



## Cancelled Transactions

This Commissioner's practice outlines how duty will be assessed or reassessed under sections 107, 88A or 205Y of the *Duties Act 2008* (Duties Act) when a dutiable transaction is cancelled.

### Background

#### Cancelled transactions

Section 107(1) of the Duties Act defines a *replacement transaction* as another dutiable transaction that:

- is between all of the same parties as the parties to the cancelled transaction and
- is substantially similar in effect to the cancelled transaction and
- in the Commissioner's opinion, is a scheme or arrangement, or part of a scheme or arrangement, for which the sole or dominant purpose of any party is to avoid, reduce or defer the payment of *tax*.

*Tax* means tax or duty payable under a taxation Act, penalty tax payable under a taxation Act, or recoverable valuation costs.<sup>1</sup>

Section 107(1) of the Duties Act defines a *subsale transaction* as another dutiable transaction which results in a beneficial interest in the dutiable property that is the subject of the cancelled transaction being held by:

- a person who is not a party to the cancelled transaction, a result which is contemplated or provided for under the cancelled transaction or
- a person who is not a party to the cancelled transaction, a result which is substantially similar in effect to the effect of the cancelled transaction or
- another person, as a result of an agreement, arrangement or understanding between a person liable to pay duty on the cancelled transaction and any other party to the transaction (including any other person liable to pay duty on the cancelled transaction).

Section 107(2) of the Duties Act defines a *cancelled transaction* as a dutiable transaction that has not been, and will not be, carried into effect. However, the following transactions are not cancelled transactions:

- a call option of a simultaneous put and call option taken to be an agreement for the transfer of the option property under section 45 of the Duties Act
- an assignment of a call option taken to be an agreement for the transfer of the option property under section 49 of the Duties Act and
- a terms contract (within the meaning given in the *Sale of Land Act 1970*)<sup>2</sup> if the person liable to pay duty on the transaction has obtained exclusive use or control of the dutiable property as

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<sup>1</sup> *Taxation Administration Act 2003* Glossary. A taxation Act includes the Duties Act and *Stamp Act 1921: Taxation Administration Act 2003* s 3.

<sup>2</sup> Under section 5 of the *Sale of Land Act 1970*, a terms contract is an executory contract (i.e. one that has not yet been fully completed or performed) relating to land under which the purchaser is obliged to make two or more payments to the vendor (in addition to any deposit), or is entitled to possession or occupation of the land, before being entitled to a transfer of the land.

provided for in the contract, whether or not the contract is fully carried into effect for any reason.<sup>3</sup>

Section 107(3) of the Duties Act provides that, subject to subsection (4), duty is not chargeable on a cancelled transaction. Under section 107(4), duty is chargeable on a cancelled transaction if the transaction has been cancelled so that a replacement transaction or subsale transaction can be entered into.

Section 107(5) of the Duties Act requires the Commissioner, on the application of a taxpayer, to reassess a dutiable transaction that is not liable to duty because of this section.

Section 107(6) of the Duties Act provides that an application for assessment or reassessment in relation to a cancelled transaction must be made using the approved form.

Under section 17(1) of the *Taxation Administration Act 2003* (TAA), a person is not entitled to apply for a reassessment more than five years after the original assessment was made. However, where the cancelled transaction is an agreement for the transfer of dutiable property that was cancelled on or after 4 September 2012, section 107(7) of the Duties Act provides that, despite section 17(1) of the TAA, a person is not entitled to apply for a reassessment:

- more than five years after the original assessment was made or
- more than 12 months after the day on which the agreement became a cancelled transaction, whichever is the later.

If the taxpayer has overpaid an amount as a result of a reassessment under section 107 of the Duties Act, section 54 of the TAA requires the Commissioner to refund that amount to the taxpayer.

### ***Foreign transfer duty***

Cancelled transactions that are exempt from transfer duty are also exempt from foreign transfer duty under section 205Y of the Duties Act.

### ***General conditional agreements***

Under section 88A(1) of the Duties Act, duty is not chargeable on a general conditional agreement<sup>4</sup> if, after the relevant instrument has been lodged<sup>5</sup> but before duty on the transaction is paid or due to be paid:<sup>6</sup>

- the agreement is terminated on relevant grounds and
- the Commissioner is notified of the termination on the approved form.

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<sup>3</sup> A terms contract must meet the requirements of section 5 of the *Sale of Land Act 1970* and provide the purchaser with the exclusive use or control of the property. Where an agreement for transfer was not a terms contract when it was first executed but was varied to grant the purchaser an entitlement to possession or occupation of the land before being entitled to a transfer of the land, the variation is be deemed to form part of the contract. The agreement is considered to be a terms contract as from the date of the variation.

<sup>4</sup> As defined in sections 9 and 87 of the Duties Act.

<sup>5</sup> Section 23 of the Duties Act requires that an instrument or statement evidencing the dutiable transaction be lodged within 2 months after the day on which liability to duty on the transaction arises.

<sup>6</sup> Section 25 of the Duties Act provides for the time periods within which duty is to be paid.

Section 88A(2) of the Duties Act provides that a general conditional agreement is terminated on relevant grounds if:

- it is not carried into effect because the condition to which it is subject cannot be fulfilled for reasons not within the control of a party to the agreement, or a person that is related<sup>7</sup> to a party to the agreement and
- duty is not chargeable on the agreement under section 107 of the Duties Act because it is a cancelled transaction.

If a general conditional agreement is terminated on relevant grounds before an instrument is required to be lodged under section 23 of the Duties Act, there is no requirement to lodge the instrument as section 19(2) of that Act provides that liability to duty does not arise in respect of the general conditional agreement.

## **Commissioner's Practice**

### ***General***

1. If a dutiable transaction has been cancelled, duty remains payable until the transaction has been assessed or reassessed by the Commissioner.

