

## Stamp Duty Bulletin

# December 2012 and January 2013 stamp duty developments

### **WHAT YOU NEED TO KNOW**

This Bulletin outlines Australian stamp duty developments in December 2012 and January 2013, which may impact your business, including:

#### **Transfer duty**

- **ACT: Outstanding debt interest table** – the Revenue Office has released the updated interest table for late or non-payment of duties, including the applicable rates for the first half of the 2013 calendar year.
- **New South Wales: *Landfall Pty Ltd v Chief Commissioner of State Revenue [2012] NSWADT 270***  
– the NSW ADT has upheld the Chief Commissioner's assessment of duty in respect of a trust deed, holding that the "apparent purchaser" concession in section 55(1)(a) *Duties Act 1997* (NSW) does not apply in circumstances where consideration for the purchase of dutiable property is provided in the form of a promissory note.
- **New South Wales: *Bondi Beachside Pty Ltd v Chief Commissioner of State Revenue [2013] NSWSC 21*** – Gzell J in the Supreme Court has largely upheld the Chief Commissioner's assessment of mortgage duty on a deed of variation that provided additional time for the payment of a purchase price, which was secured by a charge.
- **New South Wales: *CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue [2013] NSWSC 20*** – Gzell J in the Supreme Court has set aside the Chief Commissioner's assessment of duty of a series of Nomination Deeds and corresponding Call Option Nomination Notices. Gzell J held that the transaction was properly a novation, rather than a sale or transfer of dutiable property.
- **Queensland: *Sherratt v Commissioner of State Revenue [2013] QCAT 9*** – the QCAT has upheld the Commissioner's assessment of stamp duty in relation to the transfer of a 49/100 share in a property from the Applicant's wife to the Applicant, rejecting the Applicant's argument that the transfer was not dutiable as it had been carried out for the sole purpose of rectifying a "clerical error".
- **South Australia: *Statutes Amendment and Repeal (Budget 2012) Act 2012*** – the *Statutes Amendment and Repeal (Budget 2012) Act 2012*(SA) received Royal Assent on 6 December 2012. The Act amends the *Stamp Duties Act 1923* to provide concessional duty for certain off-the-plan apartments.
- **Victoria: High Court refuses Commissioner's special leave application** – the High Court has refused the Commissioner's special leave application against the decision of the Victorian Court of Appeal in *Challenger Listed Investments Ltd (As Trustee for Challenger Diversified Property Trust 1) v Commissioner of State Revenue* (2011) ATC ¶20-278, upholding the lower court's finding that a trustee was not liable for land rich duty on the conversion of a land rich private unit trust to a public unit trust under section 89C(1) of the *Duties Act 2000* (Vic) as the trustee did not hold an "interest" within the meaning of sections 76(1) and 77(1) (as in force when the transactions occurred).
- **Victoria: *Olivedale Park Pty Ltd v Commissioner of State Revenue (Taxation) [2012] VCAT 1874***  
– the VCAT has upheld the Commissioner's duty assessment in respect of the sale of a holiday park business which turned largely on the Commissioner's classification of cabins located on the site as "plant and equipment" rather than "stock in trade".
- **Western Australia: *Commissioner's Practice TAA 20.2 (Remission of penalty tax – for late payment) released*** – the Office of State Revenue has issued *Commissioner's Practice TAA 20.2* (Remission of penalty tax – for late payment), which took effect from 14 December 2012.

