

26 March 2024

Mr Paul Maxwell
A/ Deputy Commissioner of State Taxation
Revenue SA
GPO Box 1353, Adelaide, SA 5001

By email: Paul.Maxwell@sa.gov.au

Dear Mr Maxwell,

Draft Revenue Ruling - Exemption 33 of the *Stamp Duties Act 1923 (SA)*

The Tax Institute welcomes the opportunity to make a submission to the Commissioner in relation to the Exemption 33 draft Revenue Ruling that provides guidance regarding the entities, objectives, or functions that can be deemed charitable or religious, along with the necessary evidence that needs to be provided when seeking a duty exemption, that was circulated on 29 December 2023 (**proposed draft ruling**).

In the development of this submission, we have closely consulted with our SA State Taxes Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

The Tax Institute is of the view that there are some significant concerns that we consider require further consideration and amendment before the proposed draft ruling is finalised.

Our recommended further amendments to the proposed draft ruling may be summarised as follows:

- The proposed draft ruling should be revised to reduce compliance and administrative costs. Stamp duty in South Australia now applies only to residential and primary production land, resulting in fewer transactions requiring exemption. Removing the Second Limb (that the Commissioner is satisfied that the property will not be used wholly or predominantly for commercial or business purposes) from the proposed draft ruling would save costs without significantly impacting Government revenue.
- Alternatively, if the Second Limb of the proposed draft ruling is to be retained, it should be interpreted sensibly based on the original policy intent. In our view, the current draft of the proposed draft ruling does not effectively achieve this purpose. The proposed draft ruling should recognise uses closely related to charitable purposes, such as renting to homeless people at a low rent.

- Further, specific points that need addressing include accepting ACNC registration as evidence for exemption; clarifying that non-charitable purposes incidental to the charitable purpose do not disqualify an applicant; and correcting misrepresentations of the Second Limb in the proposed ruling. In this regard, the Commissioner's paraphrasing of the Second Limb appears to be incorrect, and the exclusion of land banking as an example highlights this discrepancy.

Our detailed response and recommendations to improve the proposed draft ruling are contained in **Appendix A**.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact The Tax Institute's Senior Counsel – Tax & Legal, Julie Abdalla, at (02) 8223 0058 or our representative on the SA State Taxes Liaison Group, Paul Ingram, on 0422 006 284.

Yours faithfully,



Scott Treatt
Chief Executive Officer



Todd Want
President

APPENDIX A

We have set out below our detailed comments and observations for your consideration.

Introduction

For convenience, we will refer throughout to the two 'limbs' of Exemption 33, namely:

- whether the transferee is a qualifying body (**First Limb**); and
- whether the Commissioner is satisfied that the property will not be used (wholly or predominantly) for commercial or business purposes (**Second Limb**).

1. Legislative Policy

The Tax Institute is of the view that the legislative intent behind the current drafting of Exemption 33 is misguided.

Exemption 33 should apply whenever the purchaser/transferee is a charity, irrespective of the use to which the asset is then put. We consider that the Second Limb of Exemption 33 should be deleted as it unnecessarily results in additional compliance and administrative costs.

In this regard, we note that stamp duty in South Australia now only applies to residential and primary production land, so only a greatly reduced number of transactions may require exemption than may previously have been the case (other than to achieve additional savings in terms of *ad valorem* Lands Title Office registration fees).

Accordingly, it is submitted that removing the Second Limb would result in a significant saving in terms of both compliance and administration costs, without a material impact on Government revenue.

2. Proposed Ruling

If the proposed draft ruling is to be retained in its current form, then The Tax Institute is of the view that the Second Limb should be interpreted sensibly, based on the original policy intent, as recognised by the then Commissioner. When the Second Limb was first introduced, the then Commissioner opined that a broad interpretation would prevent the exemption from applying in a range of circumstances that should properly be treated as exempt.

