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Précis Paper

Duties Exemptions for Executors and Trustees of Deceased Estates

A discussion of the duties applicable to transfers of property by executors and trustees of deceased estates in NSW.

Discussion Includes

- **What is dutiable in NSW?**
- **Operation of section 63 of the *Duties Act 1997* (NSW)**
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Précis Paper

Duties Exemptions for Executors and Trustees of Deceased Estates

In this edition of BenchTV, Ken Schurgott (Partner – Schurgott & Co Lawyers) and Ian Benson (Special Counsel – A R Conolly and Company Lawyers, Sydney) discuss the duties applicable to transfers of property by executors and trustees of deceased estates in NSW, and the exemptions that may apply.

<u>What is dutiable in NSW?</u>

1. **In each state and territory in Australia there is an exemption for a transfer from an executor to a beneficiary of an estate. This discussion will focus upon the NSW provisions under the *Duties Act 1997* (NSW). Each state has subtleties and distinctions within them so you cannot take the learning from NSW straight into the provisions of another state because the rules are different.**

2. **From 2016, NSW lived up to its obligation under the Commonwealth-States GST rules to exempt from duty, or exclude from duty, a variety of transactions. Mostly from 1 July 2016, duty only applies to land or land derivatives such as options or transferable floor space, and so on. Prior to that date, a transfer of, for example a company – shares or units and a unit trust, were subject to duty, and so was the transfer of a lot of chattels. Currently duty is still payable on your motorcar, but this is not relevant to the current discussion.**

3. **The duty that related to shares and companies was always at a concessional rate of 60 cents and $100 (0.6%), compared to ad valorem duty which rises according to the size of the transaction.**

4. **Land transfer has always been directly more expensive than transfer of shares of a company, or units in a unit trust. In the 1990's, all of the revenue authorities introduced landholder rules which treat the underlying land held by a company as being the property which is transferred in effect. This means that you work out the transferable value of the taxable value by looking at the value of the underlying land.**

5. **In NSW, where a company or a trust holds two million dollars or more in land, and the transaction involves a change of beneficial ownership of 50% or more of the shares or units, then the shares or units are dutiable at ad valorem rates. There is an aggregation rule in two respects:**
    I. **Associate inclusive; where you have connected companies that have land, you add them together, and**
    II. **If you had, for example, 45% of the shares and obtained another 5%, then it becomes dutiable. Anything that is above 50% is also dutiable.**

6. **The duty difference is extremely large, and penalties and interest may apply for failing to pay the correct duty. Revenue NSW police these things quite carefully and ensure that any land transferred through company or a unit register change is dutiable.**

7. **There are two different provisions contained in the *Duties Act 1997* (NSW) that are relevant here: section 63 which deals with a direct transfer of property which is dutiable property, and section 163A which deals with landholder entities. If you do not fall within those exemptions, then the transfer will be dutiable at ad valorem rates, and they are very precise in their terms. Trustees and executors have to ensure that what they are doing does fall within the exemption precisely or ad valorem duty will apply. Section 63 is a nominal duty ($50), the whole scheme of this provision is to compel you to lodge the transfer document for stamping, otherwise people would just ignore it. In the context of s 163A, it is not nominal, it is purely exempt.**

8. **Where there is a foreign purchaser, there is a foreign purchaser surcharge of 8% which applies to all persons who are foreign persons, i.e. someone who is not presently a resident of Australia, or is not a citizen. Where you have a discretionary trust, for example acquiring property, if any beneficiary is a foreign resident and not a citizen, then the foreign purchaser surcharge applies to the trustee acquiring the property.**

9. **Many trust deeds are so open ended that they could benefit a foreign person quite easily, so practitioners have been amending deeds at the request of trustees, particularly where there is an expectation that there will be a purchase and they wish to exclude foreign residents. The Chief Commissioner of State Revenue recognizes that it is a problem and has given the relief that if the deed is amended within a 6 month period of acquisition, he will treat it as having had affect at the time of acquisition of property. At some point the legislation with be changed to reflect this relief that is provided by the Chief Commissioner.**

