

Revenue Ruling

Public Ruling

Ruling Number	:	PUB-DT-2014-2
Title	:	Property vested in an 'Apparent Purchaser'
Tax Line	:	Duties
Legislative Reference	:	<i>Duties Act 2001</i>
Previous Ruling	:	PUB-DT-2008-27
Date of Ruling	:	20 March 2014

Preamble

This ruling gives guidance on the application of section 39 of the [Duties Act 2001](#) (the Act).

Section 39(1) of the Act provides that certain dutiable transactions involving an apparent purchaser and real purchaser are chargeable with duty of \$50. The concession applies to:

- (a) a declaration of trust made by an apparent purchaser in respect of identified dutiable property –
 - i) vested in the apparent purchaser upon trust for the real purchaser who provided the consideration for the purchase of the dutiable property; or
 - ii) to be vested in the apparent purchaser upon trust for the real purchaser if the Commissioner is satisfied that the consideration for the purchase of the dutiable property has or will be provided by the real purchaser.

AND

- (b) a transfer of dutiable property from an apparent purchaser to the real purchaser if –
 - i) the dutiable property is property or part of property vested in the apparent purchaser upon trust for the real purchaser; and
 - ii) the real purchaser provided the consideration for the purchase of the dutiable property and for any improvements made to the dutiable property after the purchase.

Ruling

Apparent purchaser and real purchaser

The principles for resulting trusts were summarised by the High Court in *Calverley v Green* (1984) 155 CLR 242 (per Gibbs CJ at 246-7 and Deane J at 266-7). In essence, a resulting trust arises where a person (the 'apparent purchaser') acquires property on behalf of another person(s) (the 'real purchaser') in circumstances where the real purchaser(s) paid the purchase price for the property.

A resulting trust would also arise at law, to the extent the real purchaser(s) paid the apparent purchaser's purchase price, where the apparent purchaser acquires property jointly with the real purchaser(s). Nevertheless, in referring to the "real purchaser" and requiring the real purchaser to have "provided the consideration for the purchase of the dutiable property", section 39 contemplates one conveyance where the whole of the purchase money has been actually paid by the real purchaser (ie the beneficial owner) although title has been taken to the property by an apparent purchaser (per Priestley JA in *Triantifilis v Commissioner of Stamp Duties (NSW)* 98 ATC 4484).

Where a resulting trust arises, and provided there is no evidence that the real purchaser intended for the apparent purchaser to take a beneficial interest in the property (and subject to any presumption of advancement that might arise from a relationship between the real and apparent purchaser), the apparent purchaser is presumed at law to hold the property in trust for the real purchaser. In the case of a joint purchase (ie both the real purchaser(s) and the apparent purchaser appear on title), the purchasers are presumed to hold the property in trust for themselves as tenants in common commensurate to the respective proportion they contributed to the purchase price of the property.

In *Truskett v Commissioner of Stamp Duties (NSW)* (1976) 6 ATR 1, Rath J held that the *Stamp Duties Act 1920* (NSW) equivalent to section 39 was confined to cases where property is purchased in the name of a stranger to the real party to the purchase. In that case the appellants in their personal capacity purported to purchase property on behalf of themselves as trustees. It was held that the concession could not apply in that matter because the real and apparent purchasers were the same persons insofar as only their capacities differed with the consequence that no question of a resulting trust arose. To this end, a resulting trust arises only where the moneys are provided by the beneficial owners in the character of purchasers of the property. Further, no resulting trust arises if the 'beneficial owner' provided the moneys as a loan or a gift to the legal owner (ie the apparent purchaser) of the property.

Where part of the purchase price of a property is provided by means of a loan secured by a mortgage over the property, the persons who are under an obligation to repay the loan are taken by law to have provided that part of the purchase price, regardless of who actually makes repayments under the mortgage. This is because the person who actually pays the mortgage instalments is merely repaying the loan, not contributing to the purchase price (*Caverley v Green* per Mason & Brennan JJ at 257-8). However, section 39(2) overcomes this principle and provides:

For the purposes of subsection (1), consideration provided by a person other than the real purchaser is taken to have been provided by the real purchaser if the Commissioner is satisfied that the consideration was provided as a loan and has been or will be repaid by the real purchaser.

Therefore, the person who has been repaying or is intended to repay the loan will generally be taken to have provided that part of the purchase price, regardless of who assumed a liability under the mortgage.

Declaration of a resulting trust

Section 39(1)(a) applies only to property vested or to be vested in the apparent purchaser upon purchase. As a result, any subsequent improvements or changes to the property after its acquisition by the apparent purchaser are not relevant (or fatal) to this particular concession.

In *Truskett* (supra) and in *Crowther v Commissioner of Stamp Duties (NSW)* (1978) 8 ATR 433, the requirements for the equivalent of section 39(1)(a) were identified as follows –

- there is a real purchaser and an apparent purchaser who are different persons; and
- the real purchaser must have actually provided the consideration for the purchase.

Consequently, a declaration of trust in favour of a company to be formed cannot meet either of the above requirements and does not come within the concession.

