

What tax consequences do I have to consider when contemplating a family law property settlement?

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A very important aspect of family law property settlements that is often overlooked is the tax and duty consequences of parties retaining or disposing of assets as part of a property settlement. It is essential for all parties to receive financial and tax advice before finalising any property settlement to ensure that everyone walks away with what they intended and to avoid nasty surprises down the track.

Generally, the biggest tax issues in family law matters are:

- Capital gains tax
- Stamp duty
- Income tax consequences – “deemed dividends”
- GST

Capital gains tax (CGT)

CGT is payable on the net capital gain made on the sale, transfer or disposal of property to another person. This also includes real estate (other than the family home), shares, leases and different types of rights.

Generally, the following is exempt from CGT:

- Assets acquired before 20 September 1985;

- Cars and motor vehicles;
- Collectables less than $500;
- Some personal assets less than $10,000;
- Assets used to produce income;
- Sale of a small business or business asset; and
- The main residence of the parties.

CGT and the family home

The main residence (or family home) exemption is easy to deal with. If you keep the family home and later sell it for a profit, you do not need to pay CGT on the profits.

CGT and investment properties

Some families also have investments properties. If you keep the investment property, the transfer from your former partner to you will not be subject to CGT. This is called the marriage or relationship “rollover relief” and you must have a certain written agreement or Court order to obtain this relief. If you later sell the investment property and make a profit, then you will need to pay CGT on the profits.

Rollover relief on assets from a company or trust

The rollover relief can also apply to assets transferred from a company or trust to a party of the marriage or relationship. But be wary of Division 7A of the *Income Tax Assessment Act 1936* (**ITAA)** – explained further below.

Capital losses

Capital losses (when the amount you received from the sale, transfer or disposal of an asset is less than what you paid for it) can be claimed against income.

Calculating CGT obligations

Exactly if and how much CGT you will need to pay or may incur as a loss, is a question for your accountant or tax lawyer.

The Family Law Courts can take into account future CGT liabilities or losses if certain factors are present. For example, how the asset was acquired, the intentions of the parties at that time and whether the sale of the asset is inevitable or part of a Court Order, may all be considered.

Stamp duty

Whether stamp duty is payable for the transfer of an asset varies across each state and territory.

Generally, properties and motor vehicles in Victoria are not subject to stamp duty if the transfer from one party to the other is pursuant to a Court Order or Financial Agreement under the *Family Law Act 1975*.

This is different where a private company, owned by one party, transfers, say a car owned by the company to the other party. Stamp duty will be payable on the transfer, by the party who keeps the car.

Income tax – deemed dividends

In some cases, a party may be "deemed" under the ITAA to have received a taxable dividend which will determine the income tax payable by that party. This could occur with:

- the transfer of an asset;
- the transfer of cash; or
- forgiving a debt owed to a private company to a party to the relationship.

A deemed dividend can occur where a private company pays a shareholder or an associate of a shareholder or the private company forgives the debt of a shareholder or an associate of a shareholder. An associate of a shareholder includes the relative or partner of, or trust or company controlled by, the shareholder. "Payment" can even include the transfer of property or giving a guarantee and meeting guarantee duties.

The party that receives the benefit (not the shareholder) is the one taxed at their full marginal tax rate.

For example, if your former partner owns a company and the company pays you money (not as part of a legitimate employment or other contract), the ITAA will deem the amount you received as a dividend that is considered when calculating your income tax that you are liable to pay.

Trusts can also have deemed dividend consequences.

Of course, there are exemptions, exclusions and marriage breakdown concessions to the deemed dividend provisions of the ITAA. This includes, for example, loans on commercial terms or the payment of genuine debts or having the deemed dividend receive the benefit of franking. A dividend is franked when your income tax calculations take into account the tax already paid by the private company or trust so you are taxed at a lesser rate rather than your full tax rate.

It is therefore essential to obtain taxation advice from an accountant or tax lawyer before entering into a property settlement involving a private company, to make sure all tax issues are discovered.

Goods and services tax (GST)

In the same example where a company, owned by one party, transfers a car, to the other party, the party receiving the car will not pay GST on the transfer (because it is not made during the course of the business).

However, the company may have to pay GST on the transfer if the company claimed the GST on the purchase of the car as a credit. Since the car changed “purpose” from being an asset of the company to private use, the company cannot retain the benefit of having claimed GST on its purchase.

A lot will depend on whether the asset is an “enterprise asset” (an asset used or intended to be used in an enterprise that is or should be registered for GST) or a “private asset” (anything that is not an enterprise asset).

Again, it is important to seek tax advice from an accountant or tax lawyer.

How a family lawyer can help

There are many ways that a transfer or retention of assets can lead to tax consequences.

If you are unsure how you or your former partner’s corporate structure or properties and tax consequences may impact a property settlement, the first step is to speak to us so we can assist you through the process. Where necessary, we can refer you to suitable professionals (such as an accountant) to obtain tax advice if you have not already received it.

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