



## COMMISSIONER'S PRACTICE DA 31.2

### DUTIES – CANCELLED TRANSACTIONS

This Commissioner's practice outlines the application requirements for the assessment or reassessment of a duty liability under section 107 or 88A of the *Duties Act 2008* ('Duties Act') where a dutiable transaction has been cancelled.

#### Background

##### *Cancelled Transactions*

Section 107(2) of the Duties Act defines a *cancelled transaction* as a dutiable transaction that has not been, and will not be, carried into effect. However, the following transactions are not cancelled transactions:

- a call option of a simultaneous put and call option taken to be an agreement for the transfer of the option property under section 45 of the Duties Act;
- an assignment of a call option taken to be an agreement for the transfer of the option property under section 49 of the Duties Act; and
- a terms contract (within the meaning given in the *Sale of Land Act 1970*)<sup>1</sup> if the person liable to pay duty on the transaction has obtained exclusive use or control of the dutiable property as provided for in the contract, whether or not the contract is fully carried into effect for any reason.<sup>2</sup>

Section 107(3) of the Duties Act provides that, subject to subsection (4), duty is not chargeable on a cancelled transaction. Under section 107(4) of that Act, duty is chargeable on a cancelled transaction if the transaction has been cancelled so that a replacement transaction or subsale transaction can be entered into.

Section 107(1) of the Duties Act defines a *replacement transaction* as another dutiable transaction that:

- is between all of the same parties as the parties to the cancelled transaction; and
- is substantially similar in effect to the cancelled transaction; and

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<sup>1</sup> Under section 5 of the *Sale of Land Act 1970*, a terms contract is an executory contract (i.e. one that has not yet been fully completed or performed) relating to land under which the purchaser is obliged to make two or more payments to the vendor (in addition to any deposit), or is entitled to possession or occupation of the land, before being entitled to a transfer of the land.

<sup>2</sup> Where an agreement for transfer was not a terms contract when it was first executed but was varied to grant the purchaser an entitlement to possession or occupation of the land before being entitled to a transfer of the land, the variation is be deemed to form part of the contract. The agreement is considered to be a terms contract as from the date of the variation.

- in the Commissioner's opinion, is a scheme or arrangement, or part of a scheme or arrangement, for which the sole or dominant purpose of any party is to avoid, reduce or defer the payment of duty.

Section 107(1) of the Duties Act defines a *subsale transaction* as another dutiable transaction which results in a beneficial interest in the dutiable property that is the subject of the cancelled transaction being held by:

- a person who is not a party to the cancelled transaction, a result which is contemplated or provided for under the cancelled transaction; or
- a person who is not a party to the cancelled transaction, a result which is substantially similar in effect to the effect of the cancelled transaction; or
- another person, as a result of an agreement, arrangement or understanding between a person liable to pay duty on the cancelled transaction and any other party to the transaction (including any other person liable to pay duty on the cancelled transaction).

Section 107(5) of the Duties Act requires the Commissioner, on the application of a taxpayer, to reassess a dutiable transaction that is not liable to duty because of this section.

Section 107(6) of the Duties Act provides that an application for assessment or reassessment in relation to a cancelled transaction must be made using the approved form.

Under section 17(1) of the *Taxation Administration Act 2003* ('TAA'), a person is not entitled to apply for a reassessment more than five years after the original assessment was made. However, where the cancelled transaction is an agreement for the transfer of dutiable property that was cancelled on or after 4 September 2012, section 107(7) of the Duties Act provides that, despite section 17(1) of the TAA, a person is not entitled to apply for a reassessment:

- more than five years after the original assessment was made; or
- more than 12 months after the day on which the agreement became a cancelled transaction,

whichever is the later.

If the taxpayer has overpaid an amount, as a result of a reassessment under section 107 of the Duties Act, section 54 of the TAA requires the Commissioner to refund that amount to the taxpayer.

### ***General Conditional Agreements***

Under section 88A(1) of the Duties Act, duty is not chargeable on a general conditional agreement<sup>3</sup> if, after the relevant instrument has been lodged<sup>4</sup> but

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<sup>3</sup> As defined in sections 9 and 87 of the Duties Act.

<sup>4</sup> Section 23 of the Duties Act requires that an instrument or statement evidencing the dutiable transaction be lodged within 2 months after the day on which liability to duty on the transaction arises.

before duty on the transaction is paid or due to be paid:<sup>5</sup>

- the agreement is terminated on relevant grounds; and
- the Commissioner is notified of the termination on the approved form.

Section 88A(2) of the Duties Act provides that a general conditional agreement is terminated on relevant grounds if:

- it is not carried into effect because the condition to which it is subject cannot be fulfilled for reasons not within the control of a party to the agreement, or a person that is related<sup>6</sup> to a party to the agreement; and
- duty is not chargeable on the agreement under section 107 of the Duties Act because it is a cancelled transaction.

If a general conditional agreement is terminated on relevant grounds before an instrument is required to be lodged under section 23 of the Duties Act, there is no requirement to lodge the instrument as section 19(2) of that Act provides that liability to duty does not arise in respect of the general conditional agreement.

## **Commissioner's Practice**

### ***General***

1. Where a dutiable transaction has been cancelled, duty remains payable until such time as the transaction has been assessed or reassessed by the Commissioner.

