MT 2014 - ACT Stamp Duty: whether a performance guarantee is a loan security subject to duty

TAXATION RULING NO. MT. 2014

A.C.T. STAMP DUTY : WHETHER A PERFORMANCE GUARANTEE IS A LOAN SECURITY SUBJECT TO DUTY

F.O.I. EMBARGO: May be released

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1077972	ACT STAMP DUTY LOAN SECURITIES PERFORMANCE GUARANTEE	AUSTRALIAN CAPITAL TERRITORY TAXATION (ADMINISTRATION) ACT 1969 4(1) 58H

PREAMBLE ACT stamp duty is imposed on loan security instruments that either subject the whole or part of property in the ACT to a security or are executed in the ACT by the borrower. The question has been asked whether a performance guarantee given by a bank is a loan security liable to ACT stamp duty.

2. The term "loan security" is defined in sub-section 4(1) of the Australian Capital Territory Taxation (Administration) Act 1969 (the Act) to mean -

. a mortgage within the meaning of Division 12 of Part III of the Act (the term "mortgage" is defined in Division 12 (section 58H) to mean, broadly, a security by way of mortgage or charge for the payment of a particular sum of money already advanced or for the repayment of money yet to be advanced (paragraphs (a) and (b) of the definition). Paragraphs (c) to (g) of the definition specifically include within the meaning of the term a range of other instruments such as a security by way of mortgage or charge in consideration of the transfer of an interest in real or personal property);

. a corporate debenture (this term is itself defined in sub-section 4(1) of the Act to mean a debenture of a body corporate, including debenture stock, a bond, a note and any other security of a body corporate, whether or not it constitutes a charge on the body corporate's assets); or

. a bond, or a covenant, for securing a loan made or to be made.

FACTS 3. On application by a customer, a bank may provide a third party with an instrument guaranteeing that, on demand, the bank will pay to the third party a sum, or sums, of money not exceeding in total a specified amount. Typically, such a guarantee may be accepted by the third party as a performance guarantee - on the basis that, if the bank's customer does not perform work for the third party as agreed, payment of the sum guaranteed will be demanded from the bank. By way of example, a builder may enter into a contract for the construction of a building for a client who requires the builder to make a deposit of 10% of the contract price to ensure that the work is completed as agreed. The client may, however, agree to accept a guarantee from the builder's bank in lieu of the deposit. In this event, the bank may provide the client with the performance guarantee, after obtaining from the builder a mortgage (or other security) to secure the bank's right to recoup from the builder the amount of any payments the bank may be required to make under the guarantee.

RULING 4. A performance guarantee as described in paragraph 3 is an unconditional undertaking to pay a sum of money on demand. It is not a loan security within the meaning of that term in sub-section 4(1) of the Act. Specifically, the performance guarantee is not -

- a mortgage, as defined in section 58H of the Act, because it is not a security for the payment or repayment of a debt or an instrument within the range of instruments specified in paragraphs (c) to (g) of the definition;

- a corporate debenture, as defined in sub-section 4(1) of the Act, because it does not acknowledge or create an existing debt or make provision for the repayment of a loan to be made in the future; or

- a bond or covenant for securing an existing or future loan because it does not secure any loan.

5. While a performance guarantee is not a loan security for ACT stamp duty purposes, a mortgage obtained by a bank for the recovery of payments made under a guarantee would be a loan security.

COMMISSIONER OF TAXATION
29 April 1986

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