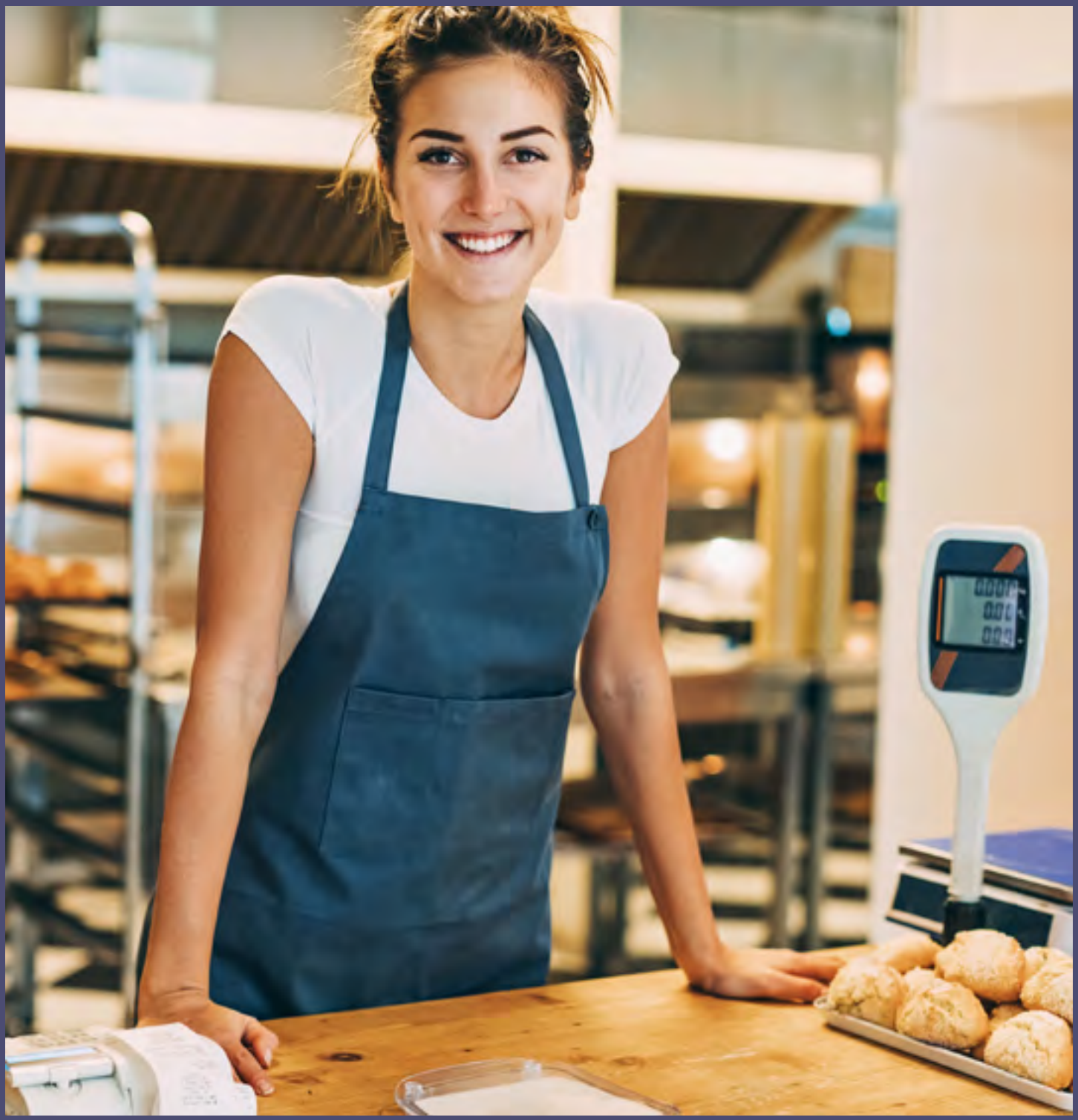


NSW GOVERNMENT Office of State Revenue

NSW State taxes 2017
Seminar notes

Duties
1300 139 814
8.30am - 5.00pm Monday to Friday
duties@osr.nsw.gov.au

Land tax
1300 139 816
7.30am - 6.30pm Monday to Friday
landtax@osr.nsw.gov.au

Small Business Grant
1300 241 869
8.30am - 5.00pm Monday to Friday
business.grants@osr.nsw.gov.au

Payroll tax – general enquiries
Phone: 1300 139 815
8.30am - 5.00pm Monday to Friday
Email: payrolltax@osr.nsw.gov.au

Payroll tax - payments by post
GPO Box 530
Sydney NSW 1159

Help in community languages is available.

Office of State Revenue NSW
GPO Box 4042
Sydney NSW 2001
DX 456 Sydney

(02) 9689 6200

www.osr.nsw.gov.au

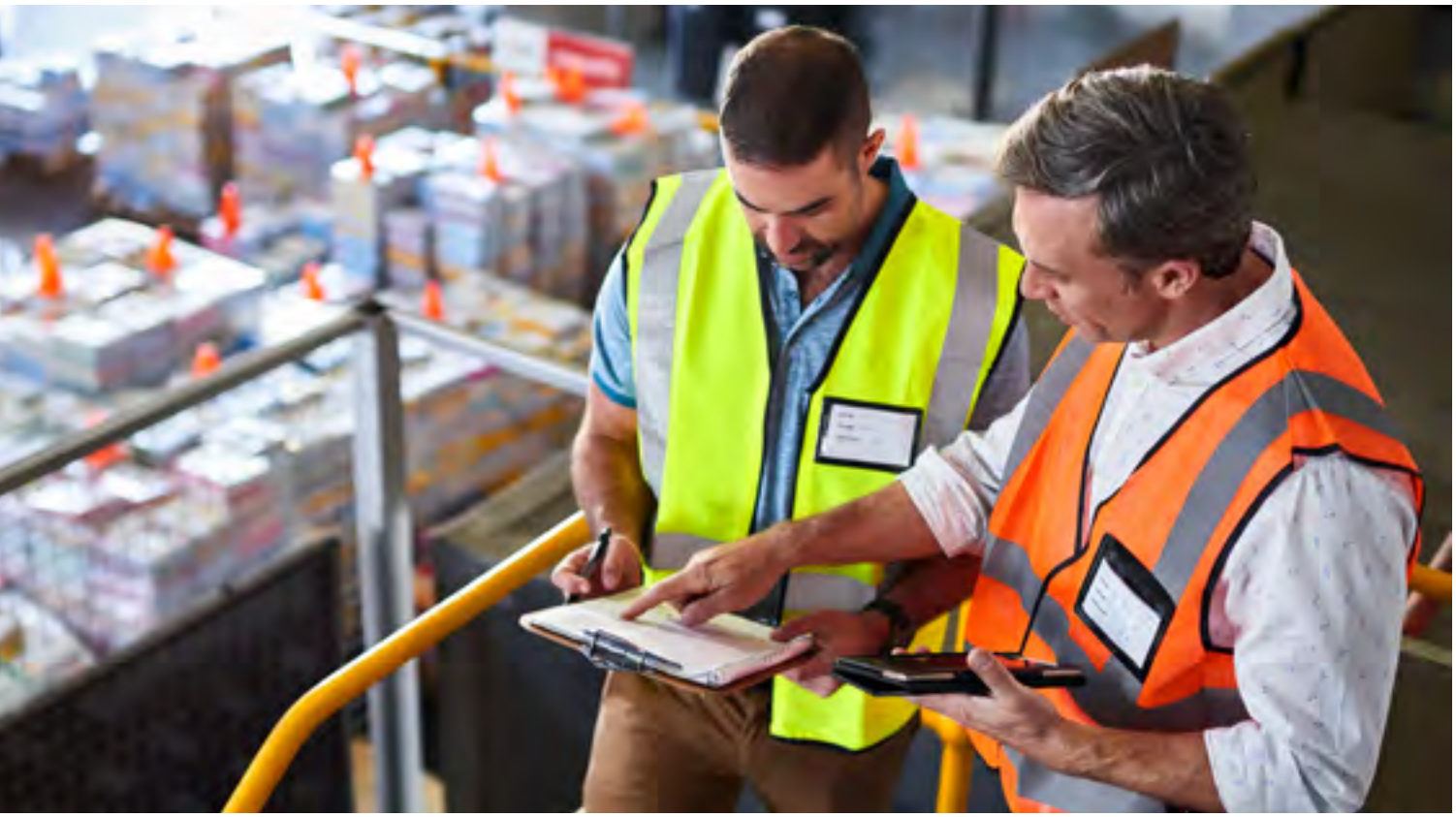
Contents

Note: All revenue rulings referenced in this document can be found at www.osr.nsw.gov.au.

