State Taxes 2015

Seminar Notes

NSW GOVERNMENT | Office of State Revenue

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Contents

Duties

Transfers of options to purchase land

From 23 October 2014, certain transactions involving options to purchase land for a fixed price at some future date, are dutiable in the same way as a transfer of an option to purchase land.

The recent amendments clarify that the acquisition of an option by way of nomination or novation is taken to be a transfer of the option. This is consistent with the longstanding practice of the Chief Commissioner.

The Act provides that a transfer of an option to purchase land in NSW is taken to occur if, for valuable consideration:

a) another person is nominated to exercise the option, or

b) another person is nominated as purchaser or transferee of the land on or before the exercise of the option, or

c) the option holder agrees to a novation of the option, or otherwise relinquishes rights under the option, so that another person obtains a right to exercise the option or to purchase the land.

For the purpose of calculating duty, the consideration paid for the transfer of the land includes the value of any consideration paid by the purchaser for the acquisition of the option.

Self managed superannuation funds

From 23 October 2014, section 62A of the *Duties Act 1997* charges a concessional rate of duty ($500) when a member of a self managed superannuation fund transfers property to the trustee or a custodian of the trustee of the fund. Duty is chargeable on such a transfer at a flat rate (rather than an ad valorem rate) if the transfer meets certain criteria (for example, the property transferred must be used solely for the purpose of providing a retirement benefit to the member who transfers the property).

Recent amendments make it clear that:

a) the concession can apply if the transfer is made by more than one member of a self-managed superannuation fund

b) if more than one member is transferring the property, the property must be used for the benefit of the members in the same proportions as it was held by them before the transfer

c) the concession does not apply if the property transferred is held by the member of the self managed superannuation fund in a trustee capacity.

Section 62B of the *Duties Act 1997* also provides that a declaration of trust, made by a custodian of the trustee of a self managed superannuation fund, that dutiable property is or is to be held in trust for the trustee of a named self managed superannuation fund, is also subject to duty at a flat rate of $500. This nominal rate of duty applies only if ad valorem duty was paid on the acquisition of the property by the custodian or the trustee, or the acquisition was chargeable with nominal duty only under section 62A of the *Duties Act 1997*, and consideration for the acquisition was provided by the trustee. This section applies despite sections 55 and 65(10).

Deceased estates

Section 63 of the *Duties Act 1997* provides that a concessional rate of duty ($50) is chargeable in respect of a transfer of dutiable property by the legal personal representative of a deceased person to a beneficiary, being:

a) a transfer made under and in conformity with the trusts contained in the will of the deceased person or arising on an intestacy, or

b) a transfer of property the subject of a trust for sale contained in the will of the deceased person, or

c) an appropriation of the property of the deceased person (as referred to in section 46 of the *Trustee Act 1925*) in or towards satisfaction of the beneficiary's entitlement under the trusts contained in the will of the deceased person or arising on intestacy.

This concession only relates to transfers that meet the above requirements. Where the will was contested and a court order is issued, the order would be considered to be a codicil to the will, so any transfer in accordance with that order would still be considered a transfer under and in conformity with the trusts contained in the will.

This concession does not apply to agreements for the sale or transfer.

Another concession applies, under this section, where the beneficiary (or beneficiaries) agree to vary the trusts contained in the will or arising on intestacy. A Deed of Family Arrangement might be an example of such an agreement. The section provides that:

> *If a transfer of dutiable property is made by a legal personal representative of a deceased person to a beneficiary under an agreement (whether or not in writing) between the beneficiary and one or more other beneficiaries to vary the trusts contained in a will of the deceased person or arising on intestacy, the dutiable value of the dutiable property is to be reduced by the portion of the dutiable value that is referable to the dutiable property to which the beneficiary had an entitlement arising under the trusts contained in the will or arising on intestacy.*

The important part to note, under this concession, is that it is referring to the property the subject of transfer. The dutiable value of that property is reduced by the portion of that property that the transferee was entitled to under the will or arising on intestacy. It does not mean that the dutiable value will be reduced by the amount of the beneficiary's entitlement under the whole estate.

Landholder duty

Acquisition of interests in landholders apply to relevant acquisitions in private landholders made on or after 1 July 2009 and in public landholders on or after 1 October 2009.

A **landholder** is a unit trust scheme, a private company or a listed company that has land holdings in NSW with a threshold value of $2 000 000 or more.

A landholder can be either private (private unit trust scheme or private company) or public (public unit trust scheme or listed company).

A **land holding** is an interest in land other than the estate or interest of a mortgagee, chargee or other secured creditor.

Interests in land commonly include:

- estates in fee simple
- leasehold interests
- options to purchase land
- some (but not all) mining tenements
- tenants' fixtures.

Land holdings include constructive ownership of land holdings through linked entities, discretionary trusts, land holdings recently transferred to the acquirer of an interest in the landholder, and uncompleted agreements for sale of land.

The **threshold value** of land holdings is the total value of all land holdings in NSW of the unit trust or company. For freehold interests in land (including strata title), the threshold value is the registered land value (Value General) as at 1 July in the previous year. For interests other than freehold interests in land (e.g. leasehold interests, tenant's fixtures, etc) the threshold value is the unencumbered value as at the date of acquisition of the interest in the landholder.

