

Article Information

Author: Alan Jessup

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Fiscal Watch - Stamp Duty - Deceased Estates

Nominal duty is only payable in respect of a transfer of dutiable property by the legal personal representative of a deceased person to a beneficiary in certain specified circumstances

Nominal duty is only payable in respect of a transfer of dutiable property by the legal personal representative of a deceased person to a beneficiary in certain specified circumstances. In addition an acquisition by a person of an interest in a land holder is an exempt acquisition where it is acquired solely as a result of the distribution of a deceased person.

Alan Jessup, Partner, discusses the decision made by the Supreme Court.

The Supreme Court recently had to consider the operation of these provisions in the context of the beneficiaries entering into a Deed of Family Agreement in relation to assets of a deceased estate to distribute certain of those assets in specie rather than selling the same and distributing the sale proceeds. The agreement, amongst other things, involved a transfer of shares in a landholder.

Two questions arose.

The first question was whether the share transfer was only subject to nominal duty of \$50 being an appropriation of the deceased's property as referred to in s. 46 of the Trustee Act, 1925 (NSW) that was made in or towards satisfaction of the plaintiff's entitlement under the trusts contained in the deceased's will and not marketable security duty.

The Court held that in this case the Deed of Family Arrangement did not vary the trusts contained in the Will but rather was a consent to the trustee's appropriating specific assets to or towards the entitlements of three of the beneficiaries under the will. The Court noted that it is well settled that even where the will contains a trust for sale, as the will in this case did, the trustee, with the consent of the beneficiary, can appropriate a specific asset in whole or partial satisfaction of the beneficiary's entitlement under the will. The Court found that there was nothing in the context of this provision that precluded its application to a transfer of property that is the subject of a trust for sale in the deceased's will to a beneficiary in, or towards, satisfaction of the beneficiary's entitlement under the will and therefore was only subject to nominal duty.

However the fact that the Chief Commissioner challenged the application of this nominal duty exemption means that care needs to be taken to ensure that the nominal duty provision does apply to transfers of property in a deceased estate. Not all transfers by a legal personal representative of a deceased person to a beneficiary are subject to nominal duty so the provisions have to be carefully followed. For example it may be necessary to ensure that any agreed variation to the Will are made pursuant to family provisions orders under the Succession Act, 2006 (NSW) rather than by way of deed of family arrangement so the transfer can be said to be in conformity with the trusts contained in the Will.

The second question was whether the interest acquired in the landholder as a result of the transfer of the shares in the landholder was exempt from landholder duty.

The Court held that the transfer of the shares was not "solely" as a result of the distribution of the estate of a deceased person. It was both as a result of the distribution of the estate and as a result of the other residuary beneficiaries' consenting to the transfer and thereby surrendering their right themselves to call for a transfer of a proportion of the deceased's shares the company to themselves and also agreeing to the additional transfers for which the Deed of Family Arrangement provided. Therefore the transfer was not exempt from duty.

This shows that care must be taken if this exemption is to be relied upon. A transfer of shares from the estate of a deceased

person to a beneficiary in a landholding company will only be exempt if it is solely as a result of the distribution of the estate of the deceased person and not for any additional reason. Again if a variation is needed to the trusts contained in the will of the deceased person to ensure that the sole reason for the transfer is as a result of the distribution of the estate of the deceased person, this should be done by way a family provisions orders under the Succession Act, 2006 (NSW) rather than by way of deed of family arrangement.