



THE TAX INSTITUTE

24 June 2013

Commissioner of State Revenue
Duties Branch
State Revenue Office Victoria
GPO Box 1641
MELBOURNE VIC 3001

By email: sro@sro.vic.gov.au

Dear Commissioner,

Tenant's fixtures and their treatment under the *Duties Act 2000* in certain contexts – request for Public Ruling

Issue

We request guidance from the Commissioner in the form of a public ruling in relation to the treatment of a tenant's fixtures for the purpose of determining a liability to duty under the *Duties Act 2000* (Vic) (**Act**) in the context of:

- a) the transfer or assignment of a lease as part of a sale of business; and
- b) an acquisition in a landholder.

We have set out below the reasons for this request and some suggested circumstances where guidance from the Commissioner would be appreciated.

Discussion

Lease transfers – Sale of Business

At the time amendments¹ were made to sections 7(1)(b)(v) and (va) of the Act, which define when the grant, transfer or assignment of a lease will be a dutiable transaction, it was conveyed that the amendments did not represent a significant shift in policy. The provisions are anti-avoidance in nature and are intended only to capture arrangements

¹ See *Duties Amendment Act 2009*

whereby a lessee acquires rights equivalent to ownership of the underlying land the subject of the lease.

The relevant Explanatory Memorandum provides the following at page 3:

Both section 7(1)(b)(v) and section 7(1)(b)(va) are anti-avoidance in nature and are intended to have broad application. A liability to duty will result where leases are used to effectively transfer rights in the underlying land and/or the economic benefits of the land. The rights and benefits obtained by the lessee as a result of such leasing arrangements are viewed as being equivalent to the rights and benefits obtained by a person who acquires the land directly. Essentially, the lessee acquires rights over the land equivalent to ownership².

The Explanatory Memorandum notes further:

Normal commercial leases for which market rent is payable and no premium is paid should not be effected by these provisions.

Following this, leases under which commercial rents are charged and no premium is payable should not be affected by these provisions.

In determining the unencumbered value of land for the purpose of determining dutiable value, section 22A requires the value of tenant's fixtures to be taken into account in certain circumstances. In transactions to which sections 7(1)(b)(v) and 7(1)(b)(va) apply, the property taken to be transferred is the leased property³. The question arises whether the value of the leased property transferred should take into account a tenant's fixtures.

We also understand that the State Revenue Office may seek to assess the transfer or assignment of normal commercial leases for which market rent is payable and no premium is paid to the extent of the value of the tenant's fixtures the subject of the underlying leased premises.

Accordingly, clarification is sought as to whether the following scenarios would give rise to a liability to duty:

Scenario 1

ABC Pty Ltd operates a retail business from premises leased from DEF Pty Ltd. The assets of the business include tenant's fixtures to the value of \$3 million. XYZ Pty Ltd enters into a sale of business arrangement with ABC Pty Ltd to acquire the retail

² Refer also to the Second Reading speech.

³ Refer to the table in section 8 of the Act.

business. The consideration for the sale and purchase is apportioned between goodwill, customer contracts, plant and equipment, intellectual property and stock in trade. Nominal consideration of \$1 is attributed to the lease as consideration for its transfer.

Please advise whether duty is payable on the transfer of the lease with the sale of business, and if so on what amount and the reasons for this.

Scenario 2

ABC Pty Ltd is an energy company operating from various leased premises and holds no freehold land. ABC Pty Ltd owns plant and equipment valued at \$30 million, most of which is bolted down for its better and more efficient use. XYZ Pty Ltd enters into a sale of business arrangement with ABC Pty Ltd to acquire its energy business. The consideration for the sale and purchase is apportioned between goodwill, customer contracts, plant and equipment, intellectual property and stock in trade. Nominal consideration of \$1 is attributed to the leases as consideration for their transfer.

Please advise whether duty is payable on the transfer of the leases with the sale of business, and if so on what amount and the reasons for this.

Landholder acquisitions

We also seek clarification as to the interaction between Chapters 2 & 3 of the Act for the treatment of leases under the landholder provisions, particularly where a tenant's fixtures are present. In this context, we refer to the definition of land contained in section 73 of the Act which applies for the purpose of determining whether an entity will be a landholder under Chapter 3.

In particular, clarification is sought as to whether the following scenarios would give rise to a liability to duty under Chapter 3 of the Act:

Scenario 3

ABC Pty Ltd operates a manufacturing business from various leased premises and holds no freehold land. The premises include tenant's fixtures to the value of \$3 million. XYZ Pty Ltd acquires all of the issued shares in ABC Pty Ltd.

Is ABC Pty Ltd a landholder for the purposes of the Act, and if so, would landholder duty be applied?

Scenario 4

ABC Pty Ltd is an energy company operating from various leased premises and holds no freehold land. ABC Pty Ltd owns plant and equipment valued at \$30 million, most of which is bolted down for its better and more efficient use. XYZ Pty Ltd acquires all of the issued shares in ABC Pty Ltd.

Is ABC Pty Ltd a landholder for the purposes of the Act, and if so, would landholder duty be applied?

Scenario 5

ABC Pty Ltd is a large scale food manufacturer. ABC Pty Ltd operates its business from freehold land it owns valued at \$10 million, with plant and equipment valued at \$20 million. A substantial proportion of the plant and equipment is connected to the land, without it necessarily constituting a fixture.

If ABC Pty Ltd were the subject of a 100% acquisition, what land value would be used for the purposes of determining the landholder duty liability?

If you would like to discuss any of the above, please contact either Nicholas Clifton on 03 9671 7748 or Tax Counsel, Stephanie Caredes, on 02 8223 0011

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Flynn', followed by a long, horizontal, slightly wavy line.

Michael Flynn
Vice President