COMMISSIONER'S PRACTICE

SUPERSEDED DA 21.1

DUTIES – REVOCATION OF CONNECTED ENTITIES EXEMPTION

This Commissioner's practice provides guidance on when the Commissioner may revoke a connected entities exemption that was granted under Chapter 6 of the *Duties Act 2008* ('Duties Act').

Background

Exempt Transactions

Chapter 6 of the Duties Act provides an exemption from duty for certain transactions between related corporations and unit trust schemes that are members of a *family*.[1] Section 258 of the Duties Act provides that members of a family are:

- a parent entity and its subsidiaries; and
- if all securities of an entity are stapled to the securities of one or more other entities, all of the entities and their subsidiaries.

For the purposes of this exemption, if:

- a corporation or unit trustee directly or indirectly holds at least 90 per cent of the securities of another entity; and
- controls at least 90 per cent 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.[2]

The connected entities exemption applies to a *relevant transaction* between members of a family. Under section 257(1) of the Duties Act, a *relevant transaction* is:

- a *relevant consolidation transaction* – the formation of a family by inserting a head entity between an entity and the shareholders or unit holders of that entity;[3] or
- a *relevant reconstruction transaction* – certain dutiable transactions or the acquisition of an interest in a landholder between members of a family.[4]

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1 For further information, refer to Fact Sheet 'Duty Exemption – Entity Restructuring'.

2 Duties Act s 257(2).

3 Duties Act s 259.

4 Duties Act s 260.

Revocation of Exemption

Under section 265 of the Duties Act, the Commissioner may revoke the connected entities exemption granted for a relevant transaction if the Commissioner determines 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 transaction, transfer of licence, or acquisition; or
- for the sole or dominant purpose of avoiding or reducing *tax*[5] other than duty.

The exempt relevant transaction does not need to be the transaction on which duty is avoided or reduced.

On revoking a connected entities exemption under section 265 of the Duties Act, the Commissioner will issue an assessment for the transaction including penalty tax equal to the amount of duty on the transaction.[6]

Notifiable Events

Under section 264 of the Duties Act, the Commissioner must be notified[7] of certain events (a *notifiable event*) involving the *transaction group* if they occur within three years after the date of an exempt relevant transaction.[8] For the purposes of a notifiable event, the *transaction group* means: [9]

- for a relevant consolidation transaction – the head entity and the affected entity;
- for a relevant reconstruction transaction – the family members that are parties to the transaction and any other members of the family necessary to establish the relationship between the parties.[10]

A *notifiable event* occurs in relation to a relevant transaction if:[11]

- the controlling entity is wound up and does not have a major holder when the winding up begins; or
- the controlling entity or the major holder (if the controlling entity is wound up and has a major holder when the winding up begins) ceases to directly or indirectly:
  - (a) hold more than 50 per cent of the securities of a member of the transaction group; or

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5 *Tax* is defined in the Glossary to the *Taxation Administration Act 2003* and includes land tax and payroll tax.

6 Duties Act s 266.

7 The Relevant Consolidation and Reconstruction Transactions – Notice of Notifiable Event form is available on the website at www.osr.wa.gov.au.

8 Duties Act s 264(4).

9 Duties Act s 257(1).

10 This includes all of the intervening entities in a chain of ownership between a parent and its subsidiaries.

11 Duties Act s 264(2).

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

or

- where entities are members of a family because the securities of two or more of the entities are stapled – any of the stapled securities cease to be stapled.

There is no notifiable event if the controlling entity ceases to hold more than 50 percent of the securities or control more than 50 per cent of votes resulting from:[12]

- the winding up of a member of the transaction group other than the controlling entity; or
- a relevant transaction that is the subject of an application for exemption under section 262 of the Duties Act; or
- an acquisition that is the subject of:
  - (a) an application made under section 180 of the Duties Act; or
  - (b) a statement lodged under section 200 of the Duties Act.

Pre-transaction Decision Requests

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 would revoke the exemption under section 265 of the Duties Act; and
- a person proposing to enter into a transaction may ask the Commissioner to decide whether, if the transaction were entered into, the Commissioner would revoke under section 265 of the Duties Act the exemption granted for a previous relevant transaction.

Commissioner's Practice

1. Section 265 of the Duties Act contains a wide discretion, and the Commissioner will consider all facts and circumstances of a matter when deciding whether to revoke a connected entities exemption for an exempt relevant transaction. The following paragraphs provide guidance about the circumstances in which the Commissioner may revoke an exemption.

