

## Revenue Circular DAA015 - *Duties Act 1999*

### Commercial Leases: Duty Payable on Lease Premiums

#### CIRCULAR HISTORY

| Circular number | Issued date  | Dates of effect |    | Status  |
|-----------------|--------------|-----------------|----|---------|
|                 |              | From            | To |         |
| DAA015          | 18 July 2014 | 29 April 2014   | -  | Current |

#### PREAMBLE

- Chapter 2 of the *Duties Act 1999* (the Duties Act) imposes duty on certain transactions, including a transfer of dutiable property, an agreement for the sale or transfer of dutiable property and the grant of a Crown lease. Dutiable property is defined as, among other things, land in the ACT, a Crown lease, a land use entitlement and an interest in any such dutiable property.
- Duty on short-term franchise agreements was abolished from 30 June 2006 and on short-term commercial leases from 30 June 2009 (short-term being less than 30 years). Dutiable property continued to include long-term commercial lease and franchise arrangements (leases or franchises with a term of 30 years or more). A term of 30 years or more was considered a de facto transfer of land and the provisions were intended as an anti-avoidance measure.
- Including these long-term arrangements as dutiable property resulted in conveyance duty being levied on genuine commercial lease arrangements, where no avoidance intention was present. The provisions were found to negatively impact on the ACT's current and potential commercial leasing agreements.
- Long-term lease duty was removed as dutiable property from section 10 of the Duties Act, and substituted with provisions that levy duty on a premium paid (above market rent) for the lease (effective 29 April 2014). Duty on long-term franchise agreements has been fully abolished.
- This Circular clarifies the duty payable for commercial leases where a premium is paid or agreed to be paid.

#### CIRCULAR

##### Duty on Lease Premiums

- Section 10 of the Duties Act imposes duty on a commercial lease with premium. The payment of a premium on the grant or transfer of a commercial lease indicates that a de facto transfer of land may be occurring as part of the leasing arrangement.
- A commercial lease is a lease that is used for commercial purposes which does not include residential purposes, or for the purposes of primary production (that is, rural land). Mixed use leases will have the duty liability imposed on the percentage of the lease that is used for a commercial purpose. Commercial use includes retail, business use or industrial use (for example, supermarkets, department stores and commercial accommodation).
- The existence of a premium for a commercial lease may not necessarily represent an avoidance of conveyance duty. In certain circumstances, the payment of a premium will represent part of a reasonable commercial arrangement (for example, in a competitive market). It is not the intention to levy duty in such instances.

9. Section 6A of the Duties Act provides that a *commercial lease with premium* is a commercial lease in relation to which there is a premium that is more than the amount determined by the Commissioner for ACT Revenue (the Commissioner). The determination of this threshold (see paragraph 15) ensures that leases where a minor premium is paid, due to factors such as market competition, are not liable for duty; only a lease with a substantial premium paid will become liable to duty.
10. A lease with a large premium paid is a key characteristic of a leasing arrangement intending to avoid conveyance duty, for what is essentially a transfer of dutiable property. By levying duty on such a premium, these provisions capture 'back door' transfers as dutiable.
11. If there is a duty liability on a commercial lease with premium, the lessee will be liable to pay duty on the entire premium component, which will be levied at the conveyance duty rate as at the date the lease was entered into.
12. The total premium amount will be dutiable irrespective of whether it is paid up front by the lessee to the lessor, or paid over the term of the leasing agreement.