Search 'revenue rulings' to see the most up to date list.

Changes to taxes announced in the 2017 NSW State Budget are outlined in this publication. Legislation to enact these changes has been introduced to Parliament. The changes will come into effect once the legislation is passed. For updates, check the Office of State Revenue (OSR) website www.osr.nsw.gov.au.

Duties



Small business insurance

Insurance duty will be abolished for insurance effected or renewed on or after 1 January 2018, where insurance policies are taken out by small businesses on:

- commercial vehicle insurance – for vehicles used for business purposes
- occupational indemnity insurance
- public and product liability insurance – cover for personal injury or property damage connected with the business or its products and services.

Small business is defined as a 'CGT small business entity' within the meaning of section 152-10(1AA) of the Commonwealth *Income Tax Assessment Act 1997*.

Crop and livestock insurance

Insurance duty on crop and livestock insurance will be abolished for insurance effected or renewed on or after 1 January 2018.

Lenders mortgage insurance

Lenders mortgage insurance (LMI) duty will be abolished for insurance where the premium is paid on or after 1 July 2017. LMI means insurance taken out by lenders to cover loss arising from default by the mortgagor.

Duty for first home buyers

From 1 July 2017, first home buyers will be exempt from duty for new and existing homes for properties up to $650,000. The duty will be reduced for amounts between $650,000 and $800,000. There is no change to the cap for vacant land.

New Home Grant scheme

The New Home Grant scheme, providing a $5,000 new home grant for non-first home buyers, will close on 30 June 2017.

Off the plan purchases by investors

From 1 July 2017, all residential purchases by investors will be excluded from the 12 month off the plan transfer duty liability deferral.

Purchasers who wish to obtain the deferral must be natural persons, and declare an intention to occupy the property as their principal place of residence (PPR). If a purchaser claims an entitlement to a deferral, but the land is not occupied as the purchaser's PPR for a continuous period of 6 months, commencing within 12 months after completion of the sale or transfer, interest and penalty tax will apply.

If a purchaser claims an entitlement to a deferral, but the land is not occupied as the purchaser's PPR for a continuous period of 6 months, commencing within 12 months after the certificate of occupation being issued by the relevant council, interest and penalty tax will apply.

Shared equity schemes

From 1 July 2017, a shared equity scheme applies where a buyer purchases a property with an approved equity partner.

Approved equity partner means:

- NSW Land and Housing Corporation
- a registered community housing provider within the meaning of the Community Housing Providers National Law (NSW)
- approved persons.

Guidelines on the operation of this scheme will be developed.

The shared equity scheme applies on eligible transactions where:

- the equity partner obtains an interest in the home of not more than 80 per cent
- the equity partner has the right to a share in any capital gains on sale or refinancing but has no right of occupation
- the home buyer can purchase more equity in the property from the equity partner at a price determined under the arrangement between the home buyer and the equity partner.

If the total purchase price of the property meets the requirements for duty exemption or concession, the home buyer:

- will be entitled to the exemption or concession, and
- will not be required to pay duty on any subsequent transfers of equity from the equity partner to the home buyer.

A home owner will be entitled to the first home owner grant if the total purchase price falls under the cap and all other conditions of the scheme are met.

State Revenue Legislation Amendment Act 2017

The *State Revenue Legislation Amendment Act 2017* received assent on 11 April 2017. The following amendments were made to the *Duties Act 1997*.

Instruments in digital form

The amendments clarify that:

- an instrument includes an instrument that is in digital form
- the provisions of the Act that apply to written instruments also apply to digital instruments.

No double duty

The amendment extends a provision to the charging of nominal duty (rather than ad valorem duty) on certain transfers of property to the custodian of a trustee of a self-managed superannuation fund where:

- duty on an agreement for the sale or transfer of the property has been paid, and
- the purchaser is the trustee.

Change of trustee

The amendments ensure that:

- nominal duty of $50 is chargeable on certain transfers of trust property that are a consequence of the retirement or appointment of trustees

only if:

- the Chief Commissioner is satisfied that the transfers are not part of a scheme to avoid duty that involves conferring an interest, in relation to the trust property, on a new trustee or other person so as to cause any person to cease holding a beneficial interest in that property.

Ad valorem duty may be chargeable on those transfers, instead of nominal duty, if the Chief Commissioner fails to be satisfied that they are not part of such a scheme.

Duty exemptions

The amendments provide for an exemption from duty for the vesting of land occurring as a consequence of the merger of credit unions or of authorised deposit-taking institutions with mutual structures.

The amendments also extend existing exemptions from duty on transfers following the break-up of marriages and de facto relationships to cover such transfers to trustees under the *Bankruptcy Act 1966* of the Commonwealth.

Landholder duty

The amendments:

- make further provision in relation to the aggregation of interests acquired by a person in a landholder by setting out circumstances to be taken into account in determining whether acquisitions form, evidence, give effect to or arise from substantially one arrangement
  - ensure that the liabilities of a landholder are disregarded in determining whether a person has an interest or a significant interest in the landholder
  - make further provision in relation to the tracing of interests through linked entities of a unit trust scheme or company for the purposes of determining whether the scheme or company is a landholder
  - extend an anti-avoidance measure which ensures that certain landholdings transferred from a unit trust scheme or company within 12 months of a person acquiring an interest in the scheme or company are counted when determining whether the scheme or company is a landholder so that the measure covers agreements for the sale or transfer of landholdings

- ensure a put option and a call option are treated in the same way as uncompleted agreements for the purposes of assessing liability to landholder duty
- make further provision to prevent a person who enters into an agreement to purchase shares or units in a landholder avoiding landholder duty by opting to defer registration of the purchase.

Primary production land

The amendments extend existing exemptions from duty connected with transfers between family members of land used for primary production to cover transfers from a self-managed superannuation fund where a member of the fund and the person to whom the land is transferred are family members.

MySuper

The amendments provide for an exemption from duty connected with transfers of property between superannuation funds that are required to be made under transitional arrangements relating to the Commonwealth's MySuper reforms.

Tax avoidance

The amendments make further provision for the test to be applied in determining the amount of duty that a person is liable to pay as a result of a tax avoidance scheme that is of an artificial, blatant or contrived nature.

Definition of 'associated persons'

The amendments extend the circumstances in which a:

- trustee and another trustee
- natural person and a trustee, and
- private company and a trustee

are treated as being 'associated' for the purposes of liability for duty, by tracing through to sub-trusts.

Recent decisions

Happy Days Property Pty Ltd v Chief Commissioner of State Revenue [2016] NSWCATAD 289

Decision 8 December 2016

Issue

Concession for a transfer of dutiable property that is not made in conformity with an agreement for the sale or transfer of the dutiable property

Background

Happy Days Property Pty Ltd (the taxpayer) applied for a review of the Chief Commissioner's decision to reassess an undated real property transfer to ad valorem duty of $22,940 on the transfer of a property in Mosman, from the vendors to the taxpayer.

The key issue was whether the transfer was eligible for concessional duty of $10 under section 18(3) of the *Duties Act 1997*.

On 17 March 2015, a contract for the sale of land was entered into between the vendors and 'FB Transitions Pty Ltd as trustee for Happy Days Custody Trust' as purchaser. The Contract had a completion date of 28 April 2015. The purchase price was $610,000. On 30 April 2015, duty of $22,940 was assessed, and was paid.

