Article

TAX

Aggregation of Land Held on Trust for Land Tax Purposes

By John Tucker

On 18 June 2019, as part of the SA Budget, the Treasurer, Rob Lucas MLC, announced that the South Australian Government would introduce a new 'aggregation model' for land tax purposes effective from 1 July 2020.

This was said to be to ensure a more 'level playing field' for taxpayers.

The Treasurer specifically referred to taxpayers setting up complex structures under existing arrangements which he claimed to be designed to avoid or minimise land tax.

To illustrate this he provided an example of a taxpayer who controls ten taxable land parcels across ten trusts with each trust having a slightly different composition of beneficiaries, saying this could subject each individual parcel to land tax on its individual value rather than their combined value, despite the fact that they are controlled by the same owner.

The Treasurer did not characterise the complex structures to which he referred as unlawful nor did he give details as to whether the trusts to which he referred were fixed trusts with several unrelated beneficiaries, including one with what was regarded as a controlling interest, or some other form of trust.

Under long standing provisions of the *Land Tax Act 1936* (SA) (**Act**) liability for tax is determined by who is the 'owner' of land.

Primarily an 'owner' is a person who holds or is entitled to a legal or equitable estate of fee simple in land. Land includes an interest in land.

The current definition of owner makes no reference to a controller.

Where land is held by a company, the company is the owner; it is not presently relevant to enquire who is its controller.

Where there are two or more owners of a parcel of land the same amount of tax is payable in respect of the land as if one person owned it.

The taxable value of the interest of each owner of an interest in a parcel of land in the State is however, subject to certain exceptions, aggregated with the taxable value of interests the owner has in other parcels of land in the State to determine the tax payable by them. This is known as the 'aggregation principle' and it feeds into the tax calculation by reason of the rate of tax progressively increasing as the total value of all taxable land holdings held by a particular owner increases.

A person may be an owner in one of a number of capacities, for present purposes these include as a legal owner or an equitable owner.

Where there are two or more owners of a parcel but not all in the same capacity all the owners in one of the particular capacities may be treated by the Commissioner of State Taxation as the sole owner and sole taxpayer for the land.

Further, if this treatment is applied to treat a person or persons as the sole owner or owners of land the aggregation principle applies as if they were the sole owner or owners of that land.

Also, if two or more trustees own land separately but subject to the same trust the Commissioner may treat any one of the trustees as the owner or owners of all the land subject to the trust.

The holding of two or more trustees owning land separately but subject to the same trust may be aggregated and any one of the trustees treated as the owner of all the land.

The aggregation principle is, however, subject to significant qualifications.

Firstly, if two or more persons are the taxpayers for the same land the taxable value of this land will not be aggregated with the taxable value of other land for which one or more, but not all, of them is the taxpayer or taxpayers or with other land for which one or more of them and some other person are taxpayers.

Secondly, and significantly in the context of the Treasurer's announcement, if land is held on trust (other than a trust arising because of a contract to acquire an interest in

continued overleaf...

land), the trustee is the taxpayer and if notice of the trust has been given (in accordance with Regulation 7) the taxable value of the land will, pursuant to Section 13(3)(b)of the Act, not be aggregated with that of other land owned by the same taxpayer unless the other land is held for the same beneficiary.

This latter exclusion of the aggregation principle does not, however, apply to trustees holding land for different beneficiaries if their holdings are only of portions of the land in a single certificate of title. In that case the Commissioner may treat all the land in the certificate of title as one piece of land.

Also, in Revenue Ruling LT004 the view is expressed that the term beneficiary includes beneficiaries and accordingly it is for the Commissioner to look at the beneficiaries of any form of trust to determine who are the beneficiaries who will take, or in the case of a discretionary trust, qualify for the potential distribution of capital, in determining whether or not, having regard to the rights of the beneficiaries and other facts and circumstances land is held for the same beneficiaries.

By the *Statutes Amendment (Budget 2007) Act 2007* (SA) significant amendments, by way of the introduction of section 13A, were introduced into the Act with effect from 1 July 2008.

These addressed the practice of trustees holding several parcels of land upon trust with each trust structured with slightly different beneficiaries thereby qualifying the trustees to be taxed on the individual value of each parcel of land held.

The amendments provided for [beneficial] interests of 5% or less to be ignored other than in circumstances where the 5% or less holding was, without doubt, proven to be entirely for a purpose or purposes unrelated to reducing land tax on any land.

The amendments also allowed the Commissioner to ignore an interest of up to 50% if, in the Commissioner's opinion, a purpose for the creation of the interest was to reduce land tax on any land.

As a result of these provisions the Commissioner has had the power, if of the opinion that a purpose for the creation of an interest in land was to reduce land tax in respect of any land, to disregard interests in land other than where the interest equals or exceeds 50% (which in the latter case there will be a lesser interest or interests that may possibly be disregarded). Only an interest of exactly 50% is not subject to the prospect of it being disregarded by the Commissioner under these provisions.

Subsequently, in 2011, the *Taxation Administration Act 1996* (SA) (**TAA**) was amended to introduce into it the new Part 6A, headed 'Tax Avoidance Schemes'. Part 6A contains provisions that enable the Treasurer to determine a scheme, such as a complex arrangement, the sole or dominant purpose of which the Commissioner considers was to enable land tax to be avoided or reduced, to be a tax avoidance scheme.

The Commissioner can then assess tax disregarding the scheme's effect, determine it a tax default and impose heavy penalties on the taxpayer seeking to benefit from the scheme.

