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Public Ruling Duties Act:

FOREIGN CORPORATIONS AND FOREIGN TRUSTS—INTERESTS OF FOREIGN PERSONS AND RELATED PERSONS

A public ruling, when issued, is the published view of the Commissioner of State Revenue (the Commissioner) on the particular topic to which it relates. It therefore replaces and overrides any existing private rulings, memoranda, manuals and advice provided by the Commissioner in respect of the issue(s) it addresses. Where a change in legislation or case law (the law) affects the content of a public ruling, the change in the law overrides the public ruling—that is, the Commissioner will determine the tax liability or eligibility for a concession, grant or exemption, as the case may be, in accordance with the law.

What this ruling is about

1. Under Chapter 4 of the *Duties Act 2001* (Duties Act), an additional amount of duty (additional foreign acquirer duty, or AFAD) applies to direct or indirect transactions in land that are liable to transfer duty, landholder duty and corporate trustee duty where the land is 'AFAD residential land'¹ and the acquirer under the transaction is a foreign person.²
2. Foreign individuals, foreign corporations and trustees of foreign trusts are 'foreign persons'.³
3. A 'foreign corporation' includes a corporation in which foreign persons have a controlling interest.⁴ A corporation is taken to be a corporation in which foreign persons have a controlling interest if, taking their interests together, one or more persons who are foreign persons or related persons of foreign persons:
 - (a) are in a position to control at least 50% of the voting power in the corporation
 - (b) are in a position to control at least 50% of the potential voting power in the corporationor
 - (c) have an interest in at least 50% of the issued shares in the corporation.

¹ Section 232 of the Duties Act and Public Ruling DA232.1—AFAD residential land

² Section 240 of the Duties Act

³ Section 234 of the Duties Act

⁴ Section 236 of the Duties Act

4. A trust is a 'foreign trust' if at least 50% of the trust interests in the trust are foreign interests.⁵ A 'foreign interest' is any of the following:
 - (a) a trust interest of a foreign individual
 - (b) a trust interest of a foreign corporation
 - (c) a trust interest of a trustee of a foreign trust
 - (d) a trust interest held by a related person of a person mentioned in (a) to (c) above.
5. 'Trust interest' is a person's interest as a beneficiary of a trust, other than a life interest. For a trust that is a discretionary trust, only a taker in default of an appointment by the trustee can have a trust interest.⁶
6. Persons are 'related persons' if they are either of the following:
 - (a) related persons under s.61 of the Duties Act
 - (b) partners in a partnership.⁷
7. This public ruling clarifies how interests of foreign persons and related persons will be considered when determining whether foreign persons have a controlling interest in a corporation or at least 50% of the trust interests in a trust.

Ruling and explanation

Interests held by related persons

8. In determining whether foreign persons have a controlling interest in a corporation or at least 50% of the trust interests in a trust, a related person of the foreign person is only relevant if the following apply:
 - (a) For a corporation, both the foreign person and the related person each:
 - (i) are in a position to control some voting power in the corporation
 - (ii) are in a position to control some potential voting power in the corporationor
 - (iii) have an interest in the issued shares in the corporation.
 - (b) For a trust, both the foreign person and the related person each have a trust interest in the trust.
9. The mere fact that a person who is in a position to control voting power or potential voting power or has an interest in the issued shares in a corporation is related to a foreign person who has no such control or interest, is not relevant for the purposes of determining whether

⁵ Section 237 of the Duties Act

⁶ Section 57 of the Duties Act

⁷ Section 238 of the Duties Act

the corporation is a foreign corporation. So too, the mere fact that a person who has a trust interest in a trust is related to a foreign person who has no trust interest in the trust, is not relevant for the purposes of determining whether the trust is a foreign trust.

