

18 September 2020

Our ref: WD RLC

Mr Mark Jackson
Commissioner of State Revenue
Queensland Treasury
Level 21, 1 William Street
BRISBANE QLD 4000

By email: [REDACTED]

Dear Mr Jackson

Taxation Consultative Committee – various issues

Thank you for the opportunity for QLS to participate in the Taxation Consultative Committee (TCC). We are looking forward to the discussion at the next scheduled meeting on 24 September 2020.

The Queensland Law Society (QLS) representatives find this a very useful forum to meet and discuss issues of concern to practitioners and other stakeholders who practise in revenue and taxation matters.

At the next meeting, the QLS Revenue Law Committee wishes to raise the following issues, which are summarised in the **enclosed** TCC Issues Form templates:

1. Ambiguity in application of Additional Foreign Acquirers Duty (**AFAD**) under the *Duties Act 2001* to New Zealand citizens
2. Interpretation of the Queensland version of the corporate consolidation or “top hat” exemption in section 409 of the *Duties Act 2001*

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[REDACTED]
Luke Murphy
President

Encl

OSR TAXATION CONSULTATIVE COMMITTEE ISSUE

Submitted by Qld Law Society - 16 September 2020

Issue
Ambiguity in application of Additional Foreign Acquirers Duty (AFAD) under the <i>Duties Act 2001 (Act)</i> to New Zealand citizens
Subject
Issues with AFAD for New Zealand Citizens
Issue Description
<p>The following issues have been brought to light through the QLS:</p> <ol style="list-style-type: none">1. Example 3 on the Queensland Government Business Queensland website¹ (example 3) about when a New Zealand citizen is liable to AFAD has the effect of imposing a responsibility on self-assessors to determine whether the evidence indicates that a taxpayer had a purpose of entry into Australia to avoid paying AFAD by obtaining a special category visa. This should not be the responsibility of the self-assessor, but rather left to the Commissioner to determine whether the Commissioner will exercise his powers under Chapter 11 of the <i>Duties Act 2001</i>.2. Unfair or unintended application of clawback rules to transactions involving companies or trusts (Clawback provisions)
Background
<p><i>Issue 1: Example 3 – New Zealand citizens</i></p> <p>The Queensland Government Business Queensland website provides on the page titled "Types of foreign persons for additional foreign acquirer duty" under the heading "New Zealand citizens" as follows:</p> <p><i>A New Zealand citizen who is the holder of a special category visa when entering into a transaction that involves AFAD residential land will not be liable for AFAD.</i></p> <p><i>The following examples explain when New Zealand citizens will be liable for AFAD after entering into transactions for AFAD residential land.</i></p> <p>.....</p> <p>Example 3</p> <p><i>A New Zealand citizen is currently residing in New Zealand but enters into Australia to obtain a special category visa for the purposes of AFAD not applying.</i></p> <p><i>AFAD will apply if evidence indicates that the purpose of entry into Australia is to avoid paying AFAD by obtaining a special category visa. AFAD was introduced to ensure that foreign acquirers of residential property, who benefit from government and infrastructure, make an appropriate contribution to their delivery as local buyers do.</i></p> <p>By contrast, the Queensland Government Business Queensland website also offers an interactive questionnaire to determine liability for AFAD.² The following is one of the questions: 'Is the acquirer an Australian citizen, or a permanent resident who is the holder of a permanent visa or a special category visa as defined by the Migration Act 1958 (Cwlth)?' If answered in the affirmative, the acquirer is advised that AFAD does not apply. There is no mention of any additional criteria to assess in relation to the purpose of the taxpayer coming to Australia.</p>

¹ Queensland Government Business Queensland, 'Types of foreign persons for additional foreign acquirer duty' <<https://www.business.qld.gov.au/industries/service-industries-professionals/professional-financial-services/transfer-duty/investors/afad/foreign-persons>>.

² Queensland Government Business Queensland, 'Additional foreign acquirer duty residential land interactive help' <<https://www.business.qld.gov.au/industries/service-industries-professionals/professional-financial-services/transfer-duty/self-assessors/interactive-help/afad>>.

Example 3 has created confusion for self-assessors as to whether they are required to determine whether the evidence indicates that a taxpayer had a purpose of entry into Australia to avoid paying AFAD by obtaining a special category visa and the extent of what evidence may be required.

Whether a taxpayer has entered into Australia for the purpose of avoiding AFAD is not a matter for self-assessors to determine, but rather a matter for the Commissioner.

Example 3 is not required. The Commissioner already has the requisite powers to address any such anti-avoidance activity under Chapter 11 of the Act. Chapter 11 of the Act exists to deter artificial, blatant or contrived schemes to reduce liability to duty. If a duty benefit has been obtained in circumstances where the Commissioner considers that his powers under Chapter 11 of the Act are enlivened, the Commissioner may decide that the amount of the duty benefit is payable as duty.

