



Immediate review of discretionary trust deeds required in light of NSW duty and land tax changes

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Article by Mimi Su, Senior Associate

Introduction

As a result of the 2016 NSW State Budget the NSW Government has introduced two measures aimed at foreign investors purchasing or holding NSW residential land.

Firstly, a surcharge duty of 4% has been effective from 21 June 2016 and will apply to acquisitions of NSW residential land by foreign persons. This surcharge is payable in addition to any other stamp duty payable on the transaction.

Additionally there is a 0.75% surcharge land tax that applies to foreign persons who are owners of NSW residential land as at 31 December in each calendar year and to commence from the 2017 land tax year.

Specific issue that it creates for discretionary trusts

The definition of who constitutes a “foreign person” for the purposes of these new measures are quite wide and takes the definition in the Foreign Acquisitions and Takeovers Act 1975.

The test applicable to whether a trust will be a foreign person for the purposes of these measures is to determine whether any foreign beneficiary of the trust holds a ‘substantial interest’ in the trust.

In respect to discretionary trusts, section 18(3) of the Foreign Acquisitions and Takeovers Act 1975 provides that in working out the extent of the discretionary beneficiaries’ interest in a trust, each beneficiary is taken to hold the maximum percentage of income or capital of the trust which the trustee may distribute to them. Effectively this means that any discretionary beneficiary is deemed to hold 100% of the beneficial interest in the trust and hence as long as one of those discretionary beneficiaries is a foreign person than the trustee of the trust will be treated as a foreign person.

These new measures obviously create an administrative headache for traditional discretionary trusts where it has been specifically drafted to have a wide beneficiary class. Should the trustee now each year go through the exercise of determining whether any of the possible beneficiaries within the class meet the definition of a foreign person?! Yes, because having just one foreign person who is a beneficiary will potentially subject the trust to NSW purchaser surcharge duty and surcharge land tax.

Solution?

Revenue Ruling No. G 009 released on 20 December 2016 by the Office of State Revenue confirmed the view that as long as the trust deed governing the discretionary trust excluded any foreign person from benefiting from the trust then the Commissioner is of the view that the specific trust is not a foreign person for the purposes of the new surcharge duty and surcharge land tax provisions.

What does this mean for your clients' trust deeds?

We suggest that all trust deeds for discretionary trust should now be reviewed and amended if required. Care needs to be taken so that any amendment does not trigger a potential resettlement of the trust and appropriate legal advice in this regard should be obtained.

How can we assist you?

We can offer a fixed fee rate for bulk amendments. We suggest that you act promptly to avoid surcharge duty.

If you would like more information or advice in these new duty and land tax surcharge provisions and amendments to your trust deeds please consult with a member of our team.

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