

STAMP DUTY

Queensland Issues

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TRANSFER OF MORTGAGE

Revenue Ruling 15 recognises the availability of concessional stamping, at the rate of \$5.00, in the case of an instrument which is a transfer solely over an interest in a mortgage secured on land or land and improvements.

This ruling arose out of an initial change in approach, when the Commissioner decided not to accept that new securities granted to a transferee of a mortgage could be stamped as collateral to the initial mortgage. The terms of the ruling comprise an ultimate acceptance of the taxpayer's preferred interpretation.

A previous concern was how to give appropriate regard to the word "solely" where it appears in item 1(a) of the "Conveyance or Transfer" head of charge. More particularly, where the instrument of conveyance in fact dealt with not only the interest of a mortgagee in a mortgage over land, but also dealt with collateral securities such as mortgage debentures, guarantees or insurance supporting the loan obligations, it is understood that the Commissioner's attitude was that this would not qualify as "solely" dealing with a mortgage over land, and therefore would not be entitled to the concession. Because item 1(c) of the head of charge allows for transfers solely of incidental or ancillary securities to a mortgage over land to be transferred at the same rate, this concern was easily overcome by splitting the land mortgage transfer from the ancillary securities transfer. However, recent experience gives rise to a further concern.

The Commissioner is now interpreting that the word "solely" should attach to the word "land" where used in item 1(a) of the head of charge. That is to say that only a transfer of a mortgage which solely relates to land will enjoy the concession. It is submitted that this interpretation involves transposing the word "solely" out of the context where it appears in the legislation, and is therefore a wrong interpretation.

The Senior Revenue Officers who impose this interpretation advise that regard has been had to the Second Reading-Speech, and the purpose for which the concession was introduced. In response to this interpretation it is submitted that:

- (a) Resort to extraneous evidence is only required where there is ambiguity in the provision requiring interpretation, and in the immediate case no ambiguity exists.

- (b) When the wording of item 1(a) is compared to the wording of item 1(c) of the head of charge, it can be seen that the word "solely" attaches to the instrument of security, and not the underlying property, ie the word is used in identical context, where clearly no ambiguity arises, and where the Commissioner's preferred interpretation of item 1(a) cannot be supported.

Of course, it remains the Commissioner's preferred interpretation, so that care must be taken in circumstances where the transfer effects other than a mortgage solely over land. For example:

- (i) Although the concessionary assessment has previously been obtained in the case of transfers only of mortgage debentures, where those mortgage debentures affected all assets of a company including some land, the concession will no longer be available. However, in circumstances where the mortgage debenture does not at the time of transfer secure any moneys, the Commissioner has accepted that the document can be assigned for nil duty.
- (ii) Where the mortgage debenture is not associated to a mortgage solely over land, it may be possible to utilise the "further assurances" clause in the mortgage to procure a collateral mortgage over land. For the purposes of item 1(a), it is not necessary that the mortgage over land be the prime security, and the creation of this collateral land mortgage allows the creation of a transfer of a mortgage solely over land. The mortgage debenture can then be transferred under item 1(c).
- (iii) A real concern arises in the case of interests in land which cannot be the subject of a familiar real property or land mortgage. Relevant interests are Port Authority land, which are customarily the subject of security created by mortgage debenture. If a mortgage over such an item of land is required to be transferred in future, then again perhaps an "old system" mortgage by way of assignment with an equity of redemption should be newly created as a collateral security, which can be assigned under item 1(a) of the head of charge.

SECURITY FOR GROUPED ACCOUNTS

Revenue Ruling 23 describes situations when existing endorsements of duty on securities will be available for multiple grouped accounts. The ruling arose out of a dispute, emanating from the recent OSR bank audits, when the Commissioner alleged that assessments of duty were required to be marked "on account" of particular debtors as and when advances took place.