A person makes a relevant acquisition where a person acquires an interest in a landholder that:

- is of itself a significant interest, or
- when aggregated with other interests held by the person, or an associated person, amounts to a significant interest, or
- when aggregated with other interests acquired by the person together with other persons under the one arrangement between them amounts to a significant interest, or
- increases an existing significant interest.

You have an interest in a landholder if in the event of a distribution of all property in the landholder you would be entitled to any of the property distributed. A person acquires an interest in a landholder if the person

obtains an interest, or the person's interest increases, in the landholder regardless of how it is obtained or increased. Some examples:

- purchase, gift or issue of shares/units
- cancellation, redemption or surrender of shares/units
- 'buy back' of shares
- altering rights attached to shares/units
- change in capacity in which a person holds an interest (e.g. person now holds on trust).

You have a significant interest in a landholder if you are entitled to the following in the case of a distribution of all property in the landholder:

- Private landholder – 50 per cent or more of the property distributed
- Public landholder – 90 per cent or more of the property distributed.

Where a relevant acquisition is made, an acquisition statement must be lodged with the Chief Commissioner within three months after the acquisition is made.

For a private landholder, where there are no prior acquisitions (within the preceding three years), duty is charged at the general rate on the amount calculated by multiplying the unencumbered value of all land holdings and goods of the landholder in NSW, as at the date of the relevant acquisition, by the proportionate interest acquired in that acquisition.

Where there are prior acquisitions (within the preceding three years), duty is charged on the aggregate of amounts severally calculated for each acquisition.

For a public landholder, the duty chargeable is 10 per cent of the duty that would be payable, at the general rate, on a transfer of all the land holdings and goods of the landholder in NSW, as at the date of the relevant acquisition, calculated on the unencumbered value of those landholdings and goods. No duty is chargeable on any further acquisitions made by that person in the landholder.

Off the plan purchase agreements (residences)

For dutiable transactions, a tax default does not occur if the duty is paid within three months of the liability arising. For an off the plan purchase agreement, the liability date is pushed back for up to 12 months.

Liability for duty on an off the plan purchase agreement arises:

a) on completion of the agreement, or

b) on the assignment of the whole or any part of the purchaser's interest under the agreement, or

c) on the expiration of 12 months after the date of the agreement,

whichever first occurs.

For the purposes of this, an *off the plan purchase agreement* means an agreement for the sale or transfer of dutiable property, being land on which a residence is to be erected or developed before completion of the sale or transfer. This means that a purchase agreement for commercial property, or vacant land, would be liable on the date of exchange of that agreement. A tax default would occur if the duty was not paid on that transaction within three months of the liability.

Evidentiary requirements

Relevant evidentiary requirements must be provided when documents are lodged for assessment of duty. A list of requirements, for most of sections in chapter 2 of the *Duties Act 1997*, is available at www.osr.nsw.gov.au via 'Info & services', select 'Legislation & rulings', then 'Evidentiary requirements'.

Recent cases

Chief Commissioner of State Revenue v Danny and Steven Knezevic [2015] NSWCATAP 98

Issue

Exemption from duty upon the break-up of a marriage or other relationship.

Background

On 7 August 2013, Orders were made by the Family Court of Australia requiring the sale of matrimonial property at Dee Why (the 'property') at a public auction. Prior to the orders being made, the property was owned by Mr and Mrs Knezevic as tenants in common.

The outcome of the auction was that the property was sold to Danny Knezevic, the former husband of the marriage, and his brother Stevan Knezevic for a purchase price of $1 352 000. Duty to the amount of $25 930 under the Duties Act 1997 ('the Act') was paid by calculating ad valorem stamp duty rates to 50 per cent of the purchase price on the basis that the sale of the half of the property was exempt from duty under section 68(1) of the Act. On 6 December 2013, the Chief Commissioner issued an assessment requiring a further $33 940 in duty.

Section 68 provides an exemption from the payment of duty where there is a dissolution of marriage or other relationship, and where an interest in matrimonial property is being transferred. Specifically, section 68(1)(a) of the Act, provides an exemption to duty being chargeable on matrimonial property that is transferred to either of the parties to the marriage, or to a child or children of either of them, or to a trustee of such child or children. The key issue in this appeal was whether or not section 68(1) operated to exempt half the transfer of the matrimonial property in Dee Why from the parties of the former marriage to Danny Knezevic.

When this matter came before Senior Member R Deutsch (the 'Tribunal member') at the NSW Civil and Administrative Tribunal, the Tribunal member held that the focus must be on what has been transferred rather

than the manner in which the transfer was made. The Tribunal member decided that, while Danny Knezevic and his wife had transferred the shares in the property as a whole, in law, they in fact sold their individual interests as tenants in common.

The Appeal Panel turned its attention towards the wording of the orders in order to ascertain the intention behind it. The Appeal Panel reasoned that the intention of the orders was to effect a transfer of the fee simple of the property at a public auction during which auction the former parties to the marriage might make a bid. However, the orders do not specify that any interest in the property be transferred to Danny Knezevic. Furthermore, the Appeal Panel noted that contrary to the Tribunal member's view, the Contract for Sale demonstrates that the whole of the property was to be transferred and did not refer to the sale of separate interests in the property.

