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Commercial Law e-alert

New tax traps for businesses operating in Victoria

Recent legislative anti-avoidance measures have the potential to unexpectedly catch a wide range of commercial transactions to make them dutiable at very high rates of duty.

The *Victorian Duties Amendment Act 2008* has only just come into force with retrospective effect from 21 November 2008. Transactions entered into as a result of development or other agreements made before that date are subject to the new tax rules unless the transaction is only a renewal of a lease entered into before that date.

Sales of businesses

Sales of businesses were never a direct head of liability for duty. However, sales of businesses that included a sale of freehold land were indirectly caught by the legislation and duty was assessed on the consideration other than goodwill, stock-in-trade and primary production. Sales and transfers of businesses, franchise agreements and other transactions, such as public private partnerships, are now directly dutiable if the transaction includes an assignment of lease for consideration, or the grant of a lease for consideration other than rent and outgoings. This is despite the explanation in the legislative explanatory memorandum and the views expressed by the State Revenue Office.

The rate of duty is the same rate as for a transfer of land. That rate is 5.5% of the higher of the consideration for the transaction and the unencumbered freehold value of the land (where the land exceeds \$960,000). Lesser rates apply for lower valued land. The lease term, may be for as little as one day.

A sale of a local milk bar business for \$1000, with only 3 months remaining on a lease, will now cost the purchaser an additional \$52,670 in duty if the landlord's shop is worth \$960,000.

Transfer of shares in certain companies and units in trusts

Transfers of shares in private companies, private unit trust schemes and wholesale unit trust schemes are now dutiable if the company or scheme falls within the definition of being "land rich". A company or scheme is land rich if its unencumbered land holdings in Victoria exceed \$1M or more, or if all its worldwide land holdings comprise 60% or more of all its property. A land holder can be deemed to be entitled to the land through a linked entity.

The rate of duty is the same as that for a transfer of land.

Disclaimer

This is only a very brief summary of the legislation and only seeks to draw attention to some of the main implications of the legislation. There is considerable detail and other issues which are not included in this summary. Please see the Hunt & Hunt e-alert of 7 July 2009 for more detail on some of the issues affecting lease transactions.

Those considering a sale or purchase of a business, franchise agreement or other transactions involving leases, sales or purchases of shares or units in a company or scheme that owns land or is a tenant of land in Victoria; should obtain detailed legal advice on how the transaction may be affected by these amendments to the *Duties Act*.

For further information please contact:

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