



COMMISSIONER'S PRACTICE DA 3.1

TRANSFERS OF DUTIABLE PROPERTY TO AND FROM A BARE TRUSTEE

This Commissioner's practice explains the factors the Commissioner will consider when determining if there has been a change in beneficial interest between the transfer of property to and from a bare trustee.

Background

Section 118 of the *Duties Act 2008* ('Duties Act') provides that nominal duty applies to a transfer of dutiable property from a bare trustee to a person (a *re-transfer*) if:

- the property was originally transferred from a person (beneficiary) to a bare trustee who held the property solely as bare trustee for the beneficiary (first transaction); and
 - the first transaction has been duty endorsed and is either:
 - a transfer of dutiable property to the bare trustee; or
 - an agreement to transfer or declaration of trust that resulted in the dutiable property being transferred to the bare trustee;
- and
- the re-transfer is a transfer of the property to the beneficiary or another person to whom the beneficial interest in the property has been transmitted by death or bankruptcy; and
 - the Commissioner is satisfied that while the property was held by the bare trustee, no person other than the beneficiary held a beneficial interest in the property (other than the trustee's right of indemnity).¹

A *bare trustee* is defined as a trustee of a trust, other than a discretionary or unit trust, if the trustee has no active powers or duties other than to transfer the property at the beneficiary's direction.²

If nominal duty applies to the re-transfer, nominal duty also applies to the first transfer.³ However, the taxpayer must make an application to the Commissioner to reassess the first transaction for nominal duty (\$20).⁴

If the first transfer and re-transfer are charged with nominal duty under section 118 of the Duties Act and there is a requirement to lodge the re-transfer for registration under the:

- *Transfer of Land Act 1893*

¹ Duties Act s 118(1).

² Duties Act s 118(2).

³ Duties Act s 118(3).

⁴ Duties Act s 118(4).

- *Registration of Deeds Act 1856*
- *Mining Act 1978,*

then the re-transfer must be registered under the relevant act within 60 days from the date it is duty endorsed.

If the re-transfer is not lodged for registration within 60 days of the date it was duty endorsed, nominal duty will not apply to the first transfer or the re-transfer.⁵ The Commissioner will issue a reassessment on the transactions in the event nominal duty does not apply.⁶

Reassessment timeframes

There are no time limits on:

- an application for a reassessment of the first transaction for nominal duty;⁷ or
- the Commissioner making a reassessment on the full dutiable value of each transaction if a re-transfer is not lodged for registration within 60 days of the date it was endorsed.⁸

Commissioner's Practice

1. A taxpayer must apply for a reassessment of the transaction which resulted in the property being transferred from the beneficiary to a bare trustee (first transaction).
2. When a transfer of the property from the bare trustee to the beneficiary (re-transfer) is lodged for assessment, the Commissioner will accept that the taxpayer has also applied for a reassessment of the first transaction.

No Change in Beneficial Interest

3. Nominal duty only applies to the first transaction and the re-transfer if the Commissioner is satisfied there has been no change in beneficial interest in the property between the transactions.
4. For this purpose, the Commissioner will consider:
 - 4.1 the circumstances surrounding the transfer and re-transfer of the dutiable property to and from the beneficiary;
 - 4.2 the powers and duties of the bare trustee;
 - 4.3 whether the transfer of the dutiable property is likely to result in a person other than the beneficiary obtaining an interest in the property;
 - 4.4 whether there is any consideration for the transactions; and
 - 4.5 whether there is any commercial gain or benefit to the bare trustee as a result of the transactions.

⁵ Duties Act s 118A(2).

⁶ Duties Act s 118A(3).

⁷ Duties Act s 118(5).

⁸ Duties Act s 118A(4).

5. When the first transaction and re-transfer are lodged simultaneously and the property is re-transferred to the original transferor, the Commissioner will usually accept there has been no change in beneficial interest and both transactions will be assessed for nominal duty.