### **Premium**

13. Section 6 of the Duties Act defines a premium as any consideration paid, or agreed to paid in relation to a commercial lease, other than rent reserved. The consideration includes both monetary and the value of non-monetary consideration.
14. Rent reserved includes the rent paid or payable during the term of the lease that is market rent (see below), as well as any reasonable amount paid or payable for the right to use the land under the lease.
15. A commercial lease with premium will become liable for duty on the entire premium component once the consideration paid exceeds 25 per cent above market rent over the term of the lease.
16. The value of the premium is determined after all reasonable consideration paid (or agreed to be paid) for the lease by the lessee has been deducted from the total consideration (for example, reasonable rent reserved payments). If there is remaining consideration after reasonable deductions (for example, amounts for outgoings), in excess of 25 per cent of the market rent over the term of the lease, this entire remaining amount is considered a premium amount, and will be liable to duty at conveyance rates.
17. When duty is liable on a commercial lease with premium, the entire premium component will be liable to duty, not only the consideration that exceeds the determined threshold amount. That is, the dutiable value of a commercial lease with premium is the total amount of the premium.

### **What is market rent?**

18. Market rent is defined by the Australian Property Institute as:

'The estimated amount for which a property, or space within a property, should lease on the date of the valuation between a willing lessor and a willing lessee on appropriate lease terms in an arm's-length transaction, after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion'. (*Spencer v Commonwealth of Australia* [1907] HCA 82)

19. The Commissioner will consider the above definition when determining the existence of a commercial lease with premium. Related or associated parties may not act severally and independently in forming an agreement in the same manner as arm's length parties would normally do.
20. Lease agreements that are entered by parties not acting at arm's length and involving a premium paid or payable for the lease (which is either monetary or non-monetary) should always be submitted to the Commissioner for ACT Revenue for consideration.
21. In determining the market rent payable on a commercial lease, the Commissioner may require the taxpayer to provide a declaration of the market rent payable for the lease, issued by a competent valuer. If no evidence is provided to substantiate the market rent of the lease, the Commissioner may request a valuation to determine the market rent. The Commissioner may choose to recover the cost of obtaining a valuation from the taxpayer (section 251A of the Duties Act).

### **Rent Reserved**

22. In determining whether a premium has been paid for a commercial lease, the following factors will be considered. The listing below shows payments that can be deducted from the total consideration paid, or agreed to be paid for the lease. The remaining figure after all reasonable rent reserved payments have been removed will assist in determining any premium paid.

Examples of payments for the right to use the land include (but are not limited to):

- |   |                             |
|---|-----------------------------|
| - market rent   | - fit-out costs             |
| - maintenance and repairs   | - security                  |
| - services and utilities  | - land rent                 |
| - legal costs payable by the lessee on behalf of the lessor in relation to the grant of the lease | - gardening and landscaping |
| - insurance premiums  | - lifts                     |
| - car park contributions  | - administration            |
|   | - turnover rent             |
|   | - rates                     |

This list is not exhaustive and is intended to provide guidance of the payments that may be taken into account when determining consideration that reasonably forms rent reserved.

23. Section 20 (3) of the Duties Act provides for determining the dutiable value for a mixed use lease. As the dutiable amount for the grant or transfer of a commercial lease is the amount of the premium, for a mixed use lease the dutiable value is the premium amount with reference to the percentage of the land the subject of the lease that is used for commercial purpose (the dutiable value multiplied by the percentage of the lease that is commercial).

### **Assessment Procedure**

24. Any commercial lease with a premium in excess of 25 per cent of the market rent over the term of the lease must be lodged with the Commissioner for assessment of duty. In addition, if the parties are not at arm's length and any premium is paid for the lease, documents regarding the transaction should be lodged for review to determine whether those documents are dutiable.

25. To enable the assessment to occur, the lessee or their representative must present the lease agreement and any associated documents to the ACT Revenue Office. This includes any documentation or arrangement separate to the lease agreement that is applicable to the payment (or agreement for payment) of a premium for the lease.
26. The determination of the dutiable value of a commercial lease with premium will be considered on the basis of all the relevant facts and circumstances of the particular case.

**Criminal Penalties**

27. Giving false or misleading information is a serious offence. For details of the serious criminal offences of making, giving or producing false or misleading statements, information or documents: see the *Criminal Code 2002*.

SIGNED

Brett Monger  
 Commissioner for ACT Revenue  
 18 July 2014

**Contact the ACT Revenue Office**

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