The purchaser intended to borrow money from Westpac in relation to the purchase. After 17 March 2015 and before the proposed settlement date of 28 April 2015, Westpac indicated that it did not accept FB Transitions Pty Ltd as custodian, and required that a different entity hold the property.

Consequently, on 7 April 2015, the taxpayer (Happy Days Property Pty Ltd) was registered. A Deed was entered into between FB Transitions Pty Ltd, Happy Days Management Pty Ltd and the Taxpayer, under which the Taxpayer replaced FB Transitions Pty Ltd as the custodian of the Happy Days Custody Trust.

The Chief Commissioner issued a Notice of Assessment for ad valorem duty of $22,940, on the basis that the concession in section 18(3) of the *Duties Act 1997* did not apply. In particular, section 18(3)(d)(ii) refers to two points in time: 'at the time the agreement was entered into, and at the completion or settlement of the agreement'. The relevant parties must be related at both those points in time. It is not sufficient if they are related at only one of those points in time.

Decision

The NSW Civil Administrative Tribunal Appeal Division found that the concession under section 18 of the *Duties Act 1997* could not apply to the transfer, and accepted the Chief Commissioner's submission that section 18(3)(d)(ii) could not be satisfied at both points in time because the taxpayer did not exist at the time the agreement was entered into (on 17 March 2015).

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58478643e4b058596cba24ce.

Tay v Chief Commissioner of State Revenue **[2017] NSWSC 338**

Decision 6 April 2017

Issues

- Whether the agreement was an agreement to vary the trusts of the Will
- Whether an appropriation as referred to in section 46 of the *Trustee Act 1925*
- Whether acquisition of interest in landholder company exempt as being solely the result of the distribution of deceased's estate

Background

The applicant was assessed by the Chief Commissioner for transfer duty and landholder duty on the transfer of shares in his late father's company, Memocorp. Under the will, the children were entitled to the residue of the estate from the net proceeds of sale of the assets.

The siblings agreed that instead of selling the property in the estate, they would carry on the legacy of the businesses and requested that the executors distribute the shares in the companies amongst the beneficiaries. A Deed of Family Agreement was entered into, and beneficiaries surrendered their shares in Memocorp together with shares from the executors of the deceased's interest in Memocorp.

The applicant was assessed for landholder duty on the acquisition of a significant interest in a private landholder as a consequence of his acquisition of shares in Memocorp.

The applicant relied on section 163A(d) of the *Duties Act 1997* to argue that the acquisition was exempt from landholder duty on the basis that the interest was acquired solely as the result of the distribution of the estate of a deceased person, whether effected in the ordinary course of execution of a will or codicil or administration of an intestate estate or the result of a court order.

The Chief Commissioner argued that the share transfer was not solely acquired under the authority of the Will and not made pursuant to a trust, given the residue clause provided that the beneficiaries were to share in the net proceeds from sale. The Chief Commissioner said the transfer was made pursuant to the Deed of Family Agreement, and not solely through the administration of the estate.

Decision

The Tribunal accepted that the share transfer was a distribution from the estate. However, the Tribunal accepted the Chief Commissioner's argument that the share transfer did not arise solely from the Will. The applicant's acquisition of the shares was reliant on other residuary beneficiaries surrendering their shares and consenting to the transfer. The shares were acquired as part of a wider transaction than what could be said to be derived from the Will. As such, the exemption failed and the assessment was confirmed.

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58ddee14e4b0e71e17f5863a.

Robert Leigh Rampton v Chief Commissioner of State Revenue [2017] NSWCATAD 72

Decision 8 September 2016

Issues

- Meaning of 'transferee'
- Meaning of 'new home' for the purposes of the New Home Grant scheme

Background

On 18 September 2014, the applicant, Mr Rampton:

- entered into an agreement to purchase vacant land in Goulburn (the Property), and as trustee for the Rampton Family Trust
- entered into another agreement to purchase another block of vacant land in Goulburn (the Trust Property) and
- successfully applied for $5,000 grants under the New Home Grant scheme for each of the agreements.

On 28 April 2015 the Chief Commissioner informed the applicant that he was entitled to the grant for the Trust Property but was not entitled to the grant for the Property because a transferee may only receive a maximum of one grant per financial year (section 81 of the *Duties Act 1997*). On the same date the Chief Commissioner issued a Duties Notice of Assessment to the applicant to recover the grant made in respect of the Property.

First issue – Trust and transferee

The parties agreed that a trust could be a transferee under the *Duties Act 1997*. However the applicant submitted that section 85A does not disqualify a trustee of a trust from acquiring property on behalf of the trust in a separate capacity. The applicant submitted that 'the grant is to the Trust and accordingly the transferee is the Trust'.

The Chief Commissioner submitted that trustees did not act in a distinct legal capacity as trusts are not entities with legal personality. While the applicant accepted this as strictly true, they submitted that trusts were legal institutions often classified as an entity.

Second issue – Multiple homes

The NSW Civil Administrative Tribunal Appeal Division considered whether the construction of multiple homes on the Property was a 'new home' for the purposes of sections 83(4) and 87G of the *Duties Act 1997*. In this case the applicant had constructed two semi-detached dwellings (duplex) on the Property in anticipation of subdivision. The Chief Commissioner submitted that a question to be determined was whether there was an intention to use the Property as the site of a new home rather than as a site for the construction of multiple homes.

Decision

Dealing first with the issue of the trust as transferee, the Tribunal held that the applicant is a natural person who is a legal entity and the trust is not a legal entity. The Tribunal was not satisfied that the applicant in his personal capacity and the applicant purchasing on behalf of the trust were different entities under law and therefore the two properties where held to be transferred to the one transferee.

Dealing with the second issue, the Tribunal was not satisfied that there was at any relevant time any intention to build 'a home' on the Property and that the Applicant at all relevant times was to build 'two or more homes'.

This decision is likely to set a precedent as the two grounds the Chief Commissioner succeeded on have not been raised previously in any other cases.

For more information, refer to the case law at

http://www.osr.nsw.gov.au/info/legislation/summaries/ncat-fhb/2017-nswcatad-72.

First Home Owner Grant (New Homes)

2017 Budget changes

The First Home Owner Grant of $10,000 is limited to new homes worth up to $600,000 in the case of contracts to purchase a new home. The cap was previously $750,000.

The $750,000 cap still remains in the case of a comprehensive home building contract to build a new home, or a building of a new home by an owner builder.

Surcharges: Purchaser duty and land tax

2017 Budget changes

Rates

Foreign persons will pay higher surcharges when they purchase residential real estate. The surcharge on duty paid on new purchases by foreign persons will double from four per cent to eight per cent from 1 July 2017, and the surcharge on land tax will rise from 0.75 per cent to two per cent from the 2018 tax year.

Australian-based developers

An Australian-based developer may be entitled to a refund of surcharge purchaser duty if they are an Australian corporation. This applies to an eligible developer who acquired land on or after 21 June 2016. The corporation or a related body corporate of the corporation must have constructed a new home on the residential land to which the residential-related property relates after completion of the transfer of the property to the corporation.

An 'Australian corporation' means a corporation that is incorporated under the *Corporations Act 2001* (Cth).

The proportion of surcharge purchaser duty refunded will be based on the proportion of dwellings sold (other than to an associated person) within 5 years of the completion of the purchase of the land by the developer. Where separate dwellings are sold progressively over the 5 year period, a developer may be granted partial refunds.

Guidelines will be provided by way of an order made by the Treasurer.

A refund will be payable in respect of the sale of a new home. A dwelling that has been rented or occupied at any time while owned by the developer is not eligible for a refund.

Residential land definition

Certain dwellings (eg. purpose built student accommodation) will not be liable to surcharge purchaser duty and surcharge land tax. The Chief Commissioner will make a determination outlining the types of dwellings that will not be liable.

This amendment will take effect from 1 July 2017.

Australian permanent residents (including New Zealand citizens)

From 1 July 2017, Australian permanent residents (including New Zealand citizens holding a special category visa) will be exempt from surcharge purchaser duty if the person:

- declares that he or she will use and occupy the premises as his or her PPR for a continuous period of 200 days within the first 12 months after liability date, and
- the Chief Commissioner is satisfied that the person intends to so use and occupy the premises.