| Relevant area             | At a glance  |
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| <b>ACT: Transfer duty</b> | <p><b>ACT: Updated interest table for late or non-payment of duties</b></p> <p>The Revenue Office has released the <a href="#">updated interest table</a> for late or non-payment of duties and other taxes for the period commencing 1 January 2013 and ending 30 June 2013.</p>  |
| <b>NSW: Transfer duty</b> | <p><b>New South Wales: <i>Landfall Pty Ltd v Chief Commissioner of State Revenue [2012] NSWADT 270</i></b></p> <p>The NSW Administrative Decisions Tribunal ("NSWADT") in <a href="#"><i>Landfall Pty Ltd v Chief Commissioner of State Revenue [2012] NSWADT 270</i></a> has upheld the Chief Commissioner's assessment of duty in respect of a trust deed, holding that the "apparent purchaser" concession in section 55(1)(a) <i>Duties Act 1997</i> (NSW) does not apply in circumstances where consideration for the purchase of property is provided in the form of a promissory note.</p> <p><b>Facts</b></p> <p>The transaction the subject of this case was complex. For the purposes of the decision, the material facts were that Landfall Pty Ltd ("Applicant") acquired a life interest in a property, which was to be held on trust for a superannuation fund, from a family trust of which the Applicant was trustee. The consideration for the life interest was provided predominantly by a promissory note from the superannuation fund to the vendor. The case concerned whether the custodian trust deed ("Deed"), by which the Applicant agreed to act as bare trustee of the life interest for the superannuation fund, was assessable for <i>ad valorem</i> duty.</p> <p>The Commissioner held that it was and assessed the Deed for duty in the amount of \$21,365. The Applicant challenged the assessment on the ground that the "apparent purchaser" concession in section 55(1)(a) <i>Duties Act 1997</i> was applicable. It should be noted that no duty was payable on the deed by which the life interest was created and granted to the Applicant ("Life Interest Deed").</p> <p><b>Held</b></p> <p>The relevant terms of section 55(1)(a) are as follows:</p> <p style="padding-left: 40px;">"Duty of \$50 is chargeable in respect of a declaration of trust made by an apparent purchaser in respect of identified dutiable property vested in the apparent purchaser upon trust for the real purchaser who provided the money for the purchase of the dutiable property."</p> <p>Two issues arose for consideration: the first concerned whether the promissory note constituted "money", the second whether the transaction could be properly described as a "purchase of ... dutiable property".</p> <p>In considering the first issue, after reviewing the legislative history of the provision and authorities on the construction of the term "money", Judicial Member Block held that the provision of the promissory note by the superannuation fund did not constitute the payment of money.</p> <p>The Applicant also failed on the second issue, with Judicial Member Block finding that the transaction did not involve the "purchase of ... dutiable property" but only an agreement "for the creation of new estates and</p> |

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|                           | <p>interests ... out of the freehold."</p> <p>An additional issue considered by the Tribunal was whether section 55 is a remedial provision and as such deserving of a beneficial construction. The Tribunal considered that the provision is not a true remedial provision and that there was no basis on which it could be construed otherwise than in accordance with the requirement that the words must not be construed so as to give a meaning which they do not bear.</p>   |
| <b>NSW: Transfer duty</b> | <p><b>New South Wales: <i>Bondi Beachside Pty Ltd v Chief Commissioner of State Revenue [2013] NSWSC 21</i></b></p> <p>Gzell J in the Supreme Court in <a href="#"><u>Bondi Beachside Pty Ltd v Chief Commissioner of State Revenue [2013] NSWSC 21</u></a> has largely upheld the Chief Commissioner's assessment of mortgage duty on a deed of variation that provided additional time for the payment of a purchase price, which was secured by a charge.</p> <p><b>Facts</b></p> <p>In late 2007, Bondi Beachside Pty Ltd and Bondi Beachside Rebel Pty Ltd ("Applicants") executed various securities in favour of the National Australia Bank Ltd ("NAB") for the purpose of financing the acquisition of the Swiss Grand Hotel at Bondi, New South Wales. As a part of this transaction, Bondi Notes Pty Ltd ("Notes") issued notes in the amount of \$92,006,545. NAB subscribed for the notes and Notes lent the proceeds to the Applicants on terms that the Applicants would pay the purchase price for the notes to NAB at completion, or a later date as agreed by the parties. Interest was payable on the purchase price and was to be capitalised. The Applicants and NAB agreed to defer the payment of the purchase price on several occasions by deeds of variation ("Deeds"). Payment of the purchase price was secured by a number of security documents in favour of NAB, including a fixed and floating charge ("Charge") that was originally stamped for \$5.</p> <p>On the ground that the Deeds constituted the making of an advance as a forbearance under the <i>Duties Act 1997 (NSW)</i> ("Act"), the Chief Commissioner assessed mortgage duty on the amount of \$102,600,000 (the sum of the purchase price and the accrued capitalised interest). After having their objection to the assessment disallowed, the Applicants commenced this proceeding.</p> <p><b>Held</b></p> <p>It was not in contention that the Charge had been properly stamped initially, given it secured payment of an unpaid purchase price rather than an advance. However, the Chief Commissioner argued that the extension of time to pay the purchase price by one of the Deeds should be treated as constituting an advance under section 206(a)(iii) as "a forbearance to require the payment of money owing on any account whatever". The Applicants sought to argue that there was no precedent for a contractual, as opposed to a non-contractual, forbearance. Gzell J rejected the Applicants' argument and agreed with the Chief Commissioner that the extension of time constituted a constructive loan.</p> <p>On the basis of section 208(2) of the Act, the Applicants then sought to argue that, regardless of whether the Deeds constituted an advance, the amount</p> |

