

COMMISSIONER'S GUIDELINE

CG-SD-009:

Aggregation of conveyances

Guideline History

| Version | Issued | Dates of effect | |
|---------|------------|-----------------|---------|
| | | From: | To: |
| 1 | 6 May 2008 | 6 May 2008 | Current |

Purpose

This guideline explains how section 52A of the *Stamp Duty Act* ('the Act') operates to 'aggregate' instruments evidencing or effecting conveyances of dutiable property, including the circumstances where the Territory Revenue Office (TRO) will consider exercising the discretion not to aggregate.

This guideline primarily refers to transactions over land, however, the general principles apply to all types of dutiable property including, for example, business assets.

Background

Stamp duty on a conveyance of dutiable property is imposed on the dutiable value¹ of the property conveyed. Where the dutiable value is \$525 000 or less, the rate of duty is imposed by reference to a sliding scale.²

Where a transaction or series of transactions are effected or evidenced by two or more instruments with at least one instrument conveying property with a dutiable value³ of \$525 000 or less, the total stamp duty payable on that transaction or series of transactions would be lower if each was assessed separately, rather than in relation to the total dutiable value for all of the property conveyed.

Section 52A of the Act

Where two or more instruments⁴ effecting or evidencing conveyances of dutiable property 'together form or arise from, substantially one transaction or one series of transactions', duty is to be calculated on the instruments as though it was a single transaction.⁵

¹ Dutiable value is the unencumbered value of the property conveyed or the consideration paid or payable whichever the greater. Refer section 4(1) ('dutiable property', 'dutiable value', 'consideration' and 'unencumbered value'), 4A and 4AB of the SDA.

² Schedule 1, item 1 of the Act.

³ Section 4AB of the Act.

⁴ Including statements created under section 83B of the Act or memoranda created under section 86 of the Act.

⁵ Section 52A(3) of the Act.

Duty is calculated on the total amount that is the sum of the dutiable value in respect of each instrument.

Presumption of one transaction or one series of transactions where instruments executed within a 12-month period

Section 52A(4) of the Act provides that where a person conveys dutiable property to the same person (whether that person takes alone or with the same or different persons) by an instrument which has been executed within 12 months of another such instrument, it shall be presumed, unless the Commissioner of Territory Revenue is satisfied to the contrary, that the instruments arose out of one transaction or one series of transactions. In such a circumstance, the forensic and legal onus to rebut that presumption lies with the taxpayer.⁶

The following is an example of this scenario.

Paul owns two units in a unit complex. On 1 May, Paul signs a contract to sell one of the units to Darren, and on 1 December of the same year, Paul signs a contract to sell the other unit to Darren and Scott. As Darren is a purchaser who is common to both of the contracts of sale, and the contracts were signed within 12 months of each other, section 52A(4) of the Act deems the two contracts to have arisen out of one transaction or one series of transactions unless the Commissioner is satisfied to the contrary.

Aggregation of instruments executed outside a 12 month period

Section 52A of the Act also operates to aggregate instruments where the instruments are executed more than 12 months apart. Although there is no statutory presumption that such instruments executed by the same parties arise out of one transaction or one series of transactions, if the facts are that the instruments arose from substantially one transaction or one series of transactions then the instruments will be aggregated.

Discretion not to aggregate instruments

The Commissioner is not required to aggregate instruments that form, or arise from, substantially one transaction or one series of transactions where satisfied that it would not be just and reasonable in the circumstances.⁷ This discretion is discussed later in this guideline

Substantially one transaction or one series of transactions

The concept of separate conveyances that 'together form, or arise from, substantially one transaction or one series of transactions' requires an examination of the substance of what are purportedly independent transactions in order to determine whether they are substantially one transaction or one series of transactions.

⁶ *P Papadakis Nominees Pty Ltd v Commissioner of Taxes* [2007] NTMC 050 at [47].

⁷ Section 52A(3) of the Act.

All of the circumstances of each case must be considered to determine whether the transactions are interdependent or have an integral relationship with each other. The use of the word 'one' in the Act points to an 'essential unity, some oneness, or unifying factor that brings the several transactions within the section.'⁸

For two or more instruments to be substantially one transaction or one series of transactions the courts have held that the relationship between the instruments must be integral and not a fortuitous one depending merely on such circumstances as contiguity in time or place.⁹

In other words, in order to ascertain whether several instruments form or arise from substantially one transaction or one series of transactions for the purposes of section 52A of the Act, 'the test is whether in all the surrounding circumstances there is some unity or 'oneness' of the contracts that makes parts of one transaction or one of a series of transactions.'¹⁰ This is a question that will fall on the relevant facts in each case, including evidence of steps taken prior to the execution of the instruments.¹¹

Section 52A of the Act requires that there be a sufficient connection between the instruments in question, which may arise from situations such as the following.

