Chat Legal Pty Ltd
ABN 64 621 391 553
letschat@chatlegal.com.au
PO Box 74, Underwood, QLD 4119
https://chatlegal.com.au

Let's chat

Business restructures – stamp duty considerations and more – April 2024

With:
Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances

Overview

- QLD stamp duty considerations
- Practical considerations
- Capital gains tax considerations

- Duties Act reference to *Duties Act 2001* (Qld)

Stamp duty generally

- Dutiable transaction (section 9 Duties Act):
  - Transfer of dutiable property
  - Agreement for transfer of dutiable property whether conditional or not…
  - A partnership acquisition
  - The creation or termination of a trust of dutiable property
  - A trust acquisition or trust surrender

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Stamp duty generally

- Dutiable property (section 10 Duties Act) includes each of the following
  - Land in Queensland…
  - …a Queensland business asset
  - a chattel in Queensland
- Note section 29 Duties Act – 'If a chattel in Queensland is the subject of a transaction, the transaction is not a dutiable transaction unless - (a) another type of dutiable property is the subject of the same transaction; or (b) under section 30, it is aggregated with a dutiable transaction that is not for a chattel'

Stamp duty generally

- Contracted property taken to be dutiable property:
  - Section 52 Duties Act – where property held by a trust
  - Section 213 Duties Act – where property held by a trust and shares in the corporate trustee is being changed
- Relevant where contract to acquire property entered into by trust, and then a dutiable transaction occurs between contract date and settlement date

Stamp duty generally

- Queensland business asset is a business asset of a Queensland business – section 34 Duties Act
- Queensland business includes a business that is conducted on or from a place in Queensland – section 36 Duties Act
- Business asset includes (section 35 Duties Act):
  - Goodwill…
  - Business name used for carrying on a business
  - Right under a franchise arrangement used for carrying on a business
  - Debt of a business if the debtor resides in Queensland
  - Supply right of a business
  - Intellectual property used for carrying on a business
  - Personal property in Queensland of a business
- Personal property includes 'motor vehicles, trading stock and P&E' – Schedule 6 Duties Act

Stamp duty generally

- Section 37 Duties Act – If intellectual or personal property of a business is the subject of a transaction, the transaction is not a dutiable transaction unless, under section 30, it is aggregated with 1 or more of the following:
  - a dutiable transaction for a Queensland business asset, other than intellectual or personal property;
  - a dutiable transaction for land in Queensland
- Transactions may be aggregated as one – section 30 Duties Act
- Circumstances in determining aggregation includes:
  - Whether transactions contained in 1 instrument or if they are conditional on entry into, or completion of, any of the other transactions
  - Whether the parties to any of the transactions are the same or are related parties
  - The time of which the transaction takes place and whether the assets were used dependently with each other

Stamp duty generally

- Dutiable value (for majority of transactions) – section 11(7) Duties Act:
  - The consideration for the dutiable transaction; or
  - The unencumbered value of the dutiable property or new right the subject of the transaction if:
    - There is no consideration for the transaction; or
    - The consideration can not be ascertained when the liability for transfer duty arises; or
    - The unencumbered value is greater than the consideration for the transaction
- Consideration includes the amount of any liabilities assumed or debts released/extinguished – section 12 Duties Act
- Unencumbered value disregards value of encumbrances/restraints/ any non-arm's length arrangements – section 14 Duties Act
- Note an apportionment applies if the business is in other States – Chapter 2 Part 4 Duties Act

Stamp duty generally

- Dutiable value of partnership acquisition – section 45 Duties Act – greater of:
  - Consideration for the acquisition so far as the consideration relates to dutiable property, or an indirect interest in dutiable property, held by the partnership
  - The value of the acquisition worked out under section 46 or 47
- Section 46 – considers the partner's partnership interest to the unencumbered value of the dutiable property held by the partnership and any indirect interest in the dutiable property held by the relevant partnership

Stamp duty generally

- The creation or termination of a trust of dutiable property – dutiable value calculated per majority methodology mentioned previously
- Dutiable value of trust acquisition or trust surrender – section 62 Duties Act – greater of the following:
  - Consideration for the acquisition or surrender so far as the consideration relates to dutiable property, or an indirect interest in dutiable property, held by the trust;
  - The value of the acquisition or surrender worked out under section 63
- Section 63 Duties Act – total of the amounts worked out by applying the beneficiary's trust interest to the unencumbered value, when the liability for transfer duty arises, of the dutiable property held by the trust and any indirect interest in dutiable property held by the relevant trust

