

Revenue Ruling 2008

Public Ruling

Ruling Number	:	PUB-DT-2008-28
Title	:	Application of section 22 of the <i>Duties Act 2001</i> (Aggregation)
Tax Line	:	Duties
Legislative Reference	:	<i>Duties Act 2001</i>
Previous Ruling	:	PUB-DT-2004-5
Date of Ruling	:	1 August 2008
Attachments	:	-

Preamble

This Ruling replaces Ruling PUB-DT-2004-5.

For the purposes of this Ruling, all references to sections and chapters relate to sections and chapters of the *Duties Act 2001* unless otherwise specified.

Chapter 2 charges duty on dutiable transactions. Section 22 provides that certain dutiable transactions will be treated as one transaction (ie aggregated) for the purpose of calculating duty in some circumstances.

Section 22(1) provides for dutiable transactions to be aggregated and treated as a single transaction if:

- they occur within 12 months,
- the transferee is the same or the transferees are associated persons, and
- the dutiable transactions together form, evidence, give effect to or arise from what is, substantially, one arrangement relating to all of the items or parts of, or interests in, the dutiable property.

Section 22(2) provides that dutiable transactions are not to be aggregated if the Commissioner is satisfied that it would not be just and reasonable to do so in the circumstances.

Section 22(6) provides for a maximum fine of 100 penalty units to be applied if a transferee to whom section 22 applies fails to disclose to the Commissioner details relating to dutiable transactions that are to be aggregated. This disclosure is to be made in writing at or before the time at which an instrument or statement relating to the dutiable transactions is lodged for stamping and is to contain details relating to the dutiable property and the consideration for each item or part of, or interest in, that dutiable property.

This ruling outlines the manner in which section 22 will be applied, with emphasis on:

- the circumstances in which two or more dutiable transactions are considered to constitute “one arrangement”;

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- the circumstances in which the Commissioner will consider exercising discretion not to aggregate; and
- the evidence requirements in relation to dutiable transactions that **may** be impacted by section 22.

This ruling applies to all types of dutiable property including, for example, business asset transactions.

Ruling

As duty is imposed by reference to a sliding scale (eg the higher the value of the transaction the higher the rate of duty) and as certain assets (eg goods) are, in some cases, only dutiable if transferred with other assets, the liability to duty can be reduced by splitting the transaction into separate contracts.

Example: a transaction for two properties sold through one contract for \$200 000 would attract duty of \$5 675. If the transaction was split into two transactions of \$100 000, each transaction would attract duty of \$2 425 each, resulting in total duty of \$4 850.

The purpose of section 22 is to ensure the same amount of duty is paid on multiple transactions as would be paid on one transaction where those multiple transactions constitute “one arrangement”, regardless of how the transactions are structured.

For aggregation to occur, each of the following three factors must be present.

(a) *Dutiable transactions occurring within 12 months*

Where one arrangement comprises two or more dutiable transactions occurring within a 12-month period, that period will commence from the date of the first dutiable transaction that is being aggregated. Therefore, if:

- separate items of dutiable property;
- separate parts of an item of dutiable property; and/or
- other interests in dutiable property;

are transferred over a period of longer than 12 months, only those transactions occurring within any 12-month period would be aggregated.

Example 1: B purchases property from A on 1 July 2007. This transaction is known as Transaction 1. B purchases further property from A on 20 May 2008 (Transaction 2) and further property from A on 15 June 2008 (Transaction 3). Provided the transferee is the same or is an associated person and provided the transactions together form one arrangement, Transactions 1, 2 and 3 are to be aggregated.

Example 2: B purchases property from A on 1 July 2007. This transaction is known as Transaction 1. B purchases further property from A on 20 May 2008 (Transaction 2) and further property from A on 15 November 2008 (Transaction 3). Provided the transferee is the same or is an associated person and provided the transactions together form one arrangement, Transactions 1 and 2 are to be aggregated. Transaction 3 cannot be aggregated with Transaction 1 as it falls outside the 12 month time frame.

In example 2, Transaction 3 would be aggregated with Transaction 2. To prevent the payment of double duty on Transaction 2, the Commissioner will reduce the tax payable on the second aggregation in

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accordance with section 22(4). Section 22(4) provides for the amount of duty payable to be reduced by the amount of any duty paid on a prior transaction that is aggregated in accordance with the section.

(b) Transferee is the same or transferees are “associated persons”

Where the various transferees (purchasers) in relation to the multiple dutiable transactions are the same, the requirement of this provision is met. Where there are two or more different transferees in relation to the dutiable transactions that are being considered for aggregation, all the transferees must be “associated persons” as defined in section 3 of the Act.

