



Dubai International
Financial Centre

REGISTRAR OF REAL PROPERTY
DIRECTIVE

*Freehold Transfer Fee - Availability of exemptions for Transferors and
Transferees with a continuing interest in Real Property following a Transfer*

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The DIFC Registrar of Real Property (the “Registrar”) in exercise of the powers conferred by Article 172 of the Real Property Law, DIFC Law No. 10 of 2018 (the “Law”), hereby issues this Directive.

1. INTRODUCTION

1.1 Application and Interpretation

This Directive is binding and applies to any person to whom the Law applies. The Registrar will administer the Law in relation to the availability of the exemptions from the payment of a Freehold Transfer Fee under paragraph 1.2.1 of the Real Property Regulations (the “Regulations”) on the basis of this Directive.

1.1.1 Defined terms in this Directive are identified throughout by the capitalisation of the initial letter of a word or phrase and have the meaning ascribed to them herein, Schedule 1 of the Law or the Real Property Regulations issued pursuant to the Law (the “Regulations”), whichever applies. Where capitalisation of the initial letter is not used, an expression has its natural meaning.

1.1.2 The Rules of Interpretation in the Law apply to this Directive.

1.2 Background

1.2.1 Paragraph 2 of Appendix 2 of the Regulations provides for the payment of a Freehold Transfer Fee in connection with a change of ownership or interest, including an Indirect Interest, in Real Property, unless an exemption is provided for in one or more of sub-paragraphs 1.2.1(a) – (h) of the Regulations (the “Exemptions”).

The purpose of this Directive is to identify the circumstances in which the Registrar will regard the Exemptions as being available on the basis that a Transferor or Transferee has a continuing interest in Real Property subsequent to a Transfer which may attract the Exemptions for which sub-paragraphs 1.2.1(a) – (d) of the Regulations provide.

2. DIRECTIVE

2.1 Exemptions for Transferors and Transferees with a continuing interest in Real Property

2.1.1 The Registrar will accept that an Exemption based on continuity of ownership of an interest in the Real Property applies in the following circumstances:

(a) In the case of a Transfer to or by a company, based on the attribution to the Transferor or Transferee (as applicable) of that percentage of the Real Property equal to the least percentage of the following rights attached to the shares of the company held by the person:

- (i) voting rights;
- (ii) dividend entitlements; or
- (iii) capital distribution rights on winding up.

Should the percentage of those rights relied upon for the grant of the Exemption change at some stage in the future, a requirement to lodge a further Indirect Transfer Notice and/or pay a further Freehold Transfer Fee may arise.

(b) In the case of a Transfer to or by a partnership, based on the attribution to the Transferor or Transferee (as applicable) of that percentage of the Real Property equal to the least percentage of the following rights attached to the partnership interest held by the person:

- (i) voting rights;
- (ii) income distribution entitlements; or

- (iii) capital distribution rights on winding up.

Should the percentage of those rights relied upon for the grant of the Exemption change at some stage in the future, a requirement to lodge a further Indirect Transfer Notice and/or pay a further Freehold Transfer Fee may arise.

- (c) In the case of a Transfer to or by the trustee of a trust where the Indirect Interest held by the Transferor or Transferee (as applicable) is vested in interest or contingency, based on the Indirect Interest in the Real Property which, under the terms of the trust, will be vested in the Transferor (in the case of a Transfer to a trust) or in the trust property (if the Transfer is to a beneficiary). In such a case the vested interest is not required to be indefeasible, but if defeasible, a further Transfer will be taken to have occurred at the point of defeasance (in whole or in part) for the purposes of the Regulations as a result of which a requirement to lodge a further Indirect Transfer Notice and/or pay a further Freehold Transfer Fee may arise.
- (d) In the case of a Transfer to the trustee of a discretionary trust, based on the interest in the Real Property which the Transferor has the right or power, under the terms of the trust, either by exercise of discretion on the part of the trustee or by removal of the trustee, to have that interest in Real Property transferred to the Transferor. If the right or power terminates, a further Transfer will be taken to have occurred at the point of termination for the purposes of the Regulations as a result of which a requirement to lodge a further Indirect Transfer Notice and/or pay a further Freehold Transfer Fee may arise. In the case of a Transfer by the trustee of a discretionary trust, the Transferee shall be taken to have a continuing interest in that part of the Real Property transferred in which the Transferee held an indirect interest as referred to above prior to the Transfer
- (e) In the case of a Transfer to or by a foundation, based on the interest in the Real Property which the Transferor (or Transferee) has the right, under the charter and by-laws of the foundation, to have transferred to the Transferor (or Transferee), or has the power by exercise of discretion on the part of the council of the foundation or any other person, or of the removal of the council or other person and replacement of same, to have that interest in the Real Property comprising the Real Property transferred. In the case of a Transfer to the foundation, if the right or power terminates a further Transfer will be taken to have occurred at the point of termination for the purposes of the Regulations as a result of which a requirement to lodge a further Indirect Transfer Notice and/or pay a further Freehold Transfer Fee may arise.