We consider that the current draft of the proposed draft Ruling does not achieve its key purpose. While the examples are helpful, we consider that some of the reasoning needs further consideration.

We acknowledge that interpreting the Second Limb is not an easy task, especially since the drafting is (with respect) inherently flawed, because it fails to take into account the comments of the High Court in the *Commissioner of Taxation v Word Investments Limited* [2008] HCA 55 (at paras 24-27) (**emphasis added**):

'24. It is therefore necessary to reject the Commissioner's arguments so far as they submitted that Word had a "commercial object of profit from the conduct of its business" which was "an end in itself" and was not merely incidental or ancillary to Word's religious purposes. Word endeavoured to make a profit, but only in aid of its charitable purposes. To point to the goal of profit and isolate it as the relevant purpose is to create a false dichotomy between characterisation of an institution as commercial and characterisation of it as charitable.

26.So far as the actual activities of Word in furtherance of its purposes are relevant, it is plain that, subject to the Commissioner's contentions in relation to the second and third issues, the funds paid out by Word were paid to bodies fulfilling charitable purposes. The activities of Word in raising funds by commercial means are not intrinsically charitable, but they are charitable in character because they were carried out in furtherance of a charitable purpose.

27.Word is not a company with both charitable and non-charitable purposes which carried on commercial businesses and incidentally conferred benefits on charity; Word is a company having purposes which are solely charitable and which carried on commercial businesses only in order to effectuate those purposes.'

Based on the above, charities primarily operate with a focus on their charitable mission rather than on commercial or business objectives. All their activities are geared towards fulfilling their charitable purpose.

The proposed draft ruling falls into the same trap – refer, in particular, the third, fourth and fifth dot points of paragraph 3, which suggest that some uses are for a charitable or religious purpose, and others are not.

The Tax Institute is of the view that at the very least, the Proposed Ruling needs to recognise that there are uses that may prima facie be of a commercial or business nature (e.g. renting), but which should not be so regarded because they are closely related to the charitable or religious purpose of the organisation (e.g. renting to homeless people at a low rent). The use is the very means by which the charitable purpose is achieved, rather than something done merely to fund the charitable activities. We note that the second sentence of paragraph 4 of the draft ruling appears to come close to recognising this.

In addition, The Tax Institute recommends that the following specific points be addressed:

- paragraph 5 of the proposed draft ruling should be revisited, particularly given attempts being made elsewhere to harmonise the treatment of charities and reduce red tape. We are of the view that registration as a charity with the ACNC should be accepted as satisfying the First Limb. If the Commissioner does not accept this as sufficient evidence, then the condition of ACNC registration as a prerequisite to exemption should be removed.
- The proposed draft ruling should clarify that non-charitable purposes that are incidental or ancillary to the charitable purpose do not disqualify an applicant, as recognised by the Charities Act 2013 (Cth) and relevant ATO and ACNC guidance.

- there is no basis for the suggestion that only the direct use of the land by the charity is relevant to the First Limb of the exemption. Both the common law and the ACNC recognise entities that support the work of other charities as charitable— for example, peak bodies, and separate entities set up to merely own the land of a charitable group and make it available to the other entities in the group.
- The fifth dot point of paragraph 3 of the proposed draft ruling misrepresents the Second Limb, and this approach is repeated throughout the proposed draft ruling. The statutory wording refers to the Commissioner being satisfied that the property will not be used (wholly or predominantly) for commercial or business purposes. It does not say that the Commissioner has to be satisfied that the property will be used wholly or predominantly for charitable or religious purposes. The two statements are not the same, and the Commissioner's 'paraphrasing' is likely to cause confusion. The exclusion of land banking (in the last dot point in paragraph 11) is an example. It is arguable (on the statutory wording) that the Commissioner cannot be satisfied for the purposes of the Second Limb so the exemption should apply. Yet on the Commissioner's paraphrased wording, it is clear that the exemption will not apply in such circumstances.