The Commissioner's office purports that this requirement of endorsing "on account" of the particular borrower/debtor has been a practice of long standing, although such an endorsement has been infrequently encountered until more recent times. The Commissioner has not been able to cite any judicial authority to support the practice, but claims that section 15 of the Stamp Act relating to instruments containing "several distinct matters" allows the endorsement of these words which limit the availability of the stamp for other debtors.

The "resurrection" of the endorsement of duty on account of particular debtors has arisen to disqualify duty on securities being "reused" by other members of a corporate group. These are commonly described as "come and go" facilities, and the position is well understood in the case of securities in favour of one debtor with borrowings to that particular debtor being available on such a come and go basis. The expansion of this utilisation, so that group securities are available for borrowings amongst all members of a group, is only accepted by the Commissioner in particular circumstances described in Revenue Ruling 23.

The Commissioner's view in Revenue Ruling 23 is that group securities can be relied upon for come and go facilities amongst all members of the group, if they were related parties at the time the endorsement of duty was first made, and if they were party to a single instrument of security. An example would be a cross deed of covenant by all members of the corporate group, or a group guarantee.

This approach by the Commissioner disqualifies the practice of later adding a new borrower to the group, even though that borrower might be party to a new and collateral group deed of covenant or guarantee. This is also the case, even though existing security providers are guaranteeing the obligations of the new borrower, within the terms of the existing prime instrument of security.

It is submitted that the proper test should be to look at the definition of "secured moneys" in that prime instrument of security. If those secured moneys extend to borrowings made at a later time to a new group borrower, or to amounts which may subsequently be guaranteed by a party to the instrument, then the prime security should still be available to secure those moneys. The Commissioner purports a "same moneys" test, but it is submitted that this is not the test described in the Queensland Stamp Act. This is a test found in the Victorian Stamp Act, and relevant case law in the context of that Act should be distinguished.

Interestingly, this may be a circumstance where a taxpayer would favourably cite the *CitiSecurities* decision, as authority for the proposition that the moneys secured under a third party mortgage can be sufficiently wide ranging to encompass loans made to another debtor who has not furnished dutiable security.

It is understood that Revenue Ruling 23 has been submitted to the Policy Section of the OSR. for review and redrafting. Until that takes place, Revenue Ruling 23 remains the Commissioner's policy in relation to group accounts and securities supporting them.

ANOMALOUS INTERPRETATIONS

It is disturbing to note certain anomalous interpretations which are arising in the context of loan security duty in Queensland, given the background where other jurisdictions are relaxing their approach under this head of charge.

Even in Queensland, there has been some concession extended in the case of the refinancing of an existing home loan, yet incongruous interpretations continue to be applied in uncontroversial domestic security transactions.

By way of example, it is not uncommon for a husband and wife to grant a security for their home loan, and at a later time have that loan refinanced by one of the parties, perhaps arising out of Family Law Act proceedings. One would have thought that the joint and several liabilities of the parties under the prime security would render the existing stamp available for a refinancing loan by one of those same debtors, but the Commissioner does not readily offer that outcome. Even in these circumstances, Revenue Ruling 23 might be called upon, so that the couple could be treated as a "group", however recent experience with the Commissioner's office is that the several nature of the existing prime endorsement is not recognised. In circumstances where significant loan security duty would be incurred by a matrimonial break-up or refinancing orders, it would be recommended that the Family Court orders sought by the debtors be particularly narrative of the steps required to substitute the existing security and loan accounts. Under Revenue Ruling 8, the Commissioner acknowledges that section 90 of the Family Law Act is paramount to the provisions of the Stamp Act, and thereby excludes the imposition of duty on particular court orders and documents relating to those court orders.

Even more alarming is an interpretation recently encountered where a new loan is obtained by the same debtor, from the same bank. The purported interpretation is that new moneys are advanced in order to repay the old moneys, so that at a point in time two loan accounts are outstanding and are thereby dutiable in their aggregate amount. It is suspected that this interpretation is arising out of recent bank practice to allocate new loan account numbers, and to fully re-document loans which are varied, in circumstances where Consumer Credit Code compliance is required. The practice of some banks is to fully re-document existing loans under one new instrument, at which time all the necessary Code disclosures are repeated. It is understood that in these circumstances the Commissioner seizes on the new loan account details as somehow representing additional moneys. This unsustainable interpretation may be an isolated experience, and it is understood to be currently the subject of reference internally at the OSR to ascertain a uniform approach.