Example 1

AB Co Pty Ltd is incorporated in Australia. A and B are both directors and 50% shareholders of AB Co. A and B are both Australian citizens. B's spouse, C, is a foreign individual. C is not in a position to control any voting or potential voting power in the corporation. To determine whether AB Co is a foreign corporation, it does not matter that C is a foreign individual because C does not have any control or interest in AB Co, in the relevant sense. Based on these facts, AB Co will not be a foreign company.

Example 2

DE Co Pty Ltd is incorporated in Australia. The shareholders of DE Co are D (30%); D's spouse, E (30%); and F (40%). D and F are Australian citizens. E is a foreign individual. F is not a related person of D or E. In determining whether DE Co is a foreign corporation, D and E's interests will be considered together (60%) because D and E are related persons and both are shareholders of the corporation. The company is considered to be foreign controlled, and therefore a foreign company.

Example 3

F, G and H are siblings and are all Australian citizens. They collectively own 100% of the units in FGH Trust. Their mother is a foreign person, but she has no trust interest in the Trust. FGH trust is not a foreign trust.

Interests held by unrelated foreign persons

10. In determining whether foreign persons have a controlling interest in a corporation or at least 50% of the trust interests in a trust, the interests of all foreign persons will be aggregated, regardless of whether the foreign persons are related persons.

Example 4

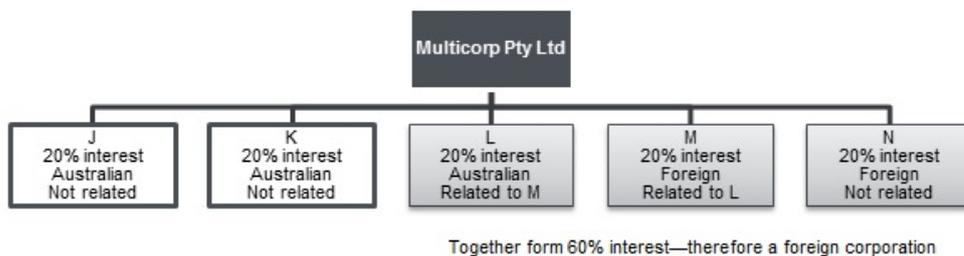
X Co Pty Ltd (X Co) is the trustee of the X Unit Trust. U, V and W hold units in the following proportions in X Unit Trust respectively: 35%, 40% and 25%. U and V are unrelated foreign individuals; whereas W is an Australian citizen, unrelated to either U or V. The X Unit Trust is a foreign trust because at least 50% of the trust interests in the trust are foreign interests (U and V collectively holding 75% of the interests in the trust).

Composite scenarios

11. In some circumstances there may be a combination of the scenarios outlined above.

Example 5

J, K, L, M and N are all 20% shareholders in Multicorp Pty Ltd. J, K and L are Australian. M and N are foreign, but unrelated to each other. L is related to M. J, K and N are not related to any other shareholders. Multicorp Pty Ltd is a foreign corporation because the interests of L (related to a foreign person), M (foreign person) and N (foreign person) total 60%.

**Discretionary trusts**

12. A discretionary trust will not necessarily be a foreign trust merely because one of its default beneficiaries is a foreign person.
13. Whether a discretionary trust with a foreign person as a default beneficiary is a foreign trust will depend on the facts and circumstances of each matter. The Commissioner will consider the likelihood of distribution to a foreign person, taking into account the terms of the trust deed concerning any priority or proportion for sharing between default beneficiaries.

Date of effect

14. This public ruling takes effect from 28 August 2023.

Amy Rosanowski
Acting Commissioner of State Revenue
Date of issue: 24 August 2023

References

| Public Ruling | Issued | Dates of effect | |
|---------------|-------------------|-----------------|------------------|
| | | From | To |
| DA000.14.4 | 24 August 2023 | 28 August 2023 | Current |
| DA000.14.3 | 13 December 2022 | 1 January 2023 | 27 August 2023 |
| DA000.14.2 | 22 June 2017 | 22 June 2017 | 31 December 2022 |
| DA000.14.1 | 28 September 2016 | 1 October 2016 | 21 June 2017 |