Stamp duty generally

- Trust acquisition occurs when a person acquires a trust interest in a trust that holds dutiable property or has an indirect interest in dutiable property – section 55 Duties Act
- Trust interest is a person's interest as a beneficiary of a trust, other than a life interest. For a trust that is a discretionary trust, only a taker in default of an appointment by the trustee can have a trust interest – section 57 Duties Act
- Indirect interest in dutiable property is an interest through a trust interest or partnership interest or a series or combination of any where there is a connection between the trust and dutiable property in the series – section 58 Duties Act
- A person acquires a trust interest if they become a beneficiary or their interest increases – section 59 Duties Act

Stamp duty – bust some QLD myths

- Don't need to lodge unit transfers for a unit trust that owns property/operates a business
- No stamp duty on the restructure of a business
- We only need to pay stamp duty on the consideration
- We only need to pay stamp duty on the net amount
- Don't need to pay stamp duty when transferring property to family

Stamp duty

- https://qro.qld.gov.au/duties/investors/trusts/interest-acquisitions/

Acquisitions and surrenders

A **trust acquisition** occurs when you obtain a trust interest. This happens when you:

- purchase units in a unit trust
- increase your trust interest
- become a 'taker in default' as a beneficiary in a discretionary trust.

A **trust surrender** occurs when you surrender a trust interest—that is, you give up your beneficial interest in the trust, which increases the interests of the remaining beneficiaries in the trust.

Duty is calculated on the dutiable value of the trust interest acquired or surrendered.

You may be eligible for an exemption on acquisitions or surrenders in family trusts and superannuation funds .

Transferring property to or from a trust is neither a trust acquisition or surrender. Depending on the circumstances, this could be a transfer, trust creation or termination.

Lodging documents

For a transfer, surrender or acquisition of an interest in a **unit trust**, you need to lodge:

- the unit transfer form and agreement to transfer the units
- details of the unit holders and their holdings immediately prior to the transaction
- a dutiable transaction statement (Form D2.2)
- a certified statement of the assets and liabilities of the trust
- evidence of value of the assets of the trust (including goodwill) supported by financial statements for the previous 3 years
- a copy of the trust deed and any variations to the trust deed
- a covering letter outlining the documents you have lodged, your name and return address.

For a transfer, surrender or acquisition in relation to **discretionary trusts** (for example, family trusts), you need to lodge:

- the documents that provide for the transfer, surrender or acquisition
- details of the beneficiaries and their entitlements under the trust (before and after the transaction), including full details of any default beneficiaries
- a dutiable transaction statement (Form D2.2)

Other duty considerations

- Landholder duty:
  - Duty imposed on relevant acquisition – section 157 Duties Act
  - Relevant acquisition occurs when person acquires a significant interest (or aggregate with another related person) or after having a significant interest a person's interest in landholder increases – section 158 Duties Act
  - Significant interest is 50% or more in a landholder – section 159 Duties Act
  - Acquiring an interest in a landholder includes purchase, gift, cancellation, redemption, surrender or having trust created over interest – section 162 Duties Act
  - Related person defined in section 164 Duties Act and can be considered broad
  - Landholder is an entity with land-holdings in Queensland, the **unencumbered value** of which hare $2,000,000 or more – section 165 Duties Act

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Other duty considerations

- Landholder duty continued:
  - Entity's land-holding includes anything fixed to the land that may be separately owned from the land – section 167 Duties Act
  - Land-holdings includes land-holdings of a subsidiary – section 167(3) Duties Act
  - Subsidiary includes following – section 166 Duties Act:
    - A company is a subsidiary if it is a subsidiary under the Corporations Act
    - A trustee of a trust, if the 'holding entity' or a subsidiary of the holding entity, whether under this or another subsection, **is a beneficiary of the trust (relevant trust);**
    - A company in which the trustee of a relevant trust has an interest of 50% or more;
    - An interest of 50% or more is held on trust and the trustee of a relevant trust ia beneficiary of that trust;
    - A subsidiary of a subsidiary is a subsidiary of the holding entity