When an Exemption Will Not Usually be Revoked

2. The Commissioner will not usually revoke an exemption where duty is appropriately paid, or there is no duty liability, on the transaction that triggered the notifiable event. For example, the exemption would not usually be revoked for a relevant transaction where, following the grant of a connected entities exemption for the transfer of property between family members, the transferee is:

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[12] Duties Act s 264(3).

2.1 sold to a third party who pays landholder duty on the value of the land and chattels owned by the transferee;

2.2 divested through a public float or public offering;[13] or

2.3 demerged from the family resulting in the demerged entity being listed on the Australian Stock Exchange ('ASX') or another stock exchange.[14]

Example 1
Gold Company Ltd is a listed company that owns and operates a gold mining business and a uranium mining business and wants to separate the businesses into separate companies for management and investment purposes.
Gold Company transfers all the uranium assets, including mining tenements valued at $10 million, to a newly formed wholly owned subsidiary, Uranium Co Ltd, and is granted a connected entities exemption for the transaction. The transaction results in Uranium Co becoming a landholder because it is entitled to land of more than $2 million.
Gold Company and Uranium Co are members of a family because they are a parent entity and subsidiary entity. Uranium Co is then floated on the ASX, which removes it from the family and means a notifiable event has occurred.
In this case, the acquisition of shares in Uranium Co under the public float would not trigger a landholder liability because no person acquires, or any related persons acquire, more than a 90 per cent interest in the company. This is on the basis the Commissioner would exercise the discretion under section 162 of the Duties Act to treat the acquirers as not related.
The Commissioner would not revoke the connected entities exemption granted for the transfer of the uranium assets between Gold Company and Uranium Co because there was no purpose to avoid or reduce duty on the subsequent removal of the assets from the family.

When an Exemption May Be Revoked

3. A connected entities exemption for a relevant transaction may be revoked when there are reasonable grounds for the Commissioner to reach a determination that there was a scheme or arrangement for:

3.1 a purpose of avoiding or reducing duty on a transaction, transfer of a licence or acquisition; or

3.2 for the sole or dominant purpose of avoiding or reducing other tax, such as land tax.

13 In this case, landholder duty would not generally apply to the public float because either the entity is not entitled to land of $2 million or more or there is no relevant acquisition because the Commissioner exercises the discretion to treat the acquirers as unrelated. For further information refer to Commissioner's Practice DA 2 'Related Persons and Commissioner's Discretion'.

14 As above.

Example 2

WA Business Services Pty Ltd provides a variety of professional support services to businesses in Western Australia. The owners of WA Business Services decide they no longer wish to provide certain services and advertise the sale of those parts of the business for $10 million.

WA Startup Pty Ltd makes an offer of $10 million for the business assets. Alternatively, the company offers to pay $10,200,000 if WA Business Services transfers the business assets to a subsidiary corporation and then transfers shares in the subsidiary to WA Startup, as this will save WA Startup over $500,000 in transfer duty.

WA Business Services accepts the second offer. The company incorporates a subsidiary, transfers the business assets to the subsidiary, and applies for a connected entities exemption for the transfer. In determining whether the exemption would be granted and revoked, the Commissioner obtains correspondence between the parties detailing the negotiations to structure the acquisition of the assets so that WA Startup does not need to pay duty.

As the Commissioner has reasonable grounds to determine there was an arrangement to avoid duty on the sale of business assets, the connected entities exemption for the transfer of business assets would be revoked.

Example 3

Land Co Pty Ltd owns two pieces of land each valued at $1.5 million. Land Co advertises the land for sale, either as a parcel or as individual lots.

Property Co Pty Ltd wants to acquire both lots of land and negotiates with Land Co to restructure the land ownership to facilitate Property Co's acquisition of the land. Land Co creates two subsidiaries and transfers a piece of land to each company. Connected entities exemptions are granted for both of these transactions.

Property Co then agrees to acquire all of the shares in the Land Co subsidiaries. As neither subsidiary owns land valued at $2 million or more, these acquisitions do not trigger landholder duty.

