



THE TAX INSTITUTE

20 August 2019

The Hon. Ben S Wyatt
Treasurer; Minister for Finance; Aboriginal Affairs; Lands
11th Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

By email: Minister.Wyatt@dpc.wa.gov.au

Dear Treasurer,

TRANSFER DUTY RELIEF FOR BUSINESS RESTRUCTURES - PROPOSAL

On behalf of The Tax Institute's Western Australia Technical Committee, we are writing to request a meeting with you to discuss a proposal we would like to make to the Government of Western Australia, Department of Treasury.

The transfer of non-land business assets is currently subject to transfer duty in Western Australia. This duty impost currently prevents WA small-to-medium businesses from restructuring into more efficient business structures. We understand the previous government contemplated the abolition of transfer duty on the transfer of non-land business assets to address this problem; however, it was not able to afford to do so while in government.

Our preference would be to see the abolition of transfer duty on the transfer of non-land business assets (goodwill, IP, etc. per s79 of the *Duties Act 2008* (WA)) introduced to address this problem. However, until such time, we request the current Government give due consideration to our proposal. Relevant details are below.

The problem

- Many small-to-medium business owners in Western Australia operate their business through a discretionary trust (usually with a company as the trustee). This is a commonly used structure for small-to-medium businesses in Western Australia.
- Many of these business owners would like to transfer their business out of a discretionary trust and into a company. Reasons for doing so include:
 - a) A company structure will assist small-to-medium businesses to operate more efficiently;
 - b) It will enable them to more easily attract funding through additional equity investment;
 - c) These businesses will be able to access the lower company tax rate for Federal income tax purposes (subject to meeting the relevant turnover threshold).
 - d) These businesses will also be alleviated from complexities in relation to other Federal tax imposts such as complications arising from the interaction of the trust tax rules with rules related to beneficiaries (eg for a corporate beneficiary) under Division 7A in the *Income Tax Assessment Act 1936* (Cth).
- Relief is available from Federal income tax for the transfer of non-land business assets required to be transferred when restructuring from a discretionary trust to company structure, in particular Federal capital gains tax.

- No relief is available from WA transfer duty for the transfer of non-land business assets so therefore these transactions are often prevented from occurring. This transfer duty obstacle hinders business restructuring and development and restricts further investment in these businesses.
- To compare, New South Wales, Victoria, South Australia, Tasmania and the ACT no longer impose duty on the transfer of non-land business assets. This allows small-to-medium businesses to restructure from a trust to company structure, in the absence of a duty impost.

The Proposal

Our proposal is that the WA State Government introduce a tightly-controlled exemption from transfer duty when a business owner transfers their non-land business assets from a trust, partnership or individual structure to a company structure.

The exemption should “piggy-back” onto the equivalent capital gains tax relief rules in Federal taxation law, thus eliminating the need to duplicate the framework and integrity rules. The specific rules on which the proposed exemption can conveniently piggy-back are Subdivisions 122-A (trusts and individuals) and 122-B (partnerships) of the *Income Tax Assessment Act 1997* (Cth). These rules already contain all the necessary measures to ensure the capital gains tax relief is provided only when specific conditions are satisfied. Those conditions are identical to what would be desired at the State level for an equivalent transfer duty relief. For example, to qualify for the capital gains tax relief, the underlying beneficial ownership of the non-land business assets must remain the same.

When the transferee company sells the business in future, the purchaser will pay transfer duty in the ordinary course. Thus, the transfer duty outcome is identical to what it would be if the purchaser purchased the business from the existing trust/individual/partnership structure. Accordingly, there is no loss of transfer duty revenue, nor any delay in collection, from the ultimate sale of that business.

Additional measures would need to be introduced into the *Duties Act 2008* (WA) to apply transfer duty to a future sale of shares in the specific transferee company, based on the unencumbered value of the underlying non-land business assets in the company. This would be very similar to the Landholder duty regime and is readily enforceable. The result is that if the business was sold in future by way of selling the company, the purchaser will pay transfer duty on the unencumbered business value. So, again, the transfer duty outcome is identical to what it would be if the purchaser purchased the business from the existing trust/individual/partnership structure.

This exemption will remove this remaining obstacle to desirable business restructures in Western Australia, allowing those businesses to get to the next phase in their business lifecycle.

There is precedent for this approach of borrowing the ready-made qualifying conditions and integrity measures from another jurisdiction where the goals are fully aligned, as is the case here. For example, former section 163ZEA of the *Duties Act 1997* (NSW) read as follows:

Section 163ZEA Exemption for “top hatting” arrangements

- 1) *An acquisition by a person of an interest in a landholder is an exempt transaction if the Chief Commissioner is satisfied that:*
 - a) *the acquisition is made for the purpose of giving effect to a scheme that would qualify as a roll-over under Subdivision 124-Q of the [Income Tax Assessment Act 1997](#) of the Commonwealth, and*
 - b) *..., and*
 - c) *the acquisition is not part of a scheme a purpose of which is to minimise duty otherwise payable under this Act.*

The above neatly captures the use of a capital gains tax roll-over in federal legislation where it is equally desirable to provide a similar non-permanent relief from transfer duty.

We anticipate that the exemption would be largely revenue-neutral given our members’ experience that the overwhelming majority of these business restructures are simply not occurring anyway due to the transfer duty impost therefore resulting in no collection of transfer duty anyway. Provision of the exemption would allow these businesses to restructure with little impact on revenue.

The exemption would have no application to a sale of the business or transfer of the business assets to a third party or in a circumstance where the requirements of the exemption (eg satisfaction of the CGT rollover requirements and no change to the underlying ownership of the assets) are not satisfied. In these cases, transfer duty would continue to apply to these transactions while it remains in place. Of course, should the WA Government so choose to abolish transfer duty on the transfer of non-land business assets altogether, no transfer duty would apply in these cases either.

We believe this proposal is both practical and workable. We believe it would be a positive initiative to support the small-to-medium business community in Western Australia

Previous submission

The Tax Institute would now like to suggest that the current Government consider this proposal. We would like to understand whether you would consider the proposal for this exemption, to be in place until such time as transfer duty on non-land business assets is abolished, or whether the current Government is now more likely to pursue the abolition of transfer duty on transfers of non-land business assets, which is a preferable outcome.

A detailed submission capturing a model for implementing this proposal was submitted in 2016 to the then-Treasurer in the previous government by Tax Institute member David Montani, CTA, acting in his private capacity. It was subjected to analysis by both the Treasurer's office and the Office of State Revenue. At the time, Mr Montani was advised that the proposal was found to have no technical flaws. However, the then Treasurer declined to progress the initiative any further. Our understanding is the previous government's preference was to address the problem via their policy of abolishing transfer duty on transfers of non-land business assets, when it was affordable to do so.

The Tax Institute's Western Australia Technical Committee would be pleased to discuss this proposal with you.

If you would like to meet to discuss this proposal, please contact Brian Martin, Regional Manager on 08 6165 6600 in the first instance.

Yours Sincerely,



Bill Keays, CTA
Vice Chair, WA State Council



Ross Forrester, CTA
Chair, WA Technical Committee