

# Department of Treasury and Finance

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Dear Francesca

### **Foreign Investor Land Tax Surcharge - Discretionary trusts**

Thank you for email of 6 October 2022 attaching a submission from the Property and Commercial Law Committee (the Committee) of the Law Society of Tasmania (the LST) in relation to the Foreign Investor Land Tax Surcharge (FILTS) provisions from the *Land Tax Act 2000* (the Act). In particular, the Committee's enquiries relate to the application of the FILTS provisions to land held in discretionary trusts.

It is convenient to first address the application of the FILTS legislation to the three examples provided in the Committee's submission. For the purposes of this discussion, a reference to a foreign discretionary trust can be assumed to be a reference to a discretionary trust that has foreign discretionary objects/beneficiaries who would be taken, by virtue of section 4B(3) of the *Duties Act 2001*<sup>1</sup>, to have a beneficial interest in 50 per cent or more of the capital of the trust.

#### **Example 1**

In the first example the trustee of a foreign discretionary trust acquired land in Tasmania prior to 1 July 2018 (prior to the introduction of the Foreign Investor Duty Surcharge (FIDS) and FILTS). No land has been acquired on behalf of the trust since that time. The land held for the trust is otherwise land capable of attracting FILTS (residential type land with a general land tax classification).

Based on the information provided, FILTS would not be payable on the land held for the trust as at 1 July 2022 (or subsequent financial years all things remaining the same). In that regard, the trustee did not acquire the land on or after 1 July 2022 (section 16C(1)(b)(i) of the Act), and the trust did not become a foreign trust (assuming the trust was a foreign trust since 2018) on or after 1 July 2022 (section 16C(1)(b)(ii) of the Act).

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<sup>1</sup> Section 16A of the Land Tax Act derives the meaning of "foreign trust" from the *Duties Act 2001*.

**Example 2**

Under example two, the trustee of a foreign trust acquired land in Tasmania prior to 1 July 2022 (prior to the introduction of FILTS but after the introduction of FIDS). FIDS is paid and the trust deed is not amended to exclude foreign beneficiaries from having a 50 per cent or more interest in trust capital (i.e. the trust remains a foreign trust). The land held for the trust is residential type land with a general land tax classification.

As with example one, FILTS would not be payable on the land as at 1 July 2022 (or subsequent financial years all things remaining the same) on the basis that the trustee did not acquire the land on or after 1 July 2022 (section 16C(1)(b)(i) of the Act), and the trust did not become a foreign trust on or after 1 July 2022 (section 16C(1)(b)(ii) of the Act).

**Example 3**

In this example a trustee of a foreign trust acquired a parcel land prior to 1 July 2022 (the First Property) and acquired another parcel of land on or after 1 July 2022 (the Second Property). All land held by the trust is understood to be residential type land with a general land tax classification.

In the given circumstances, FILTS would *not* be chargeable on the First Property, because the trustee acquired the interest in that land prior to 1 July 2022 (section 16C(1)(b)(i)), and the trust did not become a foreign trust on or after 1 July 2022 (section 16C(1)(b)(ii) of the Act). FILTS *would* be payable in relation to the Second Property because that property was acquired on or after 1 July 2022 (section 16C(1)(b)(i)).

**General discussion**

As may be evident from the answers provided for the examples above, the effect of section 16C(1)(b) of the Act is that land acquired by the trustee of an existing foreign trust prior to 1 July 2022 is not subject to FILTS. Accordingly, land acquired prior to 1 July 2022 is effectively grandfathered from FILTS under section 16C(1)(b)(i), unless 16C(1)(b)(ii) applies (that is, unless the trust becomes foreign on or after 1 July 2022), in which case the land held for the trust and which was acquired at any time, pre or post 1 July 2022 (assuming it is residential type land with a general land tax classification) would be subject to FILTS.

In regard to the above, the general scheme of FILTS is restricted to land acquired on or after the commencement of the FILTS provisions on 1 July 2022. Land is mainly acquired via a direct transfer from one party to another with the legal ownership on title reflecting the change in ownership. However, an interest in land may also be obtained indirectly, for example by way of acquisition of shares in a land-owning company, or the acquisition of units in a land-owning trust. In that regard, the landholder provisions under the Duties Act operates to apply duty to in-direct acquisitions of land so that duty is imposed in a comparable manner as had the underlying land been directly acquired.

In a similar sense, section 16C(1)(b)(ii) of the Act might be seen as treating, for FILTS purposes, the acquisition of a land-owning company or trust on or after 1 July 2022 by a foreign person/s in a similar manner as had the land owned by the company or trust been directly acquired by that foreign person. That is, if a company or trust becomes foreign on or after 1 July 2022 (for example because that company or trust is acquired by a foreign person), then the land owned by that company or trust will become subject to FILTS in a way analogous to the company or trust having acquired the land on or after 1 July 2022 (assuming it is residential type land with a general land tax classification).

For example, if 50 per cent or more of the shares in a land-owning company are acquired by foreign persons on or after 1 July 2022 (such that the company becomes a foreign company), then FILTS would be applied to any relevant land owned by the company from the next 1 July, regardless of when that land was acquired (assuming it is residential type land with a general land tax classification).