<u>Operation of section 63 of the *Duties Act 1997* (NSW)</u>

10. **The transfer must be made in conformity with the trust contained in the will, or it is an appropriate of the property of the deceased in or towards a beneficial entitlement under the trust contained in the will. The transfer of the property must be in accordance with the terms of the will.**

11. **It is common place to cause wills to be varied, either formally by deeds of family arrangement, or informally. In the context of deed of family arrangement, if what happens pursuant to that deed you have changed the terms of the trust which is in the will, and there is a transfer of dutiable property in accordance with those new terms,**

then prima facie it is not in accordance with the terms of the will, and ad valorem duty applies. However, you effectively credit against the ad valorem duty for the duty that would have been payable on the interest that you would have got, had the property been transferred in accordance with the terms of the will.

12. In *Alexander v Chief Commissioner of State Revenue* [2017] NSWCATAD 180, Mr. Alexander and his two sisters were the beneficiaries under their mother's will. The estate contained a house worth $1.07m, and some listed shares and cash of $1.42m. The siblings agreed between themselves that Mr. Alexander would take the house, and the sisters would take the shares and the cash, and he would make some compensatory payments to them. The Commissioner charged ad valorem duty on the transfer of the property. Mr. Alexander did get credit for one-third of the duty, but he was dutiable for two-thirds on an ad valorem basis. His only arguments were that it was unfair and unconstitutional, but ultimately the court found in favour of the Chief Commissioner and ad valorem duty was payable on two-thirds of the transfer.

13. If a will is varied by a court, this makes no difference to the ad valorem duty that is payable, unless a provision is made under the family provision rules in the *Succession Act 2006* (NSW). This is because the effect of a variation in accordance with a family provision is that the will is taken to have contained those provisions from the outset.

<u>The exemption in relation to landholder duty</u>

14. The exemption in relation to landholder duty is more generous in its coverage because it exempts a transfer distribution which is made of the shares or the units of the land holder in the ordinary course of the execution of a will or a codicil, or the administration of an intestate estate pursuant to a family provision claim, or under a will varied by court order. For the exemption to apply, it must be solely as a result of distribution under the will. Anything that varies this, except one of the exceptions afore mentioned, is open to ad valorem duty being applicable.

15. The case of *Tay v Chief Commissioner of State Revenue* [2017] NSWSC 338 concerned the estate of a very wealthy Singaporean gentleman, and Mr. Tay was his second son. The will dealt with assets that he had through the world, including companies in Singapore, Malaysia, Hong Kong and Australia. The family entered into a deed of family arrangement where each of the four children were to take over a particular company in the different jurisdictions. The matter before the court concerned the Australian company, which held a very substantial Sydney asset which had a payable duty of $25m.

16. **The second son, Mr. Tay, who was entitled to 29% of the overall estate under the will was to acquire the Australian company as per the deed of family arrangement. Tay already had 20% of the share-holding, he then received 29% under the will, and another 51% was transferred from other family members. The argument put forward was that the 29% should be exempt under s 63 and s 163A of the Act. The Commissioner argued that landholder duty applied, and the ordinary transfer duty applied.**

17. **The Court held that the exemption was available to the 29% that was gifted under the will, however when they turned so s 163A of the Act, the landholder duty exemption, the conclusion was reached that the transfer was not solely in accordance with the terms of the will, but that the family deed of arrangement was an operative cause of the transfer, therefore meaning that Mr. Tay did not get the exemption in respect of the 29%.**

18. **It is a very real problem for executors and trustees when they are dealing particularly with landholder provisions, and there is a lot of companies and trusts in NSW that hold huge amounts of land. If you sell property to an external person, they will pay the duty, but if you are transferring the property to a beneficiary of the estate and you are dealing with a landholder of the company or trust, then it is essential to tread warily and get advice from a practitioner who specializes in this area because the cost of duty payable can be significant**

<u>Foreign purchasers</u>

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19. **The issue with foreign purchasers is that they are subject to ordinary duty, plus the 8% surcharge that was discussed above. For example, if you have a foreign purchaser and there is a $5m property:**
    - **The standard rate of duty: $150,000**
    - **The premium property rate: $140,000**
    - **The foreign purchaser surcharge: $400,000**
    - **Total: almost $700,000**

20. **If the exemption under s 136A for landholder duty, or s 63 for ordinary transfer duty applies, then there is no duty payable. However, if you do not fit within the exemption, then the foreign surcharge premium of 8% will apply.**

<u>Change of trustees</u>

21. **In an ordinary discretionary trust environment where you change trustees, there is a nominal duty rate of $50. However, under s 54(2) of the *Duties Act 1977* (NSW), the Chief Commissioner has to be of the opinion that the continuing trustee is not a beneficiary**

under the discretionary trust. This means that if the continuing trustee can benefit, ad valorem duty will apply.