Example 1: *If an agreement to purchase a business is entered into by a husband and then an agreement to purchase the premises upon which the business is conducted is entered into by his wife, provided all other requirements of the section are met, and provided the business assets transferred are dutiable property, the agreements will be aggregated as the husband and wife are related parties and therefore associated persons in accordance with the definitions of those terms as contained in section 3 of the Act. (Note: the amendments to section 9 of the Act which came into effect on 1 July 2008 may impact on whether the business assets transferred are dutiable property).*

Example 2: *in circumstances where two agreements to purchase land are entered into by a husband and wife (in one agreement) and their son and daughter-in-law (in the other agreement), the daughter-in-law is not “associated” with her husband’s parents by virtue of the definition of “related person”. However, the parties may be considered to be “associated persons” if they are acting in concert. Parties will be considered to be acting in concert where there is an understanding or arrangement between the parties as to a common purpose or object.*

Note: section 22 of the Act does not refer to the identity of the vendors or transferors, so the aggregation provisions can apply even if the vendors or transferors are not the same or associated persons. This will only occur where the Commissioner is satisfied that the transactions form, evidence, give effect to, or arise from what is, substantially, one arrangement such as where contracts contain inter-dependency clauses or are otherwise inter-dependent. Information on determining when there is “one arrangement” is set out below. Example 3 provides an example of a situation in which the aggregation provisions may be applied, even if the vendors are not the same.

Example 3: *A major supermarket chain plans to acquire land adjacent to its store for expansion of its facilities. It enters into a contract to purchase some of the land from one Vendor and the balance land from another. Without purchasing both parcels of land the development cannot go ahead. In such circumstances there is one arrangement as if any part fails the entire arrangement fails.*

The fact that vendors are the same or associated persons, may be a relevant factor for the Commissioner to take into account in determining whether or not the transactions constitute substantially “one arrangement”.

(c) One arrangement

For the purposes of the Act, “one arrangement” may include a series of transactions. In determining what is meant by “one arrangement” reference can be had to historical stamp duties cases on aggregation because of the similarities between the repealed stamp duties legislation and the various Duties Acts, within Tasmania and in other jurisdictions. As such, “one arrangement” would include “cases where the relationship between the transactions is an integral and not a fortuitous one depending merely on such circumstances as contiguity in time or place” (*Attorney-General v Cohen and Another* [1937] 1 KB 478, per Greene LJ at 491).

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The intention of purchasers to subsequently deal with property as a single arrangement or transaction is generally not sufficient to characterise the initial transactions as one arrangement. There must be some further factor to indicate that the relationship between the transactions is “an integral and not a fortuitous one”. The most obvious example of this is an inter-dependency clause in agreements, but it would include other matters such as antecedent options (options created prior to the division of property into separate components) or development applications. In considering whether dutiable transactions constitute substantially one arrangement the Commissioner will examine the facts of each case and take a range of factors into consideration.

What will generally be considered “one arrangement”

In relation to dutiable property generally, the following circumstances will generally be considered to constitute substantially “one arrangement”:

- the agreements are interdependent (this is usually evidenced by at least one of the agreements containing an interdependency clause);
- the agreements relate to fractional interests in one item of dutiable property;
- the agreements are pursuant to antecedent options (options created prior to the division of property into separate components);
- where one price is negotiated and then split between the dutiable transactions; or
- the purchaser or associated persons, enter into multiple contracts to purchase dutiable property and receive a discount for purchasing more than one.

In addition to those circumstances referred to above for dutiable property generally, the following circumstances will also generally be considered “one arrangement” in relation to transactions that relate specifically to real estate:

- multiple lots are sold subject to a development application lodged by the transferor or development approval held by the transferor;
- completion of the transactions is conditional on the purchaser obtaining development approval; or
- the purchaser has lodged a development application(s) prior to entering into the agreements which affects all the lots being purchased.

In addition to the circumstances referred to above, in relation to transactions that relate specifically to the sale of a business, where the transaction is entered into prior to 1 July 2008, the following circumstances will generally constitute “one arrangement”:

- the vendors are the same or associated persons, and the agreements relate to freehold property and a business conducted on that property; or
- the vendors are the same or associated persons and the assets of a single going concern business are purchased under separate agreements.

What will not be considered “one arrangement”

The following circumstances will generally not constitute “one arrangement” **provided** none of the circumstances referred to immediately above under the heading *What will be considered “one arrangement”* have occurred:

For dutiable property generally:

- the vendors are not the same, “related persons” or “associated persons” (note: “associated persons” includes persons acting in concert);

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- the items of property are purchased at auction and the items were offered for sale separately;
- there is an exchange of dutiable property between “associated persons”;
- each transaction was negotiated separately by private treaty; or
- the **only** factor connecting the agreements, other than satisfying the first two criteria of section 22(1), is:
 - a single loan or facility agreement or mortgage; or
 - the payment of a single deposit.

