Revenue Ruling

Ruling Number	: PUB-DT-2016-4
Title	: Landholder provisions Tracing Interests in Land through Discretionary Trusts
Tax Line	: Duties
Legislative Reference	: *Duties Act 2001*
Previous Ruling	: Nil
Date of Ruling	: 6 December 2016

Preamble

The landholder provisions in Chapter 3 of the *Duties Act 2001* (the Act) charge duty on relevant acquisitions in landholders. A landholder is any company or unit trust scheme (whether private or public) that has land holdings in Tasmania with an unencumbered value of $500 000 or more.

In determining the extent of a company or unit trust scheme's land holdings (and the amount of duty payable on a relevant acquisition), its land holdings are not limited to land it directly owns and may include land held by linked entities and discretionary trusts.

The purpose of this Ruling is to explain how the provisions associated with the tracing of interests in land through discretionary trusts operate and to identify the factors the Commissioner of State Revenue (the Commissioner) will take into account in determining whether or not a company or unit trust scheme is taken to be entitled to the property of a discretionary trust.

Ruling

Section 77(1) of the Act provides that a company or unit trust scheme is a beneficiary of a discretionary trust if the capital of the trust may be applied in its favour, either upon the exercise of a power or discretion conferred under the trust, or in circumstances where a discretion conferred under the trust is not exercised.

Under Section 77(2) of the Act, a company or unit trust scheme (including a linked entity) that is a beneficiary of a discretionary trust is deemed to own or to be otherwise entitled to 100 per cent of the land (and goods) that is the subject of the trust even though at law it may not have a present entitlement to any part of such property.

To avoid unjust results arising, Section 77(2) of the Act provides the Commissioner with the discretion to determine that a company or unit trust scheme, that is a beneficiary of a discretionary trust, is not to be taken to be entitled to the property of the trust for the purposes of determining the extent of the company or unit trust's land holdings. This discretion is all or nothing such that a company or unit trust will be deemed to be entitled to all the property of the discretionary trust unless the Commissioner determines otherwise.

In tracing through discretionary trusts, Section 77(3) of the Act also deems the land of one discretionary trust (the First Trust) to be the land of another discretionary trust (the Second Trust) if the Second Trust is a beneficiary of the First Trust, or if the trustee of the Second Trust (in its capacity as trustee) is a beneficiary of the First Trust. Accordingly, if company A is a beneficiary of discretionary trust X and in turn discretionary trust X is a beneficiary of discretionary trust Z, company A's land holdings and goods will, in the absence of an exercise of the Commissioner's discretion to disregard the interests, be deemed to include all the land and goods of discretionary trusts X and Z.

The factors the Commissioner will consider in determining whether a company or unit trust scheme (including a linked entity) should be deemed not to own or otherwise be entitled to the land of a discretionary trust include but are not limited to –

- The extent of the company or unit trust scheme's entitlement to the capital of the trust upon the vesting of the trust, determined on the assumption that the circumstances entitling the company or unit trust scheme to a distribution of the capital of the trust are satisfied (even if the vesting of the trust is not contemplated at the time of the Commissioner's determination);
- The likelihood of the company or unit trust scheme receiving any of the capital of the trust, having regard to any intention (manifest or implied) of the settlor and/or trustee to vest the property of the trust in the company or unit trust scheme;
- If the trust was not established for the benefit of the company or unit trust scheme, how the company or unit trust scheme has become a beneficiary of the trust and how it is related to the person(s) for whom the trust was established;
- The use of the property of the discretionary trust and whether the trust or its property forms part of a business structure or activity involving the company or unit trust scheme including whether the trust's property (or any part of it) has been used as security for the benefit of the company or unit trust scheme or a business structure or activity involving it;
- Evidence of historical capital and income distributions made by the trustee of the trust. Where there have been no capital distributions, and the terms of the trust do not distinguish between persons or classes of persons to whom the income and capital of the trust may be applied, the Commissioner may consider evidence of past income distributions to determine the extent of a company or unit trust scheme's and/or linked entity's entitlement; and
- In cases where two or more entities (eg the landholder and a linked entity of the landholder) are the beneficiaries of the same discretionary trust, the extent to which the property of that discretionary trust has already been included as a land holding of the landholder (eg the discretion will be exercised to prevent double counting).