Example 1 – Transactions lodged simultaneously to sever tenancy

John and Jane hold a property as joint tenants. Jane wishes to sever the tenancy and hold the property with John as tenants in common, but John is not co-operative. Jane's friend Michael agrees to assist Jane to sever the tenancy.

Jane and Michael execute two transfers of land on the same day for no consideration. The first transfer of land results in Jane's interest in the property being transferred to Michael (first transaction) and the second transfer of land results in Michael transferring the interest back to Jane (re-transfer).

The two transfers of land are lodged together for assessment. The Commissioner is satisfied there is no change in beneficial interest in the property between the first transaction and re-transfer. As the transfers of land are lodged simultaneously, the transactions are both assessed for nominal duty.

6. When the first transaction and re-transfer are lodged separately, the following information should be provided to the Commissioner:
 - 6.1 a copy of the duty endorsed transaction record for the first transaction, for example, the agreement between the parties; and
 - 6.2 any documentation that reflects the nature of the bare trust relationship between the parties, for example, a declaration of trust; and
 - 6.3 details of:
 - 6.3.1 the circumstances or reasons for the transfer of the property to the bare trustee;
 - 6.3.2 the bare trustee's duties while holding the property for the beneficiary (where the information in 6.2 is not available);
 - 6.3.3 where relevant, why there was consideration for the first transaction or re-transfer;
 - 6.3.4 whether the bare trustee acted in any other capacity in relation to the property while holding it for the beneficiary, for example, as a mortgagor;
 - 6.3.5 whether there has been any commercial benefit to or gain by the bare trustee in holding the property for the beneficiary, for example, the bare trustee using the property as collateral or equity to acquire other property;
 - 6.3.6 whether any person other than the beneficiary held a beneficial interest in the property between the first transaction and the re-transfer; and
 - 6.3.7 any other relevant information to support there was no change in beneficial ownership between the transactions.

Example 2 – Transfer and re-transfer lodged separately

John is the sole owner of a property and is travelling overseas for an extended period. Jane agrees to hold the property for John as bare trustee during this time. The parties enter into an agreement setting out Jane's duties as a bare trustee and the requirement for Jane to transfer the property to John at his request. Jane and John execute a transfer of land to transfer John's interest in a property to Jane for no consideration (first transaction).

Transfer duty is charged on the first transaction based on the unencumbered value of the property.

John returns home 12 months later and instructs Jane to transfer the property to him. Jane and John execute a transfer of land to transfer the interest in the property from John back to Jane (re-transfer).

John and Jane submit that the purpose of the transaction was for Jane only to hold the legal title to the property while John was overseas. Jane declares that she had no active duties as bare trustee, held the property solely for John, no other person has had a beneficial interest in the property and Jane did not derive any gain or benefit from the property. The agreement which documents the parties' arrangement is lodged with the submission.

The Commissioner is satisfied that there was no change in beneficial interest in the property between the first transaction and the re-transfer. The re-transfer is assessed for nominal duty and the first transaction is reassessed for nominal duty.

7. When the beneficial interest in property is transferred to a person other than the beneficiary due to transmission by death or bankruptcy, the following additional information is required:
 - 7.1 if beneficial interest is transmitted to another person due to the beneficiary's death – a copy of the grant of probate or letters of administration; or
 - 7.2 if beneficial interest is transmitted to another person due to bankruptcy – a copy of the certificate of appointment of a bankruptcy trustee.
8. Examples of circumstances when nominal duty will not apply include:
 - 8.1 Property is transferred to a person who holds it for the beneficiary so that it can be sold, with the proceeds of sale given to the beneficiary. Nominal duty will not apply to the transfer of property to the trustee because it was not re-transferred to the beneficiary and because the trustee had powers to sell the property.
 - 8.2 Land is transferred to a person who subdivides the property on behalf of the beneficiary, with the new lots then transferred back to the beneficiary. In this case, the person is not a bare trustee because they had powers to subdivide the property.⁹
 - 8.3 Property is transferred to a person who uses the property to secure finance. In this case, the person is not a bare trustee.

