Australian Capital Territory

Duties (Corporate Reconstruction Transaction Guidelines) Determination 2017 (No 1)

Disallowable instrument DI2017–229

made under the

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

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1 Name of instrument

This instrument is the *Duties (Corporate Reconstruction Transaction Guidelines) Determination 2017 (No 1).*

2 Commencement

This instrument commences on 18 September 2017.

3 Introduction

Section 232A of the Act provides 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.

This instrument determines guidelines for section 232A of the Act.

4 Definitions

In this instrument:

corporate group—see section 6.

corporate reconstruction transaction—see the Act, section 232A (5).

corporation—see the Act, section 232A (5).

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 member—see section 7.

eligible transaction—see section 5.

5 Eligible transactions

An eligible transaction is a ***corporate reconstruction transaction***, defined under section 232A (5) of the Act as any of the following transactions:

(a) a dutiable transaction (see section 7 (2)) of the Act) where property is—

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

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

(b) the making of a relevant acquisition (see sections 85 and 86 of the Act) if, by the acquisition, property is—

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

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

(c) an application to register a motor vehicle (see section 204 of the Act), 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.

6 Corporate groups

A ***corporate group*** is a corporate parent and subsidiary corporations that are at least 90 per cent beneficially owned, either directly or indirectly, by the parent, and over which the parent or other subsidiaries have voting control.

Indirect ownership includes a subsidiary that is at least 90 per cent owned by one or more other subsidiaries of that parent. The parent and subsidiary corporations are regarded, for the purposes of these guidelines, as members of the corporate group.

A corporation includes a unit trust scheme. A unit trust in which at least 90 per cent 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.

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 per cent beneficially owned, either directly or indirectly, by those corporations, will be regarded as members of the same corporate group.

7 Eligible members

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 before 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.

A member of a corporate group is not an eligible member 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.

8 Exemption

The Commissioner will approve an eligible transaction between eligible members of a corporate group under section 232A (1) unless a purpose of the transaction is to avoid any Commonwealth, State or Territory taxation.

9 Procedure

An application for exemption must be made in the form specified by 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, 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.

10 Time limit

Applications may be made at any time before the relevant transaction or within 12 months of the date of the transaction in respect of which the exemption is sought.

If the application for the duty exemption is made within 12 months after 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.

11 Conditions

Under section 232A (2) the Commissioner may approve an exemption subject to conditions.

These conditions include, but are not limited to the following:

(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 with the application to—

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

    (A) transfers shares (or units) in the corporation; or

    (B) enters into an agreement to transfer shares (or units) in the corporation; or

    (C) enters into any other transaction (other than a liquidation, deregistration or float);

  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; and

  (iii) 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.

12 Withdrawal of approval

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.

However, approval will not be withdrawn if the transferor or transferee cease to be members of the corporate group solely by virtue of:

(a) the liquidation or deregistration of the transferor or transferee (or winding up in the case of a unit trust); or

(b) a public float.

If exemption approval is withdrawn the transaction will be liable to full duty as at the date on which the liability 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.

13 Barrier Free model

The Barrier Free model applies to the following types of dutiable transaction under chapter 2 of the Act:

(a) a transfer of dutiable property;

(b) a grant of a Crown lease;

(c) a grant of a declared land sublease;

(c) a transaction or instrument prescribed by regulation under section 178B of the *Land Titles Act 1925*.

If the Barrier Free model applies to the transaction, the transferee should make an application in accordance with section 9 before lodging the dutiable transaction for registration under the *Land Titles Act 1925.*

The relevant time limit is within 12 months of the execution date (not the date of lodgement or registration): see sections 8 and 11 of the Duties Act.

For the exemption to apply at the time of registration, the application must have been received and approved by the Commissioner before the registration date and within the 12 month time limit.

Until a transaction is approved full duty will be payable. However, approved transferees will be eligible for a refund.

14 Revocation

This instrument revokes *Duties (Corporate Reconstruction Guidelines) Determination 2015 (No 1)* DI2015-316.

15 Transitional

DI2015-316 continues to apply to a transaction or instrument first executed in the period 25 November 2015 to 17 September 2017, inclusive.

Andrew Barr MLA
Treasurer

5 September 2017