply where the trust is a unit trust. This is because generally, in accordance with the terms of the trust, the trustee has wider powers to deal with the property. In addition, under a unit trust, a unit holder has an interest in the value of all the property of the trust without an interest in any specific property. Consequently, the trustee is under no obligation to transfer property held in the trust back to the transferor notwithstanding that the transferor is also a unit holder.

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 Ruling Gen.01.

Commissioner of State Revenue
3 December 2003