### ***Application for Assessment or Reassessment under Section 107***

2. An application for the assessment or reassessment of a cancelled transaction must be made using Form FDA1 'Exemption for Cancelled Transactions'<sup>7</sup> ('application') and be accompanied by all relevant transaction record(s) unless these are already in the Commissioner's possession.
  - 2.1 Where a dutiable transaction is cancelled after duty has been assessed and paid, all original duty endorsed transaction records must accompany the application.
  - 2.2 The person liable to pay duty on the transaction, or other person(s) with the authority to act as their agent, must sign the application.
3. Where the dutiable transaction was self-assessed in Revenue Online, the lodging party may make application using the completed application and 'Cancelled Transactions under section 107' function in Revenue Online to have the assessment cancelled.

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<sup>5</sup> Section 25 of the Duties Act provides for the time periods within which duty is to be paid.

<sup>6</sup> Within the meaning given in section 87(5) of the Duties Act.

<sup>7</sup> Available on the [Duties Forms and Publications](#) page of the Office of State Revenue website.

4. If the cancellation of a dutiable transaction is under dispute, for example if the termination of an agreement for transfer is subject to legal proceedings, an application under section 107 of the Duties Act cannot be assessed until notification of the outcome of the dispute is provided to the Commissioner.
5. Where a dutiable transaction that is not a general conditional agreement that has been terminated on relevant grounds is cancelled before the transaction record is required to be lodged for assessment of duty, the record must still be lodged within the timeframe specified in section 23 of the Duties Act, together with an application under section 107 of that Act.

#### *Replacement and subsale transactions*

6. The Commissioner will consider the facts and circumstances of each cancelled transaction when determining whether the transaction was cancelled so that a replacement or subsale transaction could be entered into.

##### *Example – Replacement Transaction*

After executing an agreement for the transfer of vacant land on 1 June, John becomes aware that transfer duty rates will be reduced from 1 July. The seller agrees to cancel the contract and on 2 July the parties enter into an identical contract for the purchase of the same land.

In these circumstances, the Commissioner would consider the sole or dominant purpose for cancelling the original transaction and entering into the new transaction was to reduce the payment of duty. As such, the new transaction would be a replacement transaction and duty would remain chargeable on the cancelled transaction under section 107(4) of the Duties Act as well as being chargeable on the replacement transaction.

If John was able to provide evidence to show there was another legitimate reason for the original transaction to be cancelled and the new transaction entered into, it is unlikely the Commissioner would consider the new agreement was a replacement transaction and duty would not be chargeable on the original transaction.

##### *Examples – Subsale Transaction*

###### *Example 1*

Andrew enters into an agreement for the purchase of an investment property in which he is named as the purchaser. He subsequently decides the property should be an asset of his family trust. He and the vendor execute a variation to the agreement which provides the contract will be terminated and a new agreement will be made between the vendor and the corporate trustee of Andrew's family trust.

In this scenario, the Commissioner would determine the new agreement is a subsale transaction. As such, duty would remain chargeable on the cancelled transaction under section 107(4) of the Duties Act and would also be chargeable on the new agreement.

### *Examples – Subsale Transaction*

#### *Example 2*

Simon enters into an agreement to purchase an apartment in which he is named as the purchaser. A week later, he and his friend, Amanda, decide they should purchase the apartment together. Simon and Amanda approach the vendor who agrees to terminate the contract on condition that they enter into an otherwise identical agreement as joint purchasers.

In this scenario, the Commissioner would determine the new agreement is a subsale transaction and duty would remain chargeable on the original transaction in which Simon was the named purchaser. Duty would also be chargeable on the new transaction to the extent in which Amanda is identified as a joint purchaser.

#### *Example 3*

Kate enters into an agreement, conditional upon finance, to purchase a house as sole proprietor. After the financial institution declines Kate's application for finance, the agreement is cancelled.

The following day, Kate is advised that another financial institution will approve her application. Kate enters into a new agreement to purchase the house on the same terms and conditions as the original agreement, subject to obtaining finance from the second financial institution.

In this scenario, the original agreement is terminated on relevant grounds under section 88A of the Duties Act and not chargeable with duty. Duty would be chargeable on the new agreement.

### **General Conditional Agreements – Termination on Relevant Grounds**

7. Where a general conditional agreement is terminated on relevant grounds, the Commissioner must be notified using Form FDA16 'General Conditional Agreement - Terminated on Relevant Grounds'.<sup>8</sup> This form should be accompanied by the original transaction record if it is not already in the Commissioner's possession.
8. Where a general conditional agreement was self-assessed in Revenue Online, the lodging party may make application using the 'Terminated on Relevant Grounds' function to have the assessment cancelled.

### **Terms Contracts**

9. Where an agreement for the transfer of dutiable property that is a terms contract is cancelled before the person liable to pay duty on the transaction obtained exclusive use or control of the dutiable property, the application must be accompanied by documentary evidence to show the purchaser did not obtain exclusive use or control of that property before the agreement was cancelled.

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<sup>8</sup> Available on the [Duties Forms and Publications](#) page of the Office of State Revenue website.

**Date of Effect**

This Commissioner's practice takes effect from 24 October 2017.

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COMMISSIONER OF STATE REVENUE

24 October 2017

**Commissioner's Practice History**

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