



COMMISSIONER'S PRACTICE DA 35.0

DUTIES - TRANSFERS OF WESTERN AUSTRALIAN BUSINESS ASSETS

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
DA 35.0	30 September 2014	13 October 2014	Current

This Commissioner's practice applies to an agreement for the transfer of dutiable property (other than land or an interest in land) where:

- the liability to duty on the agreement arose on or after 13 October 2014; and
- the subsequent transfer of dutiable property is not effected, or evidenced, by an instrument in hard copy form.

Background

Section 10 of the *Duties Act 2008* ('Duties Act') imposes duty on dutiable transactions.

Section 11(1) of the Duties Act provides that a dutiable transaction includes an agreement for transfer of dutiable property and a transfer of dutiable property.

Section 15 of the Duties Act identifies dutiable property as comprising land in Western Australia, rights, chattels in Western Australia or Western Australian business assets.¹

Section 22 of the Duties Act provides that the person liable to pay duty on a dutiable transaction must make a transfer duty statement in the approved form within the time provided under section 23 of the Duties Act² for lodging with the Commissioner unless the transaction is effected, or evidenced, by an instrument in hard copy form.

Section 26 of the Duties Act states that, unless otherwise provided, duty is chargeable at the general rate of duty as set out in Schedule 2 to the Duties Act.

¹ Western Australian business assets are defined in section 79 of the Duties Act.

² 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 for duty on the transaction arises.

Section 11(2)(e) of the Duties Act provides that a prescribed transaction is an excluded transaction for the purposes of section 11 of the Duties Act and is not chargeable with duty.

Regulation 4(1)(d) of the *Duties Regulations 2008* ('Duties Regulations') prescribes, for the purpose of section 11(2)(e) of the Duties Act, that an excluded transaction includes the transfer of dutiable property (other than land or a right in relation to land) that would otherwise be a transfer on which duty is not chargeable under section 42(1) of the Duties Act.

Section 42(1) of the Duties Act provides that, when an agreement to transfer dutiable property is duty endorsed, the subsequent transfer of that property is not chargeable with duty when it is in conformity with the agreement.

Section 42(3) of the Duties Act provides that where the purchaser named in the agreement to transfer dutiable property differs from the transferee named on the subsequent transfer, or there is a difference in the division of the property, duty is chargeable on the transfer to the extent of the change between the agreement and the transfer.

In accordance with sections 42(2), (4B), (4), (5) and (7) of the Duties Act, duty is not chargeable on the subsequent transfer of dutiable property in certain circumstances, despite there being a difference between the purchaser named in the agreement for the transfer of dutiable property and the subsequent transfer of dutiable property.

Section 16(5) of the *Taxation Administration Act 2003* ('TAA') provides that if an assessment is based on a particular interpretation of the applicable law or a particular practice of the Commissioner that was generally applied to assessments of that kind when the assessment was made, then the Commissioner cannot make a reassessment based on the grounds that the interpretation was or practice is or was erroneous.

Under section 26 of the TAA, a taxpayer is liable to pay penalty tax equal to the amount of the taxpayer's primary liability where the taxpayer does not lodge a transfer duty statement that is required to be lodged under a taxation Act.

Section 29 of the TAA provides the Commissioner with the power to remit penalty tax wholly or in part.³

Section 127 of the TAA requires that the Commissioner publish all existing practices relating to the assessment of tax. The Commissioner cannot establish or direct a practice to be observed unless it is first published.

³ [Commissioner's Practice TAA 18](#) provides the circumstances in which the penalty amount may be remitted wholly or in part.

Commissioner's Practice

Where a taxpayer is not required to make a transfer duty statement

1. A taxpayer is not required to make a transfer duty statement for the transfer of dutiable property (other than land or a right in relation to land) where that statement, if made, would be duty endorsed under section 42(1) of the Duties Act in conformity with a duty endorsed agreement for the transfer for the same dutiable property.

Example 1

On 1 July, John Smith entered into a contract to purchase a business. The contract was conditional on the landlord agreeing to the assignment of the current lease from the vendor to John Smith.

On 30 August, settlement occurred and the assets were transferred to John Smith.

As the transfer of dutiable property at settlement was in conformity with the agreement for the transfer, regulation 4(1)(d) of the Duties Regulations prescribes that the transfer is an excluded transaction for the purposes of section 11 of the Duties Act. In these circumstances there is no requirement for a transfer duty statement to be lodged with the Commissioner.

Example 2

On 1 July, John Smith as trustee of the Smith Family Trust entered into a contract to purchase a business. The trust was established prior to the contract being entered into, and the contract was conditional on the landlord agreeing to the assignment of the current lease from the vendor to John Smith.

On 30 August, settlement occurred and the assets were transferred to John Smith in his capacity as trustee of the Smith Family Trust.

