



DUTIES PARTNERSHIP ACQUISITIONS: WHEN A PARTNERSHIP HOLDS LAND

INTRODUCTION

1. This ruling outlines the Commissioner's interpretation of when a partnership is considered to hold land for the purposes of the partnership acquisition provisions in the *Duties Act 2008* ('Duties Act') where the dutiable transaction is executed on or after 30 June 2016.

BACKGROUND

2. Section 11(1)(i) of the Duties Act provides that a *partnership acquisition* is a dutiable transaction.
3. Section 72 of the Duties Act states that a reference to a *partnership acquisition* is to a person acquiring a partnership interest in a partnership that holds land in Western Australia or an indirect interest in land in Western Australia.
4. Section 73 of the Duties Act provides that a partnership holds an indirect interest in land in Western Australia if an entity linked to the partnership is entitled to land in Western Australia. Section 73(2) states that section 156 applies where it is necessary to determine whether an entity is linked to a partnership.¹
5. The following entities are linked to a partnership:
 - (a) an unlisted corporation or unit trust scheme in which the partnership has a 50 per cent or greater interest;²
 - (b) the trustee of a discretionary trust of which the partnership is a potential beneficiary;³
 - (c) a partnership in which the partnership is a partner in the partnership and has contributed, or is required to contribute, 50 per cent or more of the partnership's capital or is required to bear 50 per cent or more of the partnership's losses;⁴ and
 - (d) a listed corporation or unit trust scheme in which the partnership has a 90 per cent or greater interest.⁵

¹ Under section 156 of the Duties Act, each entity below the main entity in an ownership chain is linked to the main entity. An ownership chain exists if a series of entities starting with the main entity are successively linked to one another. An entity may be linked to a corporation, unit trust scheme, discretionary trust or partnership.

² Duties Act s 156(4)(b).

³ Duties Act s 156(5).

⁴ Duties Act s 156(6).

⁵ Duties Act s 156(4)(a).

6. Section 70 of the Duties Act limits dutiable property held by a partnership or linked entity to only mean land and chattels in Western Australia, except where the transaction is a transfer or agreement for transfer to a retiring partner as provided for under section 78 of the Duties Act.
7. Section 76 of the Duties Act provides that the dutiable value of a partnership acquisition is:
 - (a) the consideration for the acquisition insofar as the consideration relates to dutiable property held by the partnership or an entity linked to the partnership; or
 - (b) the value of the partnership interest being acquired if:
 - (i) there is no consideration for the acquisition; or
 - (ii) the consideration cannot be ascertained when liability to duty on the transaction arises; or
 - (iii) the value of the partnership interest is greater than the consideration for the acquisition.
8. The definition of *land* under section 3 of the Duties Act includes:
 - (a) any estate or interest in land other than a carbon right or a carbon covenant registered under the *Carbon Rights Act 2003*; and
 - (b) anything that is part of the land as a fixture.
9. Section 11(2) of the Duties Act sets out transactions that are not dutiable transactions. Section 11(2)(e) includes a transaction prescribed as an excluded transaction for the purposes of this section.
10. Regulation 4(1)(g) of the *Duties Regulations 2008* ('Duties Regulations'), prescribes that a partnership acquisition is an excluded transaction where:
 - (a) the partnership holds no land in Western Australia, other than a lease or leases having nominal value; and
 - (b) the partnership holds no indirect interest in land in Western Australia, other than a lease or leases having nominal value.
11. Tenant's fixtures are chattels sufficiently annexed by the tenant to the leased premises so that they become fixtures at law. Tenant's fixtures become part of the land and legal title to the fixtures vests in the landlord.⁶ The tenant generally retains the right to remove that fixture when the term of the lease comes to an end and, possibly, for a reasonable time afterwards.⁷
12. The law concerning tenant's fixtures must be interpreted in light of the actual lease between landlord and tenant, however, tenant's fixtures usually include trade fixtures attached for the purpose of carrying on some trade, business or

⁶ *National Dairies WA Ltd v Commissioner of State Revenue (WA)*(1999) 43 ATR 11 at [19] confirmed on appeal in *National Dairies WA Ltd v Commissioner of State Revenue (WA)* (2001) 47 ATR 31.

⁷ *Commissioner of State Revenue v TEC Desert Pty Ltd* [2009] WASCA 128 at 226 ('TEC Desert'); *Chief Commissioner of State Revenue v Mr Espresso Group Pty Ltd* [2012] NSW ADTAP 1 at 33 and 34.

manufacture, as distinct from fixtures that become part of a building structure. Where the tenant makes improvements to a building structure, for example new doors, windows, frontage, roller doors or shutters, they may become part of the structure itself and the tenant may not have a right to remove them.⁸

13. Although there is no binding authority, there is judicial support for the view that the right of a tenant to remove tenant's fixtures amounts to an equitable interest in land.⁹ The value of this equitable interest will depend on the circumstances of the particular case.

Valuation of Property, Consideration or Benefit

14. Under section 21(1) of the *Taxation Administration Act 2003* ('TAA'), the Commissioner may require a taxpayer to provide a written valuation by a qualified valuer of any property, consideration or benefit, together with any documents or other records in the taxpayer's possession or control relevant to determining the value of the property, consideration or benefit.¹⁰
15. Section 22 of the TAA provides that, regardless of whether the Commissioner has required the taxpayer to provide a valuation or whether the taxpayer has complied with such a requirement, the Commissioner may:
 - (a) have a valuation made of any property, consideration or benefit; or
 - (b) adopt any available valuation of the property, consideration or benefit that the Commissioner considers appropriate.¹¹

RULING

Leases Having Nominal Value

16. The Commissioner considers a commercial lease will generally have nominal value where:
 - (a) there is no premium provided for the grant of the initial lease;
 - (b) the lease has an initial term of less than 20 years, excluding any options; and
 - (c) the lease is between parties dealing at arm's length.
17. A premium is consideration paid or payable for the grant of a lease and not a payment for the use of the premises being leased.¹²

⁸ *New Zealand Government Property Corp v HM and S Ltd* (1982) 1 ALL ER 624 at 627.