From the 2018 tax year, Australian permanent residents (including New Zealand citizens holding a special category visa) will be exempt from land tax if the person:

- lodges a declaration with a land tax return for the relevant tax year indicating that the person intends to occupy the affected premises as a PPR for a continuous period of 200 days during the relevant tax year, and
- the Chief Commissioner is satisfied that the person intends to so use and occupy the premises.

If the person does not use and occupy the premises as required, any surcharge purchaser duty and surcharge land tax is to be reassessed as if the exemption was never granted, and the interest and penalty tax provisions of the *Taxation Administration Act 1996* are to apply as if a tax default had been committed.

Definitions/hot topics

Definition of a foreign person

A foreign person must pay surcharge purchaser duty or surcharge land tax where they acquire or already own residential land respectively. The definition of a foreign person is discussed in Revenue Ruling G 009.

A foreign person can be:

- an individual
- a corporation
- a trustee of a trust
- a beneficiary of a land tax fixed trust
- a government
- a government investor
- a partner in a limited partnership.

Foreign person – individual

An individual, who is not an Australian citizen, is a foreign person if they are not ordinarily resident in Australia.

An individual is ordinarily resident in Australia at a particular time if the individual:

- has actually been in Australia during 200 or more days in the preceding 12 months (not including the date of arrival or the date of departure), and
- is not (or, if not in Australia, was not immediately before their most recent departure from Australia) subject to any limitation as to time for their continued presence in Australia.

A person who is entitled to reside in Australia under a permanent entry visa (i.e. a permanent resident) or a Partner (Provisional) visa (subclass 309 or 820) is not subject to a time limitation, and only needs to satisfy the 200 day test.

Foreign person – corporations

A corporation may be a foreign person for surcharge land tax or surcharge purchaser duty purposes, despite where the corporation is registered or where it conducts its business.

Surcharges: Purchaser duty and land tax (continued)

The foreign status of the corporation will be determined by the foreign interests held at the liability date. For example, if a foreign person with their associates has a substantial interest (at least 20 per cent) in the corporation at the liability date, the corporation will be a foreign person.

Similarly, where two or more foreign persons together with their associates hold an aggregate substantial interest (at least 40 per cent) in the corporation, the corporation will also be a foreign person.

Foreign person – trusts

A trustee of a trust may be a foreign person for the purposes of the surcharges even if the trustee is not a foreign person in their personal capacity (e.g. even if the trustee is an Australian citizen).

The trustee of a trust is a foreign person if:

- a foreign person with their associates holds a substantial interest (at least 20 per cent) in the trust, or
- two or more foreign persons together with their associates hold an aggregate substantial interest (at least 40 per cent) in the trust.

Trustees of discretionary and hybrid unit trusts

For a discretionary trust or hybrid trust, each beneficiary is taken to hold a beneficial interest in the maximum percentage of income or property that the trustee may distribute to that beneficiary.

Revenue Ruling G 010 has recently been introduced to exempt a discretionary or hybrid trust from surcharge taxes with retrospective effect if the trust deed is amended to remove foreign persons from the list of beneficiaries. The amendments may be made at any time between the introduction of the surcharges and the present date, and otherwise within six months after the liability was assessed.

What you need to do – Surcharge purchaser duty

Applications for a refund of surcharge purchaser duty should include:

- a cover letter requesting a refund of surcharge purchaser duty paid
- the stamped contract/transfer
- the amended trust deed
- the trustee's EFT details.

Applications should be sent to Office of State Revenue, GPO Box 4042, Sydney NSW 2001.

What you need to do – Surcharge land tax

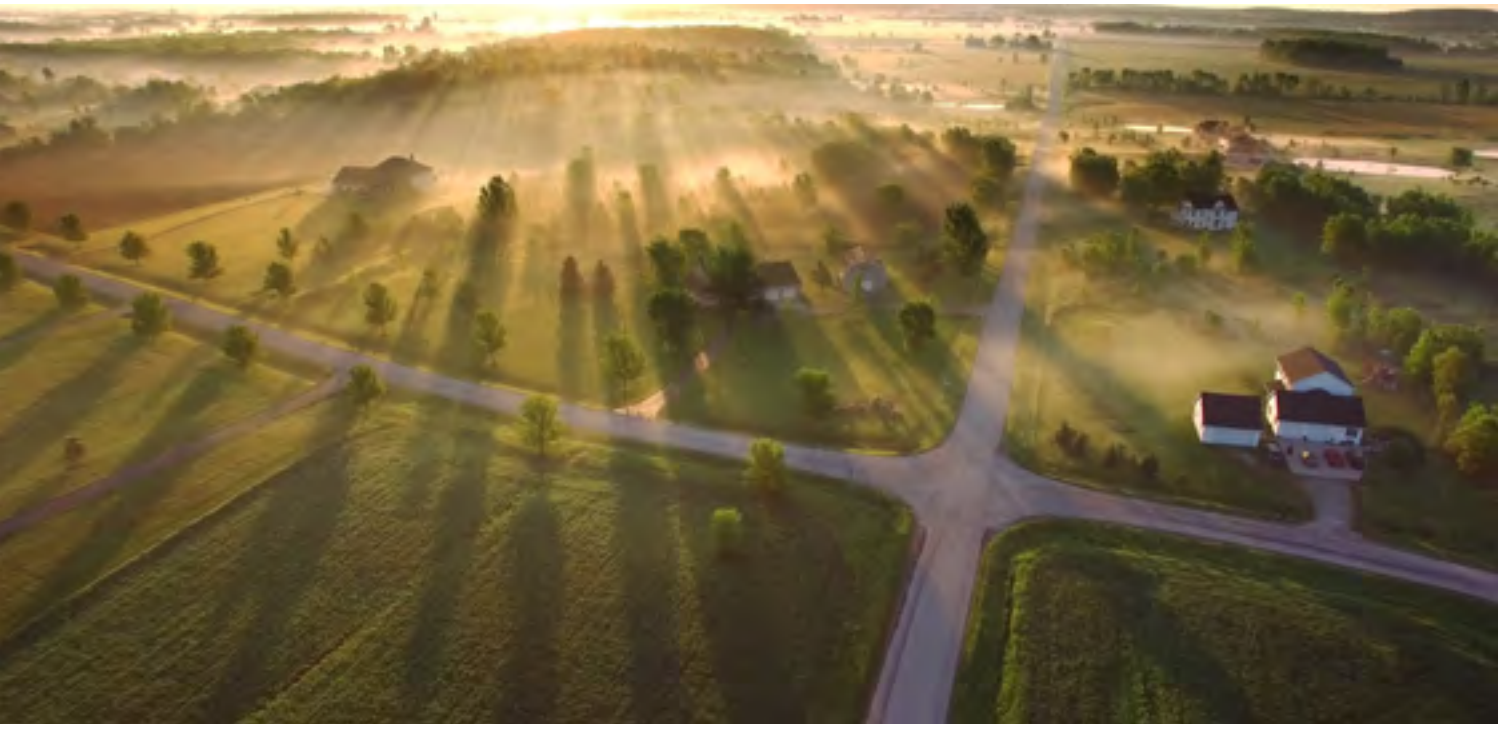
To apply for a refund of surcharge land tax:

1. go to land tax online services on the www.osr.nsw.gov.au

2. update your details and upload the relevant supporting information.

If appropriate, amend your trust deed within six months to meet the requirements outlined in Revenue Ruling G 010 and send us your amended trust deed to retain the exemption.

Land tax



How is land tax calculated for 2017?

Land tax is calculated on the combined value of all the taxable land owned. 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. The land tax threshold for 2017 is $549,000. 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 ($3,357,000) and two per cent thereafter. If the combined value of the land does not exceed the threshold, no land tax is payable. A premium land tax rate of two per cent applies for special trusts on the total taxable land value above $3,357,000.