Other duty considerations

- Corporate trustee duty continued:
  - Duty imposed on relevant acquisition – section 205 Duties Act
  - Relevant acquisition if (a) a person acquires a share interest in a corporate trustee…; and (b) the acquisition is part of an arrangement under which any person obtains, directly or indirectly, a benefit relating to the property held by the corporate trustee on trust – section 207 Duties Act
  - Share interest is a person's interest as a shareholder in a corporate trustee for a corporate trustee – section 208 Duties Act
  - Corporate trustee is an unlisted corporation…that is the trustee of a discretionary trust that (a) holds dutiable property on trust for the discretionary trust; or (b) has an indirect interest in dutiable property and that interest is held on trust for the discretionary trust – section 209 Duties Act
  - There is an apportionment where dutiable property is a Queensland business asset – section 218 Duties Act

Small business restructure

- Sections 413A to 413I Duties Act
- Small business entity – carries a relevant Queensland business with annual turnover of not more than $5m
  - Where relevant Queensland business means a business conducted on or from a place in Queensland or the conduct of which consists wholly or partly of supplying land, money, credit or goods or any interest in them, or providing any service, to Queensland customers
- Small business property is dutiable property that is directly held and used by a person for the purpose of carrying on the business of the entity and **does not include dutiable property** (a) that is used as a residence by the person; or (b) that is investment property the person holds and uses to generate income to fund the business of the entity

Small business restructure

- Transferee corporation is an unlisted corporation to which small business property is, or is agreed to be, transferred that has not, since its registration under the Corporations Act, and before the transfer or agreement:
  - Held any assets or liabilities; or
  - Been a party to an agreement; or
  - Been a beneficiary or trustee of a trust; or
  - Issued or sold any shares or rights relating to shares
- Share interest of a person in a transferee corporation is the person's entitlement as a shareholder of the corporation, expressed as a percentage of the total value of the transferee corporation's property that would be distributed if:
  - The corporation were to be wound up; and
  - The property were distributed immediately after the person acquired the interest in the corporation

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Small business restructure

- Default beneficiary of a discretionary trust is a beneficiary who is a taker in default of an appointment by the trustee of the trust, other than a last taker in default of an appointment that is (a) a person decided under the *Succession Act 1981*…
- Please note Duties Act does not mentioned the term default beneficiary other than in this section
  - A reminder that these terms are just 'colloquial' terms with no definition at law

Small business restructure

- Exemptions available where:
  - Transfer of small business property
  - Small business entity (an individual/1 or more partners/trustee of a small business entity) transfers property to a transferee corporation
  - Either of the following applies:
    - Individual is a shareholder in the transferee corporation
    - All partners of partnership are shareholders in the transferee corporation
    - All default beneficiaries of the trust are shareholders in the transferee corporation
    - Trustee is the sole shareholder in the transferee corporation
  - Unencumbered value of the property the subject of the transfer or agreement is not more than $10m
  - For discretionary trust transferor – rights and interests of the small business beneficiaries of the trust immediately before the transfer are the same immediately after the transfer

Small business restructure

- Other requirements apply, including whether duty is payable where proportion in business changes
- Required to submit exemption to Queensland Revenue Office:

How to claim

Send the following documents to Queensland Revenue Office:

- a covering letter setting out ownership levels both pre- and post-restructure
- a copy of your latest full year financial statements
- any agreements or transfer documents
- a completed dutiable transaction statement (Form D2.2) claiming exemption number 58 at question 14
- completed vehicle registration transfer applications (F3520) to claim the vehicle registration duty exemption.

Other duty exemptions

- Change of trustee – section 117 Duties Act
  - Transaction not part of an arrangement involving a change in the rights of a beneficiary of the trust or terminating the trust; and
  - Transfer duty has been paid on all trust acquisitions or trust surrenders for which transfer duty is imposed for the trust before the transaction
- Family trust exemption – section 118 Duties Act – for trust acquisition or surrender in family trust
  - Trust is established and maintained as a discretionary trust primarily for the benefit of the members of a particular family or a family company; and
  - The person acquiring or surrendering the trust interest is a member of the family who, or is a family company that, does not benefit in the capacity of trustee
    - What is 'established and maintained primarily for the benefit of the members of a particular family'
    - Depends on 'primary beneficiaries' as defined in Duties Act and 'takers in default of an appointment for capital'
    - Who 'is a member of the particular family of another person'