FUTURE DIRECTIONS FOR THE QUEENSLAND OSR

In a speech delivered on 21 May 1997, the Queensland Treasurer announced new initiatives to be undertaken at the Office of State Revenue. The transcript of that speech comprises Appendix 1 to this paper.

These new directions are the outcome of a client survey and report recently commissioned by the Queensland Treasury, in respect of the operations of the OSR. It is understood that clients were quite frank in their response to the confidential survey, and the report recommends a new direction for tax administration embracing "critical success factors" such as:

- (a) voluntary compliance;
- (b) client service;
- (c) taxpayer certainty; and
- (d) getting the right systems, practices and people to support these critical success factors.

These matters are more fully described in the Treasurer's speech. The following important matters/comments can be made:

- (i) The new Voluntary Compliance Division should be the source of more prescriptive requirements for tax compliance. Criticism has been levied at the approach of the existing Compliance Division, which pursues past transactions in search of additional revenue, whereas resources might better have been applied to prescribing certainty of the Commissioner's requirements, so that a more reliable future revenue stream might be obtained from taxpayers who fully intend to discharge their obligations under the Act.
- (ii) An interesting initiative of combining resources of the Australian Taxation Office and the OSR is floated. Whilst not part of the announcement, this initiative might be given some context if an "acquisitions" duty is introduced in the Queensland Stamp Act, this being a tax which gives rise to similar issues to capital gains tax.
- (iii) Regrettably, the Treasurer appears to concede that uniformity or harmony of interstate stamp duty legislation may not be possible. It seems that Queensland will continue to persevere with its own re-write, although having regard to the outcome of the southern re-write process.
- (iv) The Treasurer has also announced that a "Taxpayers Charter" will be developed to articulate the expectations of taxpayers and revenue officers in dealings between them.
- (v) Perhaps a more open Office of State Revenue will arise, with the announced widening of scope of consultative committees.

The Treasurer's speech outlines a program which will require a significant change in culture at the Queensland Office of State Revenue. The required restructure is to be carried out on a progressive basis, and the various consultative committees announced in the proposal should be encouraged to participate vigorously in bringing forward the worthwhile and ambitious changes which the Treasury is seeking.

Slide 1

***Banking Law
and
Practice Conference***

Stamp Duty: Queensland Issues

Slide 2

Presentation Outline

1. Transfer of Mortgage
2. Security for Grouped Accounts
3. Anomalous Interpretations
4. "Future Directions for the Qld OSR"

Slide 3

Transfer of Mortgage

- “Conveyance & Transfer” Head - Item 1(a):
“of property consisting solely of a Mortgage
... secured on land”
- Previous concern: “solely” relates to
“Mortgage”, therefore separate transfer for
guarantees or insurance
- New concern: OSR interprets “solely” to
relate to “land”, ie only pure land mortgages

Slide 4

Transfer of Mortgage

Conveyance or Transfer

- (a) Of property consisting solely of a Mortgage or an interest in a mortgage secured on land or land and improvements thereon, whether the conveyance or transfer is absolute or by way of security.
- (b) Of property consisting solely of a security which is ancillary or incidental to property of the kind specified in subparagraph (a) where the conveyance or transfer is made in connection with a conveyance or transfer of property of the kind specified in subparagraph (a).

Slide 5

Transfer of Mortgage

- Concession no longer available for Mortgage Debentures
- Suggest invoke "further assurances" and get a land mortgage
- What about Port Authority land?

