

Memo

To: Valerie Haskins
From: Mony De Kerloy
Date: 28/08/2007
Re: Stamp Duty – Avoiding Additional Stamp Duty
Nominee Clause
Agency Relationship

This article has been prepared as a general information guide to real estate and settlement agents. The information contained in this guide is by no means an exhaustive explanation of the laws relating to agency and as such it should not be relied upon as legal advice. If you are at all unsure about your legal obligations in any situation you should obtain legal advice in that regard.

1. Introduction

The Office of State Revenue (“the OSR”) in revenue ruling SD36.0 reviewed its interpretation of section 74 of the *Stamp Act 1921*.

From 1 October 2007, the previously applicable Commissioner’s Practice SD 1.3 will no longer apply and the OSR will charge additional stamp duty (double in some circumstances) on contracts of sale using a “nominee” clause pursuant to Commissioner’s Practice SD 1.3. From 1 October 2007, if a party is required to execute a contract of sale for the purchase of land on behalf of another entity, the OSR will require proof that the party who executed the contract of sale did as the agent of another entity to avoid being assessed for additional stamp duty.

A buyer of land incurs stamp duty assessed at the ad valorem conveyance rate of duty when it executes a contract to purchase land. In circumstances where the party executing the contract of sale for the purchase of land differs from the entity to whom the land is transferred then, unless a stamp duty exception applies, additional stamp duty is incurred as there are effectively two dutiable transactions taking place, i.e. from the seller to the party stated in the contract and from the party stated in the contract to the transferee who ultimately receives the land.

2. Nominee Clause

To understand the implications of the OSR’s revenue ruling 36.0 it is necessary to understand the existing nominee clause provisions.

Until 30 September 2007 and in accordance with Commissioner’s Practice SD 1.3, a party can execute a contract of sale for the purchase of land on behalf of a nominee where the nominee is clearly identifiable. The nominee clause provisions give the party a choice when deciding who to transfer the land to without being assessed for additional stamp duty.

Example – Up to 30 September 2007:

A contract of sale naming the buyer as “C Koala and/or nominee (nominee identified as F Frog)” gave the buyer the choice of transferring the land to C Koala, F Frog or C Koala and F Frog without being assessed for additional stamp duty.

From 1 October 2007, the nominee clause provisions will no longer be recognised by the OSR.

Example – From 1 October 2007:

If a contract of sale naming the buyer as “C Koala and/or nominee (nominee identified as F Frog)” then the land can only be transferred to C Koala without being assessed for additional stamp duty unless an agency relationship is shown. The transfer of the land to either F Frog or C Koala and F Frog shall be assessed for additional stamp duty unless there is an agency relationship.

3. Agency

From 1 October 2007, the OSR will only allow a party to execute a contract of sale for the purchase of land for another entity and not incur additional stamp duty, where the party is executing the contract of sale as agent for that other entity. Please note that “party” or “entity” in this context can be any entity with legal capacity, including an individual or a company.

3.1 Parties involved in an agency relationship

An agency relationship comprises at least the following three parties:

- (a) Agent – 3 types:
 - (i) Special or limited: authority to perform a specific type of contract;
 - (ii) General: authority to carry out any act in the ordinary course of business; and
 - (iii) Universal: authority to do practically anything;
- (b) Principal (the Buyer to whom the land is transferred); and
- (c) Third party (the Seller).

The Principal appoints the Agent to act on its behalf and the Agent then contracts with the Third Party on behalf of the Principal.

3.2 Separate Agreements

Agency involves 2 separate agreements:

- (a) The agreement between Principal and Agent. This agreement provides the Agent with its scope of authority. The agreement does not necessarily need to be written as authority may be express or implied, however if it is implied, a question of proof from the OSR’s perspective may arise; and
- (b) The agreement between the Principal and the Third Party. This agreement is created by the Agent who is acting on behalf of the Principal contracting with the Third Party. It is essential that the agent is acting within the scope of its authority as set out below.

3.3 Liability of Agent

In terms of enforcing a contract of sale where an Agent has executed the contract of sale, the general rule is that the Agent cannot sue or be sued, although some exceptions apply.

