



COMMISSIONER'S PRACTICE DA 31.0

DUTIES – CANCELLED TRANSACTIONS

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
DA 31.0	22 October 2013	22 October 2013	25 February 2016

This Commissioner's practice outlines the application requirements for assessment and reassessment of duty liability under sections 107 and 88A of the *Duties Act 2008* ('Duties Act') where a dutiable transaction has been cancelled.

Background

Cancelled transactions

Section 107(2) of the Duties Act defines a cancelled transaction as a dutiable transaction that has not been, and will not be, carried into effect. However, the following transactions are not cancelled transactions:

- a call option of a simultaneous put and call option taken to be an agreement for the transfer of the option property under section 45 of the Duties Act;
- an assignment of a call option taken to be an agreement for the transfer of the option property under section 49 of the Duties Act; and
- a terms contract (within the meaning given in the *Sale of Land Act 1970*)¹ if the person liable to pay duty on the transaction has obtained exclusive use or control of the dutiable property as provided for in the contract, whether or not the contract is fully carried into effect for any reason.²

¹ Under section 5 of the *Sale of Land Act 1970*, a terms contract is an executory contract (i.e. one that has not as yet been fully completed or performed) relating to land under which the purchaser is obliged to make two or more payments to the vendor (in addition to any deposit), or is entitled to possession or occupation of the land, before being entitled to a transfer of the land.

² Where an agreement for transfer was not a terms contract when it was first executed but was varied to grant the purchaser an entitlement to possession or occupation of the land before being entitled to a transfer of the land, the variation is deemed to form part of the contract. The agreement is considered to be a terms contract as from the date of the variation.

Section 107(3) of the Duties Act provides that, subject to subsection (4), duty is not chargeable on a cancelled transaction. Under section 107(4) of the Duties Act, duty is chargeable on a cancelled transaction if the transaction has been cancelled so that a replacement transaction or a subsale transaction can be entered into.

Section 107(1) of the Duties Act defines a replacement transaction as another dutiable transaction that:

- is between all of the same parties as the parties to the cancelled transaction; and
- is substantially similar in effect to the cancelled transaction; and
- in the Commissioner's opinion, is a scheme or arrangement, or part of a scheme or arrangement, for which the sole or dominant purpose of any party is to avoid, reduce or defer the payment of duty.

Section 107(1) of the Duties Act defines a subsale transaction as another dutiable transaction which results in a beneficial interest in the dutiable property that is the subject of the cancelled transaction being held by:

- a person who is not a party to the cancelled transaction, a result which is contemplated or provided for under the cancelled transaction; or
- a person who is not a party to the cancelled transaction, a result which is substantially similar in effect to the effect of the cancelled transaction; or
- another person, as a result of an agreement, arrangement or understanding between a person liable to pay duty on the cancelled transaction and any other party to the transaction (including any other person liable to pay duty on the cancelled transaction).

Section 107(5) of the Duties Act requires the Commissioner, on the application of a taxpayer, to reassess a dutiable transaction that is not liable to duty because of this section.

Section 107(6) of the Duties Act provides that an application for assessment or reassessment in relation to a cancelled transaction must be made using the approved form.

Under section 17(1) of the *Taxation Administration Act 2003* ('TAA'), a person is not entitled to apply for a reassessment more than five years after the original assessment was made. However, where the cancelled transaction is an agreement for the transfer of dutiable property that was cancelled on or after 4 September 2012, section 107(7) of the Duties Act provides that, despite section 17(1) of the TAA, a person is not entitled to apply for a reassessment:

- more than five years after the original assessment was made; or
- more than 12 months after the day on which the agreement became a cancelled transaction,

whichever is the later.

If, as a result of a reassessment under section 107 of the Duties Act, the taxpayer has overpaid an amount, section 54 of the TAA requires the Commissioner to refund that amount to the taxpayer.

General conditional agreements

Under section 88A(1) of the Duties Act, duty is not chargeable on a general conditional agreement³ if, after the relevant instrument has been lodged⁴ but before duty on the transaction is paid or due to be paid:⁵

- the agreement is terminated on relevant grounds; and
- the Commissioner is notified of the termination on the approved form.

Section 88A(2) of the Duties Act provides that a general conditional agreement is terminated on relevant grounds if:

- it is not carried into effect because the condition to which it is subject cannot be fulfilled for reasons not within the control of a party to the agreement, or a person that is related⁶ to a party to the agreement; and
- duty is not chargeable on the agreement under section 107 of the Duties Act because it is a cancelled transaction.

If a general conditional agreement is terminated on relevant grounds before an instrument is required to be lodged under section 23 of the Duties Act, there is no requirement to lodge the instrument as section 19(2) of the Duties Act provides that liability for duty does not arise in respect of the general conditional agreement.

Commissioner's Practice

1. Where a dutiable transaction has been cancelled, duty remains payable until such time as the transaction has been assessed or reassessed by the Commissioner.

Application for assessment or reassessment under section 107

2. An application for the assessment or reassessment of a cancelled transaction must be made using the Exemption for Cancelled Transactions form⁷ ('application form') and be accompanied by all relevant transaction record(s) unless these are already in the Commissioner's possession.

³ As defined in sections 9 and 87 of the Duties Act.

⁴ Section 23 of the Duties Act requires that an instrument or statement evidencing the dutiable transaction be lodged within 2 months after the day on which liability for duty on the transaction arises.

⁵ Section 25 of the Duties Act provides for the time periods within which duty is to be paid.

⁶ Within the meaning given in section 87(5) of the Duties Act.

⁷ Accessible on the Office of State Revenue website at www.finance.wa.gov.au/cms/content.aspx?id=2012.

- 2.1 Where a dutiable transaction is cancelled after duty has been assessed and paid, all original duty endorsed transaction records must accompany the application form.
3. All parties to the transaction, or other person(s) with the authority to act as their agent, must sign the application form.
 - 3.1 If the application form has not been signed by all parties, the lodging party must provide a full explanation as to why the other party has not signed. The Commissioner will contact that party directly advising them of the application, and advising that the assessment or reassessment will be determined on the available information if a response is not received within one month.
 - 3.2 The Commissioner will accept that all parties to the transaction have signed the application form where an application form has been signed only by the taxpayer or their agent and a notice of termination (or other similar notice) issued by the vendor is provided.
4. If the cancellation of a dutiable transaction is under dispute, for example if the termination of an agreement for transfer is subject to legal proceedings, an application under section 107 of the Duties Act cannot be assessed until notification of the outcome of the dispute is provided to the Commissioner.
5. Where a dutiable transaction that is not a general conditional agreement that has been terminated on relevant grounds is cancelled before the transaction record is required to be lodged for assessment of duty, the record must still be lodged within the timeframe specified in section 23 of the Duties Act, together with an application under section 107 of the Duties Act.

Replacement and subsale transactions

6. The Commissioner will consider the facts and circumstances of each cancelled transaction when determining whether the transaction was cancelled so that a replacement transaction or subsale transaction could be entered into.

Example – Replacement Transaction

After executing an agreement for the transfer of vacant land on 1 June, John becomes aware that transfer duty rates will be reduced from 1 July. The seller agrees with John to cancel the contract and, on 2 July, the parties enter into an identical contract for the purchase of the same land.

In these circumstances, the Commissioner would consider that the sole or dominant purpose for cancelling the original transaction and entering into the new transaction was to reduce the payment of duty. As such, the new transaction would be a replacement transaction and duty would remain chargeable on the cancelled transaction under section 107(4) of the Duties Act as well as being chargeable on the replacement transaction.

If John was able to provide evidence to show that there was another legitimate reason for the original transaction having been cancelled and the new transaction entered into, the Commissioner would be unlikely to form an opinion that the new agreement was a replacement transaction and duty would not be chargeable on the original transaction.

Examples – Subsale Transactions

Example 1

Andrew enters into an agreement for the purchase of an investment property in which he is named as the purchaser. He subsequently decides that the property should be an asset of his self-managed superannuation fund. He and the vendor execute a variation to the agreement which provides that the contract will be terminated and a new agreement will be made between the vendor and the corporate trustee of Andrew's superannuation fund.

In this scenario, the Commissioner would determine that the new agreement is a subsale transaction. As such, duty would remain chargeable on the cancelled transaction under section 107(4) of the Duties Act and would also be chargeable on the new agreement.

Example 2

Simon enters into an agreement to purchase an apartment in which he is named as the purchaser. A week later, he and his friend, Amanda, decide that they should purchase the apartment together. Simon and Amanda approach the vendor who agrees to terminate the contract on condition that Simon and Amanda enter into an otherwise identical agreement as joint purchasers.

In this scenario, the Commissioner would determine that the new agreement is a subsale transaction and duty would remain chargeable on the original transaction in which Simon was the named purchaser. Duty would also be chargeable on the transaction in which Simon and Amanda were identified as joint purchasers.

Example 3

Kate enters into an agreement to purchase a house as sole proprietor, conditional upon finance. After the financial institution declines Kate's application for finance, she finds out that a different financial institution will approve her application. The agreement is terminated and the following day, Kate enters into another agreement to purchase the house on the same terms and conditions of the original agreement, subject to obtaining finance from the second financial institution.

In this scenario, the original agreement was legitimately terminated on relevant grounds and duty would not be chargeable under section 88A of the Duties Act. However duty would be chargeable on the new agreement.

General conditional agreements

7. Where a general conditional agreement is terminated on relevant grounds, the Commissioner must be notified using the Termination on Relevant Grounds form.⁸ This form should be accompanied by the original transaction record if it is not already in the Commissioner's possession.

Terms contracts

8. Where an agreement for the transfer of dutiable property that is a terms contract is cancelled before the person liable to pay duty on the transaction obtained exclusive use or control of the dutiable property, the application form must be accompanied by documentary evidence to show that the purchaser did not obtain exclusive use or control of the land before the agreement was cancelled.

Date of Effect

This Commissioner's practice takes effect from 22 October 2013.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

22 October 2013

⁸ Accessible on the Office of State Revenue website at www.finance.wa.gov.au/cms/content.aspx?id=2012.