Australian Capital Territory

Duties (Corporate Reconstruction Guidelines) Determination 2015 (No 1)*

Disallowable instrument DI2015- 316

made under the

***Duties Act 1999*, s 232A (Corporate reconstruction transactions)**

GUIDELINES FOR EXEMPTION UNDER SECTION 232A OF THE *DUTIES ACT 1999*

1. The purpose of section 232A of the *Duties Act 1999* (the Duties Act) is to provide a full duty exemption for certain transactions within a corporate group where the ultimate beneficial ownership of the assets remains unchanged. That is, the assets or corporation owned by a member of the corporate group remain subject to the ownership and control of the corporate parent, either directly, or indirectly by virtue of the parent's ownership and control of the member of the corporate group.

DATE OF COMMENCEMENT

2. These guidelines are taken to have commenced on 25 November 2015.

DEFINITIONS FOR THE PURPOSES OF THESE GUIDELINES

Corporate reconstruction

3. Corporate reconstruction means an "eligible transaction" between "eligible members" of a "corporate group".

Corporate group

4. Corporate group means a corporate parent and subsidiary corporations that are at least 90% beneficially owned, either directly or indirectly, by the parent, and over which the parent or other subsidiaries have voting control. Indirect ownership includes a sub-subsidiary that is at least 90% owned by one or more other subsidiaries of that parent. The parent and subsidiary corporations are regarded, for the purposes of this determination, as members of the corporate group.

5. In section 232A (5) corporation includes a unit trust scheme. A unit trust in which at least 90% of the units are beneficially owned by members of the same corporate group is taken to be a member of the corporate group for the purposes of these guidelines.

6. If the issued shares or units of a corporation are stapled to the issued shares or units of one or more other corporations, and such stapled securities are quoted on a stock exchange, each of those corporations will be treated as if they are subsidiaries of the same parent corporation in determining whether corporations constitute a corporate group. Consequently, each stapled corporation, and any subsidiaries that are at least 90% beneficially owned, either directly or indirectly, by those corporations, will be regarded as members of the same corporate group.

*Name amended under Legislation Act, s 60

Eligible members

7. Members of a corporate group will be eligible members if the relevant corporations and unit trust schemes have been members of the same corporate group for at least 12 months prior to the date of the transaction, or since the date of incorporation (date of establishment of a unit trust scheme) where the corporation or unit trust is less than 12 months old. There are two exceptions to these requirements:

    (a) a company that had not traded before the date it became a member of the corporate group is an eligible member; and

    (b) any member of the corporate group will also be an eligible member in respect of a transaction, to the extent that the transaction relates to dutiable property, the making of a relevant acquisition, or motor vehicles acquired by the corporation or unit trust after the date on which the corporation or unit trust became a member of the corporate group.

Non-eligible member

8. A member of a corporate group is not eligible to the extent that the property the subject of the transaction is or will be held as trustee of a discretionary trust, regardless of whether members of the corporate group are beneficiaries under the discretionary trust.

Discretionary trust

9. A discretionary trust is a trust the terms of which (such as the identity of income or capital beneficiaries, the amounts they might receive, the duration of the trusts, and the property in the trust fund) depend upon the exercise of, or the failure to exercise, powers bestowed by the trust deed upon the trustee.

Eligible Transaction

10. The following transactions and instruments are eligible corporate reconstruction transactions:

    (a) a dutiable transaction (s 232A (5) (a)), and the making of a relevant acquisition (s 232A (5) (b)), if:

        (i) by the transaction, property is:

            (A) transferred or agreed to be transferred by a member of a group of corporations to another member of the same group; or

            (B) vested in a member of the group, if the property was owned immediately before the vesting by another member of the same group; and

        (ii) the transaction is approved by the Commissioner for ACT Revenue (the Commissioner) in accordance with these guidelines.

    (b) an application to register a motor vehicle (s 232A (5) (c)) if:

        (i) the application is made by a member of a group of corporations; and

        (ii) immediately before the application was made, the vehicle was registered in the name of another member of the same group; and

(iii) the application is approved by the Commissioner in accordance with these guidelines.

EXEMPTION

11. A transaction or instrument that arises from a corporate reconstruction will be approved for exemption under section 232A (2), by the Commissioner, subject to any conditions he or she might impose, except where a purpose of the transaction is to avoid any Commonwealth, State or Territory taxation.

