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Public Ruling Duties Act:

VARIATIONS TO AGREEMENTS FOR THE TRANSFER OF LAND BY DEED OR BY EXCHANGE OF SOLICITORS' LETTERS OR OTHER CORRESPONDENCE

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. Sections 9(1)(a) and 10(1)(a) of the *Duties Act 2001* (the Duties Act) provide that an agreement for the transfer of land in Queensland (agreement) is a dutiable transaction.
2. The dutiable value will be the higher of consideration or the unencumbered value of the land.¹
3. This Public Ruling sets out the Commissioner's practice in relation to certain practices to vary the purchase price or another essential element of an agreement for the transfer of land.

¹ Section 11(7) of the Duties Act

Ruling and explanation

General

4. This Public Ruling applies where the actions of the parties to an agreement vary its terms or alter it in some other respect and may involve either of the following features:
 - (a) The terms of an agreement actually being varied (including a reduction in the purchase price) by a formal process such as by a deed.
 - (b) A claim that the parties have agreed to vary the terms of the agreement or to accept a different sum from what appears as consideration in the agreement in full satisfaction of the purchase price. Either the parties or their solicitors claim that the purchase price has been reduced by an exchange of solicitors' letters but do not produce evidence to indicate that they intended to vary the essential terms of the agreement by a formal process.
5. Although the effect may appear to be the same in so far as the same reduced amount may be paid as consideration whether either of the processes in paragraphs 4(a) or 4(b) above are employed, the effect of each can be quite different for transfer duty assessment purposes.

Term of an agreement being varied by a formal process

6. Where the practice in paragraph 4(a) is utilised, the terms of the agreement have been varied and the agreement must be read in accordance with the provisions of the deed of variation. For instance, the consideration expressed in the agreement may have been altered by the terms of the deed of variation. This process is in accordance with common law principles and will be acceptable to the Commissioner for the purposes of assessment of transfer duty. Any assessment of transfer duty based on a formally varied agreement will be made having regard to the terms of the formal amendments indicated by the parties in the deed.

Example 1

An agreement for the transfer of land for \$110 000 is accompanied by a formally executed deed of variation executed by the parties indicating that they are effecting a variation to the terms of the agreement to reflect reduced consideration of \$100 000.

The assessment must be raised on the amended figure of \$100 000 evidenced in the written deed of variation.

The agreement must be noted by the Commissioner, to show that transfer duty has been assessed on the reduced consideration as a result of the deed of variation.

7. Instead of a vendor merely agreeing to accept a lesser or greater sum than what appears as the purchase price in the agreement, without formal variation, the vendor, in this instance, has agreed to reduce the purchase price by formally amending the terms of the agreement.

Claim that the parties have agreed to vary the terms of the agreement by an exchange of letters between solicitors

8. Where the practice in paragraph 4(b) is utilised, the terms of the agreement are not varied by the exchange of solicitors' letters. The amount of consideration expressed in the agreement does not change although a different amount may be accepted by the vendor in full satisfaction of the newly agreed purchase price as set out in the letters between the solicitors for the parties.
9. In the circumstances described in paragraph 4(b), a reduction in the purchase price, or the purported variation of a term of an agreement, may be claimed to have been effected by:
 - (a) an exchange of written correspondence (such as letters between the solicitors for both parties) or
 - (b) orally or
 - (c) satisfaction of a condition of an agreement.

In these cases, no formal deed of variation of the agreement has been signed.

Variation by exchange of written correspondence

10. An agreement for the transfer of land is required to be in writing by s.11 of the *Property Law Act 1974*. The essential elements of the written agreement such as parties, property and the purchase price must be varied by deed or by another agreement for consideration as required by common law. As the terms of the agreement have not been varied by the exchanged correspondence, transfer duty should generally be assessed on the amount stated in the agreement. The letters will only indicate an accord between the parties to the transaction distinct from the terms of the agreement.
11. Letters may indicate the vendor's acceptance of a lesser sum to be paid by the purchaser but the acceptance of a lesser sum is not satisfaction of the amount owing as the purchase price in the agreement because the agreement has not been formally varied.
12. The altering of agreements by written correspondence such as letters exchanged between the parties or their legal representatives is a commercial practice. Under common law principles, the validity of an exchange as a variation is limited to alteration of the mode of performance of the agreement such as an extension of the date of completion but is generally not permitted to vary one of the essential terms such as the consideration payable. However, the waiver of the benefit of a contractual term may be effected in this manner.

