

## **LAND TAX SURCHARGE AND STAMP DUTY SURCHARGE – IMPACT ON DISCRETIONARY TRUSTS**

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The 2016 NSW Budget introduced:

1. a 4% stamp duty surcharge on foreign persons who purchase NSW residential land; and
2. a 0.75% land tax surcharge on foreign persons who own NSW residential land.

Depending on the terms of the trust deed, a trustee of a discretionary trust may be deemed to be a foreign person if a potential beneficiary of the trust is a foreign person. Many trustees of discretionary trusts that purchase or own NSW residential land may be liable for the additional surcharges.

Revenue Ruling No. G 010 was issued on 1 March 2017. It clarifies that the Chief Commissioner of State Revenue may exempt a trustee of a discretionary trust from the surcharges provided that:

1. the trustee is not involved in a scheme to avoid the surcharges; and
2. within 6 months of the exemption being granted (i.e. by end August 2017), the trust deed governing the discretionary trust is amended so that the trustee is no longer liable for the surcharges. If the trust deed is not amended, the exemption granted will be rescinded.

Discretionary trust deeds commonly set out a wide range of potential beneficiaries, such as distant relatives of the primary beneficiaries who are living overseas and not Australian citizens. Even if only one of those potential beneficiaries is a foreign person, and that beneficiary was unlikely to ever receive a distribution from the trust, the trustee may be deemed to be a foreign person.

Where possible and so long as the trustee is not involved in a tax avoidance scheme, discretionary trust deeds should be amended to prevent the trustee being a foreign person if the trust assets include NSW residential land or if the trustee plans on purchasing NSW residential land. This can save tens of thousands of dollars in additional surcharges. It should be done carefully to avoid triggering other problems.

### **Explanation of the deeming rules as they apply to trusts**

1. A trustee of a trust is a foreign person if any of the following persons holds a substantial interest in the trust:
  - (a) an individual not ordinarily resident in Australia;
  - (b) a foreign corporation; or
  - (c) a foreign government.
2. A person holds a substantial interest in a trust if the person, together with their associates, beneficially owns at least 20% of the income or property of the trust.
3. If a trustee has a power or discretion to distribute the income or property of the trust to one or more beneficiaries, each beneficiary is taken to hold a beneficial interest in the maximum percentage of income or property of the trust that the trustee may distribute to that beneficiary. This means in a discretionary trust deed in which:
  - (a) the trustee has the unrestricted power to make distributions to beneficiaries; and
  - (b) a beneficiary is a foreign person,that foreign person beneficiary will be taken to beneficially own 100% of the income and property of the trust.

If you would like more information, or to discuss how this may be resolved for your trust, please do not hesitate to contact us.

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