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|                           | <p>secured had not changed "as a result of" the Deeds, meaning that the liability to duty in respect of the advance should be zero as the amount had not increased and remained \$92,006,545. Gzell J rejected this argument, holding that no amount was secured by the Charge originally, but that the Deeds constituted advances by forbearance of the above amount.</p> <p>The Applicants did succeed in arguing that the Chief Commissioner's assessment had erroneously included capitalised interest in the amount secured by the Charge. Gzell J rejected the Chief Commissioner's argument that section 206(a)(iii) did not recognise the distinction between principal and interest. Gzell J held that the assessment should properly have been completed in respect of the secured amount of \$92,006,545.</p> <p>Finally, the Applicants failed on a technical argument that the Deeds (ie the advances) had not been made under "an agreement, understanding or arrangement" for which the Charge was security for the purposes of section 213(1). Gzell J reviewed the relevant transaction documents and held that the Charge did provide security for the advance in the form of a forbearance made by the Deeds.</p>  |
| <b>NSW: Transfer duty</b> | <p><b>New South Wales: <i>CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue [2013] NSWSC 20</i></b></p> <p>Gzell J in the Supreme Court in <a href="#"><i>CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue [2013] NSWSC 20</i></a> has set aside the Chief Commissioner's assessment to duty of a series of Nomination Deeds and corresponding Call Option Nomination Notices. Gzell J held that the transaction was properly a novation, rather than a sale or transfer of dutiable property.</p> <p><b>Facts</b></p> <p>CRI Chatswood Pty Ltd ("CRI") entered into four Call Option Deeds in substantially the same form with Transport for New South Wales and Rail Corporation of NSW ("Grantors"). The Call Option Deeds each granted an option to purchase bordering parcels of land in Chatswood, New South Wales. Each Call Option Deed included provisions for the nomination by CRI of a nominee by giving the Grantors the Call Option Nomination Notice, which was included as an annexure in the Call Option Deed. In November 2010, CRI and CTI Joint Venture Company Pty Ltd ("Applicant") entered into a Nomination Deed, under which CRI agreed to nominate the Applicant under the Call Option Deeds in exchange for a nomination fee. Call Option Nomination Notices were executed and delivered to the Grantors' representative, along with Notices of Exercise of Call Option and other materials giving effect to the exercise of the options. Duty was paid on the transfers of the property. However, the Applicant objected to the Chief Commissioner's assessment to duty of the Nomination Deeds and the Call Option Nomination Notices. The objection was unsuccessful and the Applicant commenced the proceeding.</p> <p><b>Held</b></p> <p>It was not in dispute that the rights held by CRI under the Call Option Deeds were dutiable property. The question before Gzell J was whether the nomination of the Applicant involved a transfer of dutiable property or a novation. Gzell J held that an examination of the terms of the relevant</p> |