Slide 6

Security for Grouped Accounts

- "On account of debtor" notion, appears without authority
- Exception in Revenue Ruling 23 - for parties to a group security at the time
- Cannot add a new borrower

Slide 7

Security for Grouped Accounts

- The test should be to look at defined “secured moneys” in the document
- Could the taxpayer cite *CitiSecurities* against the Commissioner?

Slide 8

Anomalous Interpretations

- Refinancing of a joint debtor account by one debtor - use Family Law Act exemption if significant, or Revenue Ruling 23?
- New replacement loan accounts to the same debtor from the same mortgagee

Slide 9

Future Directions for the Qld OSR

Critical success factors for implementation of review:

- Voluntary compliance
- Client service
- Taxpayer certainty
- Right systems, practices and people

APPENDIX 1 – TO PAPER PRESENTED BY HARRY LAKIS

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FUTURE DIRECTIONS FOR THE OFFICE OF STATE REVENUE**“An Initiative of the Coalition Government”**

The Honourable Joan Sheldon MLA
Deputy Premier, Treasurer and Minister for The Arts

21 May 1997

Sponsored by

*The Queensland Law Society
Taxation Institute of Australia
Institute of Chartered Accountants
Office of State Revenue*

Brisbane

Mr Ian Donaldson, State Chairman of the Institute of Chartered accountants in Australia, Mr Hugh Grant, President of the Queensland Law Society, Mr Bill Armagnacq, State Chairman, The Taxation Institute of Australia, Mr David Russell QC, Ladies and Gentlemen.

I would like to thank each of the sponsoring organisations for giving me the opportunity to speak to you today. I would also like to acknowledge Bill Roberts, Geoff Thurgood and David O'Dowd of Gibson Associates, and thank them for their work as independent consultants, in the Review of the Office of State Revenue

The pressure for tax reform across Australia is growing. As you'd appreciate, there are a number of issues facing the Queensland Government in relation to the State's taxation base. At a National level, we have problems associated with Vertical Fiscal Imbalance, and the constitutional constraints on State taxing powers. At a State level, our tax base needs constant amendment to address changes in commercial activity and procedures.

A few examples to illustrate these issues:

- Business licences have again been challenged in the High Court recently, and we are now waiting for judgment;
- The High Court decision in the *Allders* case means we have to find a way of continuing to tax activities at airports and other Commonwealth places;
- Use of the Internet, especially for marketable security dealings, and the development of a plethora of derivatives from marketable securities;
- Changing employment practices, resulting in the use of contractors and the blurring of the traditional employer/employee relationship.

These are important issues in terms of their impact on tax reform in Queensland. You'll be relieved to hear that I do not propose to discuss them all here today, let alone so early in the morning!

Instead, I would like to speak about State tax administration in Queensland and how we can advance tax reform by improving tax administration within the State. This is an area of State Government influence, and from the early days of our Coalition Government, I have been committed to its implementation.

In Queensland we have a low tax policy, which is an integral part of promoting economic growth in the State. We now need to compliment that low tax policy, through modernisation of State tax administration. Taxpayers need to be fully aware of the proper tax they are obliged to pay, and the Office of State Revenue needs to co-operate with taxpayers, in order to collect the correct amount of revenue.

OSR has provided essential support to the State Government, by raising the revenue necessary to support the Government's many programmes. Collections for the 1995-96 year totalled \$2,924 million. However, in recent times there has been a community perception that OSR should examine the way in which it collects taxes and, more particularly, be aware of the impact of taxation administration on commercial decisions.

In Queensland, the *CitiSecurities* dispute highlighted this point. Members of the business community and their professional advisers complained that the *CitiSecurities* decision should only have applied from the date the decision was made. They maintained that there had been a re-interpretation of the law and of assessing practice in support of that argument.

I agreed with the criticism, and some \$13 million in taxes was returned to over 80 taxpayers. At that time I said that taxpayers should, wherever possible, have certainty as to their obligations.

These considerations resulted in my announcing an early initiative of the Coalition Government, to comprehensively review OSR. That review was initiated to improve OSR's relationship with Queensland's business community; small business in particular; and to foster clearer, more effective communication with a more consultative approach. The review has been completed and the recommendations have been endorsed by the Queensland Government. I'd like to spend some time outlining the Review and its outcomes.

