



Chat Legal Pty Ltd

*Let's chat*

# Land tax and grouping

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# Overview

- ◆ The legal basics
- ◆ Grouping
- ◆ Cases
- ◆ Real life examples

Legislation relates to Queensland

# Queensland land tax legislation

- ◆ Land Tax Act 2010 (Qld) (**LTA**)
- ◆ *This Act imposes land tax, for each financial year, on all **taxable land** – s6(1) LTA*
- ◆ *Land tax is imposed on the **taxable value** of taxable land – s6(2) LTA*
- ◆ *A liability for land tax for a financial year arises at midnight on 30 June immediately preceding the financial year – s7 LTA*
- ◆ *The owner of taxable land when a liability for land tax arises is liable to pay the tax – s8 LTA*

# Key questions

- ◆ What is **taxable land**?
- ◆ What is **taxable value**?
- ◆ Who is an **owner**?

# Taxable land

- ◆ Land in Queensland that is not leasehold and is not *exempt land* – s9 LTA
- ◆ Part 6 LTA contains exempt land and can include (but are not limited to):
  - ◆ Homes
  - ◆ Land held by a charitable institution
  - ◆ Land on which an aged care facility is located
  - ◆ Land on which a supported accommodation service is conducted
  - ◆ Land used for primary production
- ◆ Each 'exemption' has specific rules

# Taxable value

- ◆ Taxable value is the lesser of the 'Land Valuation Act value of the land' or the 'averaged value for the land' – s16 LTA
- ◆ 3 year averaging to reduce sudden increases in land tax value – s18 LTA
- ◆ Land valued once a year by the respective State government
- ◆ Generally notified if there has been an increase
- ◆ Dispute in relation to value of land with the department valuing the land, **not** the revenue office
- ◆ Trap – recent subdivisions

# Owner

- ◆ Section 10 defines owner in three ways (see below.
- ◆ Legal person (whether jointly or severally) entitled to a freehold estate in land who is in possession.
- ◆ Legal person (whether jointly or severally) entitled to receive rents and profits from the land.
- ◆ A person taken to be the owner of the land under the LTA.
- ◆ Tests are not mutually exclusive and subject to sections 12 to 14, 22 and 23.

# Owner

- ❖ Body corporate for community titles scheme is not the owner of the scheme land for the scheme - s12 LTA
- ❖ Mortgagee of land is taken not to be the owner of the land (even if the mortgagee is in possession of the land) - s13 LTA
- ❖ Person entitled to the land 'in reversion or remainder' is taken not to be the owner of the land - s14 LTA
- ❖ Co-owners taken to own part of the land in proportion to their interest in the land - s22 LTA (to be considered further)
- ❖ Executor of an estate may request to have land tax assessed as if the relevant beneficiaries were the owners of the land - s23 LTA



# Owner

- ◆ Type of owner, different land tax rate
- ◆ Broken into land held by an individual other than an absentee or trustee (Schedule 1), and land held by anyone else (Schedule 2).

## Schedule 1      Rate of land tax—individuals other than absentees and trustees

section 32(1)(a)

<b>Column 1</b> <b>Total taxable value</b>	<b>Column 2</b> <b>Tax payable</b>
less than \$600,000	nil
\$600,000 or more but less than \$1,000,000	\$500 plus 1.0c for each \$1 more than \$600,000
\$1,000,000 or more but less than \$3,000,000	\$4,500 plus 1.65c for each \$1 more than \$1,000,000
\$3,000,000 or more but less than \$5,000,000	\$37,500 plus 1.25c for each \$1 more than \$3,000,000
\$5,000,000 or more	\$62,500 plus 1.75c for each \$1 more than \$5,000,000

## Schedule 2

## Rate of land tax—companies, absentees and trustees



section 32(1)(b)

### Column 1 Total taxable value

less than \$350,000

\$350,000 or more but less than  
\$2,250,000

\$2,250,000 or more but less than  
\$5,000,000

\$5,000,000 or more

### Column 2 Tax payable

nil

\$1,450 plus 1.7c for each \$1 more  
than \$350,000

\$33,750 plus 1.5c for each \$1  
more than \$2,250,000

\$75,000 plus 2.0c for each \$1  
more than \$5,000,000

# Who is an 'absentee'

- ◆ A person who does not ordinarily reside in Australia
- ◆ Includes a person who can not satisfy the commissioner that they ordinarily resides in Australia and they were absent when ownership of land is decided (or where absent for more than half of the preeceding 12 month period)
- ◆ Additional absentee surcharge of 1.5%

# When are you an owner?

- ◆ If there is a sale of property that straddles 30 June – who owns what?
- ◆ Seller is taken to be the owner of the land until the buyer is in possession of it.
- ◆ Buyer is taken to be the owner of the land as soon as the buyer is in possession of it.