In addition to the circumstances referred to above for dutiable property, in relation to transactions that relate to real estate the following will generally not give rise to a finding that ‘one arrangement’ exists:

- the **only** factor connecting the agreements, other than satisfying the first two criteria of section 22(1), is a development application lodged by the purchaser after execution of the agreements (unless completion of the agreements is conditional on the purchaser obtaining development approval); or
- where a builder has bought one or more lots in a development and buys further lots in the same development within 12 months of the first purchase. This is provided that at the time of the initial purchase, the later purchases were not contemplated other than as an intention on the part of the purchaser to buy, if available, unspecified additional lots on an unspecified date.

The above examples **do not** limit the circumstances in which a series of transactions will or will not be considered to be “one arrangement”. A decision that multiple transactions amount to “one arrangement” may also be made if other factors are present that lead to the conclusion that the relationship between the transactions is more integral than fortuitous.

Not just and reasonable – Commissioner’s discretion not to aggregate

A decision under section 22(2) not to aggregate can only apply to an arrangement that satisfies all three elements of section 22(1), including that the transactions constitute one arrangement.

In *Chief Commissioner of State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd (No.2) [2005] NSWADTAP 54*, a case based on the equivalent of section 22(2) in the New South Wales legislation, the Tribunal found that the purpose of the ‘just and reasonable’ discretion is to ‘provide a measure of discretion to deal with unforeseen consequences, anomalies or unexpected outcomes’. The Tribunal stated that the discretion ‘must be applied in a manner which does not defeat the fundamental legislative objectives of the scheme of regulation within which the dispensing power is located’. The Tribunal also noted that the discretion is a relief mechanism for hardship cases.

As a result, as a general rule, the discretion to disaggregate would typically only be applied in circumstances where the applicability of the aggregation provisions was an unintended consequence of the broad wording of the legislation. A taxpayer must establish in any such case that there are special or unusual circumstances to justify the exercise of the discretion. The mere fact that the relevant transactions did not have the purpose of avoiding or reducing duty is not, of itself, a sufficient reason to exercise this discretion. In exercising this discretion, the Commissioner will therefore take into account the individual circumstances of each case together with the policy basis for the inclusion of the aggregation provisions in the legislation when considering her discretion. For example, the Commissioner may exercise her discretion to not aggregate where multiple contracts are interdependent and the interdependency is for the benefit of the vendor rather than the purchasers, the purchasers are unrelated and the properties are not being acquired for a common purpose.

In all cases a written submission must be lodged if an applicant is requesting that consideration be given under section 22(2).

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Evidence requirements

Where it is evident that dutiable transactions are to be aggregated, the transferee is to comply with the requirements of section 22(6). Section 22(6) requires the transferee to disclose certain details relating to the dutiable transactions at or before the time of lodging the documentation for assessment. The disclosure is to be made in writing and contain:

- details relating to the dutiable property; and
- the consideration for each item or part of, or interest in, that dutiable property.

Where the transferee considers that the transactions *may* be subject to aggregation, or upon request from the State Revenue Office (SRO), an aggregation statement (*Section 22 Duties Act 2001 – Statutory Declaration: Aggregation Statement*) is to be completed by the transferee(s) for each transaction and lodged at the SRO. This statement will, in most cases, enable the Commissioner to determine whether aggregation is appropriate. In some cases, further information may be required depending on the circumstances of the particular case. The statutory declaration is located on the SRO website.

Stamping

Section 22(5) provides that when an assessment is made under section 22(1), duty may be apportioned to the instruments effecting or evidencing the dutiable transactions, or may be charged in accordance with section 16(1), as determined by the Commissioner. As a general rule, the amount of duty payable on the aggregated dutiable value is apportioned by the Commissioner to the respective instruments evidencing the dutiable transactions.

Transactions which are to be aggregated cannot be assessed on Tasmanian Revenue Online and must be lodged at the SRO.

Enquiries about this Revenue Ruling should be directed to the Revenue Advice and Audit Section on telephone (03) 6233 3722 or e-mail at dutyhelp@treasury.tas.gov.au. Copies of this ruling may be obtained from our website at www.sro.tas.gov.au by selecting “Resources” and then “Rulings”.

All rulings must be read subject to Revenue Ruling PUB-GEN-2005-5, “Explanation and status of Revenue Rulings”.



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