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Land Tax Act 2005

GUIDELINES ISSUED UNDER SECTION 3BB(2) OF THE LAND TAX ACT 2005

I, Tim Pallas, Treasurer, pursuant to section 3BB(3) of the **Land Tax Act 2005** publish these guidelines for the exercise of the power of exemption under sections 3B and 3BA of the **Land Tax Act 2005**.

The guidelines dated 11 August 2015 and published in the Government Gazette No. G33 on 20 August 2015 are revoked from the date this notice is gazetted.

Dated 4 January 2018

TIM PALLAS MP
Treasurer

Land Tax Act 2005

TREASURER'S GUIDELINES

Land that is owned by an absentee person is subject to the absentee owner land tax surcharge.

Under sections 3B and 3BA of the **Land Tax Act 2015** (the Act), the Treasurer may exempt:

- an absentee person, who holds an absentee controlling interest in a corporation, from being taken to hold that controlling interest; and
- an absentee beneficiary in relation to an absentee trust from being taken to be an absentee beneficiary of that trust.

The Treasurer may also delegate this decision-making power to the Commissioner of State Revenue, who in turn may sub-delegate to a member of staff of the State Revenue Office. If a delegation to the Commissioner is in force, the Treasurer cannot exercise the power to exempt a person under sections 3B(2) or 3BA(2).

Section 3BB(2) of the Act requires the Treasurer to issue guidelines for the exercise of the power of exemption under sections 3B and 3BA.

The effect of the exemption is that:

- if an exemption has been granted for all of the absentee persons who hold an absentee controlling interest, the corporation will not be an absentee corporation and therefore will not be liable to pay the absentee owner land tax surcharge. This exemption, however, will not exempt a corporation that is incorporated outside Australia from being an absentee corporation; and
- if an exemption has been granted for all of the absentee beneficiaries in relation to an absentee trust, the trust will not be an absentee trust. Therefore, the trustee of the trust will not be liable to pay the absentee owner land tax surcharge.

The exemption will continue to apply subject to there being no material changes to the circumstances that gave rise to the exercise of the discretion. All other land taxes that are liable to be paid by the corporation or trustee of the trust will remain payable.

In determining whether an exemption should be granted to an absentee person who holds an absentee controlling interest in a corporation, the decision maker must have regard to the matters specified in paragraphs (a) to (c) of section 3B(2) and any other relevant circumstances. In determining whether an exemption should be granted to an absentee beneficiary in relation to an absentee trust, the decision maker must have regard to the matters specified in paragraphs (a) to (c) of section 3BA(2) and any other relevant circumstances.

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In exercising the power of exemption, the specified matters and relevant circumstances should be read in the context that the absentee corporation or trustee of an absentee trust that is intended to be exempted:

- (i) is Australian-based;
- (ii) makes a significant contribution to the Victorian economy and community; and
- (iii) exhibits good corporate behaviour.

This exemption is not intended to apply where the absentee corporation or the trustee of the absentee trust is essentially a landlord or property investor, that is, where its business in Victoria is wholly or primarily connected with the ownership, sale or purchase of land.

The following factors will be considered in determining whether an exemption should be granted in relation to an entity.

(a) Absentee corporation

The nature and degree of ownership and control

- The greater the degree of ownership or control the absentee person has, or absentee persons have, in the corporation, the greater this factor will weigh against the grant of the exemption. For example, a corporation that is owned and controlled 100% by an absentee person will weigh more heavily against granting the exemption than a corporation that is owned and controlled 51% by an absentee person with the remaining 49% owned and controlled by Australian citizens or residents.
- Where the control and ownership in the absentee corporation is held by one absentee person, or collectively by a number of closely related absentee persons who act together, this will weigh more heavily against granting the exemption than if the control and ownership is held by a number of unrelated absentee persons who do not act together.

Practical influence to determine, directly or indirectly, the outcome of decisions of the corporation

- The greater the absentee person's role in the management and operation of the corporation's activities, the greater this factor will weigh against granting the exemption.
- The greater the absentee person's level of practical influence over the outcome of decisions about the corporation's financial and operating policies, the greater this factor will weigh against granting the exemption.
- Practical influence includes a dormant practical influence, such as, a veto power at general meetings or board meetings.

The effect of the practice or behaviour of the absentee person on the financial and operating decisions of the corporation

- The greater the frequency and the impact of the absentee person's involvement in determining the corporation's financial and operating policies, the greater this factor will weigh against granting the exemption.

An absentee corporation is less likely to be granted an exemption if it does not have any management staff based in Australia.