A task force was established to complete the Review. The group consisted of independent consultants, Gibson Associates, and staff of OSR and Treasury. Together, they sought to identify issues, from within and outside OSR ... issues that might influence the efficiency and effectiveness of the Office. A major part of this exercise was conducted by the independent consultants. They surveyed clients who had frequent contact with the Office, in order to obtain their comments and suggestions.

The Review of OSR contains a large number of recommendations involving major change. It really isn't possible to discuss all the recommendations this morning. Instead, I will focus on those recommendations of particular interest to this group, and which will be implemented in a logical progression over a period of time.

Essentially, the report recommends a new direction for tax administration in Queensland embracing critical success factors such as:

- voluntary compliance;
- client service;
- taxpayer certainty; and
- getting the right systems, practices and people to support these critical success factors.

Looking at each of these critical success factors ...

Voluntary Compliance will be a key driver in the new system of tax administration. Most taxpayers will pay their dues, if they have clear information as to their tax liabilities. A Voluntary Compliance Division will be established in OSR. A central part of this division will be a client education branch, whose function will be to see that taxpayers get detailed information about State taxes and how to pay them.

More than this, Voluntary Compliance is a principle which requires a change of attitude within OSR. It requires that OSR accepts it should co-operate with taxpayers wherever possible.

The first assumption is that the taxpayer wishes to know their proper tax liability and that they will meet that liability. If this assumption proves wrong, then of course the tax must still be collected, and OSR will move to enforce the payment of the proper amount.

Thus the principle of Voluntary Compliance will permeate through the Revenue and Compliance Divisions of the Office, and OSR staff will be encouraged to adopt this approach.

A practical example will illustrate how the principle will operate in practice.

Where OSR has information that indicates that the proper tax is not being paid; perhaps on a certain type of transaction; it will publicise its concerns, and provide information about what is required. Taxpayers will then be given an opportunity to put their own house in order, before audit or investigation commences.

Naturally, OSR's ongoing compliance, audit and investigation programme will continue alongside these special projects, and for that programme, present arrangements will continue.

Client Service is a key strategy in the new tax administration.

The external survey of major clients indicated that although OSR processes bulk transactions successfully, it has difficulties with more complex transactions. As OSR is currently seen as being *process driven*, it isn't surprising that criticism has been levelled at the way both the Revenue and Compliance areas approach their job, the suggestion being they didn't appreciate the complexity of the transactions involved.

To overcome these problems, OSR has identified the assessment area in Revenue, and the investigative area in Compliance, as being the main points of client interface. OSR will identify officers in these areas as being key players in the provision of client service.

Support mechanisms will then be put in place to ensure a *best practice* client interface. A technical advice branch will be established whose function will be to provide consistent advice and information right across the organisation. In this way internal practice and procedures can be enhanced and improved.

Complaints will be handled by an area outside the client interface, and this section will report direct to the Executive Director.

Consultation by the Office also needs to be developed. The Tax Consultative Committee presently established will be revived, to provide valuable input on technical matters. Initially, this will be in relation to the public rulings, but, as the development of new legislation proceeds, the Committee will also have a role there.

Consultation does need to be broadened. Two new Consultative Committees will be formed.

The payment of tax by return, already accounts for one-third of all tax collected, and it is intended to extend the use of returns. The system needs a thorough revision, and that includes legislation and procedures. A special project is being established for this purpose, including investigation of a more sophisticated computer-based calculation and return system, and electronic lodgement with payment by direct debit.

Effective consultation will be required in the design of the new returns system and a Consultative Committee will be established for that purpose. The Committee will also provide ongoing input.

These Tax Consultative and Returns Committees are specialists. In order to give small business and individuals an input, especially on costs of compliance, a Small Business and Consumer Committee will be established to meet regularly to comment on new initiatives and current procedures from the point of view of general clients of the Office, rather than those having a special interest. I anticipate that one of the concerns of the Small Business and Consumer Committee will be the cost to taxpayers of compliance.