Surcharge land tax of 0.75 per cent applies on residential land owned by foreign persons for the 2017 tax year. The rate for surcharge land tax will increase to two per cent from the 2018 land tax year.

State Revenue Legislation Amendment Act 2017

The *State Revenue Legislation Amendment Act 2017* received assent on 11 April 2017. The following amendments were made to the *Land Tax Management Act 1956*.

Government lessor to notify lessee of land tax liability

Under section 21C of the *Land Tax Management Act 1956*, a lessee is generally liable for land tax payable in respect of land leased by a government entity. Government includes local councils, county councils and statutory bodies representing the Crown. It does not, however, include land owned by the Commonwealth. The amendment requires a Government entity that leases land to disclose to the lessee in writing, that the lessee can be liable for land tax on the land.

If the Government entity fails to make the required disclosure, and the lessee fails to pay the land tax payable, the Chief Commissioner can recover the unpaid tax from the Government entity, which is made jointly and severally liable for the unpaid tax. The Government entity is entitled to be indemnified by the lessee for any payment it makes to the Chief Commissioner to discharge that liability.

Common issues/hot topics

Use of online services versus objections

You can request an amendment to your assessment online using OSR land tax online services at www.osr.nsw.gov.au without the need to lodge a formal objection. You can use our online services to:

- tell us if you have purchased or sold a property
- request an exemption
- update your postal address or contact details
- attach supporting documents such as trust deeds or utility bills.

The objection process is still available where the matter cannot be resolved by other means.

Fixed trusts – procedure update

To meet the eligibility as a fixed trust for land tax, you must supply:

1. a copy of the executed trust deed, including any amendments
2. percentage of interest held by each beneficiary
3. current residential address for each beneficiary
4. a copy of the trust's unit holder register (if a unit trust)
5. a statement confirming if any beneficiaries are foreign persons and if any association exists between the other beneficiaries.

Land Tax Clearance Certificates

Vendors under a contract for the sale of land are required to provide a current Land Tax Clearance Certificate (Section 47 certificate) to the purchaser. 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. You will need to apply for any Land Tax Certificates through a Client Service Provider (CSP). To view the list of CSPs, please visit www.osr.nsw.gov.au/info/edr/csp.

Requesting a clearance certificate? Here are some tips to ensure your request is processed efficiently:

- ensure you reference the valuation number and title particulars of the relevant lots
- an application can contain up to three strata plan lots in the same strata plan in the same ownership. We do not process results on common property
- if you want a certificate to indicate all land title references contained within a single valuation parcel with multiple title references, you need enter all lots in the application at the CSP data entry point
- many applications are made on deposited plans or strata plans only just registered. Enter the 'originating land' details in the appropriate section of your CSP's online application
- enter the full names of the vendors. This will assist us if we cannot locate the land item you have applied for
- include the applicant reference and contact details rather than the CSP's contact details, as often the CSP cannot provide the information we need.

The certificate may show that there is no land tax charged for various reasons including that the land tax has already been paid or the property is exempt for the current year.

Where a certificate shows a charge on the property, the outstanding land tax must be paid. Once paid, you can obtain an updated certificate from www.osr.nsw.gov.au. If you are unable to pay prior to settlement you may be able to arrange for land tax to be paid at settlement, at one of the settlement rooms listed on our website. If you need an amount to clear for settlement, make a request to us in writing at least 10 working days prior to settlement date.

Recent decisions

***Morris v Chief Commissioner of State Revenue* [2016] NSWCATAD 219**

Decision 11 October 2016

Summary

The issue was whether the taxpayer was eligible for an exemption from land tax for the 2015 tax year for their property at Soldiers Point Road, Salamander Bay NSW, on the basis that this was the taxpayer's principal place of residence for the relevant period, pursuant to section 10(1)(r) and clause 8 of Schedule 1A of the *Land Tax Management Act 1956* ('the Act').

Clause 8(1) of Schedule 1A of the Act provides:

- (1) a person is taken, for the purpose of the principal place of residence exemption, to continue to use and occupy land formerly used and occupied by the person as a principal place of residence (a former residence), after the person ceases to so use and occupy the former residence, if the Chief Commissioner is satisfied that:
  - (a) the person used and occupied the former residence as a principal place of residence for a continuous period of at least six months, and
  - (b) the person does not own any other land used and occupied by the person as a principal place of residence.

Background

During the relevant period, the taxpayer was the sole registered proprietor of the Soldiers Point property, which he occupied with his wife. In addition to the Soldiers Point property, the taxpayer owned a 50 per cent interest in a property at Yachtsman Crescent, Salamander Bay NSW as a tenant in common with his sister.

The taxpayer and his wife decided to demolish and rebuild the house at the Soldiers Point property. For the duration of the construction at the Soldiers Point property, the taxpayer agreed to rent the Yachtsman Crescent property from his sister under the same terms as the previous tenants, whose lease was ending. In August 2014, the taxpayer and his wife vacated the Soldiers Point property and moved into the Yachtsman Crescent property. The taxpayer moved various belongings into the Yachtsman Crescent property, and placed other significant items including artwork and a piano in storage.

Decision

The taxpayer submitted that the Yachtsman Crescent property was merely a temporary place of residence, whereas the Soldiers Point property continued to be his principal place of residence. The taxpayer contended that the Yachtsman Crescent property was co-owned by him as an investment property, rather than as a principal place of residence.

The Tribunal affirmed the Chief Commissioner's decision.

The Tribunal held that the exemption under clause 8(1) of the Act could not apply since the taxpayer was at all relevant times an owner of the Yachtsman Crescent property, and that during the relevant period the taxpayer used and occupied this property as his sole – and necessarily principal – place of residence, since there was no viable residence on the Soldiers Point property.

For more information, see

http://www.osr.nsw.gov.au/info/legislation/summaries/ncat-land/2016-nswcatad-219.

T & S Nominees v Chief Commissioner of State Revenue [2017] NSWCATAP 6

Decision 11 May 2017

Summary

These proceedings dealt with an application by the Chief Commissioner of State Revenue for costs of the whole appeal, following the dismissal of an unsuccessful appeal by the taxpayer against a decision of the Appeal Panel not to reinstate appeal proceedings instituted by the taxpayer.

Background

The Tribunal at first instance summarily dismissed the taxpayer's application for a review of land tax assessments for failure to appear at the hearing on 1 and 2 February 2016.

The taxpayer applied to the Appeal Panel for reinstatement of the appeal. The taxpayer's application for reinstatement was a day late, and so the taxpayer applied to the Appeal Panel to exercise its discretion to extend the time to apply for reinstatement.

The Appeal Panel refused to extend the time, with the result that the dismissal decision stood (the reinstatement decision). The Appeal Panel agreed that the Chief Commissioner had demonstrated special circumstances justifying an awarding of costs for the directions hearing on 4 August 2016 and the subsequent steps up to and including the taxpayer's application to reinstate the proceedings on 8 November 2016.

Decision

The Chief Commissioner subsequently applied for overall costs of the appeal under section 60(2) of the Act on the basis that special circumstances applied, as defined in s.60(3), that is:

- the lack of tenability of the appeal [paragraph 60(3)(c)]
- the history of the proceedings including failure to appear and non-compliance with orders of the Tribunal [paragraphs 60(3)(a) and (g)].

The Tribunal made an order that the taxpayer pay the Chief Commissioner's costs of the appeal including the costs of the reinstatement application, superseding the previous costs order of 4 August 2016, which only applied to costs thrown away by the taxpayer's failure to appear on that day.

For more information, see http://www.osr.nsw.gov.au/info/legislation/summaries/ncat-land/2017-nswcatap-104.

Theophilas v Chief Commissioner of State Revenue [2017] NSWCATAD 89

Decision 24 May 2017

Summary

This matter involved the operation of the principal place of residence (PPR) exemption under section 10(1)(r) and Schedule 1A of the *Land Tax Management Act 1956* (LTMA) for the taxpayer's Randwick NSW property for the 2015 tax year. The taxpayer relied principally on the Concession for unoccupied land intended to be owner's principal place of residence and the Concession for absences from former residence (in Clauses 6 and 8 of Schedule 1A of the LTMA, respectively) to advance his claim for PPR exemption on his Randwick property.

