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Public Ruling Duties Act:

ADDITIONAL FOREIGN ACQUIRER DUTY— EX GRATIA RELIEF FOR SIGNIFICANT DEVELOPMENT

A public ruling, when issued, is the published view of the Commissioner of State Revenue (the Commissioner) on the particular topic to which it relates. It therefore replaces and overrides any existing private rulings, memoranda, manuals and advice provided by the Commissioner in respect of the issue(s) it addresses. Where a change in legislation or case law (the law) affects the content of a public ruling, the change in the law overrides the public ruling—that is, the Commissioner will determine the tax liability or eligibility for a concession, grant or exemption, as the case may be, in accordance with the law.

What this ruling is about

1. Under Chapter 4 of the *Duties Act 2001* (the Duties Act), an additional amount of duty (additional foreign acquirer duty, or AFAD) applies to direct or indirect transactions in land that are liable to transfer duty, landholder duty and corporate trustee duty where the land is 'AFAD residential land'¹ and the acquirer under the transaction is a foreign person.²
2. The Queensland Government recognises that there may be some land acquisitions for developments where it would be appropriate to grant ex gratia relief from additional foreign acquirer duty (AFAD), having regard to exceptional circumstances to be considered on a case-by-case basis.
3. These guidelines outline the factors that may be taken into account for determining ex gratia relief from AFAD imposed on relevant transactions³ under which AFAD residential land⁴ is acquired by a foreign corporation⁵ or trustee of a foreign trust⁶ (a 'foreign entity') for development purposes.
4. The proposed guidelines have been designed to strike a balance between providing relief in the appropriate instances while ensuring certainty and ease of administration for both industry and the Office of State Revenue.

¹ Section 232 of the Duties Act and Public Ruling DA232.1—AFAD residential land

² Section 240 of the Duties Act

³ Section 230 of the Duties Act

⁴ Section 232 of the Duties Act

⁵ Section 236 of the Duties Act

⁶ Section 237 of the Duties Act

What is ex gratia relief?

5. The granting of ex gratia relief under the guidelines will occur under a general discretion provided to the Under Treasurer (able to be delegated to the Commissioner of State Revenue) under the *Financial Accountability Act 2009*.
6. An ex gratia payment is made on the basis that liability does exist under the legislation, and an assessment is raised. However, the portion of the assessment for which ex gratia relief is provided is settled through the ex gratia payment. The availability of ex gratia relief from additional foreign acquirer duty reflects a government decision to support significant development, without diminishing the operation of the *Duties Act 2001*.

Ruling and explanation

Guidelines for ex gratia relief

7. The transactions for which ex gratia relief from AFAD may be considered are those undertaken by foreign corporations and trusts that are Australian-based and whose commercial activities involve significant development by adding to the supply of housing stock in Queensland (either through new developments or through re-development) and where such development is primarily residential.
8. In determining whether ex gratia relief from AFAD will be granted for the relevant transaction on which AFAD is imposed, all the following conditions (a) to (e) must be satisfied:

(a) Australian-based

Whether the foreign entity undertaking the relevant transaction is Australian-based. A non-exhaustive list of factors that may indicate a foreign entity is 'Australian-based' include:

- (i) The foreign entity has a head office or principal place of business in Australia.
- (ii) The foreign entity has significant management staff and office presence in Australia.
- (iii) The foreign entity employs Australian citizens or permanent residents.
- (iv) The foreign entity carries on business in Australia.
- (v) There is a considerable level of Australian participation in the foreign entity that conducts its activities in Australia. An example of 'Australian participation' is where decisions relating to the development of land under the relevant transaction are primarily made by management or employees based in Australia.
- (vi) The foreign entity primarily contracts for services and materials of Australian building contractors and suppliers to engage in the development activities in Australia. In this context, 'primarily' means more than 50% of the value paid by the entity for goods and services goes to Australian contractors and suppliers.

The more of these factors that are established, the stronger the likelihood of establishing 'Australian-based'. Examples of evidence to establish these criteria may

include details of a current ACN, ABN, ABRN or ASX listing and public details from other Australian regulators, details of previous developments, prospectus documents, minutes of meetings, corporate memoranda, payroll data, contracts, quotes or invoices with Australian building and service suppliers.

(b) Foreign Investment Review Board requirements

Whether the foreign entity has complied with any Foreign Investment Review Board (FIRB) requirements in relation to the acquisition of the land. Factors that may also be taken into consideration include:

- (i) the nature of the approval that has been provided by the FIRB
- (ii) whether the FIRB has imposed any conditions on the entity and the nature of those conditions.