The following examples illustrate how the Commissioner's discretion in Section 77(2) of the Act may be exercised for the purposes of determining whether a company or unit trust should be taken to own or otherwise be entitled to the land of a discretionary trust for the purposes of determining the extent of its landholdings:

Example 1

A discretionary trust that has been established to hold a family home for asset protection purposes.

Under the terms of a family trust deed, a company falls within the class of beneficiaries potentially entitled to a distribution of the capital of the trust on the basis that one of the family members, who is named beneficiary of the trust, is a shareholder of the company (eg the trust deed includes, as a class of beneficiaries, any company in which a named beneficiary of the trust is a shareholder). Under the trust, the company's right to receive a distribution of the capital of the trust upon its vesting is as one of five potential default beneficiaries should the fund not be distributed to named discretionary objects.

Assuming that the circumstances entitling the company to a distribution of the capital of the trust are satisfied, it would be entitled to receive at least 20 per cent of the capital of the trust upon its vesting but the only asset comprising the capital of the trust is the family home. The home is used and occupied as the principal place of residence of the family and is not in any way connected to the business structure or activity involving the company.

In this example, while the company is a capital beneficiary and potentially entitled to at least 20 per cent of the capital of the trust, the Commissioner would be inclined to find that the company's entitlement to the land of the trust should not be counted as a land holding of the company as the home was never intended to benefit the company and will most likely never vest in the company. In such a case, and upon application by the person making the relevant acquisition, the land of the discretionary trust may be disregarded in determining the extent of the company's land holdings.

Example 2

A private company landholder operates two closely aligned businesses, ie a building and construction business in its own right and a land banking and investment business in its capacity as trustee of a discretionary trust.

The landholder (in its own right) and three related individuals are the specified beneficiaries of a discretionary trust. Under the terms of the trust, the trustee has the discretion to distribute the capital and income of the trust to any of the specified beneficiaries. However, despite these entitlements, all distributions of income made during the life of the trust have only been made in favour of the landholder. Furthermore, the trust's land holdings have been used to secure third party loans to the landholder for the business it carries on in its own right.

In this example, whilst the landholder is one of a number of beneficiaries potentially entitled to the capital of the trust, the Commissioner would be inclined to include the trust's land as a land holding of the landholder (eg to deem the landholder to own or to be otherwise entitled to the land of the discretionary trust for the purposes of determining the extent of the landholder's land holdings). This is because the land of the trust forms an integral part of the business operations of the landholder and the fact that the landholder has exclusively received income distributions indicates that the land of the trust is intended to benefit the landholder. Accordingly, all the land of the trust will be taken into account in determining the land holdings of the landholder in the event of a relevant acquisition in the landholder. In addition, the goods of the trust would be included in the dutiable value of the landholder under Section 71 of the Act.

Example 3

Double counting.

A person makes a relevant acquisition in Company A, which is a landholder. Company A is a linked entity to Company B, which in turn is a linked entity to Company C. Companies B and C are amongst the primary beneficiaries of Discretionary Trust D, which also owns land. All material distributions of income from the trust have been made to Companies B and C.

In this example, both Company B and C would likely be deemed, as the beneficiaries of Discretionary Trust D who had received all distributions of trust income, to be entitled to all the property of Discretionary Trust D for the purposes of determining the extent of their land holdings. However, as deeming both companies to be entitled to all the property of Discretionary Trust D would result in Discretionary Trust D's land holdings being counted twice, the Commissioner would exercise the discretion to disregard one of the companies' interests in Discretionary Trust D.

The above considerations are provided as a guide only and are not an exhaustive list of the matters or factors the Commissioner may consider. Each matter will be considered on its own individual facts in determining the application of the provisions. A taxpayer who is uncertain of the application of Section 77 of the Act in a particular case may contact the State Revenue Office to discuss their circumstances.

Explanation of Revenue Rulings

All rulings must be read in conjunction with Revenue Ruling PUB-GEN-2014-5, Explanation and Status of Revenue Rulings.

For questions about this ruling, please email revenuereview@treasury.tas.gov.au or phone (03) 6166 4400.

JC Root
Commissioner of State Revenue
6 December 2016