Decision

After deciding that individual interests had ceased to exist in the property upon the orders being made for the sale, the Appeal Panel turned its attention to the issue of the section 68(1) exemption. The Appeal Panel held that the exemption under section 68(1) did not apply as the property had been transferred as a whole to both of the Respondents and Stevan Knezevic was not one of the persons defined in section 68(1)(a) as a person to whom matrimonial property could be transferred to without duty being payable.

Rayek v Chief Commissioner of State Revenue [2015] NSWCATAD 40

Issue

Meeting the residency requirements for First Home Benefits.

Background

In 2010, the Applicant exchanged contracts for the purchase of the subject property and received a first home plus stamp duty concession. In January 2011 the Applicants first home owner grant application was successful and he was paid $7000.

At the time of completion of the purchase, caveats were registered on the subject property. As a result, the Applicant could not become the registered proprietor until the caveats were removed. On 21 May 2012 the subject property was registered in the Applicant's name.

In June 2012, the Chief Commissioner commenced an investigation into whether the applicant satisfied the 'residency requirement'. Upon being notified of the delay in registration, the Chief Commissioner deferred the investigation. The Applicant was informed that he needed to start occupying the property by no later than June 2013.

The Chief Commissioner resumed the compliance investigation in February 2014 and found that the applicant had sold the subject property in November 2013. Enquiries with AGL indicated that the Applicant had never been recorded on the account at the subject property. Insufficient evidence was provided by the Applicant to show that he resided at the subject property. The Chief Commissioner determined that the Applicant was not entitled to the first home owner grant, nor the stamp duty concession. Accordingly, assessments were issued to the Applicant requiring repayment of the first home owner grant and the stamp duty concession, together with penalties and interest. A penalty of 60 per cent was imposed on the first home owner grant assessment. The penalty on the duties assessment was increased from the default position of 25 per cent to 30 per cent being an uplift of 20 per cent. Those assessments were objected to by the Applicant and the objection disallowed.

Decision

The Tribunal found that the version of events given by the Applicant in oral evidence at the hearing, as to when and how he occupied the property, was 'quite implausible'. The Applicant's oral evidence differed from, and was inconsistent with, what he had previously stated in his notice of objection and his written submissions to the Tribunal. Accordingly, the Tribunal found that the Applicant failed to prove that he had met the residence requirement so as to receive the first home owners grant and stamp duty concession. Nor, in the Tribunal's view, did the Applicant advance any 'good reasons' as to why he should be exempt from the residence requirement.

The Tribunal applied principles endorsed by the Appeal Panel in earlier cases in upholding the Chief Commissioner's decisions to impose penalties in relation to both the grant and duty, and in refusing to remit both the market and premium rates of interest imposed under the *Taxation Administration Act*.

Milstern Nominees Pty Ltd v Chief Commissioner of State Revenue [2015] NSWSC 68

Issue

Discretion to grant an exemption or concession for landholder duty.

Background

Milstern Nominees Pty Ltd ('the Taxpayer'), sought review of the Chief Commissioner's decision not to exercise his discretion to grant the Taxpayer a partial exemption under section 163H of the *Duties Act 1997* ('Duties Act') in relation to its acquisition of shares in Milstern Enterprises Pty Ltd ('Enterprises') on 23 December 2010 and 8 March 2011 ('Acquisition').

The sole director and shareholder of the Taxpayer was Millie Phillips. At the dates of the Acquisition, the shares were held by Millie Phillips' children, Robert and Sharonne, who together held eight of the nine ordinary shares in Enterprises. Mrs Philips deposed that the purpose of the Acquisition was to gain '100 per cent effective control of the land and other assets held by Enterprises and its subsidiaries'. Enterprises was one of eight discretionary objects of a discretionary trust, established on 9 March 1982, known as the Landsell Trust (the 'Trust'). The trustee of the Trust was Rebenta Pty Ltd ('Trustee'), who owned land holdings in NSW with a land value of more than $2 million. The trust deed provided that the beneficiaries of the Trust included: three charities; any person who made a relevant donation to those charities and, with the consent of the Guardian, the Trustee nominates as a general beneficiary; and any person the Appointor nominates as a beneficiary to the Trustee. The Guardian of the Trust was Inhage Pty Ltd and the Appointor was Mamark Holdings Pty Limited ('Mamark').

The Trustee had not nominated any person to be a general beneficiary. However, Mamark had exercised its power to appoint five beneficiaries, namely Millie Phillips, Enterprises and three other related companies.

A person has an 'interest' in a landholder if the person in the event of a distribution of all the property of the landholder would be entitled to any of the property distributed. A person has a 'significant interest' if the person, in the event of a distribution of all the property of the landholder immediately after the interest was acquired, would be entitled to in the case of a private landholder – 50 per cent or more of the property distributed.

