

# Revenue Ruling

Commissioner of State Revenue, Tasmania



PUB-DT-2023-3 · Effective 1 July 2023

## Trust Variations: Duty Implications

### Preamble

1. [Section 6 of the Duties Act 2001](#) imposes duty on “certain transactions concerning dutiable property”. This includes “declarations of trust” under [section 6\(1\)\(b\)\(ii\)](#) and “any other transaction that results in a change of beneficial ownership of dutiable property” under [section 6\(1\)\(b\)\(vi\)](#).
2. Under [section 7](#) of the Act duty is charged as if each “declaration of trust” or “other transaction that results in a change of beneficial ownership of dutiable property” was a transfer of dutiable property.
3. The Table in [section 7](#) shows how duty is to be assessed in these instances:

Column 1 Dutiable transaction	Column 2 Property transferred	Column 3 Transferee	Column 4 When transfer occurs
declaration of trust	the property vested or to be vested in the declarant	the person declaring the trust	when the declaration is made
any other transaction that results in a change in beneficial ownership of dutiable property	the property the beneficial ownership of which is changed (but only to the extent of the change in beneficial ownership)	the person who obtains the beneficial ownership or whose beneficial ownership is increased	when beneficial ownership changes

4. A variation of trust can result in a dutiable transaction if the variation is such that it is a “declaration of trust” under [section 6\(1\)\(b\)\(ii\)](#) of the Act, or if the variation “results in a change of beneficial ownership of dutiable property” under [section 6\(1\)\(b\)\(vi\)](#) of the Act.
5. [Section 18](#) of the Act provides that the dutiable value of dutiable property the subject of a dutiable transaction is the greater of the consideration for the dutiable transaction or the unencumbered value of the dutiable property. If no consideration is paid for the declaration of trust or change in beneficial ownership, duty will be based on the unencumbered value of the dutiable property the subject of the declaration of trust, or the value of the the property the beneficial ownership of which is changed (but only to the extent of the change in beneficial ownership) (see the table at [section 7](#) of the Act).
6. The purpose of this Ruling is to provide guidance as to:
  - (a) when a trust variation is of such magnitude that it amounts to a declaration of trust under [section 6\(1\)\(b\)\(ii\)](#) of the Act; and
  - (b) when a trust variation may be dutiable as it results in a change in beneficial ownership under [section 6\(1\)\(b\)\(vi\)](#) of the Act.

7. [Section 6\(1\)\(b\)\(vi\)](#) of the Act imposes duty on “any **other** transaction that results in a change of beneficial ownership of dutiable property”, meaning it must relate to a transaction other than one already listed in [section 6\(1\)\(b\)](#). Therefore if a trust variation is dutiable as a declaration of trust it is *not* also dutiable as a change in beneficial ownership.

## Ruling

### Trust variation that is a declaration of trust: Duty implications

8. Case law demonstrates that variation to a trust deed may constitute a declaration of trust for the purposes of duty.<sup>1</sup> This may occur where the variation:
- subjects the trust property to a new charter of rights and obligations; or
  - gives rise to different equitable interests to those which had previously existed under the trust.
9. However, it has been held that a “declaration of trust” in equivalent New South Wales legislation does not encompass a mere acknowledgement of an existing trust.<sup>2</sup>
10. Whether an amendment is made in proper exercise of a power of variation contained in a trust deed may also be relevant. However, cases have found that a trust has been “resettled” notwithstanding the existence of a power of variation.<sup>3</sup>
11. Whether an amendment is made in proper exercise of a power of variation is to be determined in accordance with the principles of trust law, having regard to:
- the ambit of the relevant power in the deed; and
  - whether the relevant power has been exercised in a manner consistent with any procedural steps in the deed required for the exercise of the power to be effective.
- The scope and ambit of the power will be determined by the express words of the deed. Extrinsic evidence could also be relevant.
12. Common types of amendment which may give rise to a question as to whether there has been a declaration of trust include:
- the addition or removal of beneficiaries;
  - changes to the beneficiary class;
  - changes to the rights and entitlements of beneficiaries;
  - changes to the vesting date; and
  - changes to the terms or nature of the trust or the rights and obligations of the trustee, e.g. from a discretionary trust to a fixed trust or vice versa.

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<sup>1</sup> *Davidson v Chirnside* (1908) 7 CLR 324; *Commissioner of Stamp Duties (NSW) v Perpetual Trustee Company* (1926) 38 CLR 272; *Wedge v Acting Comptroller of Stamps (Vic)* [1941] HCA 1; (1941) 64 CLR 75; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226. The Commissioner considers that *Federal Commissioner of Taxation v Commercial Nominees of Australia Ltd* [2001] HCA 33 and *Commissioner of Taxation v Clark* [2011] FCAFC 5 concern questions of continuity of trusts for federal income tax purposes. While they have some relevance, depending on the circumstances, they are not directly on point as regards State duties issues.

