RevenueSA
DEPARTMENT OF TREASURY AND FINANCE

Revenue Ruling

Stamp Duties Act 1923 SDA010

DUTY ASSESSED ON THE SALE OF A BUSINESS

Preamble

This Revenue Ruling discusses how duty is assessed with regards to the sale and purchase of a business.

Sections 60 and 60A of the *Stamp Duties Act 1923*

Under the *Stamp Duties Act 1923* (the "Act"), duty is chargeable on the conveyance or transfer of property situated in South Australia.

Section 60A of the Act, entitled 'Value of property conveyed or transferred', outlines how the value of property transferred is to be determined for the purposes of calculating the amount of duty payable.

Sections 60A(1)(a) and 60A(2) of the Act provide that in the case of a conveyance on sale (i.e. a transfer of property for consideration), the value of the property transferred is the greater of the consideration for the sale or the market value of the property.

Section 60A(2) of the Act provides the Commissioner of State Taxation (the "Commissioner") with a discretion to adopt the consideration for sale as being the value of the property conveyed or transferred unless it appears to the Commissioner that the consideration may be less than the market value of the property. If the consideration is less than the market value of the property, the Commissioner will calculate duty on the basis of the market value of the property.

Ruling

When a business is sold as a going concern, the assets are conveyed or transferred to, and often liabilities are assumed by, the purchaser (noting that the vendor and purchaser may agree that certain assets will not be conveyed or transferred to, or liabilities assumed by, the purchaser).

The starting point for calculating duty on the sale of a business under Section 60A of the Act is determining both the 'market value of the property' and the 'consideration for the sale'.

Value and consideration are different legal concepts. The amount of consideration for the conveyance or transfer of property may not always be the same as the market value of the property.

Market value

The terms 'value' and 'market value' do not have any general statutory definitions. William J in *Abrahams v The Federal Commissioner of Taxation* (1944) 70 CLR 23, 29 stated that "market value" is:

> *"the price which a willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to have to pay ... if the vendor and purchaser had got together and agreed on a price in friendly negotiation ..."*

Consideration

In most cases, provided the parties are dealing with each other at arm's length, the consideration being paid or given will generally be accepted as representing the appropriate value of the business.

For the purposes of the Act, 'consideration' is not merely the monetary amount expressed as the purchase price in the parties' agreement but also includes any other "money or value passing which moves the conveyance": see *Archibald Howie Pty Ltd v Commissioner of Stamp Duties* (NSW) (1948) 77 CLR 143 at 152. The interpretation in Archibald Howie has been applied by the High Court of Australia in the subsequent cases of *Davis Investments Pty Ltd v Commissioner of Stamp Duties* (NSW) [1958] HCA 22; 100 CLR 392; T*ooheys Ltd v Commissioner of Stamp Duties* (NSW) (1961) HCA 35; 105 CLR 602; *Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd* (2005) HCA 3; 221 CLR 496; and *Commissioner of State Revenue v Lend Lease Development Pty Ltd*; *Commissioner of State Revenue v Lend Lease IMT 2 [HP] Pty Ltd*; *Commissioner of State Revenue v Lend Lease Real Estate Investments Limited* [2014] HCA 51.

The question to ask here is what is the consideration paid or given by one party for the other party's promise or what has "moved" the transaction. Here, the usual principles of evidence will apply and a determination of the facts will be made so that the consideration is objectively ascertained. As such, the consideration is not necessarily what the parties believe it is. Rather, it is what a reasonable observer would say it is if armed with all relevant knowledge of the parties' transaction. The principal evidence of the consideration will usually be found in the terms of the parties' agreement.

Liabilities generally form part of the consideration

Where a purchaser agrees to assume the liabilities of a vendor's business, the amount or value of the liabilities assumed is added to and forms part of the consideration upon which duty is calculated. Conversely, where the purchaser does not assume the liabilities of the vendor's business, with the vendor retaining the liabilities, these are not added to and do not form part of the consideration upon which duty is calculated.