Section 159 of the Duties Act provides that a beneficiary of a discretionary trust is taken to own or to be otherwise entitled to the property the subject of the trust. It was common ground between the parties that the Trust was a discretionary trust within the meaning of that phrase in the Dictionary to the Duties Act. The property the subject of the Trust is all of the property

held by the Trustee. Hence, each of the beneficiaries, including Enterprises, was taken by section 159 of the *Duties Act* 'to own or to be otherwise entitled' to that property.

The Taxpayer did not seek an exemption from duty in respect of lands and goods held by Enterprises' subsidiaries; a partial exemption was only sought regarding the property that Enterprises was taken by section 159 to own.

For the purposes of Chapter 4 of the *Duties Act*, when the Taxpayer acquired the shares in Enterprises, the Taxpayer made a 'relevant acquisition' of a 'significant interest' in Enterprises. This was because the eight ordinary shares held by Robert and Sharonne would have entitled them to eight-ninths of the property of Enterprises if its property were distributed, and their interest in Enterprises when aggregated with that of Millie Philips, was 100 per cent of its ordinary shares. The result of this Acquisition was that duty was chargeable on eight-ninths of the unencumbered value of all landholdings and goods in NSW to which Enterprises was entitled.

Section 163H of the *Duties Act* confers upon the Chief Commissioner the discretion to grant a full or partial exemption in respect of an acquisition if the Chief Commissioner is satisfied that to impose the duty in relation to the particular acquisition would not be just and reasonable. The issue in this case was whether the Chief Commissioner should have exercised his discretion to grant a partial exemption with respect to the land held by the Trustee that Enterprises was deemed by section 159 to own.

Decision

White J observed that no express judicial guidance has been given as to when it might be considered just and reasonable for such exemptions to be granted in respect of an acquisition.

White J held that section 159 of the *Duties Act* is an anti-avoidance measure. His Honour stated that no doubt it is a measure that broadens the tax base, but the extent to which the tax base is intended to be broadened is itself subject to the discretion now found in section 163H of the *Duties Act*. His Honour held that this discretion is not limited to avoiding the application of double or multiple impositions of duty by the same acquisition.

White J held that the main question to be considered in this matter is whether it is not just and reasonable that Chapter 4 apply to the Acquisition, having regard to the purposes of Chapter 4, where:

d) Enterprises as a matter of fact does not own or control the land, or have any expectation of receiving the land or any proceeds of sale of any part of the land, or any income from it; and

e) Enterprises' position as a discretionary object of the Trust was irrelevant to the Taxpayer's acquisition of the shares in Enterprises.

In consideration of these circumstances, White J found that it is not just and reasonable that Chapter 4 apply.

Land Tax

What is land tax?

Land tax is an annual tax levied on the owners of land in NSW other than land which is exempt. Land tax is calculated on the land value of all land owned at midnight 31 December each year (otherwise known as the 'taxing date'). For example, the total value of non-exempt landholdings as at midnight 31 December 2014 is the land assessed for the 2015 tax year. Land tax years are the same as calendar years, i.e. 1 January to

31 December. There is no pro-rata or apportionment of land tax for land acquired or disposed of during the course of the year.

How is land tax calculated for 2015?

Land tax is calculated on the combined value of all the taxable land owned. The land tax threshold for 2015 is $432 000. The land tax assessment is calculated on the combined value of all the taxable land owned above this threshold. The amount of tax is $100 plus 1.6 per cent of the land value between the threshold and the premium rate threshold ($2 641 000) and two per cent thereafter. If the combined value of the land does not exceed the threshold, no land tax is payable.

General example

Basic land tax calculation				
Total taxable value of land	Rate of land tax payable	Example		Land tax payable
$500 000	1.6 cents for each $1	Total value of land	$500 000	**$1 188** ($1 088 + $100)
		Threshold	$432 000	
		Value of land above the land tax threshold	$68 000	
		Rate of land tax payable	x 1.6% (plus $100)	

Premium land tax calculation				
Total taxable value of land	Rate of land tax payable	Example		Land tax payable
$3 500 000	2 cents for each $1 over the premium threshold	Total value of land	$3 500 000	**$52 624** ($17 180 + $35 344 + $100)
		Premium threshold	$2 641 000	
		Value of land above the premium land tax threshold	$859 000	
	1.6 cents for each $1 over the land tax threshold	Total value of land under premium threshold	$2 641 000	
		Threshold	$432 000	
		Value of land above the threshold	$2 209 000	
		Rate of land tax payable	($859 000 x 2%) plus ($2 209 000 x 1.6%) (plus $100)	

Special trusts land tax calculation *				
Total taxable value of land	Rate of land tax payable	Example		Land tax payable
$500 000	1.6 cents for each $1	Total value of land	$500 000	**$8 000**
		Threshold	Does not apply	
		Rate of land tax payable	x 1.6%	

Note: A premium land tax marginal rate of two per cent applies for special trusts on the total taxable land value above $2 641 000.

How land values are determined

The Valuer General values all land in NSW annually and provides these values to the Office of State Revenue (OSR) for land tax purposes. Any land owner who believes that their land value is incorrect may object to the land value with the Valuer General. There is a time limit for lodging objections – 60 days from either the date of a land tax notice of assessment from OSR or the date of a notice of valuation from the Valuer General. For information regarding land values or objections please see http://www.valuergeneral.nsw.gov.au/land_values.