Land Co advises the Commissioner there has been a notifiable event. In determining whether the exemptions should be revoked, the Commissioner obtains evidence that Property Co:

- requested the restructure of the ownership of the land, with no commercial reason identified for the restructure;
- indemnified Land Co for any costs incurred in the restructure, including any duty liability for Land Co should the exemptions be revoked; and
- agreed to pay Land Co one half of the value of the duty saved through the restructure of the land.

As the Commissioner has reasonable grounds to determine there was an arrangement to avoid duty on Property Co's acquisition of the land, the connected entities exemptions granted for the transfers of land would be revoked.

Example 4

Mining Co Ltd operates an iron ore mining business and owns mining tenements valued at $50 million and mining chattels valued at $40 million. Mining Co transfers the mining tenements to a newly created subsidiary, Mining Tenement Co Pty Ltd, and is granted a connected entities exemption for the transaction. Iron Ore Co Ltd subsequently acquires all of the shares in Mining Tenement Co and pays landholder duty on the value of the tenements.

Mining Co Ltd advises the Commissioner there has been a notifiable event. In determining whether the connected entities exemption on the transfer of the mining tenements should be revoked, the Commissioner identifies that simultaneously with the acquisition of all the shares in Mining Tenement Co, Iron Ore Co also acquired the chattels of Mining Co, which did not trigger a duty liability. The Commissioner obtains evidence that Mining Co and Iron Ore Co agreed to structure the acquisition so that Iron Ore Co would pay duty only on $50 million rather than on $90 million.

As the Commissioner has reasonable grounds to determine there was an arrangement to reduce duty on Iron Ore Co's acquisition of the land and chattels of Mining Co, the connected entities exemptions granted for the transfer of the mining tenements would be revoked.

Example 5

Property Trustee Co as trustee for the Property Unit Trust owns several adjoining lots of land that are used for a single housing development project. Land tax is payable on the aggregated values of the lots.

Prior to 30 June, new sub-trusts are created and transfers of land are prepared to transfer one lot to each sub-trust. Property Trustee Co applies for a connected entities exemption for each transfer of land to a sub-trust.

The Commissioner carries out an investigation into the transfers of the properties and obtains evidence that the directors of Property Trustee Co approved the restructure solely for the purpose of reducing the land tax liability for the land. The evidence also identifies that overall administrative costs for the trust would increase as a result of the sub-trusts, but that these costs are far exceeded by the annual savings of tax as a result of land tax being assessed on individual values rather than on the aggregated value of the lots.

In this case, the Commissioner would grant the connected entities exemptions but would revoke them on the basis there are reasonable grounds to determine the transactions were part of an arrangement with a sole or dominant purpose of reducing the land tax liability of the Property Unit Trust.

Deciding Whether to Revoke an Exemption

4. The Commissioner's decision about whether to revoke an exemption will depend on the facts and circumstances of each particular transaction. Factors the Commissioner may have regard to when making a decision include:

   4.1 whether there are any actual or proposed arrangements involving a third party and the nature of these arrangements;

4.2 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 family member;

4.3 whether any member of the family that receives consideration for the transaction uses that consideration to pay another member of the family or to repay a loan;

4.4 whether the apparent transferee holds the property on trust for another person and, if so, who that other person is;

4.5 whether multiple transactions, one or more of which is exempt, are used to achieve a particular outcome that could have been achieved with fewer transactions that would not be exempt;

4.6 how long before the transaction the parties became members of a family and how long after the transaction the parties remain family members;

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

4.8 whether there are any genuine commercial reasons for the relevant transaction, for example, reducing administration and compliance costs; and

4.9 any other matters the Commissioner considers relevant.

Notifiable Events

5. The Commissioner will not automatically revoke a connected entities exemption when a notifiable event has occurred following an exempt relevant transaction.

6. When a notifiable event occurs, the Commissioner will examine the full facts and circumstances of the transaction, including the notifiable event and the factors outlined in paragraph 4, to determine whether it is appropriate to revoke the exemption. The taxpayer will be provided the opportunity to comment on the Commissioner's view that a connected entities exemption should be revoked.

7. Under section 265 of the Duties Act, the Commissioner may revoke the connected entities exemption for a relevant transaction even if there has not been a notifiable event following the transaction.

Date of Effect

This Commissioner's practice takes effect from 16 December 2016.

Nicki Suchenia
COMMISSIONER OF STATE REVENUE

16 December 2016

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
DA 21.1	16 December 2016	16 December 2016	8 October 2019