Background

The taxpayer lived for 18 years in a house on the property at Randwick.

On 18 July 2011 the taxpayer entered into a contract for the demolition of the residence at Randwick and the construction of a new residence. Immediately before the demolition in September 2011 the taxpayer moved out of Randwick and lived at a property at Panania, which he had inherited. After demolition of the residence at Randwick, in November 2011 the builder went into liquidation and construction of the new residence at Randwick ceased. Home warranty insurance for the project was not paid until May 2013 and a new builder was subsequently engaged by the taxpayer to complete the construction. The appellant claimed to have moved out of the Panania property in December 2013 to a property in Arncliffe, not owned by him.

The issue of the operation of the PPR exemption to the Randwick property in the 2013 and 2014 land tax years has been previously considered by the NSW Civil and Administrative Tribunal and the Appeal Panel in respect of each land tax year separately. In each case the matter has been decided against the taxpayer, with findings that the Panania property remained his PPR as at 31 December 2012 and 2013. (The 31 December is the relevant taxing date for the 2013 and 2014 tax years).

Decision

The Tribunal found that during the 2014 calendar year, up until the taxing date of 31 December 2014, the evidence established that there was no significant change to the taxpayer's utilisation of the Panania property. Accordingly, the Panania property was still the PPR for the 2015 tax year.

Clause 6(7)(a) of Schedule 1A states that this clause does not apply to land owned by a person if the person or any member of the person's family is entitled to have his or her actual use and occupation of other land taken into account, and operates to deny the Clause 6 exemption in the 2015 land tax year.

The Clause 8 concession can only apply if the Chief Commissioner is satisfied that 'the person does not own any other land used and occupied by the person as a principal place of residence.'

Having found on the facts that the Panania property was used and occupied as the PPR for the 2015 land tax year (and thus Panania is exempt as advised to the taxpayer by the Chief Commissioner) neither concession was available for the Randwick property.

Triston Pty Ltd atf The Ghantous Family Trust v Chief Commissioner of State Revenue [2017] NSWCATAD 100

Decision 31 March 2017

Summary

The taxpayer, Triston Pty Ltd, sought a review of the Chief Commissioner's land tax assessments for the 2011 to 2015 land tax years. The taxpayer claimed that the subject land was used for primary production and therefore exempt under section 10AA of the Land Tax Management Act 1956 (the Act).

Background

The subject land has a total area of approximately 3.75 hectares and was fenced into six usable areas, consisting of five paddocks on the low lying areas and a nursery. The land has dual zoning, 'rural landscape' (RU2) and 'low density residential' (R2) with around 95 per cent of the land within the RU2 zone.

The nursery was well established but the activities were fairly modest. The majority of the plants on the property were very mature and were not newly cultivated or newly propagated. The lower lying area of the property up to 2011 was used for the maintenance of horses. In 2011 following the theft of three horses, all horses were removed from the property. For the 2012–2015 tax years the only physical activity undertaken on the property was the nursery activity, which was undertaken on no more than five per cent of the property's entire area.

There were two main issues in question:

1. whether the dominant use of the land was primary production
2. whether the subject land is 'rural land' and, if not, whether the land meets the 'commerciality test' required by the Act.

Decision

Dominance test

For the 2011 tax year, the NSW Civil Administrative Tribunal held that the maintenance of horses on the lower portion of the land, accounting for over 95 per cent of the property's areas, was sufficient to characterise the property as land the dominant use of which is for an exempt activity.

For the 2012–2015 tax years, the Tribunal found that there was no propagation of plants conducted on the property. As such the nursery was held not to be a 'commercial plant nursery'. The Tribunal concluded that the property did not have a dominant use at all for those tax years due to the nursery's de minimis or insignificant use of the total area of the property.

Commerciality test

The Tribunal found that because each lot within the property carried dual zoning, the land was not rural land. This was because section 10AA(4) which defines 'rural land' suggests only a single rural zoning covering the entire parcel will satisfy the definition. As such, the use of the land must satisfy the commerciality tests in section 10AA(2) of the Act.

The Tribunal stated that the activity of the taxpayer in maintaining between four and six horses on the 3.75 hectare land:

- was not an undertaking of a serious or weighty kind, and could not be regarded as anything other than a 'sideline', and
- was not a use of the land that had a significant and substantial commercial purpose.

The Tribunal indicated that the taxpayer's statement that the activities conducted on the land were for the purpose of profit '...did not make it so'.

The Tribunal noted that the fact of making losses did not necessarily undermine the taxpayer's claim, but stated that:

> 'Nevertheless a continuous pattern of a lack of profit may cause a decision-maker to question such a claim, and may indicate a level of indifference as to the financial performance of the activity and, instead, a realisation that the losses might at least to some extent be subsidised by the land tax exemption being sought.'

Accordingly, the Tribunal affirmed the decision of the Chief Commissioner.

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58dc7f3ee4b058596cba5843.

***Chief Commissioner of State Revenue v Metricon QLD Pty Ltd* [2017] NSW CA 11**

Decision 10 February 2017

Summary

In the NSW Supreme Court, the taxpayer, Metricon QLD Pty Ltd, sought a review of the Chief Commissioner's land tax assessment for the 2009 to 2013 land tax years for a parcel of land situated in Terranora in NSW. The taxpayer claimed that it was entitled to an exemption from land tax as the dominant use of the land was for primary production, namely the maintenance of cattle, pursuant to s.10AA(3) of the *Land Tax Management Act 1956* (the Act). The Chief Commissioner argued that the dominant use of the land was commercial land development. In the alternative, the Chief Commissioner argued that the dominant use of certain lots of the subject land was for residential rental use.

On 31 March 2016, the Court handed down his decision. The Court held that, while 'use' in the Act was not necessarily confined to a physical use, it must be a current use and not acts taken, or benefits derived, in respect of a future intended use.

The Court:

- found that holding the subject land as part of its stock in trade or land bank was not a 'current' use of the land, and that work done, and expenses incurred, by consultants as part of Metricon's commercial land development, being the residential subdivision, were only a use of the land insofar as the land was physically used in carrying out those activities to obtain the requisite development approvals
- found that, in respect of the land at Terranora, the dominant use of that land was as a residential rental property for the 2009 land tax year
- was otherwise satisfied that the dominant use of the subject land for the relevant tax years was for primary production and set aside the assessments in this regard.

The Chief Commissioner appealed the decision to the Court of Appeal. Metricon lodged a Notice of Contention in the Court of Appeal, arguing that His Honour erred in finding that 'use' in s.10AA was not confined to physical use.

Decision

While the authorities support the notion that land may be used without physical activity, this presents a difficulty when trying to compare uses, as required when determining which is the dominant use of land, as there is no meaningful method of comparative quantification. Accordingly, His Honour found that the concept of 'use' in section 10AA is one of physical deployment of 'the concrete physical mass' that is land in pursuance of a particular purpose of obtaining present benefit or advantage from it, which may also include the deliberate maintenance of a state of inactivity for a specific purpose.

In this regard His Honour considered that the view of Justice White at first instance that use is not confined to physical use of the land should not be accepted. In respect of 'land banking' this of itself is not a use of the land, as mere holding with intention to sell at a future point is not the source of a present benefit or advantage. In respect of the engagement of and expenditure on consultants, His Honour found that there was no deployment of the land in pursuance of a purpose obtaining present benefit and advantage.

The Court dismissed the appeal and ordered the taxpayer pay the Chief Comissioner's costs.

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58995054e4b058596cba3cde.

Spedding Estates Pty Ltd v Chief Commissioner of State Revenue **[2017] NSWCATAD 117**

Decision 13 April 2017

Summary

The taxpayer, Spedding Estates Pty Ltd, sought a review of the Chief Commissioner's land tax assessments for the 2013 and 2014 land tax years for two contiguous lots of land situated in Carool in NSW. The taxpayer claimed that the subject land was exempt as primary production land.