22. The continuing trustee can arise in a number of ways, either the original trustees retires and is replaced (the person or entity replacing them cannot be a beneficiary under the will), or where an existing trustee, using the power within the deed, appoints a new and additional trustee (neither of them can be beneficiaries under the trust). In many discretionary trust deeds there is an exclusion of the trustee as a beneficiary at all, but some others follow the words of the *Duties Act 1997* (NSW) and exclude only continuing trustees.

23. Many trusts are established in wills. It is not uncommon to have a discretionary style trust in which the executors become trustees and conduct the estate trust as if it were a discretionary trust. It is a little unclear in respect of s 63, the general transfer provision, as to whether this provision could apply in these instances as this provision does not talk about transfer to legal personal representatives, it only deals with transfer to beneficiaries pursuant to the terms of the will. This means it is open to the Chief Commissioner to potentially take the view that s 63 could apply. Section 163A talks about distributions, but it does not talk about transfers to legal personal representatives, so again it is possible that it could apply.

24. In the case of *Balcaskie Investments Pty Limited v Chief Commissioner of State Revenue* [2017] NSWCATAD 19, Mrs. Wall bought some property in her capacity as trustee of a discretionary trust and tried to change the trustee to a corporate trustee of which she was a director. This was because she wanted to pass on control of the trust to her children. The lawyers who were involved with this transaction were aware of the requirements to exclude the trustee as a beneficiary, so they attempted to do so by including, by amendment, a provision in the deed which effectively said that the trustee could not be a beneficiary, ending with the words 'this provision is irrevocable'.

25. The Commissioner, however, argued that the general power of amendment in the trust deed would allow the trustee to cause that supposedly irrevocable provision to be amended and deleted. The Court found that in the particular circumstance that it was intended that it would not be revocable, and therefore found in favour of the trustee in this case meaning ad valorem duty did not apply. This case shows the importance of amending the amendment clause to ensure that you cannot amend the prohibition on the beneficiary being the trustee.

26. In any will trust drafted, it is a good idea to exclude a continuing trustee. Often a good option, as a matter of practice, is to ensure that the new trustee is a company that is

controlled by the beneficiaries. In these circumstances it is not an issue if one of the beneficiaries is the sole controller or director of the trustee company.

27. The Victorian case of *White Rock Properties* [2015] VSCA 77 can be contrasted against the *Balcaskie* decision. This case had complex succession planning elements to it, but ultimately the Court did find that some transactions involving an estate were subject to ad valorem duty by virtue of change of trustee of the estate.

<u>Key takeaways</u>

28. Executors, trustees and their advisors need to be alert to any transfer that they make of real property under the estate to beneficiaries to ensure that they are transferring it completely in accordance with the terms of the will. If they do need to enter into a deed of family arrangement, or vary the will informally, it is important that they understand that the duty will be payable in respect of the transfer.

29. When it comes to landholder provisions, executors and trustees must be on high alert due to the dramatic costs that may apply. If changes do need to be made, it is worth attempting to either get a court order in respect of a family deed arrangement so that it falls within one of the exclusions, or a family provision claim is made so that an exclusion may apply.

BIOGRAPHY

Ken Schurgott

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Ken is a solicitor-director of Schurgott & Co Lawyers with extensive experience across commercial law, estate and trust law and with particular expertise in State and Commonwealth taxes and business structuring. In 2012 he was the National President of the Tax Institute and has been a member of the Advisory Panel to the Board of Taxation and of the Working Group on Managed Investment Trusts. He continues to be heavily involved in consultation on trust matters with the ATO and government authorities.

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Legislation

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