⁹ Nominal duty applies to certain transactions to facilitate a subdivision under sections 120A – 120E of the Duties Act

Example 3 – Land transferred and sold

Stacey transfers her land to Daniel for no consideration (first transaction) so he can develop the land while holding it on trust for Stacey. Full transfer duty applies to this transaction.

Daniel develops the land and sells it to a third party. The proceeds of the sale are given to Stacey.

Although the proceeds are distributed to the beneficiary, the first transaction does not qualify for a reassessment at nominal duty because the land was not transferred back to Stacey (i.e., there was no retransfer). Also, Daniel is not a bare trustee as he had active duties and powers to deal with the dutiable property, including developing and selling the land.

Nominal duty does not apply in these circumstances.

Failure to lodge the re-transfer

9. For a re-transfer that is required to be registered with the relevant authority, for example, Landgate, within 60 days after the date the re-transfer is duty endorsed because it was charged with nominal duty under section 118(3) of the Duties Act, the date the re-transfer is duty endorsed is the date the certificate of duty is issued.
10. Nominal duty no longer applies to the first transaction and the re-transfer if the re-transfer is not registered with the relevant registrar within 60 days after being duty endorsed. The Commissioner must reassess the transactions on the greater of the unencumbered value of the land the subject of the transaction or the consideration for the transaction (if any).

Example 4 – Failure to lodge the re-transfer

On 1 July 2019, Jane and John execute a transfer of land to transfer Jane's interest in a property to John for no consideration (first transaction). John declares he will hold the property as bare trustee for Jane.

Transfer duty is charged on the first transaction based on the unencumbered value of the property of \$900,000.

On 1 December 2019, Jane and John execute a transfer of land to transfer the interest in the property from John back to Jane (re-transfer). The Commissioner is satisfied that, between the first transaction and the re-transfer, no person other than Jane held a beneficial interest in the property.

The first transaction is reassessed for nominal duty. The re-transfer is also assessed for nominal duty and is endorsed on 15 December 2019.

Jane fails to lodge the re-transfer with Landgate by 13 February 2020, which is 60 days after the re-transfer was endorsed. The Commissioner issues a reassessment on the first transaction and re-transfer.

For the first transaction, transfer duty is assessed again on \$900,000.

However, at the date of the re-transfer, the value of the property has increased to \$950,000. Transfer duty is therefore assessed on this amount.

Foreign transfer duty

11. If residential property is transferred to a bare trustee to hold for a beneficiary who is a foreign person, the transaction will be subject to transfer duty and foreign transfer duty.
12. If the requirements of section 118 are met on the re-transfer of the property to the beneficiary, the first transaction will be reassessed for nominal duty and will be exempt from foreign transfer duty under section 205(Y) of the Duties Act.

Example 5 – Property transferred to a foreign bare trustee

Jane transfers her residential property to John for no consideration so he can hold the property as bare trustee for Jane (first transaction). Jane is a foreign person. and John is the trustee of a foreign trust.

Transfer duty is assessed on the first transaction based on the unencumbered value of the property of \$400,000. John is liable for transfer duty and foreign transfer duty on the transaction

The property is later re-transferred to Jane (re-transfer). The Commissioner is satisfied that, between the first transaction and the re-transfer no person other than Jane has held a beneficial interest in the property.

The re-transfer to Jane is assessed for nominal duty and is exempt from foreign transfer duty. The first transaction is reassessed for nominal duty and is exempt from foreign transfer duty.

Date of Effect

This Commissioner’s Practice takes effect from 17 July 2019.

Nicki Godecke

COMMISSIONER OF STATE REVENUE

17 July 2019

Commissioner’s Practice History

Commissioner’s Practice	Issued	Dates of effect	
		From	To
DA 3.0	1 July 2008	1 July 2008	16 July 2019
DA 3.1	17 July 2019	17 July 2019	current