THE TAX INSTITUTE

Paul Broderick
Commissioner of State Revenue
State Revenue Office
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By email: consultation@sro.vic.gov.au

9 November 2020

Dear Commissioner,

Draft revenue ruling DA-064

The Tax Institute welcomes the opportunity to make a submission to the State Revenue Office of Victoria in relation to draft revenue ruling DA-064 (the **draft ruling**). Overall, we consider that a public ruling outlining the views of the Commissioner of State Revenue (**Commissioner**) on the activities which would constitute land development for the purposes of the *Duties Act 2000* (**Duties Act**) is desirable. However, we are of the view that the current draft ruling goes beyond the words and intent of the legislation and should be amended before it is finalised.

The Tax Institute agrees that land development is the process of changing the state and/or use of land to increase its value or utility, as stated in the draft ruling. However, the implication of several of the Commissioner's views is that land development may be taken to have occurred *without* any increase in value or utility of the land concerned, through preliminary activities which are not contemplated or intended to be captured by the law. The Tax Institute is of the view that land development should only be taken to occur where there is a direct and ascertainable connection between an activity and an accretion in land value. Having regard to the context and purpose of the legislation, we are of the view that there is a disconnect or an insufficient nexus between several of the activities listed in the draft ruling and any accretion in land value, and that the inclusion of preliminary steps is beyond the reasonable interpretation of land development.

The draft ruling is intended to be a non-exhaustive guide as to the kinds of activities the Commissioner considers will constitute land development for the purposes of Part 4A of the Duties Act. The context and purpose of Part 4A indicate that the expression land development was intended to capture value added by the *first purchaser* or an *associate* of the first purchaser (or a *subsequent purchaser* or an associate of the subsequent purchaser), between the date of the contract and the date of acquiring a transfer right. It was not intended to capture value added by the vendor or by the actions of an unassociated third party. This much is reflected in the exclusions contained in subsection 32J(3).[1] A broader interpretation of land development that includes actions carried out by the vendor or an unassociated third party would give rise to anomalous and unintended outcomes under Part 4A.

Our view on each limb of the draft ruling is outlined below.

[1] See also the explanatory memorandum to the *State Taxation Acts (General Amendment) Bill 2005* (which introduced Part 4A into Chapter 2 of the Duties Act) and the explanatory memorandum to the *State Taxation Acts Further Amendment Bill 2008.* This comment applies equally to subsection 32Q(3).

Limb (a) – Preparing a plan of subdivision of the land or taking any steps to have a plan registered under the *Subdivision Act 1988*

The Tax Institute is of the view that there is no legislative basis for regarding "initial activities with a view to" registration of a plan of subdivision as land development. Paragraph (a) of the definition of land development in subsection 3(1) of the Duties Act refers to "preparing a plan of subdivision of the land or taking any steps to have the plan registered under the *Subdivision Act 1988*". The term *preparing* in that paragraph should be construed as something essentially complete or ready to be proceeded with. A plan that is substantially complete and ready to be proceeded with would be more likely to contain the direct and ascertainable nexus with an accretion in the value of the land. Conversely, mere steps or initial activity with a view to registering a plan of subdivision is too remote. We consider that something more is required by the legislation and that the proper interpretation of "preparing" in limb (a) should be confined to activities that are essentially complete or ready to be proceeded with.

The Commissioner's position set out in the draft ruling would conceivably result in a wide range of everyday transactions, that do not cause an accretion in value to the property and which extend beyond the intended operation of Part 4A, constituting land development. Examples of this include engaging a professional surveyor to undertake a survey (Item 1); obtaining a feasibility study or town planning advice (second item proposed to be taken into account by the Commissioner in making a determination regarding limb (a)); or commissioning a professional review of a plan of subdivision (Item 3).

The Tax Institute is of the view that these are regular, everyday commercial inquiries that purchasers should ordinarily be able to undertake without triggering the operation of Part 4A. Importantly, it may be that such a preliminary activity (whether a survey, study, advice or review) results in a decision <u>not</u> to proceed with registering a plan of subdivision. The examples in the draft ruling set out above should be regarded as preliminary or initial steps only which may or may not lead to a plan of subdivision being prepared. Taking a purposive approach and reading the definition in context, limb (a) contemplates more than preliminary activities such as, a rough, "kitchen table" draft that may be discarded without further action being taken. The Tax Institute submits that such activities are no different to "preliminary research and analysis on the market" which the draft ruling concludes, is not land development.

The Tax Institute also considers that the mere drafting of a plan of subdivision (Item 2) in itself does not cause an accretion in value of the land and is therefore not land development. Such a draft or redraft may be abandoned or not progressed any further. Further, such a draft, in and of itself, does not fulfil the requirement of "preparing" in subsection 3(1) of the Duties Act, given that a draft is necessarily incomplete and not ready to be proceeded with. Similarly, not all instances of engaging a council or servicing authority to review or comment on a plan will result in land development occurring (Item 5). Informally engaging a council or servicing authority in circumstances where there are no changes to the plan of subdivision would not cause an accretion in value of the property and do not amount to "preparing" a plan of subdivision in the sense contemplated by subsection 3(1) and described above. In such circumstances, without more, there is no basis to conclude that land development has occurred.

