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Call of Duty – Stamp Duty on Leases

Are you a tenant of residential property in Cayman having signed a lease with a term for between one and five years? Has a stamp duty payment of 5% of the average annual rent been submitted to Lands & Survey?

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1. Call of Duty

Stamp Duty and Residential Leases in Cayman

Are you a tenant of residential property in Cayman having signed a lease with a term for between one and five years?

Has a stamp duty payment of 5% of the average annual rent been submitted to Lands & Survey?

No? You are not alone.

Based on an estimated average rental value of CI\$1,600 per month across all rental properties in the Cayman Islands – 9,678 according to the 2014 Compendium of Statistics – the Government could be collecting around CI\$9 million on residential leases annually. In 2015 it collected just CI\$1.34m in duty paid in respect of the grant of all leases (both commercial and residential).

2. The Law

What is duty payable on?

The Stamp Duty Law (2013 Revision) (“SDL”) provides that stamp duty is payable in respect of “instruments”. As such, duty is payable on all written documents which convey or transfer a proprietary interest, including a leasehold interest (whether registerable at Lands and Survey or not) of a particular parcel or parcels of land. It makes little difference whether the document itself is entitled “tenancy”, “lease”, “agreement” or other similar description including, in a number of cases, “licences” or “licences to occupy”.

Duty is not payable on true licences as it does not transfer a proprietary interest but rather it constitutes a personal right, providing permission for a licensee to do something on a licensor’s property. The fact that a document purports to create a “licence” does not mean that it will be construed as a licence, and not a tenancy. Parties cannot turn what is in reality a tenancy, into a licence, by calling it a licence. If challenged, the Court would analyse the substance of the rights and obligations contained in the agreement.

Where the document has any of the following characteristics, this may indicate that a “licence” is not a licence and may constitute a tenancy meaning duty becomes payable:

1. It grants exclusive possession. A person has exclusive possession if he can exercise the rights of the landowner and exclude both the landlord and third parties from the land Generally a tenancy is created where there is exclusive possession.
2. It is for a fixed term.
3. It reserves a rent.

As stated above, duty is payable on **written** documents which convey or transfer a proprietary interest. As such, an oral agreement providing exclusive possession of a property to a third party would not attract a duty obligation. In addition to the potential duty avoidance, an oral tenancy "agreement" brings with it certain additional advantages but has inherent disadvantage in the event that there is ever a need for clarity as to the specifics of the agreement (e.g. in respect of the extent of the term, repair liabilities, maintenance obligations etc.). Notwithstanding the risk of lack of written evidence in the event of a dispute between the landlord and tenant, the simplicity and ease can be advantageous for a tenant given how landlord-biased written leases generally are. Typically oral leases have only really been utilised in circumstances where the parties are sufficiently well-known to one another to be confident that the agreed oral terms will be understood and honoured throughout the term of the lease.

How much?

The current rates of stamp duty payable on a lease or lease agreement are:

1. If the term is for less than one year: 5% of the total rent payable.
2. If the term is one year or more, but does not exceed five years: 5% of the average annual rent. Note: a lease reserving a term of 2 years or more must be in the prescribed form (Lands & Survey Form RL8) although a more thorough lease is often scheduled to the Form.
3. If the term exceeds five years, but does not exceed ten years: 10% of the average annual rent.
4. If the term exceeds ten years, but does not exceed 30 years: 20% of the average annual rent.

If the term exceeds 30 years: the same duty as on a sale based on the full market value of the real estate or interest in it. If the rent in the lease is considered to be less than market value, for the purposes of calculating the stamp duty, the average annual rent will be declared at the market value having regard to any premium charged.

Payable by?

The SDL provides that in respect of any "conveyance or transfer of land, strata title or interest therein" the transferee shall ensure that the relevant instrument is filed and the duty paid. In the case of the grant of a lease, the transferee is the tenant.

Notwithstanding that the statutory obligation would remain on the tenant, who actually pays the required duty is negotiable between the landlord and the tenant.

When?

Duty must be paid within forty-five days of the grant of the lease.

3. What are the potential penalties for non-payment of the relevant duty?

The SDL provides that a person who is found to have failed to pay the relevant stamp duty on an instrument upon which duty is payable is potentially liable to a fine of five hundred thousand dollars and to imprisonment for five years.

The SDL also specifically provides that in respect of attorneys, accountants, realtors or bank/trust company employees who are found to have failed to pay the relevant stamp duty the Governor may, "in addition to any other penalty imposed by a court in respect of that conviction, suspend or terminate that person's licence or authorisation to practise or carry on business, or suspend or remove that person from his office, for such time and on such conditions as the Governor may determine".

In respect of filings made later than the forty five day time period that the SDL provides for a duty filing to be made, additional interest charges will be applied on the duty which remains unpaid at:

1. a rate of 10% per annum for the first month or part of a month the filing is late; and
2. a rate of 20% per annum thereafter.

In addition to the potential criminal liabilities set out above, if there is a dispute between landlord and tenant in which action is taken at Court, subject to the Evidence Law (2011 Revision), the lease instrument would not be admissible as evidence unless it had been duty stamped, evidencing that the relevant stamp duty had been paid. In the event that the lease was not duty stamped then for the document to be admissible as evidence, the stamp duty payable would be double that which would ordinarily have been payable.

Have questions? Please contact Oliver Goodwin directly at oliver.goodwin@ogier.com or call 1-345-815-1830.

The information and expressions of opinion contained in this guide are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

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Calculators

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