One initiative that might be considered in connection with cutting compliance costs, is whether the Australian Taxation Office, and the Office of State Revenue, might combine their resources to provide information to taxpayers. They could, perhaps, share facilities for this purpose. Preliminary discussions with the Deputy Commissioner of Taxation will be followed-up by the Executive Director of OSR.

A Taxpayer Charter will also be developed, to articulate the expectations of taxpayers and Revenue Officers in dealings between them. The Charter will assist in establishing a Standard of Conduct. It will be displayed prominently and be referred to in all dealings with taxpayers and their agents.

The third critical success factor is **Taxpayer Certainty**.

Legislation is one key element in providing taxpayer certainty. With the implementation of the Review of OSR, we can also look forward to the development of an ongoing legislative programme.

The Government will be asked to consider the introduction of a modern Tax Administration Act. Preliminary policy work has already begun.

Now, one specific area I know to be of interest to you, is that of inter-State legislative initiatives. OSR will continue its discussions on these initiatives. When the Coalition Government assumed office, OSR was authorised to open inter-State discussions. As some initiatives regarding Stamp Duty had already been underway for over two years, the scope for discussions was somewhat limited. However, Queensland will examine inter-State legislation as it is released, and, depending upon how it relates to the Queensland tax base and what form it takes, inter-State legislation will be considered by the Government when developing Queensland legislation.

Queensland has been developing a possible model for conveyancing Stamp Duty, the object being that it is adopted by inter-State jurisdictions. However, with the announcement by New South Wales that it intends to develop its own legislation in this area, it does not seem possible to realise our ambition of National legislation. This is unfortunate, especially for inter-State operators. Queensland will reconsider its position when the options become clearer. A more recent initiative is an inter-jurisdictional review of Pay-roll Tax, being carried out by Heads of Treasuries.

The second element of certainty relates to administration by OSR. Initiatives under the Review include: the development of more public rulings, and consideration being given to introducing a system of private rulings. The latter initiative will have to be considered carefully, to ensure that OSR doesn't become a tax Adviser.

Information Management systems will be introduced to improve access to a database, particularly by Assessors. This should assist in uniformity of decision-making.

The final and perhaps the most important of the critical success factors requires **the right systems, practices and people, to support the first three critical success factors**.

Already I have outlined some means by which OSR will adopt the right systems and practices. In order to ensure that OSR is able to carry out these initiatives, a restructure is appropriate. This will be accomplished on a revenue-neutral basis.

The restructure will involve the establishment of the Voluntary Compliance Division, to include the new Technical Advice, Client Education, Intelligence and Projects and Planning Branch.

As the name suggests, the Intelligence Branch will collect information on those areas where proper tax is not being collected. This will then be used to determine the particular Voluntary Compliance initiatives to be pursued. The Projects and Planning Branch will be used to drive projects, using teams drawn from across the organisation.

The Review recommendations impact on many aspects of the way OSR carries on its business. They propose operational changes, changes to the way business is conducted, and changes to the structure of the Office.

Once the restructure has been completed OSR will go through a strategic and operational planning exercise, to introduce the recommendations in a progressive manner.

However, work has already commenced on some of the changes and project teams will be developed to continue this work. For instance, public rulings are being developed for release for consultation. Proposals for improvements to the returns system are being developed and, as I have mentioned, preparatory work on a Tax Administration Act has commenced.

The programme for the improvement of OSR is ambitious. It will succeed because of the great effort OSR is investing in the programme. I hope you will support this effort, by contributing your input via ongoing contact with the Office.

I regard this initiative as important, not only to ensure revenue is collected correctly, but to improve efficiency and tax administration. Doing the job well, really well, properly facilitates commercial and other transactions in the State. And that will benefit all Queenslanders.

Thank you for inviting me to speak. I look forward to hearing your feedback.