Exemptions for Transfer Duty: Cancelled Agreements

AUTHORS // JOHN GRAY & YEN TRAN

JULY 2017

Under the *Duties Act 1997* (NSW) (the "**NSW Act**"), a liability to duty arises once an agreement for dutiable property, such as a contract for sale and purchase of land, is entered into.

Subject to certain exceptions, duty must be paid within 3 months from the liability arising. When an agreement is cancelled (which means rescinded, annulled or otherwise terminated without completion), the NSW Act provides that duty is not imposed in certain circumstances, and that any duty already paid may be refunded. Cancellation of an agreement often arises in the context of "novation", which is the substitution of a "new" agreement for an "old" agreement in consideration of the discharge of the "old" agreement.

Example

In a contract for sale of land, this involves the original vendor, the original purchaser, and a substituted purchaser. Usually, the terms of the agreement are the same and the only change is the substitution of the purchaser, or an addition of a further purchaser. A cancelled agreement will not be considered liable to transfer duty, and a refund of any duty paid may be obtained, if any one of the following conditions is satisfied:

1. SUBSALE

Where an agreement is cancelled to give effect to a subsequent agreement, the original agreement will not be liable to duty if it was not rescinded or annulled to give effect to a subsale. In determining whether an agreement is a subsale, the Chief Commissioner looks at the intention of, and whether any benefit is gained by, the original purchaser as a result of the cancellation of the original agreement. Benefits can include a sum of money from the substituted purchaser to the original purchaser or some other intangible benefit.

Example of an intangible benefit

A developer may "on sell" a vacant lot to an institutional investor at the same, or lower, price than the original purchase price. As part of the sale, the developer is given the benefit of developing the site. This sale would be regarded as a subsale even though, on the face of it, the developer did not earn a profit from the sale to the institutional investor.

However, where the only benefit to be gained by the original purchaser is the benefit of being released from the obligations under the original agreement, this would not, of itself, be sufficient to characterise the substituted agreement as a subsale.

Example

If the original purchaser is unable to raise the necessary finance to complete an intended purchase, but locates an alternative purchaser and

the vendor accepts this alternative purchaser by way of novation or "substitution" of the agreement, this would not be considered a subsale.

2. NOVATION OF PRE INCORPORATION CONTRACT

Where a promoter (usually the founder of a business), on behalf of a named company to be formed, enters into an agreement and the agreement is "substituted" following incorporation, so that the new company is the purchaser under the substituted agreement, the original agreement is not liable to duty.

3. RELATED PERSONS

If the original purchaser and substituted purchaser were "related persons" when the original cancelled agreement was entered into, the cancelled agreement is not liable to duty, even if the novation is considered a subsale.

Example

A purchaser makes the winning bid for a home at an auction, with the intention of purchasing it on behalf of himself and his wife. Both he and his wife provided the original purchase monies but in the heat of the moment following the auction, he tells the auctioneer his name only as the purchaser.

If there is a subsequent novation and substituted contract with the purchaser and his wife as joint purchasers, then that will not be considered a subsale as the provision of the joint monies was a strong indication of the purchasers' intention.

4. CANCELLATION GENERALLY

Where the agreement is cancelled and there is no subsequent agreement (whether or not in writing), it is likely to be accepted that the agreement was not rescinded or annulled to give effect to a subsale and therefore, is not liable to duty. Examples are termination of a contract for breach, or rescission based on a contractual or statutory right to rescind.

Under the NSW Act, if duty has been paid on an agreement that is not liable to duty, the Chief Commissioner must reassess and refund the duty if an application for a refund is made within 5 years of the initial assessment, or 12 months after the agreement is rescinded or annulled, whichever is the later date.

We consider that duty should be paid on the substituted agreement, as with any other dutiable instrument, within 3 months of the agreement being made or executed (if in written form). Otherwise, in the event that a refund of duty is not granted, time may well have passed and interest may have accrued in relation to the substituted agreement.

FOR MORE INFORMATION, PLEASE CONTACT:

JOHN GRAY //
Partner

T 61 2 8235 1205

E j.gray@clarkekann.com.au

Acknowledgment is given to Yen Tran, Lawyer, ClarkeKann Lawyers for compiling this article.