- 1) The relationship between the purchasers, or simply from the common purpose of the instruments. Accordingly, instruments showing the same purchaser(s) or vendor(s) or different unrelated purchaser(s) can be aggregated.
- 2) Each instrument being an integral part of, or sufficiently linked to, prior negotiations, arrangements or dealings by the purchaser(s).

For example, *Nicholas Paspaley Properties Pty Ltd v Commissioner of Taxes (NT)*,¹² involved the sale of waterfront land and a slipway business conducted on that land. The land and the business were purchased by two different companies and the vendors of the land and business were also two different companies. However, the two purchasing companies were both wholly owned subsidiaries of a third company. Consequently, the Supreme Court held that the conveyance of the land and business was 'one transaction'.

- 3) The instruments being a series of interdependent steps taken to achieve a single or common objective or purpose of the purchaser(s).

It is not necessary for the common objective or purpose of the purchaser to be their sole objective or purpose; however, it is confined to a specific objective or purpose (even if expressed in general terms) rather than some vague goal or ideal such as 'investment'.

⁸ *Jeffrey v Commissioner of Stamps (SA)* 80 ATC 4126.

⁹ *Attorney-General v Cohen & Anor* (1937) 1 K.B. 478.

¹⁰ *P Papadakis Nominees Pty Ltd v Commissioner of Taxes* [2007] NTMC 050 at [57].

¹¹ *Jeffrey v Commissioner of Stamps (SA)* 80 ATC 4126 at 4132; *Old Reynella Village Pty Ltd v Commissioner of Stamps (SA)* 89 ATC 4916 at 4918.

¹² 91 ATC 4171.

Arm's-length transactions can be aggregated in circumstances where the purchaser(s) has a common objective or purpose for engaging in the transactions. There need not be any interdependence between the instruments to be considered as one transaction or one series of transactions. That is, there is no need for instruments to be conditioned on other instruments going ahead.

For example, in *Old Reynella Village Pty Ltd v Commissioner of Stamps (SA)*,¹³ it was held that the acquisition of 17 properties from 16 vendors in order to form a single parcel of land for the construction of a shopping centre was a 'series of transactions' to which the South Australian equivalent of section 52A applied.

Moreover, there is also no precondition that section 52A of the Act is limited to circumstances where dutiable property is acquired through the artificial use of a number of instruments for the sole purpose of avoiding or reducing duty (that is, 'contract splitting').

Factors considered

The following is a non-exhaustive list of factors that will be considered by TRO in determining whether two or more instruments together form, or arise from, one transaction or one series of transactions.

- 1) When and where the instruments were executed.
- 2) Situations where one instrument was effectively dependent on the entry into another instrument, whether or not this was explicitly stated in the instruments. Some examples include:
 - a. agreements that contain an interdependency clause, such that one agreement will not proceed to completion unless the others also do;
 - b. agreements that relate to the conveyance of fractional interests in an item of dutiable property whether by different purchasers or the same purchaser. For example, successive purchases of 10 per cent interests in a commercial building are fractional interests. The impact of this factor on the HomeNorth shared equity scheme is discussed later in this Guideline;
 - c. instruments to purchase properties that are entered into pursuant to options to purchase those properties;
 - d. the purchase of two or more properties is made subject to a development application or similar approval (such as for a liquor or gaming machine licence) affecting the properties; or
 - e. where the purchaser has lodged a development or similar application prior to entering into at least one of the instruments in circumstances where the application relates to more than one property that has or will be conveyed.
- 3) Whether any discount was obtained by the purchaser through agreeing to purchase more than one item of property, including whether such a discount would have been available to a different purchaser who had agreed to buy only one item of property.

