

Where transfers go wrong

EXEMPTIONS FROM TRANSFER DUTY CONTAINED IN THE DUTIES ACT NEED TO BE CONSIDERED IN THE CONTEXT OF TRUSTS AND HOW THEIR APPLICATION CAN GO WRONG.

BY ADAM CRAIG AND SIMON TISHER



Disputes regarding exemptions from transfer duty involving the Commissioner of State Revenue are not uncommon. If they cannot be resolved, they are ultimately adjudicated in the Victorian Civil Administrative Tribunal (VCAT) or Supreme Court of Victoria. In that scenario, the onus will fall on the taxpayer to lead the evidence, documentary and/or otherwise, to prove they answer the requirements of the exemption.¹

Three of the more common exemptions from transfer duty contained in the *Duties Act 2000* (Vic) (Act) encountered in practice are examined:

- the exemption for property passing to beneficiaries of trusts
- the exemption for transfers to and from a trustee or nominee and
- the exemption for a transfer because of a change in trustees.

Property passing to beneficiaries of trusts

The role trusts have assumed in Australia for asset protection and tax minimisation purposes is well known. As part of the intergenerational transfer of wealth, it comes as no surprise that trustees commonly resolve to transfer real estate to one or more beneficiaries.

A critical preliminary step is to ensure that the deed in question allows the contemplated transfer. Ordinarily, a trust power is required to make an in-specie distribution of capital to the desired beneficiary prior to vesting. If the deed does not contain such a power, consideration should be given to whether the deed can be amended to facilitate the desired transfer, or whether application can be made to the Supreme Court. Again, care should be exercised to ensure that the deed, especially older

deeds, contains a sufficient power of variation.² The prospect of resettling the trust or the occurrence of capital gains tax events E1 or E2 of the *Income Tax Assessment Act 1997* (Cth) should also be carefully considered.³

Assuming that the deed permits the transfer contemplated, exemptions from duty in Victoria are contained in ss36, 36A and 36B of the Act in relation to dutiable property passing to beneficiaries of fixed trusts, discretionary trusts or to unitholders in unit trust schemes (UTS). An exemption is also contained in s41A of the Act for property passing to beneficiaries of superannuation funds.

It is not the function of this article to provide a detailed description of each of the exemptions available. However, it is noted that the terms “fixed trust”, “discretionary trust”, “unit trust scheme” and “superannuation fund” are all defined terms in the Act. Careful regard needs to be given to the deed at hand and the type of trust it answers.⁴

The various exemptions broadly require that:

- a) the duty (if any) charged by the Act when the dutiable property was vested in the transferring trust has been paid or the Commissioner is satisfied that it will be paid
- b) the beneficiary/unitholder was a beneficiary/unitholder at the time the dutiable property was vested in the transferring trust or, in the case of a discretionary trust, became a beneficiary after that time by reason of falling within a class of specified relations to a beneficiary (such as becoming a spouse, domestic partner, lineal descendant or adopted/stepchild of a beneficiary)

- c) the transfer is either to the beneficiary/unitholder absolutely or to the beneficiary/unitholder as trustee of another trust which answers strict criteria and
- d) the Commissioner is satisfied that the transfer is not part of a sale or other arrangement under which there exists any consideration for the transfer.

The requirements above should not be seen as conclusive by any means. The elements required for exemption pursuant to s41A (property passing to beneficiaries of superannuation funds)⁵ require items (a), (b) (however the beneficiary must have been a beneficiary when the property first became part of the fund), (c) (transfer must be to the beneficiary absolutely) above to be satisfied, though not item (d). In the case of ss36 (fixed trust), 36B (UTS) and 41A (superannuation fund), further rules limit the exemption – essentially to the extent of the recipient beneficiary’s interest in the trust/fund (and in some instances impose other requirements). A concession may be available where these further requirements are not met.

A key requirement for ss36, 36A and 36B is that the transfer is not part of a sale or other arrangement under which there exists any consideration for the transfer. The concept of “consideration”, in particular, is widely construed by the Commissioner. It is not sufficient to simply write “entitlement in equity” or similar on the transfer. The VCAT and Supreme Court have concluded that the concept of consideration extends to loan accounts that will be discharged or by necessity forgiven by reason of the transfer (likely if the only asset of significance is the property being transferred).⁶ Transfers that result in a deficiency of trust assets are similarly problematic; evidence will be required of the trust’s ability to discharge the loans post-transfer.