Issue 2: Clawback provisions

Part 5 of Chapter 4 of the *Duties Act 2001* provides clawback provisions with respect to an AFAD assessment issued to corporations or trusts that become foreign within 3 years of the time the liability arises.³ In such a circumstance, the Commissioner must reassess the buyer to impose AFAD as if it had been a foreign person at the time of the transaction.⁴ These provisions are unique to Queensland and South Australia.

These rules do not apply to individuals acting in their personal capacity. Hence, if a New Zealand citizen who acquires a property in their own name returns to New Zealand within 3 years of the transaction, the clawback provisions will not be triggered.

However if, for example, a New Zealand citizen was advised to purchase the AFAD residential land through the vehicle of a trust or a corporation, then the clawback rules would apply. A foreign trust is defined as a trust where at least 50% of the trust interest are foreign interests.⁵ A foreign interest is defined as a trust interest of a foreign person.⁶ As previously discussed, New Zealand citizens are not foreign persons for so long as they remain in Australia but become foreign persons as soon as they leave the country. Hence if a sole beneficiary, or at least half of the beneficiaries in a trust, are New Zealand citizens who exit Australia at any given time within 3 years of the transaction, the clawback rules would be triggered, making them liable to AFAD.

The same applies to a corporation. If a New Zealand citizen was advised to purchase property through a corporation for whatever reason and happens to be the sole or majority shareholder, they will have an interest of at least 50% in the corporation.⁷ Upon leaving Australia, the New Zealand citizen and subsequently the corporation, will be deemed foreign and the clawback provisions will apply.

Further, any corporation or trust that purchased AFAD residential land has a positive obligation of notifying the Commissioner and preparing for reassessment within 28 days of becoming a foreign person.⁸

Society's view/suggested treatment

Issue 1: Example 3

We submit that example 3 be removed from the Queensland Government Business Queensland website.

If the Commissioner wishes to use the material on the website to deter anti-avoidance activity, the Commissioner could add the following paragraph (or similar) to that section of the website instead:

Please note that if the Commissioner considers that a New Zealand citizen has entered into Australia to avoid paying AFAD on a transaction by obtaining a special category visa, the Commissioner may exercise his powers under the anti-avoidance provisions in Chapter 11 of the Duties Act to determine that AFAD applies to the transaction.

Issue 2: Clawback provisions

We submit that the clawback provisions, in relation to New Zealand residents, result in unfairness between legitimate buyers.

If a New Zealand individual (being a New Zealand citizen) acquired residential land in Queensland while in possession of a special category visa, they would not be subject to AFAD or the clawback provisions. If the same New Zealand citizen however purchased a property through a trust or company, for valid asset protection reasons,

³ Ibid s 346A(2).

⁴ Ibid s 246A(3).

⁵ Ibid s 237.

⁶ Ibid.

⁷ Ibid s 236.

⁸ *Duties Act 2001* (Qld) Ibid s 246A(4).

they would be liable to AFAD as soon as they leave the country, even for a short period, within 3 years of purchase. They would then have the positive obligation of informing the OSR and preparing their own reassessment for full AFAD.

This essentially restricts legitimate buyers from ever leaving the country for any period within 3 years of lodgement, lest AFAD be payable. It also restricts the ability of New Zealanders to implement different structures for holding assets other than to hold them in their personal names.

There is no logical reason why a different result should occur depending on whether the acquisition was by an individual or by a trust or company related to that individual.

We submit this is an unfair result of the operation of the legislation and currently does not appear necessary to achieve the purpose for which it was enacted. We submit that protections should be afforded to legitimate New Zealand buyers who purchase through a corporation or trust. These could be achieved through administrative treatment via the issue of a public ruling or through legislative amendment.

Technical References

See footnotes.

Impact on Taxpayers

These provisions create a great deal of uncertainty for self assessors and tax payers alike as to when AFAD will apply to a transaction involving a New Zealand citizens acquiring a residential property (directly or indirectly). This is a great burden on the taxpayer, and self assessors of such transactions. Clarity and fairness should be assured in the application of AFAD for these persons.

Priority of issue where OSR view is required

Medium

Has previous advice been sought from OSR?