Background

The taxpayer utilised the subject land, comprising 26.66 hectares, to carry on a multifaceted business with three main focuses: primary production, short term accommodation and a restaurant. A substantial feature of the business on the property involved its use as a location for wedding ceremonies, receptions and associated purposes. The taxpayer also grew a variety of crops including olives, grapes, nuts, citrus fruits and many others. The main use to which the produce of the cultivation was put accorded to the 'paddock to plate' philosophy (i.e. that produce is not produced for sale to third parties, but to enhance the service provided by the restaurant).

The main issue for determination was whether, during the relevant years, the dominant use of the land was for primary production, i.e. for 'cultivation, for the purpose of selling the produce of the cultivation' and therefore exempt from land tax under s.10AA(3) of the *Land Tax Management Act 1956* (the Act).

Decision

The NSW Civil Administrative Tribunal determined that the dominant use of the land was not primary production for the following reasons:

1. The majority of produce grown was not sold to third parties but 'internally transferred' to the taxpayer's restaurant and therefore did not meet the requirement of 'sale'.
2. The sale of produce that had been transformed into a constituent part of a restaurant meal does not constitute 'sale of product' but sale of a 'secondary product' and does not satisfy the s.10AA(3)(a) test.
3. The dominant use of the land was found to be for the wedding venue business when the area used for that purpose was compared with the area of land used for crops.

Accordingly, the Tribunal affirmed the decision of the Chief Commissioner.

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58ec8e97e4b0e71e17f58ac7.

For the 2017/18 financial year, the NSW threshold deduction is $750,000 and the tax rate is 5.45 per cent.

What's new for the 2017–18 financial year

Jobs Action Plan rebate – Legislative amendment effective from 31 July 2016

New jobs commencing on or after 31 July 2016 will only be eligible for the rebate if the employer's full time equivalent employee number (FTE), prior to the new job, is 50 or below.

The total rebate amount per new job has increased to $6,000. New jobs commencing on or after 31 July 2016 will receive a rebate of $2,000 payable on the first anniversary and $4,000 on the second anniversary.

To be eligible for the scheme you must be registered as an employer and paying payroll tax in NSW. From 23 November 2015, late registrations for the Jobs Action Plan will only be accepted, without justification, if made within 90 days of the commencement of the new position.

To calculate your number of FTE employees use the following formula:

FTE = F + A/B

Where:

FTE = Full time equivalent

F = number of NSW full time employees on the relevant date

A = total number of hours worked in the preceding pay period by all NSW part time and casual employees employed on the relevant date

B = average number of hours worked in the preceding pay period by all NSW full time employees employed on the relevant date.

To calculate the number of FTE employees:

- for registration – on the date of commencement of the new employee, exclude that employee from the FTE calculation
- for anniversaries – on the first and second anniversaries of the new employee commencing the job, include that employee in the FTE calculation.

FBT gross-up rate Type 2

From April 2017 Type 2 gross-up rate decreased from 1.9608 to 1.8868.

OSR will accept the use of the lower rate (1.8868) when employers reconcile their payroll tax annual return for the 2017 financial year. This means that you may use the Type 2 gross-up rate of 1.8868 instead of 1.9608 and make the adjustments in your 2017 annual reconciliation.

For monthly payroll tax lodgers, the 1.8868 rate is to be used as your basis for calculating your monthly estimate under the Alternative/Estimated method described in Revenue Ruling PTA 003v2 for July to May of the 2017/18 financial year.

Motor vehicle allowance exempt component

The exempt component of the allowance is 66c/km during 2016–17.

Common payroll tax errors

To help you comply with the payroll tax provisions, here is a list of errors that are commonly made on payroll tax returns.

- 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 gross-up rate when calculating the taxable amount results in an overstatement of liability. Only use Type 2 gross-up rate 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 Industry. 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.

Recent court cases

The National Institute of Dramatic Art v Chief Commissioner of State Revenue [2016] NSWSC 1471

Decision 17 October 2016

Issues

- Whether the National Institute of Dramatic Art (NIDA) was predominantly a non profit organisation and not a school or college within the meaning of 12(1)(c) Schedule 2

Background

There was no doubting that NIDA had non profit status, and had a charitable purpose the question was whether their school-type activities predominated. NIDA argued these school-type activities were only part of a range of other activities.

NIDA argued that its wages were exempt wages for the purposes of the *Payroll Tax Act 2007* and sought a refund of $2,540,040.

The Chief Commissioner argued that NIDA was a school or college because all or most of its activities were ancillary to the conduct of a drama school. The Chief Commissioner argued that the meaning of 'school' is broad and that an institution where people, whether young, adolescent or adult, are instructed in some area of knowledge or activity is a school. In addition, the Chief Commissioner highlighted that it was not sufficient that the employees' work advance the charitable purpose of NIDA. The work itself must be charitable work, or have an intrinsically charitable character.

Decision

The NSW Supreme Court found that NIDA conducts a school through its undergraduate and graduate programs and its Vocational and Education Training Programs, and in parts of its Open Program. It then concluded that the Chief Commissioner correctly refused NIDA's application for an exemption from payroll tax from 1 July 2009 and for a refund of payroll tax paid because NIDA was a school or college. The wages paid or payable by it were therefore not exempt wages.

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58007554e4b058596cba07aa.

UNSW Global Pty Ltd v Chief Commissioner of State Revenue (2016) NSWSC 1852

Decision 21 December 2016

Issues

- Employment agency provisions
- Contracting provisions

Background

UNSW Global Pty Ltd (UNSW Global) is wholly owned by the University of New South Wales (UNSW). UNSW Global's business unit (Unisearch) arranged for the provision of expert consultants in various fields and its first service line was the Expert Opinion Services (EOS). UNSW Global maintained a database of experts comprising academics employed by UNSW and experts external to the university. There was no dispute that the experts retained by the applicant were independent contractors. The case concerned the reach of the employment agency contract provisions of the Payroll Tax Act 1971 (NSW) (s 3C), and the *Payroll Tax Act 2007* (NSW) (ss 37-42). On 7 May 2013, the Chief Commissioner issued a payroll tax assessment notice to the applicant for the periods from 1 June 2007 to 30 June 2012. The Chief Commissioner argued that Unisearch was an employment agent under an employment agency contract (s 3C(1)) and was taken to be an employer of the consultants whose services were procured for its clients (s 3C(2)(a)). The consultants were taken to be its employees (s 3C(2)(b)) and the amounts paid or payable to the consultants were taken to be wages paid or payable by it (s 3C(2)(c)).

The applicant submitted that its contracts were outside the employment agency contract provisions because properly construed, those provisions do not apply where the service provider is in substance an independent contractor.

Decision

The NSW Supreme Court held that:

- services provided for a client's benefit but not provided by a service provider working in a client's business are not intended to fall within the scope of the employment agency contract provisions
- work done by the experts retained by the applicant was not done in the conduct of a client's business

and therefore set aside the payroll tax assessment notice.

The Court found that where the services of the individual were provided through the employment agent to help the client conduct its business in the same way as it would do through an employee, then the arrangement was within the scope of the employment agency contract provisions.

The Court found that the agency provisions should be construed:

(a) so as not to apply to all arrangements that could fall within their literal terms

(b) in accordance with the legislative intent as ascertained from the statutory context

(c) in juxtaposition of the employment agency contract provisions with the relevant contract provisions

(d) in line with the legislative history and the extrinsic materials.

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58572a60e4b058596cba2d8c.

Corrosion Control Engineering (NSW) Pty Ltd v Chief Commissioner of State Revenue **[2017] NSWCATAD 20**

Decision 16 January 2017

Issues

- Grouping exclusion

Background

The applicant is a member of the Corrosion Control Engineering group of companies. It operates in New South Wales, Victoria, Queensland and Western Australia supplying products and cathodic protection services to other group members and to the public. The applicant was grouped with the other members of the Corrosion Control Engineering group of companies for the 2010 to 2013 financial years.