These provisions give the Commissioner very broad powers, including to impose heavy penalties, in respect of any such perceived scheme. They also require that a purpose of avoiding, reducing or postponing a liability for another tax or duty be disregarded in determining the sole or dominant purpose of a taxpayer for a scheme.

Part 6A, since its enactment, has been a powerful deterrent against owners seeking to construct complex ownership arrangements with the sole or dominant purpose of saving land tax.

By the *Statues Amendment and Repeal (Budget 2015) Act 2015* (SA) section 13A was amended to strengthen its application to interests of less than 50%.

The amendment has allowed the Commissioner to disregard interests considered to have been created for a purpose that included the reduction of land tax to be disregarded from the time such interest was created and to retrospectively withdraw any exemption and assess tax.

In being able to apply this provision not just in a case where the Commissioner asserts a sole or dominant purpose of enabling land tax to be avoided or reduced, but also where the Commissioner asserts such a purpose, albeit among many, has given the Commissioner very wide powers to disregard minority interests in land held directly or through trusts.

In his 18 June 2019 statement the Treasurer has not identified why or how the existing legislative provisions, particularly those in Section 13A of the Act and Part 6A of the TAA, have, in his view, failed to achieve what clearly appears to have been their objectives with respect to the complex structures to which he refers.

He does characterise the proposed legislation as aimed at closing a 'loophole' and this would seem to be a surprisingly large one given that its closure is expected to generate additional land tax of $40 million per annum and where the SA Division of the Property Council of Australia, on its apparent understanding of the loophole, suggests that figure to be very conservative.

The proposed new regime purports to be to ensure a more 'level playing field' for taxpayers. At present it appears that the levelling is aimed at bringing any form of complexity in land ownership back to some attributed form of simplicity to maximise possible aggregation.

To do that somewhat belies situations why there might, apart from any consequence for land tax, be good reasons for complex arrangements for holding several parcels of land even when under the control of a particular person. The present regime does at least recognise the possibility that this may be the case though, given the criteria mandated by the Act to be considered and that are excluded, the onus on a taxpayer to prove this is extremely high.

continued overleaf...

That the current regime has not applied to the arrangements complained of would seem a recognition that they have not been established for the sole or dominant purpose of avoidance of land tax or, if within section 13A, any purpose of such avoidance.

One of the reasons for syndication of ownership or structuring holdings through separate companies or trusts might have been that to acquire and hold a property in circumstances where it would be aggregated with another or others for land tax would make the acquisition uneconomic. But for the structuring of the ownership interests in it so as not to attract aggregation the property would not have been acquired. That might have been true in many cases given the extraordinarily high rates of land tax existing in South Australia. Owners who have acquired in these circumstances will be particularly vulnerable to the proposed levelling of their playing field.

The levelling does not however appear only to be triggered by a perception of the Commissioner that a complex arrangement has had a purpose of reducing land tax for as already mentioned that trigger presently exists either in the TAA or the Act with respect to minority interests.

Accordingly what is proposed appears more simply to be a new basis for the levy of land tax in South Australia. The Government of course has the right to do this if it can obtain a legislative mandate, but it ought not to be seeking that mandate on the basis of enacting an anti-avoidance measure to close a 'loophole'. The measures for that already exist.

The proposed change needs to be acknowledged as a desire to change the basis for the aggregation of the taxable value of land held by companies or upon trust.

Predicting the content of the new regime, if and to the extent passed, is dangerous if to be provocative of actions based on such a prediction.

Indications given by the Treasurer are that, similar to models in Victoria and New South Wales, the measure will include:

- a shift to aggregation based on an owner's interest in every piece of land, rather than only aggregating properties held in the same ownership structure.
- introduction of provisions to allow two or more related companies to be grouped for land tax purposes; and
- introduction of a surcharge on land owned in trusts in cases where the interests in land of trust beneficiaries are not disclosed or cannot be identified. This is designed to minimise the incentive to own properties in trusts to avoid aggregation by increasing the tax payable. Exceptions will be provided from the surcharge for certain trusts (e.g. special disability trusts, guardianship trusts, complying superannuation funds). Consultation will be undertaken prior to implementation.

There are other models elsewhere. There are indications that the simpler Queensland model is also of interest. Some of these models have a simple definition of a beneficiary of a discretionary trust, others use a process for the nomination of a beneficiary who is to be treated as the owner of trust land, some limit their application to certain trusts (e.g. excluding the aggregation of discretionary trusts with a nominated beneficiary occupying the trust property as their principal place of residence), some have different provisions in relation to the extent to which to look through trusts to identify the relevant beneficiaries and so on.

Needless to say the changes will be very significant for all existing and aspiring landowners.

For some existing landowners the consequences of aggregation will be likely to compel the disposal of holdings not able, while under their control, to provide a sufficient return to meet the government charges applicable to them. Examples might include low cost housing units currently accepted as held in single ownerships but vulnerable to being deemed under single control and aggregated, land being accumulated for significant redevelopment or held in specific circumstances such as various commentators have demonstrated, should the legislation not relieve them.

Though said to be a deterrent to future conduct, the changes appear intended to apply to existing structures, complex or otherwise.

Draft legislation for consultation is expected soon, we will comment further after its publication and engagement in that process.

MORE INFO
John Tucker Director
p: +61 8 **8124 1807**
john.tucker@dwfoxtucker.com.au

DW Fox Tucker Lawyers
L14, 100 King William Street, Adelaide, SA 5000
p: +61 8 **8124 1811** e: info@dwfoxtucker.com.au **dwfoxtucker.com.au**