No

OSR Response

OSR TAXATION CONSULTATIVE COMMITTEE ISSUE

Submitted by Qld Law Society - 16 September 2020

Issue: Section 409 of the <i>Duties Act 2001</i> (Qld)
Subject: Interpretation of the Queensland version of the corporate consolidation or "top hat" exemption in section 409 of the <i>Duties Act 2001</i> (Qld) (Duties Act)
Issue Description:
<p>Members and their clients are finding practical difficulties in complying with the Commissioner's interpretation of the Queensland version of the corporate consolidation or "top hat" exemption in section 409 of the <i>Duties Act</i>.</p> <p>Specifically, we submit that the interpretation of section 409(1)(c)(v) creates undue administration to ensure that taxpayers satisfy both the exemption requirements as well as relevant provisions in the <i>Corporations Act 2001</i> (Cth) ("<i>Corporations Act</i>").</p>
Background:
<p>Section 409 is designed to provide for an exemption for landholder duty in circumstances where a company or corporate group seeks to interpose a new holding company between a company and its shareholders.¹ Without the exemption, such a transaction would be subject to landholder duty in Queensland if the previous head company is a "landholder", being a company which (whether by itself or together with its subsidiaries) has "land-holdings" with an unencumbered value of \$2 million or more.</p> <p>Most states and territories include an exemption similar in design and policy to section 409. We understand that Governments generally consider it desirable for corporate groups to structure themselves in the most efficient and effective way possible, with a view to driving profits, which ultimately leads to creation of jobs and payment of taxes. We understand that it is not uncommon for restructures to be abandoned in the event that duty arises on the restructure, which ultimately prevents corporate groups operating in the most efficient structure possible.</p> <p>Queensland has the strictest requirements both by way of proscriptive legislative provisions and their interpretation. This is particularly challenging where a company holds land in one or more jurisdictions in Australia, and thereby needs to qualify under multiple different rules.</p> <p>Section 409(1)(c)(v) Duties Act</p> <p>Section 409(1)(c) sets out seven conditions which must be satisfied in order to qualify for an exemption. These are in addition to conditions set out in section 409(1)(a) and (b). While the rules, when all put together, are proscriptive, the purpose of this letter is to address section 409(1)(c)(v), which reads as follows:</p> <p><i>each shareholder of the existing company whose shares are acquired by the new parent company receives consideration equal in value to the value of the shareholder's shares in the existing company;...</i></p> <p>We understand that this provision is an integrity measure designed to ensure that there is no change in value to the shareholder's interests due to the interposition of a new parent company.</p> <p>A typical diagram is in Annexure A.</p> <p>As a practical matter, the new parent company must be created first, which must include share capital ("Founding Share"). The new parent company then acquires the Qld landholder, the consideration for which is the issue of new shares in the new parent company to the Qld landholder's previous shareholders.</p>

¹ An interposition which qualifies for an exemption in section 409, is also an exception to the 3 year pre-association test required to establish "group property" to qualify for an exemption for a transfer of dutiable property within a corporate group under section 407(1)(c) of the *Duties Act*.

Say the value of the Qld landholder is \$5m. In order to satisfy section 409(1)(c)(v), the new parent company must issue shares to the value of \$5m to the shareholders aligning to their respective proportionate interest in the Qld landholder. It is submitted that can be achieved in a number of ways, including by one shareholder acquiring the Founding Share to incorporate the new parent company, and receiving one less share upon the interposition. It is submitted that such an approach is simple to facilitate, and is accepted in all other States and Territories where a corresponding exemption exists.

However, we understand that the Commissioner interprets section 409(1)(c)(v) in an unduly literal fashion, in that the exemption is not granted unless the Founding Share is cancelled contemporaneously with the interposition of the new parent company. It is submitted that this interpretation is not widely known or understood, and there is no public statement of the Commissioner setting it out.

Notwithstanding that it is difficult for taxpayers and their advisers to first be aware of the requirement (and therefore virtually impossible to ensure compliance), it is submitted that it is not necessary. In our example above, the founding shareholder ultimately acquires its precise percentage interest in the new parent company as it had in the Qld landholder.

Corporations Act 2001

Further, the Commissioner's requirement leads to a number of complications under the Corporations Act.

It is common practice for the Founding Share to be a redeemable preference share as it provides for the most flexibility in complying with the Commissioner's interpretation. However, the redemption of such a share has its own restrictions, particularly in section 254K:

A company may only redeem redeemable preference shares:

- (a) if the shares are fully paid-up; and*
- (b) out of profits or the proceeds of a new issue of shares made for the purpose of the redemption.*

Compliance with this requirement ultimately requires another step, most commonly a board resolution that such a redemption immediately arises upon the interposition, and that it be redeemed out of profits. However, the Qld landholder may not have any retained profits from which to redeem. Further steps are then required in order to comply, assuming of course that there are indeed profits.

It is submitted that manoeuvring through the both the Commissioner's interpretation of section 409(1)(c) and the Corporations Act is unduly onerous, particularly having regard to the policy intent underpinning the exemption, which is to prevent landholder duty from being a fetter against a corporate group from adopting the most efficient and effective approach.

Association view/suggested treatment:

It is submitted that legislative amendment is not required to give effect to the purpose underpinning section 409(1)(c)(v). Rather, we consider that the Commissioner adopt an interpretation and practice which is consistent with the other States and Territories, focusing on the ultimate interests acquired by shareholders upon the interposition of the new parent company.

That is, section 409(1)(c)(v) should be capable of satisfaction merely by reason of the shareholders holding the precise percentage interest which was held in the Qld landholder immediately after the interposition of the new parent company.

Technical References:

Section 409 of the *Duties Act 2001* (Qld)
Section 254K of the *Corporations Act 2001* (Cth)

Impact on Taxpayers:

Moderate

Priority of issue where OSR view is required:

Medium

Has previous advice been sought from OSR?
No
OSR Response:

Annexure A:

