

Information Circular No: 100

Stamp Duties Act 1923

Deeds of Rectification

Issued 10 May 2017

The purpose of this Information Circular is to clarify RevenueSA's position in relation to Deeds of Rectification.

Section and Part references in this Information Circular relate to the *Stamp Duties Act 1923*, unless otherwise stated.

Deeds of Rectification

As a general proposition, rectification is available where an executed instrument misstates the parties' actual intentions. Commonly, this occurs where particular words have been added, omitted or wrongly written, often as a result of careless copying or the like.

Rectification may also be available for mistakes of law where the parties to an instrument understand the operation of the law but are under a common mistake as to the legal effect of the provisions of the instrument.

The emphasis is on intention and the failure of the instrument to give effect to that intention.

For rectification to be available, it is necessary to establish by clear and convincing evidence that at the time of execution of the instrument the relevant party or parties had an actual intention as to the effect of the instrument and that this intention was not contained in the instrument as executed.

Rectification may be available either by an order of the Court or by the execution of a Deed of Rectification between the parties to the instrument: see *Davis v Commissioner of Taxation* (Cwlth) [2000] FCA 44.

RevenueSA's practice regarding Deeds of Rectification

Whether or not RevenueSA accepts a Deed of Rectification will depend on the evidence and the credibility of the various persons connected with the instrument, which will be determined on a case-by-case basis.

In the context of an instrument pertaining to a discretionary trust, suitable evidence may include evidence from persons connected to the instrument, including the parties to the original trust deed and professionals engaged on their behalf. Such professionals may include but are not limited to accountants, solicitors, instructors, the settlor or drafter of the original instrument. Further documentary evidence may include the relevant trust's income tax returns and/or financial statements.

Example

Section 71CC of the *Stamp Duties Act 1923* (the "Act") provides an exemption from stamp duty on the transfer of primary production land between certain relatives (family members) and/or their trustees, if certain criteria are satisfied.

A farmer wishes to transfer farming land to a newly created discretionary trust. The farmer's intention is to enable a transfer of the farm to a succeeding generation of family members. The farmer is aware that stamp duty relief pursuant to Section 71CC is available for an instrument of transfer where the beneficiaries of the trust are limited to his relatives (as defined).

Contrary to the farmer's instructions, the settled deed provides for a range of beneficiaries beyond his relatives and on the basis of the wording of the deed, stamp duty relief will not be available pursuant to the Act.

The settlor and/or trustee of the trust apply to have the deed rectified and establish by evidence from the time of execution of the instrument, by their statements and by statements from relevant parties (for example, in this case, the farmer's accountant and the drafter of the deed that the farmer's intention has been mistaken as set out in the executed deed. Further, copies of the trust's income tax returns and financial statements are provided which evidence that the added, wrongly written or mistaken range of beneficiaries beyond the farmer's relatives as detailed in the executed deed have never received a distribution from the trust.

Where RevenueSA accepts a Deed of Rectification for the purposes of Section 71CC, the Deed of Rectification will not be considered as effecting any dutiable transfer or conveyance and the transfer of land will be exempt from stamp duty.

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Further Information

Further information can be obtained from RevenueSA.

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