(b) Absentee trust

The nature and degree of the absentee beneficiary's interest in the trust

- The greater the degree of interest the absentee beneficiary has, or the absentee beneficiaries have, in the trust, the greater this factor will weigh against granting the exemption. For example, a fixed trust in which an absentee person has a beneficial interest of 100% will weigh more heavily against granting the exemption than a fixed trust in which an absentee person has a beneficial interest of 51% with the remaining 49% held by Australian citizens or residents.

- In respect of a discretionary trust, it is not possible to quantify a beneficiary's interest in the trust because a beneficiary does not have an entitlement to the income or property of the trust until the trustee exercises its discretion to distribute income or property to a particular beneficiary. When considering this factor in relation to an absentee trust that is a discretionary trust:
 - The greater the frequency or proportion of distributions made to the absentee beneficiary, the greater this factor will weigh against granting the exemption.
 - The closer the relationship between the specified absentee beneficiary and the trustee or the appointer of the trust, the greater this factor will weigh against granting the exemption. For example, where the trustee of the trust is a company in which the specified absentee beneficiary is the sole director and shareholder, the greater this factor will weigh against granting the exemption.

Practical influence that the absentee beneficiary can exert and the rights the absentee beneficiary can enforce to determine or influence, directly or indirectly, the outcome of decisions about the trustee's administration and conduct of the trust

- The greater the absentee beneficiary's role in the management and operation of the trust's activities, the greater this factor will weigh against granting the exemption.
- The greater the absentee beneficiary's level of practical influence over the outcome of decisions about the administration and conduct of the trust, the greater this factor will weigh against granting the exemption.
- Practical influence includes a dormant practical influence, such as a veto power under the terms of the trust deed.

The practice or behaviour of the absentee beneficiary affecting the trustee's administration and conduct of the trust

- The greater the frequency and the impact of the absentee beneficiary's involvement in the trustee's administration and conduct of the trust, the greater this factor will weigh against granting the exemption.

An absentee trust is less likely to be granted an exemption if the management staff of the commercial operation carried on by the trustee of that trust in Australia are not based in Australia.

Any other relevant circumstances

Consideration may also be given to the following relevant circumstances.

- **Significant contribution to the Victorian economy and community**
 - An absentee corporation or trustee of an absentee trust will be considered to make a significant contribution to the economy and community where it conducts a commercial operation in Australia and its commercial activities make a significant contribution to the Victorian economy and community by engaging local labour and utilising local materials and services.
 - o The greater the extent of commercial activities of the absentee corporation or trustee of an absentee trust in Victoria, the greater this factor will weigh in favour of the granting of the exemption.
 - o The greater the number of local workers engaged, the greater this factor will weigh in favour of the granting of the exemption.
 - o The greater the amount expended on local resources, such as materials and services, the greater this factor will weigh in favour of the granting of the exemption.

- In considering the contribution of the corporation or trust to the economy and community:
 - o The size of the commercial activities will be considered relative to the absentee owner's landholdings. For example, where an absentee corporation owns a substantial amount of land (in terms of size or value of landholding) but carries on a modest commercial activity, this factor will weigh against granting the exemption.
 - o The commercial activities of the corporate group that is 100% owned by the parent entity may be taken into account. For example, where the corporation (in which the absentee person holds an interest) that owns the land is a wholly owned subsidiary of the parent entity, and another related wholly owned subsidiary conducts a significant commercial operation on or from the land, the activities of the related wholly owned subsidiary may be taken into account in determining whether the landholding entity is making a significant contribution to the economy and community.
- An absentee corporation or trustee of an absentee trust that is essentially a landlord or property investor (that is, where its business in Victoria is wholly or primarily connected with the ownership, sale or purchase of land) is not intended to be granted the exemption.

- **Good corporate behaviour**

The absentee corporation or the trustee of an absentee trust will be regarded as exhibiting good corporate behaviour if it has complied with Australian laws, including:

- any Foreign Investment Review Board requirements in relation to its landholdings;
- Australian laws relating to the governance of the entity; and
- Victoria's taxation laws. In this regard;
 - o an absentee corporation or trustee of an absentee trust with a significant outstanding and undisputed tax liability is unlikely to be granted the exemption; and
 - o where an absentee corporation or trustee of an absentee trust has a history of underpaying its Victorian tax liabilities, this will weigh against the granting of the exemption.

Consideration may also be given to the corporate behaviour of other entities in which the directors and shareholders of the absentee corporation have an interest.

Duties Act 2000GUIDELINES ISSUED UNDER SECTION 3E OF THE **DUTIES ACT 2000**

I, Tim Pallas, Treasurer, pursuant to section 3E of the **Duties Act 2000** publish these guidelines for the exercise of the power of exempting persons from holding controlling interests in foreign corporations or substantial interests in trust estates of foreign trusts.

The guidelines dated 11 August 2015 and published in the Government Gazette No. G 33 on 20 August 2015 are revoked from the date this notice is gazetted.