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|                           | <p>documents evidenced that the process of nomination effected a novation rather than a transfer. Of significance was the use of the terms "replace" and "substitute", and relevant variants, in the Call Option Deeds. In addition, the fact that the nomination provisions required CRI to assume the role of guarantor of the Applicant's performance of its obligations was considered significant. The guarantee arrangement presupposed that CRI would have ceased to have any primary obligations under the Call Option Deeds which, in light of the established principle that "the benefit of a contract can be transferred but the burden of a contract cannot", was further evidence that a novation had been effected. In the words of Gzell J, "if [the Applicant] assumed no liability under the nomination ... there would be no point to the guarantee."</p> <p>The Chief Commissioner made several technical arguments of construction that were rejected by Gzell J as "strained" on the grounds that the transaction was "commercial" and should be "construed as such".</p> <p>Consequently, the Nomination Deeds were held not to be agreements for a sale or transfer under section 8(1)(b)(i) of the <i>Duties Act 1997</i> (NSW) ("Act") and the Call Option Nomination Notices were held not to effect a transfer under section 8(1)(a) of the Act.</p>  |
| <b>QLD: Transfer duty</b> | <p><b>Queensland: <i>Sherratt v Commissioner of State Revenue [2013]</i> QCAT 9</b></p> <p>The Queensland Civil and Administrative Tribunal ("QCAT") in <a href="#"><i>Sherratt v Commissioner of State Revenue [2013]</i> QCAT 9</a> has upheld the Commissioner's assessment of stamp duty in relation to the transfer of a 49/100 share in a property from the Applicant's wife to the Applicant. QCAT rejected the Applicant's argument that the transfer was not dutiable as it had been carried out for the sole purpose of rectifying a "clerical error".</p> <p><b>Facts</b></p> <p>The Applicant, Mr Sherratt, and his wife purchased an investment property in 2010. The title showed that the purchasers were registered as joint tenants in July 2010. Evidence was led indicating that, before completing the purchase, the Applicant and his wife had received financial advice that, for tax purposes, the property would be held best by the couple as tenants in common, with the Applicant holding a 99/100 share and his wife the remaining 1/100 share. However, it was not until the Applicant came to complete his 2010/11 tax return that he became aware that the title did not reflect this recommendation. Consequently, in October 2011, a second transfer was executed and registered to amend the title accordingly. The Commissioner assessed the second transfer for duty in respect of the transfer of a 49/100 share in the property. The Applicant sought to have the assessment overturned on the ground that the second transfer had been undertaken only to correct a "clerical error" in line with section 152 <i>Duties Act 2001</i>.</p> <p><b>Held</b></p> <p>Member Allen held that the Applicant's mistake did not constitute a "clerical error" within the meaning of section 152. It was, instead, an error concerning "the appropriateness of a transaction to achieve an intended legal result", in line with section 152(2). While the Applicant and his wife may</p> |

