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SPECIAL EDITION
September 2008

STAMP DUTY - COMPANY LIQUIDATIONS & VESTING OF UNIT TRUSTS

Stamp Duty – Company Liquidations and Vesting of Unit Trusts – Opportunities Post 30 June 2008

In general, transactions which take place on or after 1 July 2008 are subject to duty under the *Duties Act, 2008 (WA)* (“the Act”), rather than the *Stamp Act, 1921 (WA)*. Whilst the new legislation largely mirrors the concepts under the former legislation, there are a significant number of policy changes encompassed in the provisions of the Act.

One such change is to ensure that stamp duty on the vesting of a unit trust is assessed in accordance with the same principles as apply in relation to the liquidation of a company. This will represent a welcome change for most practitioners, because the former provisions in relation to the vesting of unit trusts were generally regarded as unduly complex and difficult to apply.

On that basis, section 29 of the Act deals with stamp duty chargeable on certain conveyances of a

corporation’s property by a liquidator of the corporation to its shareholders as a consequence of the winding up of the corporation. Section 29 also covers certain conveyances of a unit trust’s property, including a conveyance of property to a unit holder in the course of winding up the unit trust.

For these purposes a “winding-up” in relation to a unit trust is restricted to circumstances where the unit trust is being terminated. Accordingly a partial vesting of trust property from a unit trust will not attract relief under section 29.

In effect where the Commissioner is satisfied that a corporation is not being wound up (or, where relevant, a unit trust is not being vested) as part of an arrangement for which a dominant purpose of any party is the reduction of duty otherwise chargeable on the transaction, the Commissioner may reduce to nil the value of the property subject to ad valorem duty. This would also apply to the distribution of assets in a land rich company.

In determining whether to reduce the duty payable, the Commissioner may have regard to various factors including:

- ◆ The duration of the shareholder’s shareholding in the corporation (or where relevant, the duration of the unit holder’s unit holding in the unit trust);
- ◆ The period for which the relevant property has been owned by the corporation/unit trust; and
- ◆ The commercial efficacy to the winding up/vesting.

However there are a number of potential traps in applying these provisions, and in particular duty will not be reduced to the extent that the distribution of the assets is not in accordance with the interest holder’s entitlement to the net assets of the entity. Further, duty will not be reduced to the extent of an amount:

- ◆ Owing to the interest holder that the interest holder has released the entity from paying at any time during the period

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commencing 12 months before the day on which the winding up began, and ending on the day that the property is transferred; and

- ◆ That the interest holder has assumed or discharged on behalf of the entity in the abovementioned period. This can be a particular concern where a property is distributed to an interest holder subject to a mortgage.

Stamp Duty Exemption – Transfers of Family Farms

In practice we often find that liquidations of companies and vesting of unit trusts can be associated with a desire on the part of farming families to use the stamp duty exemption for inter-generational transfers of farming land to reorganise their farm holdings.

In very general terms transfers of land and other dutiable property between individual family members, or from an individual family member to a discretionary trust may attract the exemption (provided certain conditions are met).

We note that pursuant to the Act some of the requirements concerning exempt family farm transactions have been slightly relaxed in comparison to the provisions of former legislation, although in practice the provisions remain difficult to apply in some cases.

In this regard a dutiable transaction is an exempt family farm transaction only if:

- ◆ Each transferor is using the farming property in the business of primary production immediately before the transaction takes place; and

- ◆ When the liability to duty on the transaction arises, each transferee intends to continue to use the farming property in the business of primary production.

It is irrelevant whether the transferor was using, or a transferee intends to continue to use, the farming property in the business of primary production personally, or through an entity or combination of entities to which the transferor or transferee is related. There are often difficulties in applying the provisions due to the narrow definition of related entities for these purposes.

Tax and Stamp Duty Implications of Company Liquidations and Vesting of Unit Trusts

In summary, the stamp duty implications associated with a company liquidation or the vesting of a unit trust can be complex.

We note that in addition to stamp duty, there can be significant income tax, CGT and GST implications in relation to a company liquidation or vesting of a unit trust. We would be happy to advise in relation to any such transactions.

Contact: Johanne Thomas or Richard Norton

Norton & Smailes

We advise on:

- income tax, GST, capital gains tax, FBT
- superannuation and superannuation deeds
- stamp duties, payroll tax and other State taxes
- wills, estate planning and business succession planning
- trusts and trust deeds
- objections and appeals

- tax and commercial litigation
- commercial law

Standard Documents (24 hour turnaround)

The following is a summary of our charges (excluding GST and disbursements) for the provision of final documents in duplicate and attending to stamping:

Deeds

• **Trust Deeds**

Discretionary Trust Deeds are \$240, and Unit Trust Deeds are \$295.

• **Superannuation Fund Deeds**

We provide Superannuation Fund Deeds for \$395. This includes supporting minutes, member information statements and all relevant documentation.

Other Documents

• **Enduring Power of Attorney**

An Enduring Power of Attorney is \$150, and a General Power of Attorney is \$220.

• **Wills**

We also provide Wills, including Testamentary Trusts where required. Estimates of fees can be provided.

• **Buy/Sell or Business Succession Agreements**

Estimates of fees can be provided.