Accordingly, The Tax Institute considers that Items 1, 2, 3 and 5 should be removed from the list of activities which the Commissioner regards as land development under limb (a).

For completeness, we note that The Tax Institute agrees that the activities outlined in Items 4, 6 and 7 fall within the meaning of subsection (a) of the definition of land development on the basis that those activities carry the requisite connection with an increase in land value.

Limb (b) – Applying for or obtaining a permit under the *Planning and Environment Act 1987* in relation to the use or development of land

Limb (c) – Requesting under the *Planning and Environment Act 1987* a planning authority to prepare an amendment to a planning scheme that would affect the land

Limb (d) – Applying for or obtaining a permit or approval under the *Building Act 1993* in relation to the land

Limb (e) – Doing anything in relation to the land for which a permit or approval referred to in paragraph (d) would be required

The Tax Institute does not agree with the Commissioner's view in the draft ruling that for limbs (b) to (e), it is irrelevant who makes the application or requests or undertakes the activity. For example, a council may request an amendment to a planning scheme under the *Planning and Environment Act 1987*. In that scenario, it would be wholly inappropriate to impose double duty based on land development having occured. It would also be unreasonable to expect purchasers or their agents to make inquiries regarding such activities that may have been initiated by councils or other bodies without any involvement on the part of the purchaser or agent.

The Tax Institute submits that in each instance, land development should be found to have occurred only where the application, request or activity is initiated either by the purchaser or an associate of the purchaser. As noted above, Part 4A was not intended to capture value added by the vendor, nor by the actions of an unassociated third party. To conclude that land development has occurred on the basis of an activity of a person or entity unassociated with the purchaser (or a subsequent purchaser) would result in double duty being unfairly imposed and detract from the purpose and integrity of the sub-sale provisions.

The Tax Institute considers that the above statements are equally relevant to the application of Foreign Purchaser Additional Duty (**FPAD**). The view expressed by the Commissioner essentially taints the purchaser with the actions or intent of a third party. The Tax Institute makes the further observation that it is unnecessary and excessive for the Commissioner to take such an expansive view given the protection already available under section 18A for changes in use.

Separately, The Tax Institute wishes to bring to the Commissioner's attention certain other concerns in relation to the draft ruling and FPAD. In Example 1 in respect of limb (b), the Commissioner's view appears to be that, for the purposes of FPAD, the land becomes residential property from the time that the vendor made an application for a permit for the creation of residential lots, presumably under subparagraph 3G(1)(c)(ii) of the Duties Act. We consider that clarification is required whether following such a permit application, the land retains its status as residential property for FPAD purposes, regardless of the intention of a foreign purchaser of the land (who may not have any intention for the land to be developed for residential purposes). The Tax Institute considers that a foreign purchaser should not incur FPAD if the property is not otherwise residential property under other limbs of the definition of residential property in subsection 3G(1) at the time of the dutiable transaction and there is no change of intention in respect of the use of the land by the foreign purchaser that is subject to section 18A.

Similarly, in Example 5 in respect of limb (d), the Commissioner's view appears to be that land becomes residential property for FPAD purposes from the time that the vendor makes an application for a building permit under the *Building Act 1993* to construct residential buildings. The Tax Institute reiterates that a foreign purchaser should not incur FPAD if the property is not otherwise residential property under other limbs of the definition of residential property in subsection 3G(1) at the time of the dutiable transaction and there is no change of intention in respect of the use of the land by the foreign purchaser that is subject to section 18A.

Recommendations

In light of the above, The Tax Institute recommends that the draft ruling be amended before being finalised.

As outlined above, in relation to limb (a), we are of the view that there is no legislative basis for regarding "initial activities with a view to" registration of a plan of subdivision as land development. Reference to this in the draft ruling should be removed. Such initial activities do not contain a direct and ascertainable connection or nexus to an accretion in land value. We recommend that the draft ruling state that the term "preparing" in limb (a) will be construed to mean "essentially complete or ready to be proceeded with".

The Tax Institute recommends that the statements that "it is irrelevant who carried out or intended to carry out the process or any part of the process", be removed from the draft ruling. To conclude that land development has occurred on the basis of an activity of a person or entity unassociated with the purchaser (or a subsequent purchaser) would result in double duty being unfairly imposed and detract from the purpose and integrity of Part 4A. In our view, the draft ruling should instead state that land development is confined to activities conducted by the purchaser (or a subsequent purchaser), or an associate thereof.

Finally, in relation to limbs (b)-(e), we recommend that the draft ruling is amended to clarify that a foreign purchaser will not incur FPAD if the property is not otherwise residential property under other limbs of the definition of residential property in subsection 3G(1) at the time of the dutiable transaction and there is no change of intention in respect of the use of the land by the foreign purchaser that is subject to section 18A.

If you would like to discuss any of the matters raised above, please contact the Chair of The Tax Institute's Victorian State Taxes Committee, Simon Tisher on 03 9225 7416, in the first instance.

Yours faithfully,

Peter Godber

President