<sup>2</sup> *Benidorm Pty Ltd v Chief Commissioner of State Revenue (NSW)* [2020] NSWSC 471, [227]; *Chief Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285.

<sup>3</sup> *Commissioner of State Revenue v Lam & Kym Pty Ltd* [2004] VSCA 204.

13. Whether the variations made to the trust constitute a declaration of trust will be a question of degree. The examples given in this ruling should be considered to be a guide only. There could be circumstances or terms in a trust instrument or instrument of variation which alter the result in a particular case.
14. In the Commissioner's view, a "substance over form" approach is to be adopted in assessing whether there has been a declaration of trust. For example, duty is not avoided based on the terms used in the relevant instrument, if the effect is to subject the trust assets to the terms of a new trust. If that is the effect, then the variation will constitute a declaration of trust under [section 6\(1\)\(b\)\(ii\)](#) of the Act. Likewise, an instrument that is termed a "declaration of trust" will not amount to a declaration of trust under the legislation if it merely recognises a state of affairs which was already in existence.<sup>4</sup>
15. Where there is a declaration of trust, and no consideration is paid, duty is calculated based on the unencumbered value of all of the dutiable property subject to the declaration of trust ([section 18](#) of the Act). Duty is payable by the person declaring the trust in accordance with [section 7](#) of the Act.

#### Trust variation that results in a change of beneficial ownership: Duty implications

16. Calculating duty on a trust variation which results in a change of beneficial ownership, is subject to some complexities. It depends upon the nature of the interests held by the beneficiaries and whether there has been a "change in beneficial ownership" under [section 6\(1\)\(b\)\(vi\)](#) of the Act.
17. A variation to a trust may result in a change in beneficial ownership. The Table in section 7 of the Act provides that the dutiable property in this circumstance is "the property the beneficial ownership of which is changed (but only to the extent of the change in beneficial ownership)." Assuming that no consideration is paid for the variation, it is the change in interest in the trust property which must be valued to determine the dutiable value, which must occur on a case-by-case basis.
18. In *Chief Commissioner of Stamp Duties (NSW) v Buckle*<sup>5</sup> the High Court held that where the beneficiaries of a trust held remainder interests, in default of the prior exercise of a power of appointment the valuation of those interests had to take into account the trustee's liabilities and other "vicissitudes" (meaning possible changes in circumstances which might eventuate). The value of the interests was not simply a proportion of the unencumbered value of the trust property.
19. The liable party where there is a change of beneficial ownership is the person who obtains the beneficial interest, in accordance with [section 7](#) of the Act.

#### Example - no declaration of trust or change in beneficial ownership

20. The Z Family Trust is a discretionary trust with three named discretionary objects. The trust deed includes a broad power of variation.
21. The trustee exercises the power of variation in the manner specified in the trust deed to add a fourth beneficiary to the Z Family Trust's class of named discretionary objects.
22. Because the amendment has been made in proper exercise of a power of variation contained under the trust deed and there is a degree of continuity of membership of the trust, along with no change to the nature of the trustee's obligations or the trust property, it is the Commissioner's view that there is likely to be no declaration of trust or change in beneficial ownership in these circumstances.

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<sup>4</sup> *Chief Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285.

<sup>5</sup> (1998) 192 CLR 226.

23. The addition of a new discretionary beneficiary does not result in a change in beneficial ownership of dutiable property because beneficiaries of a discretionary trust are not beneficial owners of dutiable property until the trustee's discretion is exercised in the beneficiaries' favour or the trust vests.

#### Example - variation amounting to a declaration of trust

24. The X Family Trust is a discretionary trust. The trust deed provides the trustee with limited powers of variation.
25. The trustee and the beneficiaries decide to convert the X Family Trust into a fixed trust with reduced discretionary power granted to the trustee. The trust deed is amended to broaden the trustee's powers of variation. The deed of variation substantially amends the obligations and powers of the trustee and the rights and entitlements of the beneficiaries. It converts interests which were previously defeasible into vested and indefeasible interests.
26. As the change creates new obligations and rights that extinguish the existing rights and obligations, it is likely that a new trust has been established and, in turn, there has been a "declaration of trust" under [section 6\(1\)\(b\)\(ii\)](#) of the Act. Assuming that no consideration was paid, duty would be payable based on the unencumbered value of the dutiable property held by the X Family Trust, as per [section 18](#) of the Act.