Examples of evidence may include a copy of FIRB approvals or correspondence from FIRB concerning FIRB compliance by the foreign acquirer; or if prior to receipt of FIRB approval but post-application, a copy of the application lodged with FIRB. Where conditions apply to FIRB approval, evidence the conditions have been met, or a statement of how the conditions will be met, will also be required.

(c) Entity meets regulatory requirements

Whether the foreign entity meets regulatory requirements, including:

- (i) the extent to which the foreign entity complies with the *Corporations Act 2001* (Cwlth) or equivalent legislation that may also be applicable to the entity
- (ii) the extent to which the foreign entity complies with Queensland taxation laws and whether the entity has any outstanding liabilities under those laws.

The following are examples of evidence that may be taken into account for the purposes of this condition:

- information sourced from the ASX or other stock exchange on a foreign entity
- Australian Securities & Investments Commission's information on a foreign entity.

However, the exercise of a foreign entity's legal rights would not be a factor weighed against eligibility.

(d) The development must be significant

This condition can be met by establishing either 'significant development' or 'significant developer' status.

Significant development will be satisfied if:

- (i) the land that is the subject of the relevant transaction is acquired by a foreign entity for the purposes of undertaking a development or re-development of 50 or more residential lots (transaction lot test)

or

- (ii) where status cannot be established under the transaction lot test, the development or redevelopment will nevertheless make a significant contribution to the region in which it is occurring, having regard to factors including:
- the nature of the development
 - the contribution made to housing stock and infrastructure by the development, in the context of population size and demographics, and activity in that region
 - the economic and social impacts of the development, for that region
 - whether in the absence of the development by the foreign entity, such outcomes for the region would otherwise be likely. This will include, for example, the number of other developers, builders or owner-builders in the same market

(regional significance test).

Note: The regional significance test is not targeted at metropolitan areas, nor is it targeted at urban in-fill developments.

Significant developer status will be satisfied if the developer will undertake development or redevelopment of 50 or more residential lots in the relevant year. Relevant year is a 12-month period that includes the date of the relevant transaction. Averaging for up to 5 years will be permitted.

Example 1

The development to which the relevant transaction relates will produce 20 lots. In another development, which concluded 5 months prior, another 10 lots were produced; and the developer has a development that will conclude within 7 months from the date of the relevant transaction, in which another 20 lots will be produced (totalling 50).

Taken on average over up to 5 years including the date of the relevant transaction (at the foreign acquirer's election), and including the development the subject of the relevant transaction, the foreign acquirer has developed or re-developed 50 or more lots for residential purposes, per year (significant developer test).

For establishing the number of lots developed or redeveloped in any of the above contexts:

- A. The number of residential lots produced are counted, not the number of lots to which the relevant transaction to which AFAD applies. For example, the development of 50 residential lots from a single lot of vacant land would be counted as 50 lots.
- B. The expected number of lots to be produced from a development within a specified timeframe can be included in this context, even if the specific development doesn't complete or commence in the year. If projected lot production in the same development is subsequently relied upon for relief for other transactions, the Commissioner may take into account actual production

numbers in considering whether the average production of 50 lots per year is in fact achieved.

- C. For significant developer status, the following developments may also be counted (in the relevant date ranges) if the foreign entity is wholly owned by a parent entity:
- developments by the parent entity
 - developments by any entity that is 100% owned by the same parent entity.
- D. In all other cases, only development in which the foreign acquirer has a direct ownership interest in the land developed is counted.

Evidence for the significant development or significant developer tests may include Titles Office evidence of lot creation, development approvals and project plans.

A 'lot', for the purpose of meeting these tests, is not limited to a lot within the meaning of the *Land Title Act 1994*.

Example 2

The development of 50 independent living units (ILUs) in a retirement village on land held by a developer under a long-term lease—where the ILUs will be subleased to residents on completion—would be counted as 50 lots and eligible for relief, provided all other conditions were met.

In addition to the above, consideration will be given to whether the land is in a priority development area declared by the Minister for Economic Development Queensland under the *Economic Development Act 2012*, or part of a declared coordinated project declared by the Coordinator General under the *State Development and Public Works Organisation Act 1971*. However, this factor alone will not be determinative of whether a development or developer is significant.

Note: Where significant developer status is established it applies to the transaction in relation to which it is established and may be relevant for future transactions. However, it will not result in any previous transactions being entitled to an ex gratia payment for the associated liability that arose on any of those transactions.