⁹ *TEC Desert* per McLure JA at [226]. Although the decision in *TEC Desert* was reversed on other grounds by the High Court on appeal in *TEC Desert Pty Ltd v Commissioner of State Revenue* [2010] HCA 49; (2010) 241 CLR 576, McLure JA's comments were not criticised by the High Court.

¹⁰ Commissioner's Practice TAA 23 'Circumstances When a Taxpayer will be Required to Provide a Written Valuation' ('Commissioner's Practice TAA 23') sets out the circumstances in which a taxpayer will be required to provide a written valuation and when the Commissioner may accept other evidence of the property, consideration or benefit that the Commissioner considers satisfactory.

¹¹ Commissioner's Practice TAA 30 'Valuation of Land for Duties Purposes' outlines the circumstances in which the Commissioner will obtain a valuation for duties purposes of residential or commercial land, mining tenements, or pastoral leasehold land.

18. Where a premium has been provided for the lease, the taxpayer is required to provide evidence of the value of the lease, including evidence to support claims that the lease has nominal value.
19. The Commissioner will determine the value of the lease having regard to a number of factors including the conditions of the lease agreement, the amount of premium paid, and the term remaining on the lease. This will depend on the circumstances of each particular case.

Example 1 – nominal value lease

A, B and C are in partnership in equal shares. The partnership conducts a physiotherapy clinic from leased premises. The lease has been entered into between parties dealing at arm's length and is for a term of 7 years with no premium paid for the grant of the lease. A and B each acquire an interest in the partnership from C such that A and B remain in partnership in equal shares.

As the only interest in land held by the partnership is a lease of nominal value, A and B's partnership acquisitions are excluded transactions and are not required to be lodged with the Commissioner for assessment of duty.

Example 2 – premium paid for the lease

A and B are partners in a partnership that operates a business from leased premises with a term of 7 years. The partnership paid a premium of \$60,000 for the grant of the lease.

C acquires an interest in the partnership such that A, B and C are in partnership in equal shares. At the time of the acquisition by C, there are 6 years remaining on the lease.

As a premium was paid for the grant of the lease, the partnership acquisition is not an excluded transaction. The documents evidencing the transaction will need to be lodged with the Commissioner for assessment of duty.

The value of a leasehold interest will generally be considered to be the value of the premium paid unless evidence is provided to support that a lesser value applies. For example, if C's acquisition in the partnership occurred when there was 1 year remaining on the term of the lease, it may be considered that the residual interest in the lease has a nominal value only.

The Commissioner will consider submissions from the taxpayer concerning the value of the lease at the time of the partnership acquisition. Evidence that may be accepted by the Commissioner as proof that a lease has a nominal value only will depend on the particular facts of each case.

Note: Where the acquisition of the partnership interest occurred during the term of a renewal or extension of the initial lease agreement, the Commissioner will accept the lease has a nominal value unless a further premium was paid for that renewal or extension.

¹² *Frazier v Commissioner of Stamp Duties* (NSW) (1958) 17 ATR 64; 85 ATC 4735.

Tenant's Fixtures

20. A partnership holds a direct or indirect interest in land where the partnership or a linked entity has an entitlement to tenant's fixtures. Accordingly, a partnership acquisition involving tenant's fixtures is not an excluded transaction under regulation 4(1)(g) of the Duties Regulations.
21. To determine the dutiable value of the interest in land, the Commissioner will require independently verified evidence that provides an objective view of the value allocated to the fixtures. This may include:
 - (a) a copy of the lease agreement;
 - (b) an opinion of market value (not book value) of the tenant's fixtures at the date of the transaction, for example, an expert valuation from a qualified valuer;¹³
 - (c) the value of the fixtures as reported in the partnership's financial statements as at the date of the transaction or as at 30 June nearest to that date; or
 - (d) a depreciation schedule or fixed asset register as at the date of the transaction, or as at 30 June nearest to that date, that sets out the depreciated book value of the tenant's fixtures.

Example 3 – nominal value lease with tenant's fixtures

A, B and C are in partnership in equal shares. The partnership conducts a physiotherapy clinic from leased premises. The lease has been entered into between parties dealing at arm's length and is for a term of 7 years with no premium paid for the grant of the lease.

The partnership has installed customised light fittings valued at \$30,000 and specialised treatment equipment valued at \$100,000. The lease evidences that the partnership has an entitlement to remove these items before the term of the lease expires. A and B each acquire an interest in the partnership from C such that A and B remain in partnership in equal shares. The tenant's fixtures are an interest in land so the partnership acquisitions by A and B are not excluded transactions. The documents evidencing the transaction will need to be lodged with the Commissioner for assessment of duty.

Administrative Matters

22. The acquisition of an interest in a partnership that meets the definition of an excluded transaction is not required to be lodged for the assessment of duty.
23. The relevant records relied on by the taxpayer (for example, a copy of the lease agreement and the partnership's financial statements) will be required by the Commissioner to make an assessment if the taxpayer has incorrectly determined that a partnership acquisition is an excluded transaction.

¹³ Refer to Commissioner's Practice TAA 23 which outlines the circumstances in which the Commissioner will require a taxpayer to provide a written valuation.

RULING HISTORY

Revenue Ruling	Issued	Dates of effect	
		From	To
DA 20.0	30 June 2016	30 June 2016	16 June 2019

SUPERSEDED