Practical considerations

- Business transfer
  - Consent via assignment of lease or new lease
  - Consent via refinance
  - Consent of any other business assets (leased equipment (?)
  - New bank account
  - Transfer business name
  - Update invoices
  - Transfer subscription/software agreements/telephone, interest and IT companies
  - Go through bank account and look at all expenses and arrange for them to transfer to the new entity (potentially up to 12 months)
  - Employees to be transferred and consideration on how to deal with leave entitlements
  - Contractor arrangements and existing client engagements

Practical considerations

- Share/unit transfer
  - Notify ASIC
  - Consent for any change of owner with landlord/financier (usually will contain a clause about change of control)
  - Beware risk remains with trading entity (including historical issues – less an issue for restructures given continuity of ownership)

CGT options

- SBCGT Concessions
  - MNAV/Turnover Test
  - Active Asset Test
  - Additional conditions (4 tests) where share/unit interest
- SBRR
  - Genuine restructuring of an ongoing business
  - Each party is a small business entity/affiliate/connected with
  - Ultimate economic ownership test
  - Active asset (other than a depreciating asset)
  - Residency requirement
  - Each party chooses to apply a rollover
- 122-A/122-B rollover

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CGT options

- SBRR
  - roll-over applies to active assets that are CGT assets, depreciating assets, trading stock or revenue assets - meaning those assets move to the new entity balance sheet from the effective date;
  - assets transferred under the roll-over will not result in an income tax liability arising for either party at the time of the transfer;
  - the seller is considered to have received an amount for the transferred asset equal to the seller's cost of the asset for income tax purposes;
  - the buyer is considered to have acquired the asset at the time of the transfer for an amount that equals the seller's cost just before transfer.
  - roll-over cost for trading stock is either:
    - cost of the item for the seller at the time of the transfer;
    - value of the item for the seller at the start of the income year if the seller held the item as trading stock at the time;
  - roll-over prevents the seller from making a balancing adjustment when the asset is transferred - it allows the buyer to deduct the decline in value of the depreciating asset using the same method and effective life as the seller was using (a continuation);
  - for revenue assets - the roll-over cost is the amount that would result in the seller not making a profit or loss on the transfer - the buyer will inherit the same cost attributes as the seller just before the transfer;
  - rollover does not require any consideration.

CGT options

- SBRR
  - LCR 2016/3 – Genuine restructure
    - Does not includes estate planning
    - Commercial arrangements to facilitate growth, innovation, diversification or adapting to changing conditions/reducing administration burdens/costs
      - Continued use of transferred assets
      - Continuity of employment of key personnel
      - Continuity of production, supplies, sales or services
    - Example 2 – introduce employee equity – family trust to company
    - Example 3 – obtain additional investment to business – partnership to company
    - Example 6 – separating two restaurants owned by a single company into two entities so different children can take over – **not genuine**
    - Safe harbour rule – 3 years
  - Ultimate economic ownership requirement – discretionary trust requires family trust election and reducing beneficiary class to members of family group

CGT options

- SBRR
  - Active asset requirements – unlike SBCGT concessions, shares in trading company **not active**
    - See LCG 2016/3 example
  - Note importance to document intention for parties to rely on rollover, particularly if nowhere to note reliance of rollover in tax return

CGT options

- Want cost base?
  - SBCGT Concession
    - Prudent to obtain formal valuation to evidence cost base at time of transaction
    - Need to contribute money to superannuation
- Don't want cost base?
  - SBRR
    - Beware 50% CGT discount reset
    - SBCGT concession timings not affected
  - 122-A
    - Note shares must be issued
- Don't have money to contribute to superannuation?
  - SBRR or 122-A

Restructuring opportunities

- Individual to company (sole individual as shareholder)
- Family trust to company (family trust as shareholder)
- Family trust to company (default beneficiaries as shareholder)
- Company with individual shareholder to company with trust shareholder

Other restructures

- Vary trusts
- Change of trustee
- Unit transfers
- Change shares in company trustee
- Share transfers in landholder

- Is there a smarter way to restructure to achieve client objective?

Timing

- Don't leave it to the last minute
  - Not an issue tax wise, but ensuring all relevant consents obtained in time
- Note delay in having new bank accounts established and getting accounts/systems moved across
- Pre-planning and discussions with clients so they understand the extent of what is required

Contact details

Darius Hii

Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal Pty Ltd

darius@chatlegal.com.au

0403923374