Assuming the Agent is authorised to execute the contract of sale, there are three possible situations:

- (a) Agency disclosed and Principal identified:
Where an Agent contracts for a named Principal, the Agent is generally discharged from any obligations or liabilities under that contract;
- (b) Agency disclosed but Principal not identified:
Where an agent contracts with a Third Party and discloses in the contract that they are acting as an agent but does not disclose the identity of the Principal, the Agent is generally discharged from any obligations or liabilities under the contract. In this situation it is up to the seller to decide whether they are happy to enter into such a contract;
- (c) Agency nor Principal disclosed:
Where an Agent contracts with a Third Party on behalf of a Principal but does not disclose either that they are acting as an agent or the identity of the Principal then the Third Party generally has the choice of suing the Agent or the Principal.

3.4 Exceptions re: Liability

An Agent may not be discharged from its obligations under a contract in situations where:

- (a) the Agent contracts in its name only;
- (b) the Principal is non-existent;
- (c) the Agent agrees to be liable; or
- (d) the Agent is acting beyond its scope of authority - If an Agent represents that it has the authority of the Principal and a Third Party acts on that representation, the Agent is taken to warrant that the representation is true. If it is untrue the Agent has committed a breach of warranty and can be sued by the Third Party.

3.5 OSR: Proving Agency Relationship

In order not to be assessed for additional stamp duty where a party signs a contract of sale for the purchase of land on behalf of another entity, the OSR requires clear proof that the party is signing the contract as Agent for the other entity. The following are the different circumstances of agency and the relevant OSR requirements:

- (a) Agency disclosed and Principal identified
Where the contract of sale clearly shows the agency relationship the OSR will accept that an agency relationship exists and no additional stamp duty will be assessed. In order to sufficiently disclose the agency relationship in the contract of sale the following wording is recommended:
 - (i) If Susan Liberty is purchasing land as agent for Big Ben Pty Ltd then the contract of sale needs to be worded as follows:
“Susan Liberty as agent for Big Ben Pty Ltd”
 - (ii) If Susan Liberty is purchasing land for herself and as agent for Big Ben Pty Ltd as joint tenants then the contract of sale needs to be worded as follows:
“Susan Liberty and Susan Liberty as agent for Big Ben Pty Ltd as joint tenants.”
 - (iii) If Susan Liberty is purchasing land as agent for Big Ben Pty Ltd and Leanne Pisa as joint tenants then the contract of sale needs to be worded as follows:

“Susan Liberty as agent for Big Ben Pty Ltd and Susan Liberty as agent for Leanne Pisa as joint tenants.”

Complying with the OSR requirements in this circumstance is relatively straightforward. If it is possible to clearly state the agency relationship in the contract no further evidence of the agency relationship is required. Although it is possible to put the agency relationship in writing (i.e. Principal appoints Agent with authority to purchase land and any other limitations on the authority) it is not required by the OSR. However there are other advantages in having a written agency agreement such as certainty of appointment, scope to enter contract of sale, etc.

- (b) Agency disclosed and Principal not identified
Where the contract of sale clearly shows that an agency relationship exists but the Principal is not identified additional evidence must be produced to the OSR to show that the party executing the contract was acting as Agent for the entity to whom the land is being transferred. For evidence requirements, refer to clause 20 of the OSR Revenue Ruling 36.0.
- (c) Agency nor Principal disclosed
Where the contract of sale does not disclose the agency relationship additional evidence must be produced to the OSR to show that the party executing the contract was acting as Agent for the entity to whom the land is being transferred. For evidence requirements, refer to clause 20 of the OSR Revenue Ruling 36.0.

4. Summary

The changes made by the OSR are relatively minor but it is vital that they are understood as the consequences of not complying with the requirements are severe. Apart from the change in terminology from “nominee” to “agent” the requirements remain similar.

There are 2 major changes resulting from OSR’s revised interpretation of section 74 of the *Stamp Act 1921*. The first is the removal of the ability to include an “and/or” provision presently afforded to buyers. Following 1 October 2007, before a contract is entered into, it will be necessary to clearly identify the entity buying the land as no flexibility is afforded under the agency requirements set out in revenue ruling SD 36.0. Secondly, the change has an implication for sellers and therefore real estate agents as it will be necessary to have an understanding of the principles of the agency relationship to ensure sellers are fully aware of their legal rights and obligations when contracting with a party who is acting as the agent for another entity.