This would also be the case if a discretionary trust became foreign on or after 1 July 2022. However, section 16E of the Act contains specific provisions allowing for the reassessment of FILTS for discretionary trusts if the trust deed is amended (and as a result of the amendment to the trust deed, the trust is no longer a foreign trust) no later than 6 months after the date on which the notice of assessment which contains FILTS has been issued to the trustee of the trust. See the example below.

#### **Example 4**

A discretionary trust acquires land prior to 1 July 2022 (residential type land with a general land tax classification). On 1 July 2022 and 1 July 2023, the trust is considered non-foreign because the trust has no foreign beneficiaries. FILTS is not payable for the 2022-23 or 2023-24 financial years because the trust is non-foreign.

In January 2024, foreign beneficiaries become eligible for capital distributions from the trust (for the purposes of the example additional beneficiaries were added). As a result, foreign beneficiaries became eligible for a distribution of 50 per cent or more of the capital of the trust, and the trust therefore became foreign for the purposes of FILTS. As at 1 July 2024 the land held by the trust would be subject to FILTS (assuming it is residential type land with a general land tax classification) on the basis that the land is owned by a person who became a foreign person on or after 1 July 2022 (section 16C(1)(b)(ii) of the Act).

Continuing the example, on 1 October 2024 the Commissioner issues a Notice of Assessment to the trustee for the 2024-25 financial year for land tax plus FILTS.

On 1 November 2024 the trustee of the trust makes an amendment to the trust deed to the effect that no distribution of trust capital can be distributed to foreign persons. On that basis the trust would no longer meet the definition of a foreign trust.

In accordance with section 16E of the Act, the discretionary trust, having been amended within 6 months of the Notice of Assessment so that the trust was no longer foreign, the trustee would be eligible to make an application to the Commissioner to have the FILTS reassessed for the 2024-25 financial year, and the Commissioner could reassess the land as not being subject to FILTS and make a refund of the FILTS component of land tax, if it had been paid.

#### **Concluding comments**

One view raised in the Committee's submission related to whether the operation of section 16C(1)(b)(ii) means that all existing discretionary trusts "became" foreign trusts by enacting the legislation. I do not interpret the provision to have that effect.

A discretionary trust that would meet the definition of foreign trust prior to 1 July 2022 will not be considered a person who "*became a foreign person*" for the purposes of section 16C(1)(b)(ii) of the Act by virtue alone of the enactment of the FILTS provisions. In that regard, if the intended operation of section 16C(1)(b)(ii) was to ensure that all discretionary trusts became foreign trusts by enacting the legislation, then it would seem that end could have been achieved more effectively by *not* including section 16C(1)(b)(ii) to begin with (the requirements under section 16(1)(b) would be

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<sup>2</sup> By virtue of foreign objects/beneficiaries becoming entitled to 50 per cent or more of the capital of the trust.

reduced to one or more of the owners being foreign persons, and the land having been acquired on or after 1 July 2022).

Based on the above, and on the plain reading of the provisions, I am satisfied that the application of section 16C(1)(b)(ii) is limited to circumstances where a non-foreign person (other than a natural person) becomes a foreign person on or after 1 July 2022.

On that basis, there is no requirement for a discretionary trust which was foreign immediately prior to 1 July 2022 to have its trust deed amended so as to avoid FILTS in respect to land acquired prior to 1 July 2022. However, land acquired by that trust on or after 1 July 2022 (or further interests in land for which the trust held an interest prior to 1 July 2022) would attract FILTS.

A discretionary trust will be considered to have become a foreign person if, for example, immediately prior to 1 July 2022 foreign persons did not have a beneficial interest in 50 per cent of the capital of the trust, but at some point on or after 1 July 2022 foreign persons obtained a beneficial interest in 50 per cent or more of the capital of the trust. That said, as set out above, it is expected that a trust or company becoming foreign on or after 1 July 2022 is more likely to result from foreign persons acquiring majority interests in unit trusts or companies rather than changes in discretionary trust objects/beneficiaries<sup>3</sup>.

Where a company or a trust does become foreign on or after 1 July 2022, all relevant land (residential type land with a general land classification) owned by the company or trust would become subject to FILTS, regardless of whether the company or trust acquired the land before or after 1 July 2022.

I take on board your comments relating to the FILTS guideline, and I will undertake to review the relevant guideline with a view of clarifying these matters. I will also refer these issues to the appropriate tax policy area within the Department for their consideration as to whether the legislation might be clarified for the avoidance of doubt.

Should you have any queries or require any further information regarding this matter, please contact Nathan Gourlay on (03) 6145 5483 or email [Nathan.Gourlay@treasury.tas.gov.au](mailto:Nathan.Gourlay@treasury.tas.gov.au).

Yours sincerely



J C Root  
Commissioner of State Revenue

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<sup>3</sup> The acquisition by foreign persons of company or trust which is itself a discretionary object/beneficiary of a discretionary trust may also affect the foreign status of that discretionary trust (i.e. if it results in foreign persons having a beneficial interest in 50 per cent or more of the capital of the trust).