

COMMISSIONER'S GUIDELINE

CG-SD-012:

Conveyances - exemption for distributions in specie on the winding up of a company

Guideline History

Version	Issued	Dates of effect	
		From:	To:
1	28 August 2007	28 August 2007	31 December 2007

Purpose

This Guideline explains the requirements and factors considered by the Territory Revenue Office (TRO) in administering the exemption for a transfer of property in specie to a shareholder on the winding up of a company.

Background

Item 9 of Schedule 2 to the *Stamp Duty Act (SDA)* provides an exemption from stamp duty for a transfer during the winding up of a company of its property (both real and personal) to a shareholder of the company where:

1. the shareholder is entitled to the property on a distribution in specie; and
2. the transfer is not a tax avoidance scheme or part of a tax avoidance scheme.

This exemption recognises that the shareholders of the company generally have a claim on the assets of a company in proportion to their shareholding. The requirement that the transfer not be a tax avoidance scheme or part of a tax avoidance scheme recognises that there is a potential for the exemption to be utilised to effect transfers of dutiable property from the company to other persons in circumstances that would have been a dutiable transaction such as by sale and purchase.

This is particularly the case where the person to whom the property is distributed was not a shareholder at the time that the company originally acquired the dutiable property, or where prior to the winding up, arrangements have been made to entitle that person to the distribution of the property when that entitlement did not previously exist.

Entitlement of shareholders to a distribution in specie

Under the *Corporations Act*, the property of a company on its winding up must firstly be applied in satisfaction of the company's liabilities and, subject to that application, must, unless the company's constitution provides otherwise, be distributed among the shareholders according to their rights and interests in the company.

That is, a shareholder is only entitled to a distribution of surplus assets to the value of their interest in the company after all liabilities have been satisfied.

Tax avoidance scheme

A tax avoidance scheme includes a scheme¹ that, in the opinion of the Commissioner of Taxes, has or is intended to have a collateral purpose of reducing stamp duty otherwise payable or obtaining the benefit of an exemption from stamp duty.²

A collateral purpose is, at most, a purpose parallel to or additional to some other purpose and may mean no more than a subordinate purpose.³ The courts have deemed that it may be sufficient to identify a matter as one purpose of the whole scheme.⁴

In determining an opinion as to whether a scheme is a tax avoidance scheme, the Commissioner may have regard to any matter that the Commissioner thinks is relevant.⁵ Accordingly, the Commissioner has a discretion as to the selection and weighting of any factors that the Commissioner considers relevant, including both objective and subjective criteria.⁶

The conclusion which has to be drawn about the purpose(s) of a scheme is to be decided by reference to the way the scheme is structured and not a conclusion as to the scheme itself. That is, it is a conclusion not as to why the scheme itself is entered into, but why a scheme on the particular terms and conditions is entered into.⁷

General factors considered by TRO

Generally, in determining whether a scheme is a tax avoidance scheme the following matters will be considered.

1. The manner in which the scheme was entered into or carried out.
2. The form and substance of the scheme.
3. The time at which the scheme was entered into and the length of the period during which the scheme was carried out.
4. The result in relation to the operation of the *Taxation (Administration) Act* (TAA) and/or SDA that, but for section 4B of the TAA, would be achieved by the scheme.
5. Any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme.
6. Any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme.
7. Any other consequence for the relevant taxpayer, or for any person referred to in point 6, of the scheme having been entered into or carried out.
8. The nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in point 6.

¹ Section 4B(1) of the *Taxation (Administration) Act*.

² Section 4B(2) of the *Taxation (Administration) Act*.

³ *Stardawn Investments Pty Ltd v Comptroller of Stamps (Vic)* 84 ATC 4097; *David Securities Pty Limited and Ors v Commonwealth Bank of Australia* 92 ATC 4658; *Commissioner of State Revenue (Vic) v Purdale Holdings Pty Ltd* 2003 ATC 4847.

⁴ *Commissioner of State Revenue (Vic) v Purdale Holdings Pty Ltd* 2003 ATC 4,847.

⁵ Section 4B(3) of the *Taxation (Administration) Act*.