# Assessment – bringing it all together



- ◆ A taxpayer's liability for land tax must be assessed on the **total taxable value** of **all taxable land owned** by the **taxpayer** when the liability arises – s19 LTA
- ◆ A taxpayer who is a trustee of a trust must be separately assessed on the taxable land that is subject to the trust, **as if that land were the only land owned by the taxpayer as trustee** – s20(1) LTA
- ◆ S20(1) LTA does not apply if the taxpayer is trustee of more than 1 trust **and** the interests of the beneficiaries of 2 or more of the trusts are, when the taxpayer's liability for land tax arises, the same – s20(2) LTA

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# Co-owners, again

- ◆ Separate co-owners can be assessed for land tax separately.
- ◆ However, co-owners can be assessed as 1 if the land were owned by 1 co-owner as the trustee of the other co-owners.
- ◆ The commissioner may make such an assessment **only if** – there are at least **5 co-owners of the land**; and **the commissioner considers the land is used for investment or commercial purposes** – s22(5) LTA.
- ◆ Factors that suggests the land is used for investment or commercial purposes include the purpose for which the land is used; the number of co-owners of the land; whether co-owners are individuals, trustees or companies; the relationship between co-owners, the value of the land and any other relevant matter



# Trust land

- ◆ If land is owned by 2 or more trustees of the same trust, the commissioner must make 1 assessment as if the land were owned by 1 person – s22A LTA (i.e. having ‘multiple trustees of a trust hold separate land in the same trust will group them all together)
- ◆ The beneficiaries of a discretionary trust when a liability for land tax arises are the persons in whose favour a power of appointment has been exercised during the 12 month period ending when the liability arises – s24 LTA

# Harrison v OSR [2018] QCATA 75



- ◆ Tribunal decision
- ◆ Harrison was the registered owner of three residential properties in Brisbane.
- ◆ OSR assessed there would be land tax payable on the aggregate value of those three properties.
- ◆ Note that Harrison also owned a fourth in his name which was his home.
- ◆ Land tax for the 2013/2014 year assessed at \$8,955.00.
- ◆ Land tax for the 2014/2015 year assessed at \$10,109.95.
- ◆ Harrison objected stating that he is the owner of each property as trustee for each of his three adult children and should therefore have separate assessments for each property.
- ◆ Rejected in first instance at the tribunal and was therefore appealed

# Harrison v OSR – The arrangement

- ◆ Three children.
- ◆ Idea was for Harrison to buy four houses, he to live in one and three others for each of his three children.
- ◆ Harrison would finance the loans himself with an external financier.
- ◆ Each child would be *reasonable rent* for their respective houses while Harrison lived, and when he and his wife passed away, they would inherit their respective properties.
- ◆ The rent was intended to provide some source of income to Harrison and his wife into their retirements.
- ◆ Mutual Wills would also be made to ensure each child received their property.

# Harrison v OSR – Harrison's approach



- ◆ Each property to be assessed separately on the basis each property was held on trust.
- ◆ Law relating to 'mutual Wills' raised stating a 'an institution (not remedial) constructive trust' arose on the basis of the mutual Wills.
- ◆ OSR rose arguments relating to the term 'institutional and remedial constructive trust'.
- ◆ Harrison argued that 'detriment' was not necessary to be incurred for the constructive style trusts to arise.
- ◆ Argued a constructive trust arose from the common intention of the parties, that the trust arose from partial completion of the contract to transfer and that Harrison had a fiduciary duty to the beneficiaries.

# Harrison v OSR – Court's thoughts

- ◆ Constructive trust by means of an estoppel – yes.
- ◆ *Arises where the plaintiff is led by the defendant's representations to expect that he has been or will be given an interest in property of the defendant, and where the plaintiff is encouraged by the defendant to act to his detriment on that representation.*
- ◆ No evidence suggestion arrangement was a sham.
- ◆ Evidence demonstrates the agreement was to leave the property to the children.
- ◆ Accepted the children relied on the promise for the property and performed part of their agreement by paying the 'rent'.

# Harrison v OSR – Court's thoughts

- ◆ Common intention constructive trust – yes.
- ◆ A constructive can be imposed according to the actual express or inferred common intention of the parties.
- ◆ No unchallenged evidence that it was the intention for the children to have the properties on the death of Harrison and his wife.
- ◆ Suggestion that there needs to be detriment as well as common intentions.
- ◆ View of the Court that there was sufficient detriment for the children (i.e. rent) to come to a conclusion there was common intention.

# Harrison v OSR – Court's thoughts

- ◆ Trust created by promise to leave property under Will – no.
- ◆ Needs something more than the mere execution of Wills (even Wills containing a promise to leave specific property) to create a trust. The promise is not enough to transfer the beneficial ownership of the assets, and additional factors are required to create a present declaration of trust.

# Harrison v OSR – Court's thoughts



- ◆ Trust 'sub modo' arising out of a promise to convey an interest in land – no.
- ◆ I.e. seller of property is treated in all respects as a trustee.
- ◆ Court questions this line of argument as the children could not be described as purchasers.
- ◆ The only payment they made is by way of rent which is not suggested to be a contribution to the purchase price.
- ◆ There is a promise to convey the properties on death, however, there is no payment of a deposit by the children and no transfer or even partial transfer of the legal title.



