MT 2015 - ACT Stamp Duty: mortgage securing a contingent liability

TAXATION RULING NO. MT 2015

A.C.T. STAMP DUTY : MORTGAGE SECURING A CONTINGENT LIABILITY

F.O.I. EMBARGO: May be released

REF H.O. REF: 85/9274-8 DATE OF EFFECT: Immediate

B.O. REF: ACT 011/A90 DATE ORIG. MEMO ISSUED: 31 January 1986

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1078260	ACT STAMP DUTY LOAN SECURITIES CONTINGENT LIABILITY	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 mortgage that secures a contingent liability is subject to ACT stamp duty when it is executed or when the contingency occurs. A contingent liability would arise, for example, where a bank extends to a customer a credit facility that may or may not be used. A contingent liability would also arise where a bank provides a performance guarantee as described in Taxation Ruling No. MT 2014.

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, among other things, a mortgage within the meaning of Division 12 of Part III of the Act. The term "mortgage" is, in turn, defined in Division 12 (section 58H) to include "a security by way of mortgage or charge ... for the repayment of money to be thereafter lent, advanced, or paid ... ".

3. In Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps [1981] VR 35, the Supreme Court of Victoria (Tadgell J.) considered the application of identical words in the definition of "mortgage" in the Stamps Act 1958 of Victoria. It was held that -

- a security which envisages a contingent or prospective payment by the grantee to a third party provides for the "repayment" of money even though the security does not confer on the grantee a right to sue the grantor for debt; and

- a contingent or prospective payment by a surety can be described as money to be "lent, advanced or paid" after a security by way of mortgage has been given for its repayment.

RULING 4. A mortgage securing a contingent liability is a loan security for ACT stamp duty purposes. If such a mortgage is over the whole or part of property in the ACT or is executed in the ACT by the mortgagor, the mortgage is subject to ACT duty when executed. Amounts which are contingently owed are to be taken into account in calculating the amount of duty payable.

COMMISSIONER OF TAXATION
26 May 1986