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Public Ruling Land Tax Act:

GUIDELINES FOR EX GRATIA RELIEF FROM THE LAND TAX FOREIGN SURCHARGE

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. This public ruling outlines the factors that may be taken into account for determining ex gratia relief from the surcharge rate of land tax imposed by the *Land Tax Act 2010* (Land Tax Act) on the total taxable value of the taxable land owned by a foreign company or a trustee of a foreign trust¹ (foreign surcharge).
2. From the 2019–20 financial year, s.32(1)(b) of the Land Tax Act imposes a 2% foreign surcharge in addition to the general rate of land tax.
3. The Queensland Government recognises that it may be appropriate to provide ex gratia relief from the foreign surcharge, having regard to exceptional circumstances to be considered on a case-by-case basis, for foreign companies and trustees of foreign trusts (foreign entities) whose commercial activities make a significant contribution to the Queensland economy and community.

What is ex gratia relief?

4. 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*.
5. 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 the foreign surcharge reflects a government decision to support commercial activities that make a significant contribution, without diminishing the operation of the Land Tax Act.

¹ For more information about foreign companies and trustees of foreign trusts, refer to Public Ruling LTA000.3 – *Foreign corporations and foreign trusts – interests of foreign persons and foreign trusts*.

6. Ex gratia relief can be provided on an in-principle basis, prior to any liability arising. Where relief has been provided in-principle, a foreign entity will need to apply for final approval of ex gratia relief once the liability has arisen. Further details on the application process is provided in paragraphs 10 and 11.

Ruling and explanation

Guidelines for ex gratia relief

7. Where a foreign entity satisfies the conditions for ex gratia relief from the foreign surcharge, relief will apply to all land owned by the foreign entity in Queensland. Nominees or custodians appointed for regulatory compliance purposes will be looked through, and eligibility will be determined by reference to the activities of the next level trustees and will apply to all land owned by that trustee.
8. Ex gratia relief will apply for as long as the foreign entity continues to satisfy the conditions for relief. The foreign entity is required to notify the Commissioner if the conditions for relief are no longer satisfied or there is a material change in circumstances (see paragraphs 12 to 14).
9. In determining whether ex gratia relief from the foreign surcharge will be granted, all the following conditions in (a) to (d) must be satisfied:

(a) Australian-based

Whether the foreign entity that owns the relevant land 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 commercial activities that make a significant contribution to the Queensland economy and community are primarily made by management or employees based in Australia.
- (vi) The foreign entity primarily contracts for services and materials of Australian contractors and suppliers to engage in its commercial 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, ARBN or ASX listing and public details from

other Australian regulators, prospectus documents, minutes of meetings, corporate memoranda, payroll data, contracts, quotes or invoices with Australian contractors and suppliers.

(b) Foreign Investment Review Board requirements

Where Foreign Investment Review Board (FIRB) approval was required in relation to the acquisition of land for which ex gratia relief is sought, whether the foreign entity has complied with all FIRB requirements in relation to the acquisition of the land will be a relevant consideration. Factors that may also be taken into consideration include:

- (i) the nature of the approval that has been provided by FIRB
- (ii) whether 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 entity, or a copy of an application lodged with FIRB (if an application for ex gratia relief is made prior to FIRB approval). 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. If the acquisition of land did not require FIRB approval, this evidence will not 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 information that may be taken into account for the purposes of this condition:

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

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

(d) Entity conducts commercial activities that make a significant contribution to the Queensland economy and community

Whether the foreign entity makes a significant contribution to the Queensland economy and community will depend on the extent to which the foreign entity conducts commercial activities in Queensland, engages local labour and utilises local materials and services.

In considering whether a foreign entity makes a significant contribution:

- (i) Regard will be had to the size of the foreign entity's commercial activities relative to their landholdings.

Example 1

Where a foreign entity owns a substantial amount of land (in terms of size or value of landholdings) but carries on a modest commercial activity, this factor will weigh against the foreign entity being considered to make a significant contribution.

- (ii) Regard will be had to the number of local workers engaged.

Example 2

A foreign entity that employs 75 or more full-time equivalent employees (not labour hire or contractors) in Queensland would generally be considered to make a significant contribution.

- (iii) Regard will be had to the amount expended on local resources, such as materials and services.

Example 3

A foreign entity that demonstrates expenditure in Queensland of more than \$20 million annually, comprising Queensland payroll tax and land tax liabilities, expenditure on Queensland goods and services, and wages paid to Queensland residents, would generally be considered to make a significant contribution.

- (iv) A foreign entity whose commercial activities involve property development may be considered to make a significant contribution while development activities are being undertaken. Once the development is complete, the foreign entity will generally be considered to hold the developed land as a passive investor and the land will no longer qualify for ex gratia relief. However, if the entity starts using the land to make a significant contribution through the operating activities the entity conducts on the land, the land may continue to qualify for ex gratia relief.

Example 4

A foreign entity that undertakes development or redevelopment of 50 or more residential lots in Queensland within a 12-month period would generally be considered to make a significant contribution.

In addition to considering the extent of the development activities undertaken by the foreign entity, consideration will be given to whether development activities are being undertaken on land that is in a priority development area declared in accordance with the *Economic Development Act 2012*, or part of a coordinated project declared by the Coordinator-General under the *State Development and Public Works Organisation Act 1971*.

