Government of **Western Australia**
Department of **Finance**
Office of State Revenue

COMMISSIONER'S PRACTICE
DA 21.0

Superseded

DUTIES - REVOCATION OF DUTY EXEMPTIONS GRANTED FOR TRANSACTIONS BETWEEN CONNECTED ENTITIES

This Commissioner's practice details the circumstances under which the Commissioner may revoke an exemption granted under Chapter 6 of the *Duties Act 2008* ("Duties Act").

Background

Section 257(2) of the Duties Act provides that if a corporation or unit trustee directly or indirectly (a) holds at least 90% of the securities of another entity, and (b) controls at least 90% of the maximum number of votes that may be cast at a general meeting of that other entity, then the corporation or unit trustee is the parent of the other entity and the other entity is the subsidiary of the parent.

Section 258 of the Duties Act defines the term "family". A parent entity and its subsidiaries are members of a family. Section 258 also clarifies that if all of the securities of an entity are stapled to the securities of one or more other entities, all of the entities and their subsidiaries are members of a family.

Where an application for exemption is made pursuant to section 262 of the Duties Act and pursuant to section 263 of the Duties Act it is shown to the satisfaction of the Commissioner that:

(a) there has been a relevant transaction; or

(b) a relevant reconstruction transaction referred to in section 260(1)(b) will occur,

the Commissioner must exempt the transaction from the duty that would otherwise be chargeable unless section 263(4) of the Duties Act applies.

Under section 265 of the Duties Act, the Commissioner may revoke an exemption that has been granted in relation to an exempt relevant transaction, if he determines that the transaction is part of a scheme or arrangement entered into, or carried out, by a person for a purpose of avoiding or reducing duty on a dutiable transaction, transfer of a vehicle licence, or relevant acquisition in a landholder.

However, it should be noted that the exempt relevant transaction need not in itself be the transaction with respect to which duty is avoided or reduced in order for the Commissioner to revoke the exemption.

Section 265 of the Duties Act also provides that the Commissioner may revoke an exemption if he determines that the transaction is part of a scheme or arrangement entered into, or carried out, by a person for the sole or dominant purpose of avoiding tax other than duty. This includes taxes such as land tax and pay-roll tax.

Under section 261 of the Duties Act, a person proposing to enter into a relevant transaction may ask the Commissioner to decide whether, if the transaction were entered into and exempted, the Commissioner, under section 265 of the Duties Act, would revoke the exemption. In addition, a person proposing to enter into a transaction may ask the Commissioner to decide whether, if the transaction were entered into, the Commissioner, under section 265 of the Duties Act, would revoke the exemption granted for a relevant transaction.

Section 264 of the Duties Act provides that the Commissioner must be notified of certain events if they occur within three (3) years after the date of an exempt relevant transaction.

A notifiable event occurs in relation to a relevant transaction if:

(a) the controlling entity is wound up and does not have a major holder when the winding up begins; or

(b) the controlling entity or, if the controlling entity is wound up and has a major holder when the winding up begins, the major holder, ceases to directly or indirectly:

   i. hold more than 50% of the securities of a member of the transaction group; or

   ii. control (either by being able to cast or to control the casting of) more than 50% of the maximum number of votes that may be cast at a general meeting of a member of the transaction group;

   or

(c) in a case where entities are members of a family because of section 258(2) of the Duties Act - securities of the first entity mentioned in the section cease to be stapled to the securities of another of the entities.

However, pursuant to section 264(3) of the Duties Act, a cessation referred to in (b) above is not a notifiable event if it results from:

(a) the winding up of a member of the transaction group, other than the controlling entity; or

(b) a relevant transaction that is the subject of an application made under section 262 of the Duties Act for an exemption; or

(c) an acquisition that is the subject of:

i. an application made under section 180 of the Duties Act; or

ii. a statement lodged under section 200 of the Duties Act;

or

(d) a prescribed event.

Commissioner's Practice

When it is unlikely that the Commissioner would revoke an exemption

1. Circumstances where it is unlikely that the Commissioner would revoke an exemption include:

   1.1 Where duty on a subsequent transaction has been paid, unless the duty is less than it should otherwise have been; or

   1.2 Where a member of a family is divested through a public float or demerger, or a similar purpose which results in the entity becoming widely held upon ceasing to be a member of the family.

When the Commissioner may revoke an exemption

2. Circumstances where the Commissioner may revoke an exemption include, but are not limited to:

   2.1 By way of example, where a company owns parcels of land, each with a value of less than $2 million, but a total value greater than $2 million, and another company wishes to acquire that land. A direct acquisition of the land, or an acquisition of the shares in the landholder company, would both be subject to duty. Instead, the landholder company creates subsidiaries and transfers a parcel of land to each subsidiary, utilising the exemption granted under section 263 of the Duties Act. The shares in the subsidiaries, which are themselves not landholders, are then transferred to the transferee company with no duty being chargeable; or

   2.1 Where the Commissioner determines that the sole or dominant purpose of a relevant transaction was to avoid land tax, where land holdings are transferred to one or more members of a family, so as to minimise the associated land tax liability and there are no operational efficiencies to be achieved by the restructure.

Factors the Commissioner may have regard to in making a determination

1. A determination by the Commissioner as to whether or not to revoke an exemption will be based on the facts and circumstances of each particular transaction. Factors the Commissioner may have regard to in making a determination include:

   3.1 Whether any part of the consideration for a relevant transaction has been or will be provided or received, directly or indirectly, by a person that is not a member of the family;

3.2 Whether a member of a family is to be enabled to provide or dispose of any of the consideration by a person other than a financial institution by way of a loan on ordinary commercial terms or a family member;

3.3 Whether the apparent transferee holds the property on trust for another person;

3.4 Whether multiple transactions, one or more of which is exempt, are used in order to obtain a particular outcome, when that outcome could have been achieved with fewer or a single transaction for which an exemption is not available, and there was no commercial efficacy to the multi-step process;

3.5 The duration of the shareholdings of any of the members of the family;

3.6 The period for which the property the subject of the relevant transaction has been owned by a family member;

3.7 Whether there is any commercial efficacy to the relevant transaction, other than to avoid or reduce the duty that would otherwise be payable; or

3.8 Any other matters the Commissioner considers relevant.

Date of Effect

This Commissioner's practice takes effect from 1 July 2008.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

1 May 2009

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
DA 21.0	1 May 2009	1 July 2008	15 December 2016