Strata unit valuations

For strata units, the land value for each individual strata lot is calculated on a proportional basis using the unit entitlement for each lot and the aggregate for the strata scheme.

Average values

The value used to determine the land tax liability will generally be the average of the land value for the current tax year and the land values for the previous two tax years. Where a parcel of land was only recently created (e.g. by subdivision or amalgamation) the average value will be based only on the land values for those taxing dates when the newly created land item existed.

Taxation of Joint ownerships

Joint owners are assessed as if they are a single owner. Each joint owner may also be assessed separately on all their interests in land, with their share of each jointly owned parcel of land added to the value of each parcel of land that they own individually. Where tax is paid by the joint owners, each joint owner is entitled to a deduction in their separate assessments to prevent double taxation of the jointly owned land.

Taxation of Companies

A company is assessed in the same way as a sole owner unless it is related to another company. A related company can be assessed separately or assessed jointly with another company or companies to which it is related. In assessing land tax, each member of the group will be assessed as either a concessional, joint concessional or non-concessional company.

Where the concessional or joint concessional companies total taxable land value does not exceed the premium rate threshold, but exceeds the general threshold, these companies are assessed at 1.6 per cent of the taxable value above the land tax threshold plus $100. Each non-concessional company is then assessed at 1.6 per cent of their taxable value as it does not qualify for the threshold.

Where the total taxable land value of the group exceeds the premium rate threshold, the total taxable land value of each non-concessional company is assessed at two per cent.

Taxation of Trusts

A trustee of a trust is assessed in the same way as a sole owner unless it is a special trust.

Special trusts do not qualify for the general threshold. A special trust is assessed at the rate of 1.6 per cent on the combined taxable value of the land up to the premium land tax threshold ($2 641 000) and then two per cent thereafter.

As well as the trustee receiving a land tax assessment, a secondary assessment may be issued to a beneficiary as well where they are equitable owners, or deemed equitable owners. Similar to joint owners, any such beneficiaries are entitled to a deduction in their individual assessments to prevent double taxation of the property held in trust.

Principal place of residence exemption

Land that is used and occupied as the principal place of residence of the owner of the land may be exempt from land tax. This applies to both residential land and strata lots. The exemption is not affected by the value or size of the land.

Each family, including dependents under 18 years, can only claim the principal place of residence exemption for one property. If there is more than one owner for the land, at least one owner must use and occupy the property as their principal place of residence for the exemption to apply.

Hot topics

Section 47 Clearance Certificates

When purchasing property, it is very important that purchasers obtain a clear section 47 certificate or clearance certificate. A clearance certificate states whether there is any land tax owing on a property. The clearance certificate protects a purchaser from any outstanding land tax liability from a previous owner. It does not provide any protection to the owner (vendor) of the land.

Clearance certificates can be obtained directly from OSR or from a Client Service Provider (CSP). A current list of all CSPs is on our website. If applying through OSR, please allow at least 10 working days for a clearance certificate to issue.

Where a certificate shows an charge of the property, the outstanding land tax must be paid. Once paid, the purchaser (or their representative) can obtain an updated certificate on our website. This is irrespective of whether the original certificate was obtained through OSR or via a CSP. To print certificates online go to http://www.osr.nsw.gov.au/taxes/land/clearance.

Settlement payments

Generally all outstanding land tax needs to be paid prior to any settlement taking place. If however a vendor is unable to pay prior to settlement they may be able to arrange for land tax to be paid at settlement, at one of the settlement rooms listed on our website. If an amount to clear is needed for settlement, a request needs to be made to OSR in writing at least 10 working days prior to settlement date to allow for processing.

Crown Leases

Lessees of land owned by the Government are deemed to be owners of land and may need to pay land tax. Importantly, it is also the responsibility of the lessee to register for land tax. If you lease any property from the Government (such as shops, offices and parking spaces) you need to register for land tax. Government includes local Councils, county Councils and statutory bodies representing the Crown. It does not, however, include land owned by the Commonwealth.

Trusts

Where a property is held on trust, an assessment should be issued to the trustee in their capacity as trustee for the trust. It is the obligation of the trustee to advise OSR if a property is held on trust as this may affect their land tax liability.

Some unit trusts may be taken to be fixed trusts if they meet the ‘relevant criteria’ outlined in section 3A(3B) of the *Land Tax Management Act 1956*. The criteria are as follows:

a) The unit holders must be presently entitled to both the income and capital of the trust. Present entitlement to income means that the unit holders must have a present or immediate right to demand payment of income under the trust, subject only to payment of proper expenses

by and of the trustee relating to the administration of the trust. The term present entitlement should appear in the deed. To have present entitlement to capital, the unit holders must have the right to redeem and/or transfer their units at any time (this cannot be subject to any restrictions such as trustee's discretion or consent of other unit holders). The unit holders must also have a right to require the trustee to wind up the trust and either distribute the trust property to the unit holders or sell the property and distribute the net proceeds of the sale to the unit holders.

b) The entitlements, as listed above, cannot be removed, restricted, or otherwise affected by any discretion, or by a failure to exercise any discretion, conferred on a person by the trust deed. Essentially the trust deed must not have any clauses which would contradict or interfere with the unit holders' present entitlement to the income and capital of the trust. Furthermore the trust deed must not grant the power to any person to amend the deed in a way which could potentially affect the unit holders' entitlements.

c) There must only be one class of units and all units must entitle unit holders to a fixed and equal portion of income and capital. For example, 10 per cent of the income and 10 per cent of the capital of the trust.