- 2.1.2 Although the definition of Indirect Interest in the Regulations refers to the possibility of an indirect entitlement being held through a non-profit organisation, at least in the context of a Non Profit Incorporated Organisation in the DIFC (“NPIO”), the Registrar is of the view that no member of a NPIO has any interest or potential interest in the Real Property of an NPIO, implying that a Transfer to or by such a NPIO will not be entitled to an Exemption based on a continuing interest or potential continuing interest of a Transferor or Transferee in the Real Property of a NPIO except in the case of distribution of the Real Property of the NPIO to another NPIO approved by the Registrar of Companies as having a similar purpose to the dissolved NPIO.

2.2 Detailed Explanation – General Principles

- 2.2.1 The liability to pay a Freehold Transfer Fee arises under paragraph 2 of Appendix 2 of the Regulations. It provides:

Freehold Transfer Fees

- 1.1 Subject to this Appendix 2, a Freehold Transfer Fee is payable in relation to each Transfer unless exempted in these Regulations.
- 1.2 A Freehold Transfer Fee is payable in relation to a Transfer regardless of whether the transaction is in writing, or is effected by the conduct or act of the parties, by order of court or other authority, under statutory authority, by operation of law, or otherwise.

1.3 A Freehold Transfer Fee payable in respect of the acquisition of an Indirect Interest shall be calculated with reference to the proportion of the Indirect Interest acquired by an Ultimate Beneficiary in:

- (a) a Registered Owner; or
- (b) a trust on whose behalf a Registered Owner holds Real Property as trustee.

2.2.2 The exemptions from liability to the Freehold Transfer Fee (the “Exemptions”) are contained in Regulation 1.2.1. Four of these rely on continuity of ownership of interests or Indirect Interests:

- (a) a Transfer by a natural person to a legal person where the Indirect Interest held by the natural person in the Transferee is in the same proportion as the ownership stake directly held by the natural person in the Real Property immediately prior to the Transfer;
- (b) a Transfer from a legal person to a natural person where the Transferee will directly hold the same ownership stake in the Real Property as to the proportion indirectly held by the natural person by way of an Indirect Interest in the Transferor immediately prior to the Transfer;
- (c) a Transfer from one legal person to another legal person where each Ultimate Beneficiary thereof remains the same and each Ultimate Beneficiary continues to hold the same proportion of Indirect Interests for a minimum period of one (1) year subsequent to the Transfer;
- (d) a Transfer where the parent entity of the Transferor and Transferee is the same and the Ultimate Beneficiaries thereof remain the same and continue to hold the same proportion of Indirect Interests subsequent to the Transfer for a minimum period of one (1) year;

2.2.3 An interest includes an “Indirect Interest”, a term defined in the table forming part of Regulation 1.1.6 as follows:

any direct or indirect legal, equitable or beneficial interest, right, entitlement, or combination thereof, in a company, partnership, non-profit organisation, foundation or trust (inclusive of a Unit Trust), that is the Registered Owner of Real Property, or (in the case of a trust) where its trustee is the Registered Owner of Real Property.

2.2.4 This definition of “Indirect Interest” necessarily requires that the normal rules as to direct interests in Real Property not be applied in the administration of the Regulations. Although the position is usually that:

- a shareholder in the company has no right to or interest in its assets (*Macaura v. Northern Assurance Co Ltd* [1925 AC 619];
- a partner in a partnership has no right to any particular property of the partnership but simply a right to share of the net assets remaining on the dissolution of partnership (*Commissioner of State Revenue v. Rojoda Pty Ltd* [2020] HCA 7);
- a beneficiary of a non-fixed trust has no interest in the trust property but merely an expectation of the due execution of the terms of the trust by the trustee (*Gartside v. Inland Revenue Commissioners* [1968] A.C. 553); and
- a qualified recipient of a foundation in the absence of specific provision to the contrary in the charter or bylaws has no interest in the foundation property (*DIFC Foundations Law* 2018 Article 10)

the definition of an Indirect Interest in the Regulations requires that in each of these cases the possible existence of Indirect Interests be recognised.

2.2.5 The possible interests of a beneficiary under a trust fall into a number of categories –vested and indefeasible interests, vested but defeasible interests, contingent interests, and mere expectancies.

2.2.6 This Directive adopts the approach, in relation to each of these circumstances, of treating as being the Indirect Interest of a Transferor (or Transferee in the case of Transfers from those entities or a trustee) that part of the underlying Real Property to which the Transferor or Transferee (as the case may be) has either:

- a direct interest under settled property law principles;
- a shareholding or partnership interest in a company or partnership; or
- the power or capacity by unilateral action on the part of the Transferor or Transferee to obtain such an interest.