⁶ *Commissioner of State Revenue (Vic) v Purdale Holdings Pty Ltd* 2003 ATC 4847.

⁷ *Macquarie Finance Limited v Commissioner of Taxation* [2004] FCA 1170.

For example, in relation to the manner, form and substance of the scheme, if a distribution in specie is the end result of a series of steps to minimise the duty outcome, when the transaction could have been effected with the same commercial result through a direct transfer of the property, it is more likely that TRO will consider that the distribution is part of a tax avoidance scheme.

Specific factors considered in relation to the winding up of a company

In relation to whether a conveyance during the winding up of a company is or is part of a tax avoidance scheme, TRO will also have regard to a number of factors including but not limited to the following.

1. The nature of the winding up.

Where the winding up of the company is an involuntary liquidation initiated by an unrelated creditor, it is more likely that TRO will consider that the transfer is not or is not part of a tax avoidance scheme. Where the winding up is a voluntary liquidation, TRO will give careful consideration to objective and subjective purposes of the liquidation.

2. The duration of the shareholder's shareholding in the company.

TRO will consider the length of time that the shareholder to whom the dutiable property is transferred has held all of their shares in the company. The longer the period, the more likely it is that TRO would consider that the transfer is not or is not part of a tax avoidance scheme. Conversely, where the duration of the shareholding was brief or if there was a recent significant increase in the number of shares held by a long-term shareholder (for example, to ensure that the shareholding was sufficient to qualify for the distribution in specie) it is more likely that TRO will consider the transfer is or is part of a tax avoidance scheme.

TRO will also consider:

- whether the shareholder to whom the dutiable property is transferred was a shareholder of the company at the time that the property was acquired by the company; or
- if the property is land, whether the shareholder to whom the land is transferred paid ad valorem 'land holder' duty in relation to that land when the shareholder acquired their shareholding in the company.⁸

Either of these situations would be factors that would suggest to TRO that the transfer is not or is not part of a tax avoidance scheme.

3. The class of shares the shareholder has held in the company and the rights of each class of shares, including any creation or variation of rights.

TRO will examine the rights attached to the shares held by the shareholder to whom the property is transferred, particularly when there are classes of shares with different rights to property. Where the rights were varied to enable a shareholder to receive assets or a particular asset of the company to the exclusion of other shareholders, it is more likely that TRO will consider the transfer is or is part of a tax avoidance scheme.

4. Whether there is any commercial efficacy to an arrangement or scheme of transactions involving the company, the shareholder, companies related to the company or shareholder in relation to the winding up other than to reduce the duty otherwise payable on the transfer.

⁸ Part III, Division 8A of the *Taxation (Administration) Act*.

TRO will consider the reasons for and any commercial efficacy of the winding up and transfer of dutiable property to the shareholder and any transactions that precede the winding up, such as any arrangement for the shareholder or an associated person to discharge, release or structure the liabilities of the company in order to enable the property to be distributed to the shareholder exempt from stamp duty.

Application of the exemption

If TRO is satisfied the transfer is not a tax avoidance scheme or part of a tax avoidance scheme and the value of the dutiable property transferred to the shareholder does not exceed the value of the shareholder's interest in the surplus assets of the company, the transfer will be exempt under item 9 of Schedule 2 to the SDA. If the exemption does not apply, conveyance duty will be imposed based on the unencumbered value on the property at the date of the transfer.

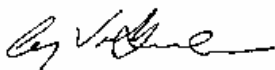
Lodgement requirements

Section 5.2.3 of the Stamp Duty Lodgement Guide (I-SD-001) details the information required by TRO to determine whether the exemption applies. This includes a submission detailing the reasons why TRO should not regard the transfer to be a tax avoidance scheme or part of a tax avoidance scheme. The Guide can be obtained from TRO's website (www.revenue.nt.gov.au) or by contacting TRO directly on the contact details provided below.

Commissioner's Guideline CG-GEN-001, which sets out information on the revenue publication system, is incorporated into and is to be read as one with this Guideline.

Date of effect

This Guideline takes effect from the date of issue.



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COMMISSIONER OF TAXES

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