- (v) If the foreign entity is wholly owned by a parent entity, the commercial activities of the parent entity and any entity that is 100% owned by the same parent entity may be considered in determining whether the foreign entity makes a significant contribution.

Example 5

Where a foreign entity owns land and the commercial activities on the land are undertaken by a wholly-owned subsidiary of the same parent entity, these commercial activities may be taken into account in considering whether the foreign entity makes a significant contribution.

- (vi) For the purpose of the ex gratia relief, a foreign entity that essentially holds land passively as a landlord or property investor (i.e. its business in Queensland is wholly or primarily connected with the ownership, sale or purchase of land) is not considered to be undertaking activities that make a significant contribution.
- (vii) Regard will be had to the extent of commercial activities in Queensland. Special consideration may be given to whether the commercial activities are significant to the particular region and/or industry in which the commercial activities are undertaken, having regard to factors specific to the context of the region and/or industry.

Example 6

A residential subdivision of less than 50 lots in regional Queensland may make a significant impact where that development makes a contribution to housing stock and infrastructure that is significant to a local community in the context of the population size, demographics and activity in that region.

A commercial activity in regional Queensland through which a foreign entity employs fewer than 75 people may make a significant impact where that entity is the major employer in the region, or whether the industry or activity might not exist in the absence of the foreign entity.

The above factors and examples focus on an entity's current commercial activities (e.g. current number of local workers engaged, and current amount expended on local resources) in considering whether the entity makes a significant contribution. If an entity's current commercial activities do not make a significant contribution on the date liability for land tax arises (liability date), the entity's committed future commercial activities (having regard to the above factors) over a 12-month period from the liability date may be considered in determining whether the entity makes a significant contribution. Evidence of committed future commercial activities may include executed contracts and agreements, the granting of regulatory approvals (e.g. environmental approvals, development approvals, licences and permits), business plans, recruitment plans, and capital raised.

Example 7

A manufacturing entity seeks ex gratia relief from the foreign surcharge from the 2020–21 land tax year onwards. Liability for land tax for the 2020–21 year arises on 30 June 2020. The entity cannot demonstrate that as at 30 June 2020 its commercial activities make a significant contribution, because the entity only engages 20 local workers and expends \$12 million annually on local resources. However, the entity has secured a long-term supply contract and has committed to expand its manufacturing business to fulfil the supply contract. The committed future commercial activities will, during the 2020–21 land tax year alone, result in the entity engaging more than 80 local workers and expending more than \$30 million on local resources. The entity may be considered to make a significant contribution based on the committed future commercial activities.

The examples provided above are indicative examples only. Whether a foreign entity makes a significant contribution is considered on a case-by-case basis.

Application for ex gratia relief

10. Ex gratia relief from the foreign surcharge can be applied for on a retrospective or prospective basis, provided the foreign entity can demonstrate it has met or will meet the conditions at the time that liability for the surcharge arises.
11. The foreign entity must submit an application in the approved form, and provide the following documents:
 - (a) a statutory declaration by a person holding appropriate authority from the foreign entity (e.g. a director of a foreign corporation or trustee of a foreign trust) containing:
 - (i) details of the basis on which the foreign entity satisfies the guidelines
 - (ii) an acknowledgement of the entity's obligation to confirm with the Commissioner at the beginning of each land tax year that the entity satisfies the conditions under the guidelines for that land tax year (see paragraph 12)
 - (iii) an acknowledgement of the entity's obligation to inform the Commissioner in writing within 28 days if it no longer satisfies the conditions for ex gratia relief (see paragraphs 13 and 14)
 - (iv) 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.

Confirmation and notification requirements

12. As ex gratia relief is provided on an ongoing basis, the foreign entity must confirm at the beginning of each land tax year that it satisfies the conditions under the guidelines for that land tax year. This will be done by providing the Commissioner with a statutory declaration by a person holding appropriate authority from the foreign entity. While no supporting evidence is required to be submitted, the Commissioner may request supporting evidence.
13. The foreign entity must also notify the Commissioner within 28 days of any of the following occurring:
 - (a) Any of the conditions under the guidelines are no longer satisfied or complied with.
 - (b) There has been a material change in the circumstances existing when the approval was given.
14. Failure to notify is a breach of ex gratia conditions. A pragmatic approach will be taken by the Commissioner in administering the notification obligations, and will take into account those matters that the foreign entity knew—or ought reasonably to have known—in assessing when a notification obligation arose.

Streamlined process for applying for ex gratia relief from additional foreign acquirer duty (AFAD)

15. Where a foreign entity acquires land on which AFAD has or will be imposed and the entity applies for ex gratia relief from AFAD for that acquisition, the entity may also apply for ex gratia relief from the foreign surcharge for that land, which may be considered by the Commissioner simultaneously. The foreign entity may rely on the same supporting documentation for both applications.

Date of effect

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

Mark Jackson
Commissioner of State Revenue
Date of issue: 3 July 2020

References

Public Ruling	Issued	Dates of effect	
		From	To
LTA000.4.1	3 July 2020	3 July 2020	Current