*Astakhov v Commissioner of State Revenue*⁷ is a typical example of the pitfalls that can occur. Mr Astakhov was the trustee of the S & V Astakhov Family Trust, a standard kind of discretionary trust established by deed in February 2010. In May 2010 a residential property was purchased by Mr Astakhov as trustee for the trust. The purchase was financed entirely by loans from beneficiaries. Some five years later, Mr and Mrs Astakhov told their accountant they wished to live in the property as their home. Resolutions were passed to vest the property in Mr Astakhov (personally) and Mr and Mrs Astakhov entered a Deed of Distribution. Mrs Astakhov was a party to the Deed in her capacity as a guardian of the trust.

Ultimately, the financial statements of the trust were provided to the Commissioner. They showed that loans owed by Mr Astakhov (as trustee of the Trust) to each of Mr and Mrs Astakhov had been reduced by \$939,583, or \$1,879,166 in total during the financial year of transfer. The Commissioner assessed

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- Although commonly claimed, exemption for the transfer of dutiable property from a trust to a beneficiary is by no means a given. Particular regard should be given as to whether any consideration, including the forgiveness of loans, exists for the transfer.
- The Court of Appeal has clarified that the existence of broad trustee powers in a bare trust need not preclude the availability of the exemption in s35(1)(a) of the *Duties Act*. However, the exemption remains limited in scope, especially if beneficial interests are shifted or diluted.
- The exemption for a transfer in relation to a change in trustees in s33(3) of the *Duties Act* has a specific and narrow purpose. A rigorous test of a factual nature is imposed. A finding that the transfer creates a new trust or structure will be fatal to its application.
- The specific criteria of each exemption must be applied rigorously and strictly. Near enough will not be good enough. If exemption is denied, it is the taxpayer who will carry the onus of proof in a dispute with the State Revenue Office.

the transfer to duty of \$112,200.

In VCAT, the taxpayer was unsuccessful. Member Reynah Tang found that there was consideration in the form of waiver by conduct of loans owing to Mr Astakhov. He also found that Mr Astakhov’s accountant knew that as a consequence of the transfer of the property, the loans owed by the Trust to Mr and Mrs Astakhov would become worthless. Mr Astakhov’s submission that any forgiveness of the loans occurred after the transfer was rejected. Member Tang found that there is nothing in the language of the provision that requires the two events to be within the same financial year or otherwise contemporaneous.

Fundamentally, as was articulated by Geoffrey Nettle QC (later Nettle J of the High Court) in *Ralara*,⁸ the transfer must be to a beneficiary qua beneficiary. That is, it is to be for no consideration and in conformity with the trust. Careful regard should be given to the State Revenue Office’s (SRO) online evidentiary manual as to the documents that will be required (including three years of financial accounts and a statutory declaration from the trustee) before the transaction is undertaken.

The giving of a mortgage by the beneficiary or unitholder to secure the same or a greater amount as that outstanding under a mortgage to which the property was subject prior to transfer will not necessarily be fatal to the availability of the exemption.⁹ This is provided the Commissioner is satisfied that the transfer is not part of a sale or arrangement for consideration designed to take advantage of an exemption or concession.

Where exemption is sought pursuant to s36B in relation to a transfer of property from a UTS, the dutiable value of property transferred as a proportion of the trust’s net assets must not exceed the unitholder’s proportion of the trust’s net assets at the relevant time, being the time the property became subject to the trust.¹⁰ Further, the value of the unitholder’s units must be reduced by the value of the property transferred. A similar though simpler test is applicable where exemption is sought under s36 for a fixed trust.

The proportionate calculations can be complex. In *Rakmy*¹¹ a UTS had three unitholders. The units of one unitholder was fully paid; the units of the other two unitholders were partly paid only (to a minor degree). The Supreme Court of Victoria concluded that the owners of the partly paid units still had an equal interest in the trust fund and that the interest of the fully paid unitholder was one-third, not 99.98 per cent as contended.¹² Since the dutiable value of the property as a proportion of the net assets of the UTS was 64 per cent, a proportionate concession from duty as to one-third was applicable only.

Transfers to and from a trustee or nominee

Another exemption that is commonly sought is for transfers made where the property is “to be held solely as trustee or nominee of the transferor, without any change in the beneficial ownership of the property”: s35(1)(a) of the Act.