This matter concerned the review of a decision of the Chief Commissioner to not exercise discretion under section 79 of the *Payroll Tax Act 2007* to exclude Corrosion Control Engineering from a group of three other companies for the 2010 to 2013 financial years for the purposes of payroll tax. The other companies were Corrosion Control Engineering (VIC) Pty Ltd, Corrosion Control Engineering (QLD) Pty Ltd and Corrosion Control Engineering (WA) Pty Ltd.

The NSW Civil Administrative Tribunal Appeal Division had to:

- place itself in the position of the Chief Commissioner and decide whether it could and should exercise its discretion to exclude the tax payer from the group under section 79
- determine whether the Chief Commissioner should have viewed the applicant as carrying on its business independently of, and not in connection with, businesses carried on by the other group members.

The applicant argued that it should be de-grouped on the basis that its business was carried on independently of, and was not connected with, the businesses carried on by the other group members.

Decision

The Tribunal ruled that having regard to the:

- nature and degree of ownership and control of the businesses
- nature of the businesses and the other relevant matters

it was not convinced that in each tax year, the business carried on by the applicant was carried on independently of the business carried on by each of the other companies and that there was no relevant connection between the carrying on of those businesses.

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58758550e4b058596cba343f.

***Urmar Pty Ltd ATF Ross Burton Family Trust v Chief Commissioner of State Revenue* [2017] NSWCATAD 54**

Decision 15 February 2017

Issues

- Grouping exclusion
- Section 46 notice to third party

Background

The applicant was Urmar Pty Ltd ATF Ross Burton Family Trust (Urmar). The issue was whether to exclude the Urmar from the payroll tax group comprising Urmar, and trucking companies NJW Contractors Pty Ltd (NJW) and Ross Burton Transport Pty Ltd (RBT) for the relevant period from 1 July 2006 to 30 September 2011.

The crucial question revolved around whether the business carried on by the applicant was carried on 'substantially independently of, and not substantially connected with', the businesses carried on by the other companies.

The secondary question was about the legitimacy of issuing a section 46 notice for the recovery of outstanding tax to the applicant's bank.

The applicant argued that its business was:

- carried on independently of the other grouped businesses during the relevant period
- not financially dependent on the other businesses
- one of a property owner, whereas the nature of the other businesses was the business of transport
- not unduly influenced by the actions of the director in control of the other businesses
- unfairly treated when the Chief Commissioner had issued the section 46 notice to its bank, because it had failed to comply with statutory requirement and provide prior to the issue of the section 46 notice, relevant documents to the applicant.

Decision

The NSW Civil Administrative Tribunal Appeal Division found that the applicant had:

- not discharged the onus of proving the parties should be de-grouped for payroll tax purposes
- engaged in the business of property ownership as per the evidence provided
- strong interdependent financial arrangements between the relevant grouped members which involved significant indebtedness with NJW
- financial connections between certain group members
- income in the relevant period derived from payments from interest and loan repayments from NJW one of the grouped companies
- allowed NJW free parking for its vehicles, workspace for its employees and a vehicle workshop for its vehicle fleet
- been mistaken in thinking that the Chief Commissioner had failed to comply with a statutory requirement, when it issued the section 46 notice.

The Tribunal confirmed the decision of the Chief Commissioner not to exclude the applicant from the payroll tax group comprising the applicant, NJW and RBT for the relevant period.

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58a24c1fe4b058596cba3f85.

***Advance Pallets Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWCATAD 128**

Decision 26 April 2017

Issues

- Penalty tax and interest

Background

The applicant, Advance Pallets Pty Ltd, submitted that the tax default occurred because of circumstances beyond its control, being an undiagnosed brain tumour suffered by the dominant director, Mr Attard. Mr and Mrs Attard were the two shareholder/directors of Advance Pallets. Mr Attard was unable to fulfil his responsibilities as a director.

Decision

The NSW Civil Administrative Tribunal Appeal Division confirmed the decision of the Chief Commissioner to include market rate interest and 20 per cent penalty tax in payroll tax assessments issued to the applicant for the financial years ended 30 June 2011 and 30 June 2013.

The Tribunal found that:

- Where an applicant is a body corporate with two or more directors and the more dominant director is unable to perform his usual functions, it does not follow that the applicant's failure to meet its taxation obligations is a result of circumstances beyond its control. To accept a proposition along these lines blurs the legal distinction between the applicant company (as a legal person) and its directors and managers. The applicant has a management structure, and the fact that one individual participant in the management structure is unable to perform his duties as effectively as he or the applicant might wish does not alter the facts that the company continues to have both certain legal obligations, as well as a management structure through which its obligations can be met.
- Whilst Mr Attard was ill, the applicant chose to put in place a contract management arrangement to allow it to meet its production and sale obligations. At the same time, it could have (but failed to) establish temporary arrangements in relation to its payroll tax obligations.
- The applicant had another shareholder/director, Mrs Attard. This distinguished the current matter from Commissioner of ACT Revenue v G Kalsbeek Pty Ltd [2015] ACAT 90 where the Tribunal accepted that the serious illness of the sole shareholder/director of the applicant was a circumstance sufficient to justify the remission of penalty tax.

For more information, refer to the case law at https://www.caselaw.nsw.gov.au/decision/58fd793ee4b0e71e17f58f84.

Small Business Grant

The Small Business Grant (SBG) is designed to encourage small businesses in NSW, that do not pay payroll tax, to hire new employees and expand their business. The SBG applies to new jobs created on or after 1 July 2015 and will continue until 30 June 2019.

The SBG is a one-off payment and is paid when a claim is made on the 12 month anniversary of the hire of a new employee. For full time employees, the amount of the SBG is $2,000. In the case of a part time or casual employee, the amount of the SBG will be prorated based on the number of hours worked compared to the standard hours of that particular employer's full time employees.

Businesses cannot claim both the $2,000 SBG and the $6,000 Payroll Tax Jobs Action Plan rebate.

To obtain the SBG, employers should initially register a new employee with OSR within 60 days after the employee commences work. An employer who satisfies the eligibility criteria can apply for payment of the SBG within 60 days after the first anniversary of the date on which the employment commenced.

To be eligible for the SBG, a business must:

- have an active ABN
- during the 12 month employing period of a new person, not have a payroll tax liability as at 30 June of that financial year.

The eligibility criteria for the SBG have been designed to ensure employers increase the number of employees for at least 12 months. Employment is eligible employment if:

- the employer is an eligible small business
- the person is employed in a position that is a new job
- the employment commences between 1 July 2015 and 30 June 2019
- the services of the employee are performed wholly or mainly in NSW.

A business can register for the SBG via an online application at www.osr.nsw.gov.au.

Transferring Small Business Grant application to Jobs Action Plan Rebate application

OSR is aware of situations where a customer may have been eligible for the Small Business Grant (SBG), however before the first anniversary of the commencement of the job, the customer becomes liable for payroll tax. This means the customer is no longer eligible for the SBG and may also not be eligible for the Jobs Action Plan rebate (JAP) because they did not register that new job for the JAP within the 90 days of commencement (as required by Revenue Ruling JAP 001).

In keeping with the policy intent of the SBG and JAP, OSR will accept applications for the JAP in situations as described above, provided all other eligibility criteria for the SBG and JAP are met, for example an increase in FTE. The customer will also have to register for payroll tax when they become liable or before the first anniversary of the new employee commencing.

Example of customer no longer being eligible for the SBG

Mary started work with ABC Pty Ltd in August 2016. At that time ABC Pty Ltd was not liable to pay payroll tax. ABC Pty Ltd registered the new employee under the SBG scheme. In May 2017 ABC Pty Ltd became liable for payroll tax. The following month they registered and began paying payroll tax. In August 2017 ABC Pty Ltd's claim for the SBG was rejected because they were now liable for payroll tax. ABC Pty Ltd's FTE increased and they met all other eligibility criteria for the SBG and JAP. Their registration will be transferred to the JAP and they may be eligible for the JAP rebates.

If you think this scenario applies to you, please contact us by email at business.grants@osr.nsw.gov.au.

For more information go to:

www.osr.nsw.gov.au

/nswosr

@ client.education@osr.nsw.gov.au