Subsequent transfer following improvements and changes to the dutiable property

Section 39(1)(b) applies concessional duty to a transfer of dutiable property from the apparent purchaser to the real purchaser provided the real purchaser provided the purchase money for the acquisition of the property and for any subsequent improvements to the property.

In circumstances where there has been a change to the nature of the dutiable property between its acquisition by the apparent purchaser and transfer to the real purchaser (for example as a result of subdivision which creates new rights in respect of new property as distinct to constituting a mere change in description of the existing property), an issue arises that the property transferred to the real purchaser is not the same property as the property acquired by the apparent purchaser. Section 39(3) operates to address this irregularity and provides:

(3) This section applies whether or not there has been a change in the legal description of the dutiable property between the purchase of the property by the apparent purchaser and the transfer to the real purchaser.

Accordingly, if, for example, the dutiable property vested in the apparent purchaser is land, the section 39 concession would continue to apply if the legal description of the dutiable property changes as a consequence of the subdivision of the land prior to its transfer to the real purchaser. In addition, the fact that arrangements such as a construction contract were entered into by the apparent purchaser would not prevent the concession from applying, provided it can be shown that the real purchaser provided the monies to effect those improvements.

Transfer of part of the dutiable property

Further to the foregoing, the section 39(1)(b) concession continues to apply where the property transferred to the real purchaser is only part of the dutiable property initially acquired by the apparent purchaser.

For example, if land held by an apparent purchaser is subdivided into two lots and only one of those lots is transferred to the real purchaser, that transfer would remain eligible for the concession under section 39(1)(b) because the concession applies to property “or part of property” vested in the apparent purchaser upon trust for the real purchaser.

However, the above example can be distinguished from the situation where there is more than one real purchaser all of whom together were joint real purchasers of all of the property but severally all receive a part of the property. For example, in *Growing Wealth Pty Ltd & Ors v Commissioner of Stamp Duties* [2000] 3 QCA 418, an agent acquired land to construct separate residential units. Funds were provided by investors who contributed amounts referable to the price specified for an individual unit. The Queensland equivalent to section 39 was nevertheless held not to apply in respect of the transfer of individual lots to each investor because, amongst other things, the investors were entitled to all of the land as tenants in common in proportion to their contributions, whereas each investor received a transfer of the entire interest in an individual lot. In these circumstances, although each lot is ‘part’ of the dutiable property vested in the apparent purchaser, each ‘real purchaser’ did not provide all of the money for the purchase and improvement of any individual lot with the consequence that the concession could not apply.

Example of the operation of Section 39 – transfer

Company A acquires land as agent for X & Y who jointly provide the purchase money. Company A subsequently obtains a loan secured by a mortgage over the land, which loan is guaranteed by X & Y who make all the loan repayments. The loaned money is subsequently used to construct a residential apartment building and to register a strata plan. Company A then makes a declaration of trust setting out the arrangement before transferring lot 1 in the strata plan to X, lot 2 to Y and lots 3 & 4 to X & Y as tenants in common in equal shares. The remainder of the lots are sold to third parties, with the proceeds used to discharge the loan.

In these circumstances, the concession in section 39(1)(a) would operate to apply duty of \$50 only to the declaration of trust made by Company A acknowledging the arrangement, so long as evidence is provided that shows X & Y provided the consideration for the purchase and that X & Y paid all liabilities under the mortgage.

However, with the regard to the transfers, X did not provide the whole of the money for the purchase and improvements in relation to lot 1, and Y did not provide the whole of the money for the purchase and improvements in relation to lot 2. Therefore, only the transfer of lots 3 & 4 to X & Y jointly will be assessed to \$50 duty under section 39(1)(b) and the transfer of lots 1 and 2 would attract *ad valorem* duty.

Note: If all four lots had been transferred to X & Y jointly, section 39(1)(b) would apply, and subsequent transfers of the separate lots to X and to Y could be eligible for concessional duty under section 26 as a partition.

Evidence requirements

If seeking a concession under section 39(1)(a), the written declaration of trust must be lodged for assessment or, in the case of 39(1)(b), an executed transfer instrument. Further, both the apparent purchaser (trustee) and the real purchaser must provide a statutory declaration setting out:

- (a) the arrangement between the parties about the beneficial ownership of the property at the time of purchase by the apparent purchaser;
- (b) why the property was purchased in the name of the apparent purchaser;
- (c) who actually provided the purchase money for the property, including any deposit payable under the agreement for the purchase of the property; and
- (d) the date of birth of the real purchaser (if he or she was under 18 years of age at the time of the purchase by the apparent purchaser) or, if the real purchaser is a company, the date of its incorporation.

In addition, evidence is required that confirms the real purchaser actually provided the consideration for the trust property (or that the real purchaser will provide the consideration). This may consist of bank statements, copies of cheques and the like. Such evidence should clearly demonstrate that the real purchaser actually provided the deposit as well as the balance of the purchase money. If any part of the purchase money was borrowed by the apparent purchaser (e.g. in the apparent purchaser's name as mortgagor), details about the loan arrangements and any indemnities given by the real purchaser should be provided, together with evidence of the source of any loan repayments made before the transfer.

It is important to know that ...

All rulings must be read subject to Revenue Ruling [PUB-GEN-2014-5, 'Explanation and Status of Revenue Rulings'](#).



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