Dated 4 January 2018

TIM PALLAS MP
Treasurer

Duties Act 2000

TREASURER'S GUIDELINES

A foreign purchaser is liable to pay the foreign purchaser additional duty on the purchase or acquisition of residential property in Victoria.

Under section 3E(2) of the **Duties Act 2000** (the Act), the Treasurer may exempt a person who has a controlling interest in a foreign corporation, or a substantial interest in the capital of a trust estate of a foreign trust, from being taken to hold that interest.

The Treasurer may also delegate this decision-making power to the Commissioner of State Revenue, who in turn may sub-delegate to a member of staff of the State Revenue Office. If a delegation to the Commissioner is in force, the Treasurer cannot exercise the power to exempt a person under section 3E(2).

Section 3E(4) of the Act requires the Treasurer to issue guidelines for the exercise of the power of exemption under subsection (2).

A person who has an exemption is taken not to have a controlling interest in the corporation or a substantial interest in the trust estate. The effect of this exemption is that the corporation or trust will not be a foreign corporation or foreign trust, and therefore will not be liable for the foreign purchaser additional duty. All other duties that are liable to be paid will remain payable. This exemption, however, will not exempt a corporation that is incorporated outside Australia from being a foreign corporation.

In determining whether an exemption should be granted under section 3E(2) of the Act, the decision maker must have regard to the matters specified in sections 3E(2)(a)(i) to (iii) and 3E(2)(b)(i) to (iii) of the Act and any other relevant circumstances.

In exercising the power of exemption, the specified matters and relevant circumstances should be read in the context that the foreign corporations and foreign trusts that are intended to be exempt are those corporations and trusts:

- (i) that are Australian-based;
- (ii) whose commercial activities significantly add to the supply of housing stock in Victoria; and
- (iii) that exhibit good corporate behaviour.

The following factors will be considered in determining whether an exemption should be granted in relation to an entity.

(a) Foreign corporation**The nature and degree of ownership and control the foreign person has in the corporation**

- The greater the degree of ownership or control the foreign person has in the corporation, the greater this factor will weigh against granting the exemption. For example, a corporation that is owned and controlled 100% by a foreign person will weigh more heavily against granting the exemption than a corporation that is owned and controlled 51% by a foreign person with the remaining 49% owned and controlled by Australian citizens.

Practical influence the foreign person can exert and the rights the foreign person can enforce to determine, directly or indirectly, the outcome of decisions about the corporation's financial and operating policies

- The greater the foreign person's role in the management and operation of the corporation's activities, the greater this factor will weigh against granting the exemption.
- The greater the foreign person's level of practical influence over the outcome of decisions about the corporation's financial and operating policies, the greater this factor will weigh against granting the exemption.
- Practical influence includes a dormant practical influence, such as, a veto power at general meetings or board meetings.

The practice or behaviour of the foreign person affecting the corporation's financial and operating policies

- The greater the frequency and the impact of the foreign person's involvement in determining the corporation's financial and operating policies, the greater this factor will weigh against granting the exemption.

A foreign corporation that does not have management staff based in Australia and the foreign person, who has the controlling interest, who makes the major decisions relating to the development or redevelopment of the property are less likely to be granted an exemption.

(b) Foreign trust

The nature and degree of the person's beneficial interest in the capital of the trust estate

- The greater the degree of beneficial interest the foreign person has in the trust estate, the greater this factor will weigh against granting the exemption. For example, a trust in which a foreign person has a beneficial interest of 100% will weigh more heavily against granting the exemption than a trust in which a foreign person has a beneficial interest of 51% with the remaining 49% held by Australian citizens.
- In respect of a discretionary trust:
 - where the principal or primary beneficiary of the trust is a foreign person, this factor will weigh more heavily against granting the exemption than where the principal or primary beneficiary or beneficiaries are Australian citizens or permanent residents or New Zealand citizens who are the holder of a special category visa.
 - Where a trust is a foreign trust because the class of general beneficiaries includes a foreign person, who has never received any distributions from the trust and is unlikely to receive any distribution, this factor will weigh in favour of granting the exemption.
 - The closer the relationship between the foreign beneficiary and the trustee or the appointer of the trust, the greater this factor will weigh against granting the exemption. For example, where the trustee of the trust is a company in which the foreign beneficiary is the sole director and shareholder, the greater this factor will weigh against granting the exemption.

Practical influence that the foreign person can exert and the rights the foreign person can enforce to determine, directly or indirectly, the outcome of decisions about the trustee's administration and conduct of the trust

- The greater the foreign person's role in the management and operation of the trust's activities, the greater this factor will weigh against granting the exemption.
- The greater the foreign person's level of practical influence over the outcome of decisions about the administration and conduct of the trust, the greater this factor will weigh against granting the exemption.