The most recent decision that deals with this exemption is *MD Commercial Pty Ltd v Commissioner of State Revenue (MD Commercial)*.¹³ Two brothers inherited a property. Each established a trust and transferred their respective interests in the property into each respective trust. The trust deeds required the trustees to act in accordance with the beneficiaries’ directions, and empowered the trustees, at the beneficiaries’ direction, to engage in property development activities. The SRO stamped the transfer as exempt. It later issued assessments following property development activities.

The taxpayer was initially unsuccessful in the VCAT and on appeal to the Supreme Court.¹⁴ Central to the reasoning of the Tribunal and the Court was that, pursuant to the particular provisions of the deeds, the obligations of the trustees extended further than to simply holding the property for the respective transferrers.¹⁵ The “possibility” of the trustee subdividing, developing and selling some or all of the land denied the exemption because, according to the Court, the terms of the trust contemplated changes in the beneficial ownership.¹⁶

The taxpayer’s appeal to the Court of Appeal was allowed. In reaching its conclusion, the Court considered the previous leading authorities: *Comptroller of Stamps v Yellowco Five Pty Ltd (Yellowco)*, *Commissioner of State Revenue v Victoria Gardens Developments Pty Ltd (Victoria Gardens)* and *White Rock Properties Pty Ltd v Commissioner of State Revenue (White Rock)*.¹⁷

The Court of Appeal distinguished the facts before it from *Victoria Gardens* and *White Rock* on the basis that on the facts before it there was no “present obligation on the trustee to develop and realise the property”.¹⁸ The Court articulated the critical inquiry as “for whom is the property to be held”¹⁹ The decision in *Yellowco Five* was distinguished on the basis that the facts before the Court (in *MD Commercial*) did not involve the possibility of the introduction of new beneficiaries.²⁰ Further, the Commissioner’s submission that a trustee empowered by the deed to do anything more than “guard” the property may not be “holding” it in the relevant sense was rejected. “Holding” property was not confined to “guarding” property – it was permissible to earn income from the property.²¹ Finally, a power to sell (as opposed to the obligation to sell) did not prevent the exemption from applying.²²

It is clear from *MD Commercial* that the existence of broad trustee powers in a bare trust need not preclude the availability of the exemption. However, the decision should not be seen as a broad panacea to accessing the exemption. The Court in *MD Commercial* confirmed the requirement, articulated by Phillips J in *Yellowco Five*, that the words “solely as trustee or nominee of the transferor” imported some requirement of exclusivity.²³ Further, the Court in *MD Commercial* did not overrule or disapprove of the Court’s observation in *White Rock* that s35(1)(a) “has a very limited scope”.²⁴ If the trust deed allows the beneficial interest in the property to be shifted or dilutes the interest of the beneficiary, then there will still be difficulties in obtaining the exemption.²⁵

Change in trustees

Section 33(3) of the Act provides an exemption from duty in respect of a transfer of dutiable property if the Commissioner is satisfied that the transfer is made solely because of the retirement of a trustee or the appointment of a new trustee (or other change in trustees) and in order to vest the property in the trustees entitled to hold it.

The Commissioner’s views as to the application of this exemption are well known. Pursuant to Revenue Ruling DA.030, the Commissioner will not be satisfied that the transfer is solely because of a change in trustee where it forms part of a transaction or a series of transactions that have a separate commercial objective.

The Court of Appeal in Victoria has made it clear that the exemption has a “specific and narrow purpose”.²⁶ A finding that the transfer gives rise to a new trust or a new legal structure, as was the case in *White Rock* and *Michaelides & Anor v Commissioner of State Revenue* [2016] VSC 256, will be fatal to the application of the exemption.²⁷

Even if the transferee is appointed as trustee of the same continuing trust, exemption under s33(3) will only be conferred where the transfer occurs:

- a) solely because of the retirement of a trustee, the appointment of a new trustee or a change in trustee and
- b) solely to vest the property in the trustee entitled to hold it.

In *Perpetual Trustee Co Ltd v Commissioner of State Revenue*²⁸ Hansen J noted the Oxford English Dictionary’s meaning of “solely” to include “exclusively”. He articulated that exemption (23) under Heading VI of the Third Schedule to the *Stamps Act 1958 (Vic)* (the predecessor to s33(3)) would only apply if its requirements, which were substantially the same as (a) and (b) above, were met and the transfer was “not in consequence of any other factor”.²⁹ According to Hansen J, the legislature had imposed a rigorous test of a factual nature.