- 4) Whether or not the separate instruments arise from the fact that each transaction was the result of separate and independent bargaining or whether a single course of negotiations was conducted for a single transaction or series of transactions. It is generally assumed that property purchased at a public auction is a result of genuine bargaining regarding each separate instrument. However, this assumption will not apply where negotiations for items of property occur before or after the auction, or where entry to the auction is restricted to a limited number of bidders.
- 5) Whether the items of property have previously operated as one unit. Some examples of this include:
 - a. where the instruments relate to freehold property and a business conducted on that property;
 - b. assets of a single business operating as a going concern that are purchased under separate instruments;
 - c. where separate instruments relate to land and chattels and the chattels were used in conjunction with the land or a business operated from the land; and
 - d. where properties were advertised, or offered for sale, as a single parcel and are sold as separate parcels under separate contracts that have the same or related purchasers.
- 6) The intended use for the dutiable property being conveyed. For example, where the purchaser(s) are buying more than one farming or grazing property and intend to use them together as a single business.
- 7) The relationships between the vendor(s) and purchaser(s), and where there are multiple purchasers, the relationship between those purchasers (see below).
- 8) The proximity of the properties (if land).

Examples where not substantially one transaction or one series of transactions

As stated above, all of the circumstances of each case need to be considered in order to ascertain whether two or more instruments actually form substantially one transaction or one series of transactions for the purposes of section 52A of the Act.

Following are two examples of where TRO may consider that two or more instruments do not arise from substantially one transaction or one series of transactions.

- 1) On 1 March, Ed, a builder, enters into contracts to purchase four lots in a subdivision ('Package 1'), receiving a 5 per cent discount on the advertised price on each of the lots. The discount is provided to Ed as a result of him purchasing the four lots. This discount is indicative that the purchase of the lots is substantially one transaction or one series of transactions and section 52A(4) of the Act applies to the purchase of the Package 1 lots so that stamp duty is assessed as if the four lots were conveyed under a single instrument (unless the presumption is rebutted).

Eight months later, Ed enters into contracts to purchase a further two adjoining lots in the same subdivision ('Package 2') that he intends merging into a single lot for the purpose of constructing a unit complex (and the purchase is conditional on his obtaining approval to do so).

There are two consequences of the purchase of the Package 2 lots within 12 months after the purchase of the Package 1 lots.

- i. The first consequence is that the common purpose for the purchase of the Package 2 lots and the co-conditioning of the purchase agreements is such that the purchase of the lots is substantially one transaction or one series of transactions and section 52A of the Act applies to the purchase of the Package 2 lots.
- ii. The second consequence is that section 52A(4) of the Act operates to presume that the Package 1 contracts and the Package 2 contracts together form or arise from substantially one transaction or one series of transactions. Accordingly, unless the Commissioner is satisfied to the contrary, the purchases of all six lots (Package 1 and Package 2), will be aggregated and assessed as if they were conveyed under a single instrument.

However, in this case, while the factors may indicate that the Package 1 lots should be aggregated and that the Package 2 lots should be aggregated, the Commissioner will not necessarily treat the Package 1 and Package 2 lots as together arising from substantially one transaction or one series of transactions, provided there is no other connection between the purchases of the two packages such as a common discount, or a unified purpose to the acquisitions.

Accordingly, depending on all the circumstances, duty may not be assessed on the six lots in Packages 1 and 2 as if they were all conveyed under a single instrument. For further information, see below under the title 'The discretion not to aggregate'.

- 2) In a situation where one instrument relates to a conveyance of land and a second instrument relates to the conveyance of chattels that were used in a business conducted on that land, the two instruments will not generally be treated as arising from one transaction or one series of transactions where the purchasers of the land and chattels are unrelated and the chattels are no longer going to be used in the business conducted on that land.

The discretion not to aggregate

The Commissioner has a discretion not to aggregate instruments that arise from substantially one transaction or one series of transactions where he is satisfied that it would not be just and reasonable in the circumstances. There are no fixed criteria of what is just and reasonable, and thus all the circumstances of a particular case must be considered. This guideline does not attempt to establish an exhaustive list of

factors that will be taken into account by TRO in determining whether this discretion should be exercised.

However, a taxpayer must establish in a given 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 the discretion. As a general rule, the situation would have to be an unintended consequence of the legislation.

*Chief Commissioner of State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd (No 2)*¹⁴ considered the application of a similar provision in the New South Wales stamp duty legislation. In that case, the taxpayers purchased five adjoining residential properties from five neighbours. The properties were initially the subject of options to purchase while a development application was being made.

The development was approved and the options were exercised. The approval permitted the taxpayers to undertake a mixed commercial and residential development on the site.

In that case 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’. Moreover, the Tribunal also 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’, noting that it ‘is a relief mechanism for hard cases’.

The Tribunal found that there was ‘nothing special about this transaction, and there would have to be some unusual or special considerations which would take the case outside the normal application of duty. To use the discretion to relieve a purchaser from duty would require special justification. A dispensing power should not lightly be applied.’