Example 2

The vendor agrees, by letter, to accept the lesser sum of \$115 000 rather than the \$120 000 specified in the agreement but the agreement has not been formally varied to reflect this agreement. No transfer document has been produced for assessment at this stage.

The assessment should be raised on the amount appearing as consideration in the agreement and not on the claimed lower purchase price. This is because letters only acknowledge a lower amount to be accepted as the purchase price or the waiver by the vendor of a contractual term. The letters have not varied the actual terms of the agreement. Evidence such as a deed of variation must be provided, to indicate that the terms of the agreement have been formally varied.

If the value of the property, according to evidence of value produced, is higher than the amount expressed as consideration in the agreement, transfer duty should be assessed on that higher value.

If the value of the property is shown to be equal to or less than the expressed consideration then transfer duty should be assessed on the amount expressed as consideration in the agreement.

13. The practice in paragraph 4(b) does not effect the variation of an agreement. However, where the parties' intentions to reduce the amount of consideration to be paid have been demonstrated by the presence of solicitors' letters and the reduced consideration is expressed in the transfer document, for the purposes of this Public Ruling transfer duty will be assessed on the reduced consideration. In these instances, the transfer document confirms the waiver of the term.
14. In such instances as described in paragraph 13, if transfer duty has already been assessed on the agreement prior to lodgement of the transfer showing a lesser sum as consideration, the assessment will be amended to reflect the reduced consideration when the transfer is received. An appropriate notation will be recorded on the agreement to detail the reduced consideration.

Example 3

An agreement for the transfer of land is executed and lodged for assessment. An assessment has been issued on the consideration shown in the agreement. Upon production of the transfer, the solicitors advise that a defect in the property has been identified, that the value of the property has been reduced and the purchase price has also been reduced. The reduction in the purchase price is evidenced by an exchange of solicitors' letters. As the agreement has already been assessed, the variation will not be reflected in the agreement.

If the transfer shows the reduced consideration in accordance with the copies of the solicitors' letters, the issued assessment should be amended to reflect the reduced consideration. The agreement must be noted to indicate the amount of the reduced consideration and the reason for the reduction.

If the transfer does not reflect the reduced consideration, the assessment must remain on the higher amount as shown in the agreement and transfer regardless of solicitors' letters.

15. For the purpose of assessing transfer duty, the difference between the situations in paragraphs 4(a) and 4(b) is that the formally varied agreement must be assessed in accordance with the formal, evidenced variations. However, in the second set of circumstances the exchange of solicitors' letters cannot vary the agreement, but, on the production of sufficient satisfactory evidence to the Commissioner to confirm the parties' intentions to waive a term, transfer duty will be assessed on the reduced amount appearing in the transfer document.²
16. For the purposes of assessment of transfer duty, the Commissioner will not recognise practices to vary other essential elements of agreements, such as the parties to the contracts, by an exchange of letters.

² Subject to the provisions of s.11(7) of the Duties Act.

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17. Where transactions strictly comply with the agent provisions of s.22(3) of the Duties Act, a transfer to the principal, who may not appear as the purchaser in the agreement, will not attract transfer duty. The authority required by the legislation may be contained in a letter from the principal but must be prepared and delivered to the agent prior to the agent entering into the agreement.

Variation by oral agreement

18. An oral agreement to vary a written or oral agreement does not affect the assessment of duty on the amount stated as consideration in the instrument or transfer statement or on the unencumbered value of the property.

Satisfaction of a condition of an agreement which effects a reduction in the purchase price

19. In some cases, an agreement will contain a clause providing for a reduction in the purchase price if the transaction is settled earlier than the stated completion date.
20. In those instances, transfer duty is calculated on the purchase price without reference to the condition that provides for the reduction. This follows the contingency principle as outlined in s.502 of the Duties Act. Transfer duty is assessed on the total amount that may become payable under the agreement regardless of the actual happening of the event that may cause the vendor to accept a lesser amount as consideration.

Date of effect

21. This Public Ruling takes effect from the date of issue.

David Smith
 Commissioner of State Revenue
 Date of Issue 24 February 2009

References

Public Ruling	Issued	Dates of effect	
		From	To
DA501.1.1	24 February 2009	24 February 2009	Current
Supersedes Practice Direction DA 3.1	1 March 2002	1 March 2002	23 February 2009