Hansen’s dicta has since been approved numerous times by the Victorian Court of Appeal in cases that have considered s33(3).³⁰ Accordingly, a finding that the transfer was made to facilitate the carrying on of a partnership business of the development and sale of land, rather than solely because of the appointment of a trustee or solely in order to vest the land in a trustee entitled to hold it will not answer the requirements of s33(3).³¹

Conclusion

Taxpayers who do not qualify for the exemptions considered above often fail to approach the specific criteria of the relevant exemption rigorously and strictly. Near enough will not be good enough. Where this occurs, it will be up to the taxpayer to contest the resulting assessments through the objection process and, if unsuccessful, in the VCAT or the Supreme Court if they wish to pursue the matter further. ■

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1. See *Portbury Development Co Pty Ltd as trustee for Portbury Family Trust v Commissioner of State Revenue* [2020] VCAT 631, at [86] to [89].
2. See *Re Owies Family Trust* [2020] VSC 716, *Mercanti v Mercanti* [2015] WASC 297 and *Jenkins v Ellett* [2007] QSC 154.
3. Sections 104-55 and 104-60.
4. See, eg, *Goletsos v Commissioner of State Revenue* [2018] VCAT 730.
5. Also includes complying approved deposit funds, pooled superannuation funds or eligible rollover funds.
6. See *Gulliman v Commissioner of State Revenue* [2020] VCAT 804; *Astakhov v Commissioner of State Revenue* [2018] VCAT 1363 (*Astakhov*); *Westella Nominees Pty Ltd & Ors v Commissioner of State Revenue* [2010] VCAT 1786; *Navakumar v Commissioner of State Revenue* [2007] VCAT 476; *Shop, Distributive and Allied Employees Assoc (SDAEA) v Commissioner of State Revenue* [2005] VSC 484; *Ralara Pty Ltd v Comptroller of Stamps (Vic)* (1992) 92 ATC 2108 (*Ralara*).
7. See *Astakhov*, note 6 above.
8. See *Ralara*, note 6 above.
9. Section 36C.
10. *Rakmy Pty Ltd v Commissioner of State Revenue* [2017] VSC 237 (*Rakmy*); *Lincara Pty Ltd v Commissioner of State Revenue* [2018] VCAT 1060.
11. *Rakmy*, see note 10 above.
12. *Rakmy*, see note 10 above, at [78].
13. [2019] VSCA 295.
14. *MD Commercial Pty Ltd & AJ Commercial Pty Ltd v Commissioner of State Revenue* [2018] VCAT 333; *MD Commercial Pty Ltd & AJ Commercial Pty Ltd v Commissioner of State Revenue* [2018] VSC 560.

15. Note 14 above, VSC 560 at [42].
16. Note 14 above, VSC 560 at [42].
17. *Comptroller of Stamps v Yellowco Five Pty Ltd* [1993] 2 VR 529 (*Yellowco Five*), *Commissioner of State Revenue v Victoria Gardens Developments Pty Ltd* [2000] VSCA 233 (*Victoria Gardens*) and *White Rock Properties Pty Ltd v Commissioner of State Revenue* [2015] VSCA 77 (*White Rock*). In this context, the Court in *Yellowco Five* and *Victoria Gardens* considered the predecessor to s35(1), exemption (18) under Heading VI of the Third Schedule to the former *Stamps Act 1958*. Exemption (18) is substantially the same as s35(1).
18. [2019] VSCA 295 at [87].
19. Note 18 above, at [88].
20. Note 18 above, at [77].
21. Note 18 above, at [88].
22. Note 18 above, at [88].
23. Note 18 above, at [31], [82]; [1993] 2 VR 529 at 539.
24. [2015] VSCA 77 at [108].
25. See, eg, *Avmak Pty Ltd v Commissioner of State Revenue* [2019] VCAT 223.
26. *Commissioner of State Revenue v Lend Lease Funds Management Pty Ltd* [2011] VSCA 182 at [46] (*Lend Lease*); *Perpetual Trustee Co Ltd v Commissioner of State Revenue* [2000] VSC 177.
27. [2015] VSCA 77 at [134]; [2016] VSC 256 at [65]-[68].
28. [2000] VSC 177.
29. Note 28 above, at [54]. Exemption 23 contained the words "in consequence of" whereas s33(3) uses the word "because", however there is no meaningful distinction between the two phrases.
30. See *Victoria Gardens*, at [28] to [29], *Lend Lease* at [43] and *White Rock* at [126].
31. *White Rock* at [135]-[136]; see also *Michaelides & Anor v Commissioner of State Revenue* [2016] VSC 256 at [63].



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