2.2.7 The loss of such an interest or capacity is accordingly treated as a Transfer at that point of time. Any entity seeking an Exemption in relation to a Transfer will be required to give an undertaking to the Registrar in terms which protect the revenue in the event that occurs.

3. COMPANIES

3.1 As previously noted, shareholders have no right or interest in any Real Property owned by a company unless it is held on trust, in which case the principles in relation to trusts apply.

3.2 Shareholders can benefit from the company's ownership of Real Property in one of three ways: Control, income distributions (dividends), and capital distributions. In most companies, the percentage rights for each of these will be the same but if the company has shares of different classes they may not. In such circumstances, the lowest of the percentages so determined and retained by the Transferor or passed to a Transferee will provide the extent of the Exemption.

Examples

- A. Hassan sells his freehold property to XY Limited. XY Limited has 1,000 issued shares, all of which are owned by Hassan. An Exemption will apply to the Transfer.
- B. In the above example, Hassan owns 500 of the shares in XY Limited, all of which are of equal entitlements in respect of dividends, voting and capital distributions on winding up. The remaining shares are held by an unrelated third party. An Exemption will apply in respect of Hassan's continuing interest of 50%.
- C. In example B, the shares of XY Limited have different rights attached to them. Hassan's shares carry 50% of the total dividend rights and rights to capital distributions on winding up, but only 40% of the voting rights. An Exemption will apply in respect of Hassan's continuing interest, but calculated at 40%.
- D. In example C, following the sale of the freehold property for which the partial exemption is granted, the voting rights applicable to Hassan's shares are reduced to 25% of the total. Hassan will be regarded as having sold a further 15% of his interest in the Real Property to the person(s) whose voting rights have increased.
- E. In any of the above examples, following Hassan's death, his wife and children inherit his partnership interest. An Exemption (under sub-paragraph 1.2.1(f) of the Regulations) will apply to the Transfer of this Indirect Interest.

4. PARTNERSHIPS

4.1 The interest of a partner in partnership property including Real Property prior to the dissolution of the partnership is more direct than the interests of the shareholders in Real Property owned by a company, but it is nonetheless not a present right. As with companies, the rights which partners are able to enjoy in relation to Real Property owned by the partnership may be aligned with the share of the partnership capital contributed by a partner, or vary depending on the nature of the right. In the usual case it would be the former.

4.2 In a situation in which members of the partnership hold differing partnership rights depending upon whether what is at issue is control, income share or capital distribution share, a similar approach to that outlined for companies will be applied, namely, the Transferor or Transferee will be treated as retaining the least of these rights continuing to be held by the Transferor or Transferee.

Examples

- A. Ali sells his freehold property to the XY Partnership. XY Partnership has two partners, each of whom has an equal entitlement in respect of income distributions, participation in partnership decision making and capital distributions on winding up. The remaining partner is an unrelated person. An Exemption will apply in respect of Ali's continuing interest of 50%.
- B. In example A, the partnership interests of XY Partnership have different rights attached to them. Ali's interest carries 50% of the total income and capital distribution rights, but only 40% of the voting rights when partnership decisions are made. An Exemption will apply in respect of Ali's continuing interest, but calculated at 40%.
- C. In example B, following the sale of the freehold property for which the partial exemption is granted, the capital distribution rights applicable to Ali's partnership interest are reduced to 25% of the total. Ali will be regarded as having sold a further 15% of his interest in the property to the person(s) whose capital distribution rights have increased.
- D. In any of the above examples, following Ali's death, his wife and children inherit his partnership interest. An Exemption (under sub-paragraph 1.2.1(f) of the Regulations) will apply to the Transfer of this Indirect Interest.

5. TRUSTS

- 5.1 The flexibility of trusts as a vehicle for the holding of property including Real Property means it is not possible here to exhaustively categorise the types of interest which may arise under them. That accordingly is not attempted in this Directive.
- 5.2 Except in the case of a vested and indefeasible interest in the particular trust property (which will be regarded as property of the holder of that interest) in principle all interests of beneficiaries in trust property is capable of changing in beneficial ownership. That might be because of the occurrence of a specific event such as defeasance of a previously vested interest, the satisfaction of a contingency or due to the exercise of a discretion on the part of the trustee or some other person having the power to determine the ultimate ownership of the trust property.
- 5.3 Accordingly the holder of a vested but defeasible interest, or a contingent interest in respect of trust property in respect of which there is no prior interest, will be regarded as having an Indirect Interest in that trust property. The person having the power to exercise, or controlling the exercise of discretion or replacing the person exercising the discretion in relation to the distribution of trust property of a fully discretionary trust will be regarded as having the Indirect Interest for the purposes of the Regulations.