The Tribunal held that the transactions should be regarded as one transaction for the purpose of determining the duty chargeable, and that the ‘just and reasonable’ dispensing power should not be applied.

This view was affirmed in *P Papadakis Nominees Pty Ltd v Commissioner of Taxes*,¹⁵ which involved the purchase of 35 allotments of land from the same vendor by the same purchaser. The allotments made up an entire stage of a subdivision. In addition, the Tribunal found that ‘there must be equitable treatment between taxpayers and the Commissioner’s discretion is the tool that he can use to ensure that equity.’

¹⁴ [2005] NSWADTAP 54.

¹⁵ [2007] NTMC 050 at [78].

The following are examples where TRO may exercise the discretion not to aggregate.

- 1) Fred owns three adjacent parcels of land. Fred wants to sell all of the parcels at the same time, and does not want to risk being left with one or more of the parcels should any of the sales fall through. Accordingly, Fred requires three unrelated purchasers to enter into contracts which make the sale of each parcel conditional on the sale of the other two. In this instance, although the three contracts are interdependent, the interdependency is for the benefit of the vendor rather than the unrelated purchasers and the properties are not being acquired for a common purpose. In these circumstances, TRO is likely to consider that it is not just and reasonable to assess stamp duty on the three contracts as if they were a single instrument.
- 2) Natural persons are able to enter into shared equity arrangements under the Northern Territory Government's HomeNorth scheme with the CEO (Housing) to purchase homes. At the time of the initial purchase, the parties often enter into an agreement that allows the homebuyer to purchase the CEO (Housing)'s share at a later time. On a strict interpretation, the initial purchase from the vendor and the subsequent purchase of the CEO (Housing)'s share would be considered to fall within the ambit of section 52A of the Act.

However, as the underlying reason for the HomeNorth shared equity scheme is to encourage and facilitate home ownership by low income earners, TRO would consider it to be not just and reasonable to assess stamp duty on the two instruments as if they were a single transaction in these circumstances.

Stamping – apportionment of duty

The Act provides that where an assessment is made in circumstances where section 52A of the Act is applied, duty may be apportioned between the instruments in a manner determined by the Commissioner¹⁶. As a general rule, duty will be apportioned between the instruments in proportion to the dutiable value of dutiable property conveyed by each instrument.

Conveyance by Return (CBR) Agents

Persons approved to self-assess instruments under the CBR scheme are authorised to assess instruments that arise from substantially one transaction or one series of transactions, or instruments executed within 12 months of each other between the same or similar parties. However, this authority is limited only to assessing the instruments on the basis that the instruments are aggregated.

If CBR agents are of the opinion that it would not be just and reasonable for the aggregation provisions to apply, or that the instruments have not arisen from substantially one transaction or one series of transactions, the instruments must be lodged with TRO for assessment (see below for lodging requirements).

¹⁶ Section 52A(3) of the Act.
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Lodging requirements

When a conveyance of dutiable property arises from substantially one transaction or one series of transactions, persons lodging the instrument or statement for assessment of duty must make a declaration to that effect in the Stamp Duty Lodgement Form (F-SD-001). This form can be obtained from the TRO website (www.revenue.nt.gov.au) or by contacting TRO as per the contact details below.

It is the responsibility of the persons liable for the payment of the duty, or their representatives, to ensure this declaration is made and that the instruments or statements are lodged for assessment at the same time. Alternatively, they should notify the Commissioner of the existence of those circumstances and provide details of those transactions.

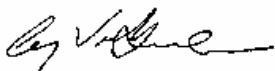
Taxpayers and tax advisers are obliged to fully and truly disclose relevant information for the purposes of assessing a person's tax liability.¹⁷ Severe penalties apply for evasion or conspiring to evade stamp duty.

To expedite the assessment process, parties seeking the exercise of the Commissioner's discretion not to aggregate the instruments or statements should make a written application addressing the matters mentioned in this Guideline under the title 'Factors considered', as well as any other matters that are relevant, when lodging the instruments or statements for assessment.

Commissioner's Guideline CG-GEN-001, which sets out information on the revenue publication system, is incorporated into and is to be read as one with this Guideline. All Circulars and Guidelines are available from TRO's website.

Date of effect

This Guideline takes effect from the date of issue.



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Date of issue: 6 May 2008

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¹⁷ Section 24 of the *Taxation Administration Act 2007*. Also see Commissioner's Guideline CG-GEN-005: *Requirement for full and true disclosure* for further information.