12. An approval for an exemption will be withdrawn if the transferor and transferee do not remain members of the corporate group for at least 12 months from the date of the eligible transaction, except where the transferor or transferee cease to be members of the corporate group solely by virtue of the liquidation or deregistration of either of them (or winding up in the case of a unit trust) or by virtue of a public float.

13. The effect of the withdrawal of the exemption approval is that the transaction will be liable to full duty from the date on which the transaction occurred. Interest, or interest and penalty tax, may be applied to a reassessment of duty if the exemption approval is withdrawn. This will depend on the particular circumstances of the transaction and the withdrawal of the exemption.

PROCEDURAL

14. An application for exemption must be made in the form of a letter to the Commissioner addressing each of the issues specified in the guidelines that are relevant to the reconstruction. The application must:

(a) identify that the transaction or instrument arises from a corporate reconstruction;

(b) state the purpose of the corporate reconstruction (for example, whether for the purpose of the sale or liquidation of a company), including the anticipated benefits to the corporate group;

(c) indicate how the relevant corporations are eligible members of a corporate group, including diagrams of the corporate group structure before and after the corporate reconstruction;

(d) identify that the transactions are eligible transactions;

(e) include an estimate of the value of all dutiable property, relevant acquisitions (including the unencumbered value of any ACT land), and motor vehicles to which the application relates, including the basis on which the estimate is made and relevant documents to support the calculations;

(f) state whether any private corporation involved in the relevant acquisition has an interest in ACT land (within the meaning of Chapter 3 of the Duties Act) and include the unencumbered value of that land;

(g) show that all members in the group are eligible members ; or, if they have been a member for less than 12 months, include a statutory declaration from the relevant directors:

(i) stating that the company had not traded before it became a member of the corporate group; and

(ii) listing any dutiable property, relevant acquisitions and motor vehicles that had been acquired since the company has become a member of the corporate group; and

(h) include historical company extracts and searches from the Australian Securities and Investments Commission (ASIC), or other documents, that demonstrate:

(i) at least 90 per cent beneficial ownership, either directly or indirectly, by the parent;

(ii) that the parent company has voting control of the eligible members;

(iii) the dates and places of incorporation of the eligible members;

(iv) the company numbers and registered addresses of eligible members; and

(v) identify the form of the execution clause/signature block of the ultimate parent company for the signing of any deed that may be required.

15. Applications may be made at any time prior to the relevant transaction, or within 1 year of the transaction in respect of which the exemption is sought.

16. If the application for the duty exemption is made within one year of the date of the transaction or relevant acquisition, but is beyond the statutory period in which any liability may need to be paid, interest (or interest and penalty tax) may be applied to the assessment.

APPROVALS

17. Under section 232A (2) the Commissioner may grant approval for exemption provided by section 232A (1), subject to such conditions as he or she determines. These conditions include (but may not be limited to):

(a) the applicant must, on entering into a transaction on which prior exemption approval has been given by the Commissioner, advise the Commissioner whether or not there have been any material changes in circumstances which might have resulted in the application not being approved;

(b) the applicant (or such other person as determined by the Commissioner) must lodge a written undertaking to:

(i) advise the Commissioner if, within 12 months from the date of the eligible transaction, the immediate parent of the transferor or transferee corporations:

- transfers shares (or units) in the corporation, or
- enters into an agreement to transfer shares (or units) in the corporation, or
- enters into any other transaction (other than a liquidation, deregistration or float referred to in paragraph 11)

as a result of which the corporation will not remain a member of the corporate group; and

(ii) pay the full duty (and any applicable interest or penalty tax) otherwise payable on the eligible transaction if approval is withdrawn under paragraph 11;

(c) the applicant must enter into an undertaking to abide by the conditions of any approval given by the Commissioner, and to agree to pay all or part of the duty (and any applicable interest or penalty tax) on the transaction on which approval was given, if any conditions included in the undertaking are not met within a specified time frame.

REVOCATION

18. DI2014-288 is revoked

TRANSITIONAL PROVISIONS

19. DI2014-288 continues to apply to eligible transactions entered into in the period 14 November 2014 to 24 November 2015, inclusive.

Andrew Barr MLA
Treasurer
30 November 2015