# Harrison v OSR – Court's thoughts

- ◆ Fiduciary relationship between Harrison and children falls within definition of 'trustee' of LTA.
- ◆ Argued obligation on Harrison to act in good faith which establishes a trust.
- ◆ Argued because Harrison was a fiduciary, he was not entitled to ignore the interests of the other party (his children).
- ◆ Court doesn't agree with this interpretation. The expression 'trustee of a trust' should not be expanded to refer to a person who has fiduciary obligations.

# Harrison v OSR – Tax comments

- ◆ Harrison informed Court (tribunal) that he declares rent paid by his children in his personal income tax returns (and has set off the net loss on the properties against his other personal income).
- ◆ Submitted by the OSR that how Harrison treated this income is relevant for the analysis, namely, Harrison treated himself as the legal and beneficial owner of each property for income tax purposes.
- ◆ *In the Marriage of Dawes* – litigants could not have their cake and each it too.
- ◆ *We accept it is undesirable that there be a situation in which an appellant expressly or impliedly represents one set of circumstances to the [ATO] whilst at the other reserving a different position which suits a different advantage for the purposes of the LTA – [90]*

# Harrison v OSR – Tax comments

- ❖ *The appellant argues that there is no evidence that he has made any representations that he is the beneficial owner of the three properties in a way inconsistent with his other arguments. That contention must be rejected because it is clear that such conduct does involve the making of an inconsistent representation as to the state of affairs associated with the ownership of that property, to that which he contends for in this appeal. The appellant has not suggested that he filed separate tax returns as trustee, and his position appears to be that he sees himself as entitled to offset trust losses associated with ownership against his ordinary non-trust general income – [92]*
- ❖ *Income discrepancy is 'a matter for the Commissioner of Taxation to enquire into and take such steps as is necessary' – [93]*

# Harrison v OSR – Aftermath

- ◆ OSR tried to appeal the decision in the Queensland Court of Appeal.
- ◆ They failed with a majority of 2:1.
- ◆ Largely a technical rejection (no comments change what was previously said), noting the Court did not find there were sufficient issues of public importance.

# Case Example 1

<i>Legal title</i>	<i>2018 land value</i>	<i>Land tax payable</i>	<i>Land tax payable if 1 property per trust</i>
1	\$ 455,000.00	\$145,9995.00	\$ 3,235.00
2	\$ 550,000.00		\$ 4,850.00
3	\$ 280,000.00		\$ -
4	\$ 275,000.00		\$ -
5	\$ 199,750.00		\$ -
6	\$ 2,200,000.00		\$ 32,900.00
7	\$ 425,000.00		\$ 2,725.00
8	\$ 415,000.00		\$ 2,555.00
9	\$ 2,300,000.00		\$ 34,500.00
10	\$ 1,450,000.00		\$ 20,150.00
<b>Total</b>	<b>\$ 8,549,750.00</b>	<b>\$ 145,995.00</b>	<b>\$ 100,915.00</b>

## Case Example 2

- ◆ Taxable land in a single commercial property \$1,800,000.
- ◆ 5 co-owners of the property in equal shares (i.e. 20% each).

### Potential land tax to be paid if single assessment for 5 co-owners

Taxable land value	\$1,800,000
Tax rate for trusts with taxable land value between \$350,000 and \$2,249,999	\$1,450 + 1.7 cent per additional dollar over \$350,000
Land tax payable	$\$1,450 + 0.017 (1,800,000 - 350,000)$ = \$26,100

# Case Example 2

- ◆ Restructure to move property owned by 1 co-owner to another (thereby reducing the co-owners to 4).

## Potential land tax to be paid if broken into 4 assessments

Total taxable land value	\$1,800,000
Taxable land for 20% co-owner of property	\$360,000
Tax rate for trusts with taxable land value between \$350,000 and \$2,249,999	\$1,450 + 1.7 cent per additional dollar over \$350,000
Land tax payable for 20% co-owner of property	\$1,450 + 0.017 (360,000-350,000) = \$1,620
<i>Per the Proposed Post Restructure Ownership, there are 3 co-owners with a 20% share</i>	\$1,620 ( [REDACTED] ) \$1,620 ( [REDACTED] ) [REDACTED] \$1,620 ( [REDACTED] ) [REDACTED]
Taxable land for 40% co-owner of property	\$720,000
Tax rate for trusts with taxable land value between \$350,000 and \$2,249,999	\$1,450 + 1.7 cent per additional dollar over \$350,000
Land tax payable for 40% co-owner of property	\$1,450 + 0.017 (720,000-350,000) = \$7,740
<i>Per the Proposed Post Restructure Ownership, there is 1 co-owner with a 40% share</i>	\$7,740 ( [REDACTED] ) [REDACTED]
Total land tax payable by all co-owners	\$12,600

# When restructuring

- ◆ CGT.
- ◆ Stamp duty.
- ◆ GST.
- ◆ Anti-avoidance.



# Contact details



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