

Article Information

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Service: Taxation

Fiscal Watch - Land Tax - Foreign Surcharge - Family Trusts

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In NSW, a foreign person who owns residential land in NSW, must pay a surcharge of 0.75% from the 2017 land tax year onwards.

Alan Jessup, Partner, summarises the actions you must take to avoid a land tax surcharge applicable to foreign persons.

The trustee of a trust is a foreign person if an individual not ordinarily resident in Australia or a foreign corporation or a foreign government holds a substantial interest in the trust, or two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest in the trust.

Where a trust is a discretionary trust, each beneficiary to whom the trustee has discretion to distribute the income or property, is deemed to have the maximum percentage interest in the income or property that the trustee may exercise a discretion to distribute to them e.g. if 100% could be distributed to a particular beneficiary then that beneficiary has a 100% interest in the trust.

This creates a problem for discretionary trusts including family trusts where the trustee has a wide power to distribute income and/or capital to various classes of beneficiaries including various trusts companies or charities where any potential beneficiary is or could be a foreign person whether or not that is a likely scenario.

In order to avoid this problem, a trust deed should be amended in a way to ensure that no person or two or more persons can in aggregate have a substantial interest in the trust.

The Commissioner has issued a ruling that if the trustee applies for a retrospective exemption (which will need to be made for the 2017 land tax year) and makes an appropriate amendment to the trust deed within 6 months of the grant of the exemption, the trustee will be exempt from the foreign land tax surcharge.

A similar amendment will also need to be made if a discretionary trust proposes to acquire residential land in NSW before the contract for sale of land is entered into by the trustee of the trust to avoid the foreign surcharge duty of 8%.