The assumption of the business liabilities is itself a valuable promise and a promise that a purchaser is ordinarily under no compulsion to give. It is reasonable to assume that but for the promise to assume responsibility for the business liabilities, there would not have been any conveyance. The promise relieves the vendor of the necessity to meet the liabilities owed to a third party and, without such an assumption of liability by the purchaser, the vendor would have remained responsible for discharging these liabilities.

Example 1

A going concern with liabilities of $50 is sold for a cash purchase price of $50, with the purchaser assuming the liabilities. The consideration upon which duty is calculated is $100, comprising the $50 purchase price paid and the assumed liabilities of $50.

In addition, a purchaser may undertake to assume the liabilities of a business where the liabilities are substantially greater than the value of the assets of the business itself, for example, on the basis that the business as a going concern can trade out of difficulty, pay its liabilities and return a profit in the long term.

Example 2

A going concern with assets of $100 and liabilities of $150 is sold for a cash purchase price of $1, with the purchaser assuming the liabilities. The consideration upon which duty is calculated is $151, comprising the $1 purchase price paid and the assumed liabilities of $150.

Liabilities: Mortgages

The conveyance or transfer of property subject to a mortgage, such as land, where the purchaser undertakes to perform the vendor's obligations under the mortgage, is an assumption of a liability and the amount assumed, being the outstanding amount payable on the mortgage, is added to and forms part of the consideration upon which duty is calculated. Put differently, the consideration for a transfer of land subject to a mortgage is to be calculated as the sum of the purchase price for the land and the amount or value of the mortgage outstanding.

Example 3

A vendor transfers land that is subject to a mortgage outstanding of $20 for a cash purchase price of $30, and the purchaser agrees to assume the mortgage liability. The consideration upon which duty is calculated is $50, comprising the $30 purchase price paid and assumed liability of $20.

Liabilities: Employee entitlements

The assumption of employee entitlements (such as annual leave, long service leave and sick leave) is an assumption of a liability constituting consideration and is added to and forms part of the consideration upon which duty is calculated. This also applies to employee entitlements assumed by the purchaser as part of a statutory obligation, as the purchaser's obligation only arises by virtue of the purchaser agreeing to employ the vendor's employees, thereby relieving the vendor of the obligation to pay the employee entitlements remaining at settlement.

Example 4

A sale agreement provides that a business is to be sold for $200, with the purchaser taking on the vendor's employees and their entitlements as at settlement. The sale agreement further provides that the total purchase price at settlement is to be reduced by 70% of the value of the outstanding employee entitlements assumed (the percentage reflecting the purchaser's entitlement to an income tax deduction for the annual leave expense incurred).

At settlement, the total employee entitlements are $10. The reduced purchase price is therefore $193. The consideration upon which duty is calculated is $203, comprising the $193 purchase price paid and the assumed employee entitlements of $10.

Example 5

A going concern with employee entitlements of $20 is sold for a cash purchase price of $190, with the purchaser taking on the vendor's employees and their entitlements as at settlement. Unlike the above example, there is no set-off for the employee entitlements assumed. The consideration upon which duty is calculated is $210, comprising the $190 purchase price paid and the assumed employee entitlements of $20.

Example 6

A going concern with employee entitlements of $20 is sold for a cash purchase price of $190, with the purchaser taking on the vendor's employees and their entitlements as at settlement. At settlement, the employee entitlements have decreased $10 on account of employees taking leave in between the contract date and settlement. The consideration upon which duty is calculated is $200, comprising the $190 purchase price paid and the reduced assumed employee entitlements of $10.

Prepayments

If the purchase price paid by the purchaser at settlement has been adjusted to take account of an amount already paid by the vendor that is attributable to a period of time after settlement, there will be no adjustment for duty purposes.

Example 7

A business with liabilities of $500 is sold for a cash purchase price at settlement of $600, with the purchaser assuming the liabilities. An examination of the accounts of the business shows that the vendor has paid rent in advance on the lease of the business premises and that an amount of $60 is attributable to a period after settlement. The sale agreement shows that the cash purchase price will be adjusted so as to take account of the rent paid in advance. The consideration upon which duty is calculated is $1,100, comprised of the cash purchase price of $600 and the assumed liabilities of $500. No adjustment, either positive or negative, is made for the prepayment of rent.