Examples

- A. Faisal sells his freehold property to the trustee of the Faisal Family Trust which is a fixed trust. He is under the terms of the Trust entitled to 25% of the trust property and income. An Exemption will apply in respect of Faisal's continuing interest of 25%.
- B. In example A, Faisal assigns his trust interest to his children at a time after the sale. No Exemption will apply to the Transfer.
- C. In example B, Faisal's trust interest passes to his children upon his death. An Exemption (under sub-paragraph 1.2.1(f) of the Regulations) will apply to the Transfer of this Indirect Interest.

6. FOUNDATIONS

- 6.1 Article 10(3) of the DIFC *Foundations Law* provides that the property of a foundation is not held in trust for any other person. Articles 10(4) and (5) of the *Foundations Law* provide that qualified recipients have such rights as specified in the by-laws (which may be incorporated in the Charter). A qualified recipient has no interest in the property of a foundation other than the right to payment of amounts arising by virtue of the by-

laws (or Charter). A DIFC foundation must have a default recipient that is entitled to the property of the foundation in the event that no other person is so entitled.

- 6.2 Consistently with the principles outlined above in relation to trusts, qualified recipients will be regarded as holding a fixed interest in the foundation property to the extent that is provided for the by-laws. A default recipient will be regarded as a contingently entitled to the foundation property and any person holding the power to determine ultimate the destination of foundation property will be regarded is the holder of an Indirect Interest in the whole of the foundation property subject to the position of the default recipient.
- 6.3 The position of foreign foundations will be dependent on whether they provide for rights analogous to shares (in which case company treatment would be applicable) or direct interests in the foundation property (in which case trust treatment would be applicable). A foreign foundation having essentially similar characteristics to a DIFC foundation will be treated accordingly.

Examples

- A. Mahmoud sells his freehold property to the Mahmoud Foundation. He is under the terms of the foundation by-laws entitled to 25% of the foundation property and income. An Exemption will apply in respect of Mahmoud's continuing interest of 25%.
- B. In example A, Mahmoud assigns his interest under the by-laws to his children at a time after the sale. No Exemption will apply to the transfer.
- C. In example B, Mahmoud's entitlement passes to his children upon his death. An Exemption (under subparagraph 1.2.1(f) of the Regulations) will apply to the Transfer of this Indirect Interest.
- D. Abdullah sells his freehold property to the Abdullah Foundation which is a foundation of which Abdullah is the Guardian. The Charter (or by-laws) provides that the Guardian may determine that the foundation property will be distributed to any person, including the Guardian. An Exemption will apply to the Transfer.
- E. In example D, Abdullah is the default recipient of the foundation. An Exemption will apply to the Transfer irrespective of the existence of powers in any other person to bring an end to Abdullah's prospective interest provided the Registrar is satisfied that the replacement is not part of a scheme under which, at a later time, Abdullah will be replaced, or the property will be appointed to someone else.
- F. In example E, Abdullah is replaced as Guardian by Essam. Essam will be treated as having acquired the whole of Abdullah's interest at the time of the replacement unless Abdullah is the default recipient, in which case Abdullah will continue to be regarded as holding the Indirect Interest in the property provided the Registrar is satisfied that the replacement is not part of a scheme under which, at a later time, Abdullah will be replaced, or the property will be appointed to someone else.

7. NON PROFIT INCORPORATED ORGANISATIONS

- 7.1 Although the Regulations in the definition of "indirect interest" refer to the possibility of an indirect entitlement being held through a non-profit organisation, at least in the context of a Non Profit Incorporated Organisation incorporated in the DIFC no member has any interest or potential interest in the property of an NPIO (DIFC *Non Profit Incorporated Organisations Law 2012* Article 9(2)) so a Transfer to or by such an organisation will not be entitled to an Exemption based on the continuing interest or potential interest of a Transferor or Transferee in the property of the NPIO.
- 7.2 The one exception to this approach is where, upon dissolution of an NPIO, its surplus assets are distributed to another NPIO approved by the Registrar of Companies as having similar objectives as the dissolved NPIO.
- 7.3 A non-profit organisation not the subject of a similar prohibition will be categorised as a company, partnership, trust or foundation depending on its legal form.

8. ADMINISTRATION

- 8.1 The Registrar's decisions in relation to the availability of Exemptions to the payment of a Freehold Transfer Fee under paragraph 1.2.1 of the Regulations will be administered on the basis of this Directive. The Registrar's decisions in relation the availability of Exemptions are reviewable by the DIFC Courts in accordance with paragraphs 5.8 and 5.9 of Appendix 2 of the Regulations.