#### Example - variation which is not a declaration of trust

27. The V Family Trust is a discretionary trust with three named beneficiaries. The trust deed includes a broad power of variation. The beneficiaries hold contingent interests as they must reach a certain age before they become entitled to their interest. In the event none of them reach the age specified, the trust property will revert to the settlor.
28. Before any of the beneficiaries have reached the relevant age, the trustee exercises the power of variation in the manner specified in the trust deed to name the three beneficiaries as takers in default. Accordingly, the beneficiaries are now also entitled to the reversion (not the settlor).
29. It is likely that a variation of the trust of this kind would not amount to a declaration of trust but would be considered to result in a change of beneficial ownership in the trust, which is dutiable. However, valuation of the change in beneficial interest must consider the uncertainties associated with the interest.

#### Explanation of terms used in this Revenue Ruling

30. Trusts are legal arrangements where a person or company (the **trustee**) holds property and the legal title to that property for the benefit of someone else (the **beneficiary** or **unit holder**). The nature of the interest held by the beneficiary or beneficiaries depends on the wording of the trust document.
31. A **declaration of trust** is defined in [section 6\(3\)](#) of the Act as meaning:  
"any declaration (other than by a will or testamentary instrument) that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons, or the purpose or purposes, mentioned in the declaration although the beneficial owner of the property, or the person entitled to appoint the property, may not have joined in or assented to the declaration."

32. Beneficial ownership or interests in trust property may be vested or contingent:
- (a) an interest is **vested in possession** where there is a right of present enjoyment (the beneficiary is entitled to immediate payment by the trustee);
  - (b) an interest is **vested in interest** where there is a presently existing right to future enjoyment of the trust property.<sup>6</sup> Interests vested in interest may be **defeasible**, where although the beneficiary has a presently existing right to trust property, they may be divested (lose this right) if circumstances change. This type of interest includes remainders and reversionary interests;
  - (c) an interest is **contingent** where some prior condition must be fulfilled before the beneficiary has a right to the interest.<sup>7</sup> The condition may never be fulfilled.
33. There are different types of trust, including fixed trusts, discretionary trusts, unit trusts and testamentary trusts. The nature of the trust affects the type of interest that the beneficiary or beneficiaries hold.
34. Beneficiaries under a fixed trust have a beneficial interest in the income and/or property of the trust.
35. Beneficiaries under a discretionary trust are generally one of two types: default beneficiaries and discretionary objects. For the purposes of this Ruling:
- (a) a **discretionary object** has neither a vested nor contingent interest in the trust but has an equitable chose in action involving a right to call for consideration and the due administration of the trust.<sup>8</sup> This can be characterised as a mere expectancy;<sup>9</sup> and
  - (b) a **default beneficiary** (or taker in default) has a vested, beneficial interest in the trust property, but may be divested by an exercise of the trustee's power to distribute the trust property elsewhere.<sup>10</sup> They have a beneficial interest, but one which they may lose, depending on the trustee's exercise of discretion (in other words, this type of interest is **defeasible**).

### Application of this Ruling

36. This Ruling applies to assessments and reassessments on and after 1 July 2023.
37. *Rulings do not have the force of law.* Each decision made by the State Revenue Office (SRO) is made on the merits of each individual case having regard to any relevant Ruling.

### More information

For more information about this ruling, please contact the SRO's Legislation, Communication and Review section by emailing [revenuereview@treasury.tas.gov.au](mailto:revenuereview@treasury.tas.gov.au) or calling (03) 6166 4400.

For all [Revenue Rulings](#) go to [sro.tas.gov.au/resources/rulings](http://sro.tas.gov.au/resources/rulings). All Rulings must be read subject to Revenue Ruling [Explanation and Status of Revenue Rulings](#), available at [sro.tas.gov.au/resources/rulings](http://sro.tas.gov.au/resources/rulings).

JC Root  
**Commissioner of State Revenue**

1 July 2023

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<sup>6</sup> *Glenn & Ors v Federal Commissioner of Land Tax* (1915) 20 CLR 490.

<sup>7</sup> See *Dwight v Federal Commissioner of Taxation* (1992) 23 ATR 236.

<sup>8</sup> See *Benson v Doloraine Pty Ltd* [2015] TASSC 41, [33] (Porter J); *Kennon v Spry* (2008) 238 CLR 366, 393 [74]–[75] (Gummow and Hayne JJ).

<sup>9</sup> *Commissioner of State Revenue v Serana Pty Ltd* (2008) 72 ATR 24, [52].

<sup>10</sup> *Commissioner of Taxation of the Commonwealth of Australia v Ramsden* [2005] FCAFC 39, [37].