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|                           | <p>have intended to achieve the most advantageous tax outcome in respect of the registration, the documentation provided by the Applicant and his wife to their representatives at the time of the purchase showed no indication of their intention to hold the property other than as tenants in common. In the view of Member Allen, this placed the circumstances of the case outside the scope of the legislative provision, and was distinguishable from examples of "clerical errors" such as a misdescription of the property the subject of the transfer or of a party to the transfer.</p>  |
| <b>SA: Transfer duty</b>  | <p><b>South Australia: <i>Statutes Amendment and Repeal (Budget 2012) Act 2012</i></b></p> <p>Further to our <a href="#">Stamp Duty Bulletin, dated 13 December</a> 2012, covering November 2012 developments, the <i>Statutes Amendment and Repeal (Budget 2012) Act 2012</i> ("Act") received Royal Assent on 6 December 2012.</p> <p>The Act amends the <a href="#">Stamp Duties Act 1923</a> (SA) to provide concessional duty for off-the-plan apartments within the City of Adelaide, Bowden Village and at 45 Park Terrace, Gilberton.</p>  |
| <b>Vic: Transfer duty</b> | <p><b>Victoria: High Court refuses Commissioner's special leave application</b></p> <p>The High Court has refused the Commissioner's special leave to appeal application against the decision of the Victorian Court of Appeal in <i>Challenger Listed Investments Ltd (As Trustee for Challenger Diversified Property Trust 1) v Commissioner of State Revenue</i> (2011) ATC ¶20-278. In that case, the Court of Appeal held that a trustee was not liable for land rich duty on the conversion of a land rich private unit trust to a public unit trust under section 89C(1) of the <i>Duties Act 2000</i> (Vic) (Duties Act), as the trustee did not hold an "interest" within the meaning of sections 76(1) and 77(1) of the Duties Act (as in force when the transactions occurred). A detailed discussion of the Court of Appeal decision was included in our <a href="#">Stamp Duty Bulletin, dated 7 October 2011 covering</a> August and September 2011 developments.</p>  |
| <b>Vic: Transfer duty</b> | <p><b>Victoria: <i>Olivedale Park Pty Ltd v Commissioner of State Revenue (Taxation) [2012] VCAT 1874</i></b></p> <p>The Victorian Civil and Administrative Tribunal ("VCAT") has upheld the Commissioner's assessment of stamp duty in <a href="#">Olivedale Park Pty Ltd v Commissioner of State Revenue (Taxation) [2012] VCAT 1874</a> in respect of the sale of a holiday park business.</p> <p><b>Facts</b></p> <p>The applicant acquired the land, and the holiday park business operated on the land, from the vendor in March 2011. The Commissioner assessed duty on the purchase in the sum on \$132,236, based on the consideration paid for the land (\$1,400,000) and for the business (\$1,100,000) of which a valuation indicated plant and equipment used in the business was worth \$1,011,555. The valuation indicated that the cabins located on the property had been included as "plant and equipment" and accounted for \$959,180. The applicant challenged the assessment on several grounds:</p> <ul style="list-style-type: none"> <li>• the cabins had been mischaracterised as plant and equipment and were rightfully stock in trade;</li> <li>• the goodwill of the business had been undervalued and the</li> </ul> |

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|                          | <p>assessment should be reduced to take proper account of its real value;</p> <ul style="list-style-type: none"> <li>• the applicant had been misadvised in respect of the quantum of its potential liability to duty; and</li> <li>• the Commissioner had delayed referral of the matter to the VCAT.</li> </ul> <p><b>Held</b></p> <p>The VCAT dismissed all of the grounds upon which the applicant challenged the Commissioner's assessment. Firstly, while the applicant sought to point to its purchase of an additional cabin, and its disposal of another cabin that was deemed unsatisfactory, as evidence of cabins constituting "stock in trade" of the business, Senior Member Davis held that the selling and buying of cabins was not truly a part of the business. Instead, the cabins were properly characterised as plant and equipment that were used to accommodate the holiday park's guests, and were not "stock in trade".</p> <p>Secondly, the applicant's claim that the goodwill of the business had been undervalued was held to have been unsubstantiated by the evidence. The applicant had sought to argue that the value of the goodwill was in excess of \$300,000 but the purchase price paid for the business, in conjunction with the valuation, indicated that the proper amount was in the realm of \$88,000 (ie the difference between the value of the plant and equipment and the total consideration paid for the business).</p> <p>Lastly, the applicant's reliance on the duty estimate of its advisers was held to be immaterial to the correctness of the Commissioner's assessment, and the delay in the referral of the matter was deemed not to be a proper ground for appeal or review.</p> |
| <b>WA: Transfer duty</b> | <p><b>Western Australia: <i>Commissioner's Practice TAA 20.2 (Remission of penalty tax – for late payment) released</i></b></p> <p>The WA OSR has issued <a href="#"><u>Commissioner's Practice TAA 20.2 (Remission of penalty tax – for late payment)</u></a> ("Practice"), which took effect on 14 December 2012. The Practice summarises the situations in which penalty tax for late payment of duty or tax will be remitted. The Practice replaces TAA 20.1.</p>   |

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