Any unit trusts which do not meet the relevant criteria may be amended with changes taking effect from the following land tax year.

Primary Production land

Rural zoned land may be exempt from land tax if the dominant use of the land is for primary production. Where land is used for more than one purpose, the different uses are weighed up to determine which is the dominant use. It is important to remember that 'use' is not limited to physical use. For instance, the development of land is considered a use even if physical construction has not yet commenced. To determine dominance, factors taken into account include the:

- area of land attributed to each use
- level of capital investment in each use
- level of income received from each use
- size, scale and intensity of each use
- labour input required for each use.

Land that is not zoned rural must meet a further test to qualify for the primary production exemption. The primary production use of the land must have a significant and substantial commercial purpose or character, and it must be engaged in for the purpose of profit on a continuous or repetitive basis (whether or not a profit is actually made). To qualify for this exemption, the person conducting the primary production activity would need to demonstrate that the activity is financially viable or self-sustaining, taking into account all reasonable costs associated with the activity (including wages).

Recent decisions

Joukhador v Chief Commissioner of State Revenue [2015] NSWCATAD 43

Summary

Mr Les Joukhador and Mr Michel Joukhador ('the taxpayers'), sought review of the Chief Commissioner's land tax assessment requiring them to pay land tax in respect of a property at Croydon ('the Property') for the 2014 land tax year. On the relevant taxing date the taxpayers were in the process of developing the site as a child care centre.

Background

In 2013 the taxpayers purchased the Property with development approval for a child care centre. In October 2013, construction of a child care centre commenced. Due to delays caused by weather and other factors, the centre was not completed until sometime in February or March 2014.

On 23 April 2014, the Department of Education and Communities approved the operation of a child care centre on the Property. Shortly after obtaining that approval, the child care centre commenced operations.

Decision

The Tribunal concluded that the land tax exemption applying to child care centres did not apply and confirmed the land tax assessment because on the taxing date the operation of the child care centre had not commenced and the centre was not an approved facility.

Clause (ii) of section 10(1)(u) of the *Land Tax Management Act 1956* confines the exemption to land where 'children are educated and cared for by the service'. Since children can only be educated and cared for in a child care facility once the facility receives approval, the Tribunal found that the exemption did not apply where the property was merely being developed with a view of conducting child care operations on it.

Furthermore, the Tribunal concluded that there was nothing unfair, unreasonable or illogical in the Chief Commissioner's decision to comply with the statutory duty to impose land tax in accordance with the Act.

Paspaley v Chief Commissioner of State Revenue [2014] NSWCATAD 217

Summary

Ms Paspaley ('the taxpayer') sought a review of the Chief Commissioner's land tax assessments for the 2008 to 2012 land tax years in respect of a residence in Sydney ('the Property').

In seeking review of the Chief Commissioner's decision, the taxpayer submitted that the principal place of residence exemption applied to the Property or in the alternative, the concession for absences from a former residence applied.

Background

The taxpayer lived in the Property after purchasing it in 1990. However, from approximately 1997 onwards the taxpayer began to spend an increasing amount of time in northern Australia, and purchased an apartment in Darwin.

In 2003, the taxpayer purchased another, more substantial, property in Darwin. The Chief Commissioner formed the view that the taxpayer resided principally in that property until sometime in or around 2006 when, she began to spend the bulk of her time in Broome.

Decision

The Tribunal was not satisfied on the balance of probabilities that the Property was the taxpayer's principal place of residence for any of the relevant tax years. The taxpayer used and occupied other residences in Darwin and Broome for extended periods and had spent considerably more time at those other residences during the relevant periods. The Tribunal found that it was not open to the taxpayer and her husband to elect which property was their principal place of residence as such an election can only be made where there were two or more residences owned by two or more members of a family.

In view of the Tribunal's findings as to the taxpayer's principal place of residence, her submission in relation to the concession for prior occupation also failed, and the decision under review was affirmed.

Delli-Carpini v Chief Commissioner of State Revenue [2015] NSWCATAD 12

Summary

This matter involved an application for review of the Chief Commissioner's decision not to apply the primary production exemption from land tax in respect of the property in Maraylya ('the Property') for the 2009 to 2013 land tax years.

The key issue was whether the dominant use of the Property was the maintenance of animals for the purpose of selling them or their natural increase or bodily produce.

Background

The Property was zoned 'rural' for the relevant period, and during this time the taxpayers owned the Property and leased it to a tenant who resided in a house on the Property. The taxpayers claimed that the tenant incurred significant expenses in improving the Property for primary production purposes, and maintained horses, alpacas and poultry. However, the Chief Commissioner claimed that the residential use was the dominant use of the land.

