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e review
INTELLIGENT ACCOUNTING

State Tax Warning for Family Trusts

Recent changes to State laws may trigger a surprise tax bill for family trusts (discretionary trusts).

The problem for family trusts stems from recent legislative changes in New South Wales (NSW), Victoria (VIC) and Queensland (QLD) that impose a surcharge on foreigners purchasing residential land. While that might not sound like a problem, the issue arises because of the way family trust deeds are often drafted.

These trust deeds are typically drafted so that the trustee has the power to distribute income or capital to a very wide class of potential beneficiaries. As a result, if a foreigner could receive distributions from the trust then your trust may be liable to pay the new surcharge if it holds or purchases residential land in New South Wales, Victoria or Queensland.

The way the State laws are written, if you cannot exclude foreigners as beneficiaries (your cousin living in England for example) you are potentially exposed to the new tax. It does not matter if a distribution to a foreigner is unlikely to happen, the trust deed just has to allow it as a possibility.

How can you avoid being caught by the surcharge?

Assuming you don't have foreigners that you want the trust to distribute to, the solution might involve amending your trust deed. The amendment would exclude a "foreign person" from being a beneficiary and being able to benefit from the trust. However, it would be necessary to work through this process carefully to ensure that even worse tax implications don't follow (e.g. need to ensure the amendment does not cause the trust to be resettled).

What's the problem with Trust Deeds?

For asset protection purposes, most family trusts have a very wide class of potential beneficiaries and unfettered powers for the trust to distribute income or capital. This means that no one beneficiary can claim that they have a right to the assets or income of the trust, which is helpful when a creditor is looking to target assets – you don't have a right to the assets or income of the trust until the trust agrees to distribute to you.

The State law changes and the exposure for family trusts

Legislative changes introduced at the end of 2016 in NSW, VIC and QLD impose a surcharge on “foreign persons” (or “foreign purchasers”) who purchase and own (for land tax purposes) certain types of residential land in those States (this includes units in a landholder). The surcharge is in addition to existing land taxes and stamp duty.

State	Foreign Surcharge Duty	Land Tax Surcharge
NSW	4% (21 June 2016)	0.75%
QLD	3% (1 Oct 2016)	n/a
VIC	7% (1 July 2016)	1.5%

If your trust deed does not exclude a foreign person, then it may be liable to pay the new surcharge if it holds or purchases residential land in the affected States.

If you are concerned about the impact of these legislative changes on your family trust, speak wth your advisor who can help you work through this issue. Legal advice may also be required.

More information on the surcharge can be found at:

- Business Queensland
- Office of State Revenue NSW
- State Revenue Office Victoria

“Foreign residents are certainly in the cross-hairs of our revenue authorities, both at the Federal as well as State levels – particularly when it comes to property transactions. However this issue is a great example of how quickly formulated law passed in the pursuit of a particular group has consequences far beyond its original intent. There are a huge number of family (discretionary) trusts potentially impacted by this issue – if your trust owns residential land, speak with your advisors immediately to understand the issue and any potential actions that should be taken to avoid being impacted by this.”

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