Adjustments at settlement

The Commissioner will review any positive or negative adjustments to the net amount of the purchase price paid at settlement for the sale and purchase of a business in order to ensure that any adjustment is reflected in an assessment. This involves analysing the components of any given purchase price, the liabilities assumed and any adjustments made to these at settlement in order to determine the true consideration for the property transferred.

In addition, where the total amount to be paid under the agreement cannot be ascertained at the time of the settlement of a sale of business, then the agreement will be initially assessed based on the ascertainable amount and the agreement will be reassessed once the final consideration moving the transaction is ascertainable.

Example 8: final purchase price subject to final trading stock

A business sale agreement provides that the cash purchase price may be varied or adjusted in accordance with a final stock take, with the business sale agreement initially assessed on an estimated stock amount of $100. At settlement, the final stock amount is $50, such that the cash purchase price is reduced. Having reviewed the evidence and being satisfied that the final stock amount is $50, the Commissioner will reassess the business sale agreement and issue a refund in light of the reduced consideration. The stamped agreement will need to be resubmitted for reassessment with a refund application, together with evidence and calculations of the final stock amount.

Example 9: final purchase price subject to assets and liabilities at settlement

A business with liabilities of $100 is sold for a cash purchase price of $10, with the purchaser assuming the liabilities. The business sale agreement provides for the adjustment of the final cash payment at settlement depending on the assets and liabilities of the business at that time. The consideration upon which duty is initially calculated and assessed is $110, comprising the $10 cash purchase price and the assumed liabilities of $100.

At settlement, the liabilities have increased to $200 and the cash purchase price has been reduced to $1. Having reviewed the evidence and being satisfied as to these increases and reduction, the Commissioner will reassess the business sale agreement, with the consideration upon which duty is recalculated as being $201, comprising the $1 cash purchase price and assumed liabilities of $200.

Example 10: final purchase price subject to future trading results

A business sale agreement provides that the purchase price is subject to future trading results.

If the agreement provides for a maximum purchase price, the consideration upon which duty will be calculated and assessed will include the maximum amount. If it is later determined that the purchase price is less in light of lower trading results, the Commissioner will reassess the agreement and issue a refund in light of the reduced consideration. The stamped agreement will need to be resubmitted for reassessment with a refund application, together with evidence and calculations of the final purchase price paid.

If the business sale agreement does not provide a maximum amount and the final purchase price cannot be ascertained for some time, the agreement must be submitted to RevenueSA and an assessment will be issued based on the greater of the base consideration or the market value. The Commissioner will retain the agreement until advised of the final purchase price and a reassessment will be issued. The agreement will be returned once the further duty is paid in full.

Gross and net purchase prices

In order to determine the true consideration for assessing, the Commissioner will have regard to the particular business sale agreement and whether the stated purchase price is either a gross or net amount.

Example 11: gross amount

A business sale agreement states that the cash purchase price of $100 includes assumed liabilities of $10.

Example 12: net amount

A further business sale agreement provides that the cash purchase price is $90. Elsewhere, a different provision of the agreement separately provides that the purchaser is to assume liabilities of $10.

In all of the above examples, the consideration upon which duty is calculated is $100.

Face value of the liabilities

The Commissioner will calculate duty on the total liabilities assumed on the basis that the promise to assume responsibility for the liabilities is equivalent to the face value of the liabilities.

Goods and services tax

In accordance with Section 15A of the Act, the consideration upon which duty is calculated is the value of the property inclusive of any GST payable.

Further Information

Further information can be obtained from RevenueSA.

Location	RevenueSA State Administration Centre 200 Victoria Square East ADELAIDE SA 5000
Postal	Commissioner of State Taxation RevenueSA GPO Box 1353 ADELAIDE SA 5001
Telephone	(08) 8226 3750
Facsimile	(08) 8226 3737
Email	stamps@sa.gov.au
Website	revenuesa.sa.gov.au

History

This Revenue Ruling is effective from 16 January 2015.

This is the first Revenue Ruling issued on this topic.

Tim Smith
A/COMMISSIONER OF STATE TAXATION

16 January 2015