Decision

The Tribunal accepted that parts of the Property were used during the relevant period to maintain these animals, but emphasised that there was no evidence of primary production income from the use of the Property. The intention to maintain animals for the purpose of sale was not sufficient to satisfy the statutory test for a primary production land exemption, and the Tribunal confirmed the land tax assessments.

Krcmar Holding Pty Limited v Chief Commissioner of State Revenue [2015] NSWCATAD 54

Summary

This matter involved an application for review of the Chief Commissioner's decision to assess the taxpayer as a special trust for the 2009, 2010 and 2014 land tax years. The appeal in relation to the 2009 and 2010 tax years was on the grounds that the assessments were a harsh and inequitable retrospective decision in reassessing a unit trust as a special trust in relation to land since disposed of. The appeal in relation to the 2014 tax year was on the grounds that the trust deed had been amended to become a fixed trust.

Background

The taxpayer entered into a deed of trust and proceeded to purchase the Revesby property on 28 July 2004 and the Peakhurst property on 4 November 2010. The taxpayer sold the Revesby property on 19 October 2010.

The Chief Commissioner issued land tax notices of assessment for the years 2009 to 2013 inclusive to the taxpayer as a company, and subsequently issued reassessments to the taxpayer for these periods as trustee of a special trust, removing the land tax threshold.

On 8 January 2014, the taxpayer amended the trust so it could be classed as a 'fixed trust'. The Chief Commissioner claimed that, although the taxpayer had executed a deed of amendment, it was not executed until after the relevant taxing date (31 December 2013) and as such only took effect from the 2015 land tax year onwards.

Decision

The Tribunal confirmed that at all relevant times, on the face of the trust deed, the trust was not a fixed trust, and the Chief Commissioner did not have the discretion to forego the assessments.

Payroll tax

NSW threshold deduction for 2014–15 is $750 000 and the tax rate is 5.45 per cent.

Recent court cases

Conrad Linings Pty Limited v Chief Commissioner of State Revenue [2014] NSWSC 1020

The NSW Supreme Court has affirmed a payroll tax assessment (including interest and penalty tax) issued to a taxpayer for the relevant periods. It also affirmed the Chief Commissioner's decision not to exclude the taxpayer from its group with another company for payroll tax purposes. The taxpayer disputed the Chief Commissioner's decision to assess it as liable for payroll tax, interest, and penalty tax for the 2008 and 2009 financial years for the amounts of $469 412 and $605 034 respectively.

The assessment was made on the basis that the taxpayer was a group member with another company pursuant to s72(2)(c)(i) and 72(2)(e) of the *Payroll Tax Act 2007 (NSW)*. The Chief Commissioner had determined that as a group member with the other company, the taxpayer was jointly and severally liable pursuant to s81 of the *Payroll Tax Act* for amounts payable by the other company. The other company went into liquidation on 1 June 2010.

At the hearing the taxpayer conceded that by reason of s72(2)(e) it and the other company were both members of a group for the years in question. The issue was whether the Court should exercise the Chief Commissioner's discretion in s79 to exclude the taxpayer as a member of the group. The Supreme Court was not satisfied that the taxpayer had discharged the onus of establishing that the discretion should be exercised in its favour, therefore the Chief Commissioner's decisions were upheld.
http://www.caselaw.nsw.gov.au/decision/54a63ed53004de94513dc251

Chief Commissioner of State Revenue v Seovic Civil Engineering Pty Ltd [2014] NSWCATAP 94

Seovic was looking to exclude Exell Management for 2008–12 tax years. Exell formed a group with the third taxpayer (Seovic Engineering Pty Ltd).

As a result of these two groups and s74 of the *Payroll Tax Act 2007 (NSW)*, all three taxpayers constituted a group. Previously NCAT ordered the Chief Commissioner to exercise his discretion under s79 of the *Payroll Tax Act* to exclude Exell from the first and second smaller groups. This resulted in the larger group being dissolved.

The Chief Commissioner appealed this decision and was successful because Exell supplied contract workers to its only two customers, being Civil and Engineering. Civil and Engineering were in a commercial position to influence the business of Exell and Exell was in a commercial position to influence business decisions of Seovic Civil and Seovic Engineering.
http://www.caselaw.nsw.gov.au/decision/54a63ffd3004de94513dc98d

Qualweld Australia Pty Ltd v Chief Commissioner of State Revenue [2014] NSWCATAD 227

Qualweld was involved in the welding industry and paid its welders for certain work done for its clients. There were three issues that needed to be addressed. The first issue was whether the payments received by the welders were paid for services rendered under an employment agency contract. The second issue was then if the payments were not paid for services under an employment agency contract, were they exempted

under the payroll tax contracting provisions. The third issue was whether penalty tax should have been imposed.

Were these contracts employment agency contracts?

The Tribunal indicated that the following basic conditions needed to be satisfied to establish an employment agency contract:

- there must be a contract
- the worker must be procured by a party that acts like an employment agency
- the workers must be hired to provide services to a client of the party that acts like an employment agency
- the contract must not be a contract of employment between the worker and the end-user or client
- the contract must not attempt to establish a contract of employment between the worker and end-user or client.

The crucial question was whether Qualweld procured the services of the workers, who operated through interposed entities for their client. The tribunal drew upon the meaning of 'procure' from the Freelance Global Ltd v Chief Commissioner of State Revenue 2013 NSWSC 127 case.