Example 3

A foreign developer who is new to Queensland begins to grow from a small-scale developer. It produces 40 residential lots in 2017 from an acquisition after 1 October 2016 to which AFAD applied (the 2017 acquisition). No ex gratia relief was available on the 2017 acquisition. In 2018, the developer seeks ex gratia relief for 5 acquisitions of land that year, each of which it plans to use to produce 30 residential lots during 2018 and 2019. It establishes significant developer status based on an average of at least 50 residential lots produced or to be produced each year over the 3-year period (2017–2019). It meets all the other conditions for ex gratia relief on the 2018 acquisitions, and obtains relief for them. However, this does not mean it becomes entitled to relief from AFAD on the 2017 acquisition.

- (e) Use of Australian goods, services and personnel

Whether the foreign entity primarily employs or contracts for services, materials of Australian building contractors and suppliers to engage in the development of land under the relevant transaction. In this context, 'primarily' means:

- (i) more than 50% of the value paid by the entity for goods and services is paid to Australian contractors and suppliers

Note: A contractor or supplier can be Australian even if they use non-Australian sub-contractors or suppliers. However, the Commissioner will examine any cases where it appears that an Australian-based contractor or supplier is not genuinely the source of goods or services and has been inserted between an actual foreign supplier and the entity to give the appearance of Australian-sourced supply of goods and services.

- (ii) more than 50% of the foreign acquirer's employees for the development, in total wage value or total number of employees, are Australian.

Lodgement and application for relief

- 9. The availability of relief under these guidelines does not alter the usual requirements for lodgement of documents with the Office of State Revenue. If the transaction would normally be liable to duty, the parties must comply with the requirements of the *Duties Act 2001* and the *Taxation Administration Act 2001*. For practical reasons, where ex gratia relief is sought for a transaction, self-assessment will not be available, and Commissioner assessment will be required.
- 10. In addition to the normal documentation required by the Commissioner to assess a relevant transaction (e.g. transaction documentation, valuations where necessary and relevant approved forms), the following documents must be provided to the Office of State Revenue when lodging a request for ex gratia relief under these guidelines:
 - (a) a statutory declaration by a person holding appropriate authority from the foreign acquirer (e.g. a director of a foreign company; the trustee of a foreign trust) containing:
 - (i) details of the basis on which the applicant satisfies the guidelines
 - (ii) an acknowledgement of the party's obligation to inform the Office of State Revenue in writing within 28 days if it no longer satisfies the conditions for ex gratia relief (see below)
 - (iii) an acknowledgement that the ex gratia payment must be repaid or refunded to the government where, subsequent to the granting of relief, it is required to be paid back because the conditions for ex gratia relief are not met.
 - (b) any evidence of the matters asserted in the statutory declaration as required in these guidelines.
- 11. A statutory declaration is available on the Queensland Government website for completion and lodgement with the application for ex gratia relief.

Streamlined process for ongoing developments

12. If ex gratia relief has been granted for a relevant transaction (upon full consideration of the proposed guidelines being undertaken on the merits of relief and the nature of the foreign entity's operations), the administrative process for determining ex gratia relief for subsequent relevant transactions undertaken by the foreign entity may be streamlined. This is intended to ensure faster processing times for ex gratia relief applications to which the proposed guidelines apply where a foreign entity undertakes ongoing or multiple developments on the same general basis.
13. For example, in a subsequent application by an entity that has been assessed as a 'significant developer' within the last 12 months, only the statutory declaration will generally be required. However, the Commissioner reserves the right to request clarifying evidence, if considered necessary; for example, where a notification of change of circumstances has occurred for that foreign entity during that period.

A foreign entity must notify Commissioner of State Revenue if it no longer satisfies the conditions for ex gratia relief

14. If approval for ex gratia relief is granted in respect of a transaction, the foreign entity to the transaction must notify the Commissioner of State Revenue within 28 days of the following occurring:
 - (a) any of the conditions under the guidelines are no longer being satisfied or complied with, or
 - (b) there has been a material change in the circumstances existing when the approval was given.
15. For example, notification would be required if on application a 55-residential-lot development was proposed as the basis for satisfying the 'significant development' criteria, and decision is then taken by the foreign entity to change the development to a 30-lot project.
16. Failure to notify is a breach of the ex gratia conditions. A pragmatic approach will be taken by the Commissioner in administration of the notification obligations, and will take into account those matters that the foreign acquirer knew or ought reasonably to have known, in assessing when a notification obligation arose.

Date of effect

17. This public ruling takes effect from the date of issue.

Elizabeth Goli
Commissioner of State Revenue
Date of issue: 8 September 2017

References

Public Ruling	Issued	Dates of effect	
		From	To
DA000.15.2	8 September 2017	8 September 2017	Current
DA000.15.1	28 September 2016	1 October 2016	8 September 2017