

10 JUNE 2015

# AUSTRALIAN TAX ALERT

## VICTORIA INTRODUCES 3% STAMP DUTY SURCHARGE FOR FOREIGN PURCHASERS OF RESIDENTIAL PROPERTY

AS ANNOUNCED IN THE VICTORIAN 2015-16 BUDGET, A BILL INTRODUCING AN ADDITIONAL 3% STAMP DUTY SURCHARGE ON "RESIDENTIAL PROPERTY" PURCHASES BY "FOREIGN PURCHASERS" WAS INTRODUCED INTO THE VICTORIAN PARLIAMENT ON 5 MAY 2015. THE SURCHARGE BRINGS THE TOP DUTY RATE FOR FOREIGN PURCHASERS TO 8.5% AND WILL COME INTO EFFECT 1 JULY 2015. THIS CHANGE INCREASES THE TRANSACTION COSTS FOR FOREIGN INVESTORS AND POTENTIALLY DEVELOPERS OF REAL ESTATE IN VICTORIA, ALTHOUGH THE VICTORIAN TREASURER WILL HAVE A DISCRETION TO EXEMPT FOREIGN DEVELOPERS OPERATING IN THE STATE.

### TRANSACTIONS THAT WILL ATTRACT THE ADDITIONAL DUTY

The additional 3% duty will apply in any of the following circumstances:

- 1 The acquisition of residential property by a foreign purchaser;
- 2 The acquisition of a non-residential property by a foreign purchaser where there is a later change in intention to use the property as a residential property. In this circumstance the foreign purchaser must lodge a statement with the Commissioner within 14 days of forming
- 3 the relevant "intention", with the liability for payment arising within 30 days of the intention being formed;
- 3 A relevant acquisition under the landholder provisions (e.g. 50% interest or more for private companies and 20% or more for unit trusts) by a foreign purchaser, of an interest in a landholder that owns residential property.

## KEY DEFINITIONS/CONCEPTS

A foreign purchaser is any of the following:

- Foreign natural person - a person who is not an Australian or New Zealand Citizen or is not a permanent visa holder.
- Foreign corporation - a corporation that is incorporated outside Australia or an Australian incorporated company where a foreign purchaser has a controlling interest in that company.
- Foreign trust - a trust in which a foreign purchaser has a 'substantial interest' in the trust estate.

Residential property: is land in Victoria which has/or is intended to have a residential building affixed to it that may be lawfully used as a place of residence.

Controlling interest: is where a foreign purchaser (alone or together with any associated person) is in a position/potential position to control more than 50% of the voting power in the corporation, or that has an interest in more than 50% of the issued shares in the corporation. The Commissioner also has the power to deem a foreign purchaser to have a controlling interest in a company where that person has direct or indirect influence on the outcome of decisions.

Substantial interest: is where a foreign purchaser (alone or together with any associated person) has a beneficial interest of more than 50% of the capital of the estate of the foreign purchaser. The Commissioner also has the power to deem a foreign purchaser to have a substantial interest in the trust where that trust has direct or indirect influence on the outcome of decisions.

## OTHER ISSUES

The provisions provide that a foreign purchaser is not entitled to a concession from duty or a concessional rate of duty under Part 5 in respect of foreign purchaser duty.

The Explanatory Memorandum assumes that a provision that provides for no liability to duty is not a concession from duty. This seems a somewhat unusual approach. If not correct, then the transactions that are not liable to duty under Part 5 are liable to foreign purchaser duty. The main ones

of interest are change of trustee, apparent purchaser and transfers to and from a trustee or a nominee.

## KEY ISSUES

Foreign developers will need to consider carefully whether the property they are acquiring is residential property as defined.

In the case of joint ventures, foreign purchasers and developers need to consider carefully whether the joint venture is caught, particularly where trusts are involved as the definition of "associated persons" in the Victorian legislation is extremely wide.

## "DISCRETIONARY EXEMPTION" FOR FOREIGN PROPERTY DEVELOPERS

Where the developer is foreign they will need to seek relief under Treasurer's Guidelines published on 26 May 2015 by the Victorian Government.

The Guidelines provide for relief at the discretion of the Treasurer. The Treasurer may grant relief where the circumstances set out in the Guidelines are satisfied. The person having a controlling interest in a foreign corporation or a substantial interest in the capital of a foreign trust can make an application for exemption. If granted the person will be taken not to have a substantial interest, such that the foreign corporation or trust is exempt from the stamp duty surcharge. Generally speaking it is intended for the exemption to apply to those whose commercial activities add to the supply of housing stock in Victoria.

As the relief is entirely at the discretion of the Treasurer there is no effective avenue of appeal in the event the relief is not granted. It is not clear how timely applications will be granted.

The discretion will have regard to more than just the foreign ownership. The Guidelines set out a large number of considerations the Treasurer is to have regard to.

The Treasurer is to have regard to any one or more of the general principles set out in the Guidelines. These include:

- 1 The nature and degree of interest or ownership or control.
- 2 Practical influence to determine, directly or indirectly, the outcome of decisions of the entity.

- 3 The ability to influence the outcome of financial, operating and management decisions of the corporation or trust.
- 4 Any other relevant circumstances. These include impact on economy, competition, impact on the community, satisfaction of Foreign Investment Review Board requirements, character of the controlling interest or substantial interest, independence of management.

## MORE INFORMATION

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