This interpretation of 'procure' means more than facilitate or enable and requires that the employment agent cause the services of a contract worker (or service provider) to be provided to the employment agent's clients, with the expenditure of care and effort by the employment agent.

The Tribunal then considered six factors as follows:

- was there any prior relationship between the worker and the client?
- the payment of an hourly rate by the client to the worker
- the number employees of Qualweld
- the nature of the business undertaken by Qualweld
- the way in which the work was done by Qualweld
- the amount of Qualweld total revenue derived from providing workers to be on-hired.

The Tribunal concluded that:

- just because there was no prior relationship between the workers and the client, it didn't diminish the possibility in this instance that Qualweld could procure workers for their client
- what mattered was the work being done, not the way the work was paid
- the fact that Qualweld only had two employees was another factor that led the tribunal to believe the contracts were employment agency contracts
- anything beyond the provision of welders for Qualweld's client was largely incidental to Qualweld's core business
- the clients was paying for the supply of welders that were procured by Qualweld and for nothing else. Qualweld's client did pay an additional amount but only as a goodwill gesture and not because they were obligated to do so.

Relevant contracts

The Tribunal determined that the payments made by the applicant to the welders were made under an employment agency contract. This issue did not have to be considered once it was decided an employment agency contract existed.

Penalty

The assessments issued to the applicant imposed penalty of 25 per cent. At objection this was reduced to 20 per cent based on voluntary disclosures made by the applicant.

The applicant sought a review of this decision on the basis that it took reasonable care to comply with taxation law. The tribunal concluded that the taxpayer provided precious little in the way of hard evidence to demonstrate that it took the sort of steps one would expect a reasonable person to take in such circumstances. In addition, it believed that the application of the employment agency provisions did not appear to have been considered by Qualweld in any detail, until it became apparent that the Chief Commissioner raised these concerns.
http://www.caselaw.nsw.gov.au/decision/54a640013004de94513dcaf2

What's new for the 2015–16 financial year

Extension of the Jobs Action Plan rebate

The Jobs Action Plan rebate which helps businesses with up to $5000 payroll tax rebate on new workers maintained for two years has been extended from 30 June 2015 to 30 June 2019.

FBT gross-up rate Type 2

From 1 July 2015 to 30 June 2016 businesses are to use 1.9608 as the Type 2 grossed-up rate multiplier for the aggregate value of all fringe benefits. This rate is to be applied by all taxpayers who either use the actual or estimate method of returning fringe benefits for payroll tax purposes.

Motor vehicle allowance exempt component

77c/km during the period 2015–16.

Amendment to the *Payroll Tax Act 2007*

There are two specific contracting exemptions that will be removed at a date to be proclaimed. These exemptions are firstly for those contractors who procure persons who wish to be insured and secondly for those who provide services based on the door-to-door sale of goods solely for domestic purposes.

Common payroll tax mistakes

We have identified a number of errors clients generally make when remitting their payroll tax returns. To ensure your business correctly complies with the payroll tax provisions, below is a list of common mistakes.

- Wages – for the purposes of determining the payroll tax liability, gross wages should be used rather than net wages.
- Allowances – claiming an exempt component for motor vehicle and accommodation allowances requires substantiation with log books or records.
- Fringe benefits:
  - using reportable values from employee pay summaries results in an incorrect calculation of fringe benefits for payroll tax purposes
  - including salary sacrifice amounts towards fringe benefits results in an overstatement of payroll tax liability
  - using the Type 1 grossing up factor when calculating the taxable

amount results in an overstatement of liability. Only use Type 2 grossing up factor for both benefit types

  - forgetting to proportion the fringe benefits taxable amount according to the State's wages proportionate to total Australian wages results in an overstatement of taxable fringe benefits.

- Superannuation – only including up to the Super Guarantee Charge leads to an understatement of liability. All amounts paid into Superannuation including salary sacrifice amounts are liable.
- Third-party payments to Directors – if a director provides services to a corporation, all payments relating to those services are wages for the corporation even if the payments are made to another company, a superannuation fund or other entity.
- Contractors – failure to include liable contractor payments (less GST and approved deductions) results in an understatement of payroll tax unless an exemption applies. If an employer is claiming an exemption for one of their contractors, the employer needs to have the evidence to be able to substantiate the exemption they wish to claim. This involves the employer being aware of the contractor's business – e.g. do the contractors engage others to fulfil the contract, do they have other customers that they provide services to?
- Threshold entitlement – excluding interstate wages when calculating payroll tax results in incorrect threshold allocation and underpayment of tax. Including interstate wages allows for the threshold to be proportioned according to total Australian wages.
- Apprentices and Trainees – to claim the available rebate the apprentices and trainees must be registered with the Department of Education and Communities. Additionally, all forms of wages (wages, allowances, super, fringe benefits) paid to apprentices and trainees are rebateable wages. Trainees must be new entrant trainees, not working more than three months full time or three months part time or casual to be eligible for the rebate.
- Grouping – multiple thresholds claimed by group members. This often eventuates due to businesses not being aware of the grouping provisions.

Notes

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