### ***Application for Assessment or Reassessment under Section 107***

2. An application for the assessment or reassessment of a cancelled transaction must be made using [Form FDA1 'Exemption for Cancelled Transactions'](#)<sup>8</sup> (application) and be accompanied by all relevant transaction record(s) unless these are already with the Commissioner.
  - 2.1 If a dutiable transaction is cancelled after duty has been assessed and paid, all original duty endorsed transaction records must accompany the application.
  - 2.2 The person liable to pay duty on the transaction, or another person with the authority to act as their agent, must sign the application.
3. If the dutiable transaction was self-assessed in Revenue Online, the lodging party may apply to have the assessment cancelled using the completed application and 'Cancelled Transactions under section 107' function in Revenue Online.
4. If the cancellation of a dutiable transaction is under dispute, for example the termination of an agreement for transfer is subject to legal proceedings, an application under section 107 of the Duties Act cannot be assessed until the Commissioner is notified about the outcome of the dispute.
5. A transaction that is cancelled within two months of the date of liability is still required to be lodged for assessment, unless the transaction was terminated on relevant grounds. The transaction record must be provided together with an application.

### ***Replacement and subsale transactions***

6. The Commissioner will consider the facts and circumstances of each cancelled transaction when determining whether the transaction was cancelled so that a replacement or subsale transaction could be entered into.

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<sup>7</sup> Within the meaning given in section 87(5) of the Duties Act.

<sup>8</sup> Available on the [Duties publications page of the website](#).

#### *Example 1 – Replacement transaction*

After executing an agreement for the transfer of vacant land on 1 June, John becomes aware that transfer duty rates will be reduced from 1 July. The seller agrees to cancel the contract and on 2 July the parties enter into an identical contract for the purchase of the same land.

In these circumstances, the Commissioner would consider the sole or dominant purpose for cancelling the original transaction and entering into the new transaction was to reduce the payment of tax. As such, the new transaction would be a replacement transaction and duty would remain chargeable on the cancelled transaction under section 107(4) of the Duties Act as well as being chargeable on the replacement transaction.

If John was able to provide evidence to show there was another legitimate reason for the original transaction to be cancelled and the new transaction entered into, it is unlikely the Commissioner would consider the new agreement was a replacement transaction and duty would not be chargeable on the original transaction.

#### *Example 2 – Replacement transaction*

Jane enters into an agreement for the transfer of a residential property on 1 January. Settlement of the property is scheduled for 15 September.

On 3 August, Jane makes enquiries about how to pay duty on the agreement. Jane receives advice that late lodgment penalty tax will be applied when she lodges the contract, as it was due to be lodged by 1 March.

Jane and the vendor cancel the first agreement and enter into a new agreement on 10 August so that Jane can lodge the new contract without late lodgment penalty tax being applied.

As the new contract is entered into for the purposes of reducing the penalty tax, it is considered a replacement transaction. Therefore full duty will be charged on both agreements.

#### *Example 3 - Subsale transaction*

Andrew enters into an agreement to purchase an investment property in which he is named as the purchaser. He subsequently decides the property should be an asset of his family trust. He and the vendor execute a variation to the agreement which provides the contract will be terminated and a new agreement will be made between the vendor and the corporate trustee of Andrew's family trust.

In these circumstances, the Commissioner would determine the new agreement is a subsale transaction and duty would remain chargeable on the original transaction in which Andrew was the named purchaser. Duty would also be chargeable on the new transaction in which the company as trustee for Andrew's family trust is the purchaser.

#### *Example 4 - Subsale transaction*

Simon enters into an agreement to purchase an apartment in which he is named as the purchaser. A week later, he and his friend, Amanda, decide they should purchase the apartment together. Simon and Amanda approach the vendor who agrees to terminate the contract on condition that they enter into an otherwise identical agreement as joint purchasers.

#### *Example 5 - Subsale transaction*

Kate enters into an agreement, conditional upon finance, to purchase a house as sole proprietor. The agreement is cancelled after the bank declines her application for finance.

The following day, Kate is advised that another financial institution will approve her application. She enters into a new agreement to purchase the house on the same terms and conditions as the original agreement, subject to obtaining finance from the second financial institution.

In this scenario, the original agreement is terminated on relevant grounds under section 88A of the Duties Act and not chargeable with duty. Duty is chargeable on the new agreement.

#### **General conditional agreements – termination on relevant grounds**

7. If a general conditional agreement is terminated on relevant grounds, the Commissioner must be notified using [Form FDA16 'General Conditional Agreement - Terminated on Relevant Grounds'](#).<sup>9</sup> This form should be accompanied by the original transaction record if it is not already with the Commissioner.
8. If a general conditional agreement was self-assessed in Revenue Online, the lodging party may apply to have the assessment cancelled using the 'Terminated on Relevant Grounds' function.

#### **Terms contracts**

9. If a terms contract is cancelled before the person liable to pay duty obtained exclusive use or control of the property, the application must be accompanied by documentary evidence showing the purchaser did not obtain exclusive use or control of that property before the agreement was cancelled.

#### **Date of Effect**

This Commissioner's practice takes effect from 17 June 2019.

Nicki Godecke  
COMMISSIONER OF STATE REVENUE

17 June 2019

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<sup>9</sup> Available on the [Duties publications page of the website](#).

## Commissioner's Practice history

Document	Issued	Dates of effect	
		From	To
DA 31.0	22 October 2013	22 October 2013	25 February 2016
DA 31.1	26 February 2016	26 February 2016	23 October 2017
DA 31.2	24 October 2017	24 October 2017	31 December 2018
DA 31.3	1 January 2019	1 January 2019	16 June 2019
DA 31.4	17 June 2019	17 June 2019	Current