As the transfer of dutiable property at settlement was in conformity with the agreement for transfer, there was no requirement for a transfer duty statement to be lodged with the Commissioner.

Where a taxpayer is required to make a transfer duty statement

2. Where a transfer of a Western Australian business asset is not prescribed as an excluded transaction for the purposes of section 11(2) of the Duties Act, the person liable to pay tax must, within two months of the date that the liability to duty arose, lodge a completed transfer duty statement with the Commissioner.
3. The Commissioner will, on receipt of the transfer duty statement, determine the liability to duty. Where the taxpayer is seeking relief from duty the taxpayer must supply evidence to support their claim.

Example 3

On 1 July, John Smith *acting on behalf of a corporation to be incorporated* entered into a contract to purchase a business. The contract was conditional on the landlord agreeing to the assignment of the current lease from the vendor.

On the same day, John Smith emailed his accountant with instructions to commence incorporating a new company for the purpose of acquiring the business assets at settlement.

On 21 July, New Co. Pty Ltd was established.

On 30 August, settlement occurred and the assets were transferred to New Co. Pty Ltd.

As the transfer of business assets to New Co. Pty Ltd was not in conformity with the agreement for transfer that was entered into on 1 July, New Co. Pty Ltd as the transferee was required to lodge a transfer duty statement with the Commissioner within two months of the settlement.

As satisfactory evidence is submitted with the transfer duty statement to support that, when the liability for duty on the agreement arose, the person named in the agreement for transfer as the purchaser was taking steps to incorporate the corporation, the transfer duty statement was endorsed under section 42(5) of the Duties Act for no double duty.

Note: In this example, if New Co. Pty Ltd had acquired the business assets as *trustee of a trust*, the transfer of dutiable property would not be eligible for relief under section 42(5) of the Duties Act and additional transfer duty would apply on the transfer duty statement at the general rate of duty.

Example 4

On 1 July, John Smith entered into a contract to purchase a business. The contract was conditional on the landlord agreeing to the assignment of the current lease from the vendor.

On 30 August, settlement occurred and the assets were transferred to Old Co. Pty Ltd, a corporation that was incorporated prior to John Smith entering into the contract. The shareholders of Old Co. Pty Ltd are John Smith and his wife Alice Smith.

As the transfer of business assets to Old Co. Pty Ltd was not in conformity with the agreement for transfer entered into on 1 July, Old Co. Pty Ltd as the transferee was required to lodge a transfer duty statement with the Commissioner within two months of the date that settlement occurred.

Note: In this scenario, the parties were entitled to apply for relief from duty under the substituted transferee provisions.⁴ Provided the substitution had met the criteria set out in section 42(2) of the Duties Act, the transfer duty statement would have been endorsed for no double duty.

⁴ Further information on substituted transferees is available from the [Substituted Transferees Fact Sheet](#) available at www.osr.wa.gov.au

Example 5

On 1 July, John Smith *acting on behalf of an entity to be formed* entered into a contract to purchase a business. The contract was conditional on the landlord agreeing to the assignment of the current lease from the vendor.

On the same day John Smith emailed his accountant with instructions to commence the establishment of a discretionary trust for the purpose of acquiring the business assets at settlement. On 21 July, the Smith Family Trust was settled.

On 30 August, settlement occurred and the assets were transferred to John Smith as trustee of the Smith Family Trust.

As the transfer of business assets to John Smith as trustee of the Smith Family Trust was not in conformity with the agreement for transfer entered into on 1 July, John Smith as trustee was required to lodge a transfer duty statement with the Commissioner within two months of the settlement date.

The transfer of business assets to John Smith as trustee of the Smith Family Trust was chargeable with transfer duty as the transfer of dutiable property was not a transaction that falls within the no double duty provisions of section 42 of the Duties Act.

Circumstances where the Commissioner will request a transfer duty statement

4. Notwithstanding paragraph 2, where the Commissioner considers that the subsequent transfer of dutiable property is not an excluded transaction under section 11(2)(e) of the Duties Act, the Commissioner will request the taxpayer to submit a transfer duty statement for assessment. These circumstances include where:
 - 4.1 the agreement for transfer provides that the named purchaser is acting on behalf of an undisclosed principal;
 - 4.2 the purchaser named in the agreement for transfer is acting on behalf of an entity to be formed; or
 - 4.3 the Commissioner believes that the transfer of dutiable property may not be in conformity with the preceding agreement for transfer.

Penalties for not making a transfer duty statement

5. Notwithstanding paragraph 4, where a taxpayer is required under the Duties Act to make a transfer duty statement and does not make the statement in the requisite time provided under section 23 of the Duties Act, the taxpayer commits an offence and may be subject to a penalty of up to \$20,000 upon conviction.

Date of Effect

This Commissioner's practice takes effect from 13 October 2014.

Nicki Suchenia
ACTING COMMISSIONER OF STATE REVENUE

30 September 2014