- Practical influence includes a dormant practical influence, such as a veto power under the terms of the trust deed.

The practice or behaviour of the foreign person affecting the trustee's administration and conduct of the trust

- The greater the frequency and the impact of the foreign person's involvement in the trustee's administration and conduct of the trust, the greater this factor will weigh against granting the exemption.

A foreign trust that does not have management staff based in Australia and the foreign person who has the substantial interest makes the major decision decisions relating to the development or redevelopment of the property are less likely to be granted an exemption.

Any other relevant circumstances

Consideration may also be given to the following relevant circumstances.

- **Significantly adding to the supply of housing stock in Victoria**

The commercial activities of the corporation or trust must significantly add to the supply of housing stock in Victoria, either through new developments or through redevelopment, where such development is primarily residential. This includes purchasing existing property or properties for redevelopment, refurbishment or conversion for sale or re-sale where the primary use of the redeveloped, refurbished or converted property is for residential purposes.

- The greater the number of residential premises that the development or redevelopment adds to the Victorian housing stock, the greater this factor will weigh in favour of granting the exemption.
- A development or redevelopment that adds 50 or more residential premises to the Victorian housing stock will be considered to be a significant addition to the supply of housing stock.
- A corporation or trust will be regarded as significantly adding to the Victorian housing stock if the developments or redevelopments add 50 residential premises within a 12-month period that includes the transaction in question. Future transactions may be taken into account if there is a sufficient degree of certainty that those transactions will result in an increase to the supply of Victorian housing stock. For example, a small foreign developer entered into four separate transactions to purchase property as follows; January 2018 to build 15 residential premises, May 2018 to build 20 residential premises, September 2018 to build 15 residential premises and December 2018 to build 10 residential premises. An exemption may be granted in relation to the first two transactions, if the foreign developer provides a sufficient degree of certainty that the future transactions within a 12 month period will add at least 50 residential premises. Averaging for up to five years may be permitted.
- A development or redevelopment that adds less than 50 residential premises to a region may be regarded as a significant addition to the supply of Victorian housing stock having regard to:
 - o the nature of the development;
 - o the contribution made to the housing stock and infrastructure by the development or redevelopment in the context of the population size and demographics and activity in that region;
 - o the economic and social impacts of the development or redevelopment for that region; and
 - o whether, in the absence of the development or redevelopment by the foreign entity, such outcomes for the region would otherwise be unlikely.

- In considering whether the corporation or trust is significantly adding to the housing stock in Victoria, the activities of the corporate group that is 100% owned by the parent entity may be taken into account. For example, where the foreign corporation that owns the land is wholly owned by the parent entity, and another wholly owned subsidiary of the parent entity conducts the development or redevelopment of residential premises on the land, the activities of the other wholly owned subsidiary will be taken into account in determining whether the landholding entity is significantly adding to the Victorian housing stock.
- Where a foreign person acquires shares or units in a landholder that is undertaking a residential development rather than acquiring the residential development directly, the development activities of the landholder/developer will not necessarily be taken into account in determining whether the foreign person is significantly adding to the supply of housing stock in Victoria. Circumstances where those activities may be taken into account include where the foreign person provides funding for the development, either through consideration paid for:
 - o the issue of new shares/units in the landholder/developer to the foreign person; or
 - o under an agreement that requires all security holders to provide funding for the development based on the number of shares/units held.
- The development or redevelopment must result in a net increase in housing stock. For example the demolition of fifty residential premises and building another fifty is not increasing the housing supply.
- A transaction relating to property that is not used for the purposes of adding to the supply of housing stock will not be eligible for the exemption notwithstanding that the purchaser carries out other activities that do add to the supply of Victorian housing stock.
- **Impact on the economy and community in Victoria**
 - The greater the number of Australian citizens or permanent residents employed or engaged locally by the corporation or trust in the residential development or redevelopment, the greater this factor will weigh in favour of granting the exemption.
 - The greater the extent that the corporation or trust contracts for services and materials of Australian building contractors and suppliers, the greater this factor will weigh in favour of granting the exemption.
- **Good corporate behaviour**

A foreign corporation or trustee of a foreign trust will be regarded to exhibit good corporate behaviour if it has complied with Australian laws, including:

 - any Foreign Investment Review Board requirements in relation to the acquisition of the residential property;
 - Australian laws relating to the governance of the entity; and
 - Victoria's taxation laws. A foreign entity with a significant outstanding and undisputed tax liability is less likely to be granted the exemption. Where a foreign entity has a history of underpaying its Victorian tax liabilities, this will weigh against the granting of the exemption.

Consideration may also be given to the corporate character of other entities in which the directors and shareholders of the foreign corporation have an interest.

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